A COMMENTARY *on* CANON LAW

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A COMMENTARY ON THE NEW CODE OF CANON LAW

Bachofen

By THE REV. P. CHAS. AUGUSTINE, O.S.B., D.D.
Professor of Canon Law

VOLUME I

Introduction and General Rules (can. 1-86)

SECOND EDITION

B. HERDER BOOK CO.
17 SOUTH BROADWAY, ST. LOUIS, MO.
AND
68 GREAT RUSSELL ST. LONDON, W. C.
1918

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FOREWORD

Aug. 7th, 1917, the S. Congregation on Seminaries and Studies issued a decree which imposes on teachers of Canon Law the task of explaining the new Code, not only synthetically, but also analytically, by closely following the order and text of the Code itself. The decree also calls for a historical survey, whenever necessary and opportune, of the respective canons. This precisely has been the guiding line along which the writer taught Canon Law at the Benedictine University in Rome for nine years (1906–1915), until the European conflict closed our international College. Most of that time, therefore, fell within the period of the present codification.

We do not intend to make an apology for the commentary now offered to the clergy and all interested in the study of ecclesiastic law. The commentary shall be as brief as the matter permits and shall not be encumbered with moralizing reflections. The reader should remember that the commentary is intended for countries where the English language prevails, and hence for such countries as do not reflect all the customs and laws in vogue and practice elsewhere. Wherefore certain parts of the Code (*e. g.,* cathedral chapters, *jus patronatus,* benefices) will not be treated *in extenso.* We shall endeavor to render the text in a verbal, or at least substantially faithful, transcription, no official English text having reached us. For the rest, the old saw, "Bis dat qui cito dat," has quickened this edition.

THE AUTHOR.

Conception, Mo.

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THE NEW CODE OF CANON LAW

PART I
INTRODUCTION

CHAPTER I

NAME AND DEFINITION OF LAW IN GENERAL AND CANON LAW IN PARTICULAR

The Latin word *jus* (from *jurare,* to swear, or *jussum,* command) has a double meaning or sense: a) subjectively, it signifies *right,* or "the moral power to have, to do, or to require something from another (*facultas moralis inviolabilis aliquid habendi, agendi, exigendi*), as we say to give to every one his due (*suum cuique*); b) in the *objective* sense, *jus* denotes norm or *law* either in the singular or plural (complex of laws), for instance, the law of celibacy, civil law, canon law. This latter meaning is attached to the "eternal law," since "the very idea of government of things in God the Ruler of the universe has the nature of a law,"[1] and every law, divine or human, is but an irradiance from the eternal law, as all human laws bear the character of laws only in as far as they approach, more or less, this prototype.

Canon Law (*jus canonicum,* derived from the Greek *κάνων, i. e.* norm or rule), as a technical term occurs since

[1] *S. Theol.,* I-II, q. 91, a. 1 f.

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the twelfth century,[2] this nomenclature being exclusively reserved for the laws of the Church, whilst *lex* (*νόμος*) was applied to civil laws. Consequently the interpreters of ecclesiastical law were called *canonistae,* those of civil law, *legistae.*

DEFINITION.—Canon Law may therefore be defined as "the complex of rules which direct the exterior order of the Church to its proper end."

EXPLANATION.—a) In this definition the laws of the entire Church only are, *per se,* considered, viz. those laws which touch upon the whole body as such and emanate from the supreme authority (*jus commune*). Hence laws made for a particular portion of the Church or its members are outside our subject except in so far as they form part and parcel of the body of common law. However, since these particular or special rules need the explicit or implicit consent of the supreme lawgiver, and rest on the interpretation of law in general, it is evident that even these particular laws must, to some extent at least, be taken into consideration.

b) The *purpose* of Canon Law, as of all law properly so called, is the establishment and maintenance of *exterior order.* The Church forms an organized body which has its special and proper functions. In a certain sense, she is a body politic with a working to the outside. Hence her laws, either in regard to the hierarchic ramifications, or in relation of member to member, are concerned not directly with internal acts (*"de internis non judicat praetor"*), but with the public or exterior order of the Church at large (*finis proximus juris canonici*).

c) However, the *end* of the *Church* being mainly

2 *Summa Stephani Tornacensis, apud* Schulte, *Gesch. d. Quellen u. Lit. d. can. Rechts,* 1875, I, 29.

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spiritual, *i. e.*, of the supernatural order, it is plain that Canon Law must partake of that order, and hence tend, *a potiori*, to a supernatural end. Yet, it is perfectly true what has been said above (b), that ecclesiastical laws are principally intended to maintain the public order, since the Church is not merely a supernatural and an invisible organization, but a visible body consisting of men, not of angels.

Besides the time-honored nomenclature "Canon Law," *i. e.*, the law made up chiefly of canons, there are other names: a) *jus ecclesiasticum*, inasmuch as it embraces the whole range of Church legislation contained in the canons of councils as well as in the decrees and decretals of the popes and in unwritten laws, *i. e.*, legitimate customs; b) *jus pontificium* (a term used *v. g.* by Giraldi), in as far as the supreme and chief source of Church legislation is the Sovereign Pontiff; c) *jus sacrum*, in as far as its main author is Jesus Christ and it treats of sacred persons and things.

Division of Canon Law.—a) By reason of its *origin*, Canon Law is either divine or human. *Divine* is that part of it which owes its origin to Christ or the Apostles, in as far as the latter enacted laws by divine inspiration, (which is not, however, to be identified with Scripture inspiration) or promulgated them as divine norms, *v. g.*, the hierarchy, the matter and form of the sacraments (James 5, 14), the *privilegium Paulinum*. *Human* is that portion of the Canon Law which has merely human authority for its existence; thus the Apostolic decrees (Acts XV) are of human authority though established by Apostles; purely human laws, too, are those passed by councils, popes, and bishops, unless, indeed, they are implicitly contained in revelation, or are merely

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declarations, specifications, or modifications of divine or natural law. In the latter case they belong to the class of divine laws.

b) By reason of its *obligatory force,* either personally or territorially, Canon Law is: α) either *general,* when it binds all members of the Church, or *special,* when it binds only some members or a class of members, *e. g.,* the clergy, regulars; β) either *universal,* when it is incumbent on the entire Church as far as it is spread, or *particular,* when it affects only a certain portion of the Church, as a province or diocese. Under this heading belongs the difference between the law prevailing in the *Oriental*[3] and that binding the *Occidental* Church. γ) By reason of its *promulgation* we speak of written or unwritten law, or custom (*consuetudo*).

d) By reason of *time,* Canon Law is distributed into various epochs: α) *jus antiquum,* or old law, from the beginning of the Church up to Gratian's *Decretum* (about 1150); β) *jus novum,* or new law, up to the Tridentine Council (1545–63); γ) *jus novissimum,* or modern law, up to our time. It remains to be seen whether the New Code will constitute a new epoch.

e) By reason of its *matter,* Canon, like civil law, may be classified into public and private law. *Public* law is concerned with the Church as a society, its government and external relations; *private* law with the rights of the members and their mutual relations.[4]

This latter distinction is rejected by most of the German canonists, *v. g.,* Philips, v. Scherer, Sägmüller, but defended by Roman authors. If we subsume under public law the constitutional law proper, together with that

[3] Concerning the laws binding this Church see the *Collectanea Prop. Fid.,* 1907, II, n. 1578; can. I of the *Codex Iuris Can.*

[4] Schenkl, *Institutiones Iuris Eccl.,* 1853, I, § 38, p. 60.

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governing the Church's external relations, we believe there is nothing unwarranted in this division. Private law would then embrace chiefly the administrative portion of the laws. Whether we substitute the terms "external" and "internal" is of little importance.

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CHAPTER II

THE SCIENCE OF CANON LAW AND ITS IMPORTANCE

Abstracting for a moment from the historical resources, which partly date back to the founder of the Church and partly owe their origin to the natural development of the living organism, Canon Law as a distinct *science* owes its existence and splendor chiefly to the Benedictine monk, *Gratian,* in the middle of the twelfth century, when canonists — and also legists — commenced to cultivate ecclesiastical law systematically.

If science means "a demonstrative syllogism" or conclusions drawn from premises, it is evident that single laws form the stock and store out of which deductions are made, and which, in their turn, may become new laws and new bases for mental operations (*e. g.,* exemption). Science demands a knowledge not only of the several existing laws, but of their systematic and pragmatic putting together. Canonical science must be analytical as well as synthetic, and should be based upon critical and historical researches. And in this latter regard some progress, mainly due to the two brothers Ballerini and to German scholars, has been made.

Preëminently, however, law is *practical,* and hence the canonist should not only know the law, but also be able to apply it to concrete cases, such as occur daily. This is the function of what is called *jurisprudence* (*juris-*

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prudentia sacra), or "the habit (*habitus*) of knowing, interpreting and applying the laws." [1]

As to the *necessity* or *importance* of this systematic-practical science, it is not too much to say that the "watchmen on Sion's tower," *i. e.* the *prelates,* are obliged to possess a more elaborate and extensive knowledge of ecclesiastical laws than is required of the lower clergy. For the prelates should be especially well versed as to the rights of the Church in regard to civil power, and should know the laws regulating their own attitude towards the clergy and the laity. This observation holds good also in regard to the officials of episcopal courts.

The *priests,* too, are bound in conscience to obtain a sufficient knowledge of Canon Law to enable them to discharge their duties as pastors of souls and to defend the rights of the Church and their own position. It is a sad saw, often repeated, "What's the use of Canon Law, the prelate is Canon Law." This saying is not only offensive to the prelates, who are thus represented as arbitrary law-makers and expounders, but betrays a lack of reverence for a noble, time-honored science, and degrades those who utter that unpriestly sentiment to the level of cowards or sluggards. Let them rather hear Gratian: "*Ignorantia mater cunctorum errorum maxime in sacerdotibus Dei vitanda est. Sciant ergo sacerdotes scripturas sacras et canones;*" and again: "*Nulli sacerdotum liceat canones ignorare.*" [2]

In order to make canonical science solid, extensive, and systematic, the canonist, and especially the professor of Canon Law, should be conversant not only with dogmatic and moral theology, but also with Church history and civil law. *History* will render the study of Canon Law

1 Schenkl, *op. cit.*, 41.

2 C. 4, Dist. 38.

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more agreeable, give the student living pictures of the past, and help him to understand many laws otherwise barely intelligible. *Civil Law,* more particularly the old *Corpus Juris Civilis,* will furnish the key to a great many terms, *v. g.,* in civil and criminal procedure, and show the connection existing between civil and religious law. Besides, the priest being a citizen of the State, and, we may justly say, a citizen of higher standing than most others, it appears but just that, even in this respect, his "lips shall keep knowledge, and they shall seek the law at his mouth." [3] Therefore, in this country, for instance, the Constitution should not be a sealed book to priests, nor should they be strangers to the laws governing marriage, contracts, last will, and labor.

[3] Mal. II, 7.

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CHAPTER III

THE SOURCES OF CANON LAW

The term *source* or *fountain* of Canon Law (*fons juris canonici*) may be taken in a twofold sense: a) as the formal cause of the existence of a law, and in this sense we speak of the *fontes essendi* of Canon Law or lawgivers; b) as the material channel through which laws are handed down and made known, and in this sense the sources are styled *fontes cognoscendi,* or depositaries, like sources of history.

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SECTION 1

THE "FONTES ESSENDI"

Taking for granted that the Church is a complete and autonomous society (*societas perfecta*), she must evidently possess legislative power, *i. e.*, the faculty of enacting laws. For "a law is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[1] Therefore, every law must proceed from the legitimate power residing in that community for which the law is given. Now, the Church Catholic being founded by our Lord and perpetuated by the Apostles and their lawful successors, among whom the Roman Pontiff holds not only an honorary but also a jurisdictional supremacy, the following must be acknowledged as ecclesiastical *lawgivers:*

1. *Christ* our Lord, the original source of divine laws laid down chiefly in the Constitution of the Church, and next to Him the *Apostles* as lawgivers either of divine or human laws, *viz.:* as inspired or merely human instruments.

2. The *Roman Pontiff,* either alone or in unison with a *general council,* as endowed with the supreme and ordinary power of enacting laws for the universal church;

3. The *Bishops* for their respective districts, inasmuch as they are empowered to enact laws subordinate to common law;

1 *S. Theol.,* I-II, q. 90, a. 4.

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4. *Customs,* too, must be considered as a source of law, universal as well as particular.

Whether the *natural law* can be called a source of Canon Law depends on the formal declaration of the supreme authority; for the natural law as such — its extent is very uncertain — cannot be called a homogeneous source of Canon Law except it has been declared such by the highest authority.[2] Besides its range being very uncertain, the so-called natural law is often nothing but a subjective sentiment, or, at most, a dictate of reason.

2 Cfr. J. Laurentius, S.J., *Institutiones Juris Eccl.*, 1903, p. 9; Schenkl, *l. c.*, 37, justly remarks that the natural law should be cautiously used in Canon Law.

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SECTION 2

THE "FONTES COGNOSCENDI"

These sources, as we have said, are depositaries in which we find collected the laws enacted in the course of centuries. They may also be considered as the channels through which the river and rivulets of legal enactment flow and are preserved. They do not constitute the law as such, but rather point out where it may be found. Among these sources are Holy Scripture and the decrees of popes and councils; also, in a measure, custom, inasmuch, namely, as it proves the existence and continuity of laws unwritten and perhaps forgotten.

ARTICLE 1

HOLY WRIT

1. When we speak of Holy Writ as a source of Canon Law, it is evident that we refer primarily to the writings of the *New Testament.* There we meet with a nucleus of constitutional laws which were later developed; there, also, are to be found moral precepts which form the connecting link between the Old and New Dispensations.

2. As to the *Old Testament,* a distinction must be made between moral, ceremonial, and judiciary laws. The strictly *moral* laws contained chiefly in the decalogue were received bodily into the New Law. Not so the *ceremonial laws*, which, being ordained for the external worship of God, were modified and even abrogated by the

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Church, inasmuch as they were laws of the old Code and to some extent detrimental to the spirit of the universal Church,[1] and consequently have no binding force as laws of the Old Testament (*v. g.*, tithes).

The *judicial* laws of the Old Testament, *i. e.*, those which govern man's relations to other men, were enacted according to the needs of the old theocratic State and have lost their binding force by the coming of Christ. Yet as far as they suit the conditions of the New Testament, they may, not as O. T. laws, but as rules for the N. T., be used even in the Church, because they rest on the dictates of reason[2] (*v. g.*, prohibited degrees of marriage).

ARTICLE 2

DECREES OF THE ROMAN PONTIFFS

The decrees of the Roman Pontiffs have always enjoyed great authority in the Church, from the time of Clement I (+ 100?) to our own day.[3] Their subject-matter was partly dogmatic, partly disciplinary; it is the latter class that especially concerns Canon Law.

1. It was customary for the Pope, soon after having taken possession of St. Peter's Chair, and on other occasions, to gather a synod in Rome and to send the acts of that synod, together with a profession of faith, to the patriarchs and other prominent bishops. These documents often contained matter concerning not only the faith but also the discipline of the universal Church, and were called *constituta* (*scil. in synodo*). Besides, the Popes were often called upon to issue what are called *privilegia,* either for monasteries or for person-

1 Cfr. *S. Th.*, I–II, q. 103.
2 *Ib.*, qq. 104 ff.
3 Cfr. Coustant, O.S.B., *Epistolae Rom. Pontificum*, Paris, 1721, a work still useful and highly appreciated.

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ages placed in high station. These sometimes bore the character of regular documents (*diplomata*), then again they were but personal letters, though written in a more solemn style, and having a silk thread (*litterae gratiae*) or a hemp thread (*litterae justitiae*) attached to them (eleventh century). Later on, especially under Martin V (1417–31), the custom prevailed in the Roman Curia of distinguishing two principal kinds of papal documents, *i. e., bullae* and *brevia,* which distinction is still preserved. At the time of Innocent VIII (1484–92) another sort of papal letters was introduced, not sealed but only signed by the Pope; their name is "*Motu Proprio*" (*scil. scriptae litterae*). This, in short, is the origin of papal documents.[4]

2. As to the *form* and *juridical value* of the various kinds of papal documents, the following distinctions may serve as a guide:

a) *Bullae, Brevia, Rescripta,* and between the two last-named the so-called "*Motu Proprio.*"

a) *Bullae,* or Bulls, thus called from the seal of lead appended to, or impressed upon, the paper or parchment,[5] and bearing on one side the images of SS. Peter and Paul and on the other the name of the reigning Pontiff, are solemn documents. If the matter or object to be expedited "*in forma Bullae*" is a very important one, such as the confirmation of a bishop, the erection or division of a diocese, or a solemn act of the R. Pontiff, the leaden seal hanging on a silken cord is appended. If, however, the Bull contains matter of less importance, *v. g.*,

4 Cf. Bresslau, *Handbuch der Urkundenlehre,* 1889, Vol. I (only one vol. published), p. 67 ff.; also Mabillon, *De Re Diplomatica,* Paris, 1681.

5 The original meaning of *bulla* is gem (precious ornament), then seal, from which it is transferred to the document provided with a seal, cf. *Thesaurus Linguae Lat.,* 1906, II, p. 2241 f., Du Cange, *Glossarium,* II, p. 1339.

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dispositions regarding minor benefices or matrimonial dispensations, the document has a seal of red wax with the images of SS. Peter and Paul, and around them the name of the reigning Pontiff.[6] The opening words are: "*[Benedictus XV] Episcopus Servus Servorum Dei.*"[7] A special kind of Bull are the "*Bullae dimidiatae,*" which are issued between the election and coronation of a Pope, and bear only the image of the two Apostles, whilst the reverse side of the seal is blank.[8]

β) *Brevia,* or Briefs, which have grown out of the letters closed with wax, are issued in the *Secretaria Brevium,* and generally concern minor affairs (*negotia non gravia*), although, at times, in order to save expenses, Briefs are issued regarding matters which would really require a Bull, *v. g.,* the erection of *Abbatiae Nullius.* They begin with the name of the Pontiff, thus: "*Benedictus Papa XV,*" and end with the words: "*Sub annulo piscatoris.*"

"Motu Proprio's" and Rescripts have no special form.

We may add that the *Bullae* are now no longer written in Gothic but in the usual Latin letters, on parchment.[9]

b) Concerning their *juridical* value, it must be noticed that papal documents are variously styled: α) *Constitutions,* named after the ancient imperial constitutions, are Apostolic letters referring to important matters which concern the universal, or at least the entire Western Church. They may also be called, not improperly, *En-*

6 *Acta Leonis XIII,* 1881, t. I, p. 184 f.

7 This title dates back to the pontificate of St. Gregory the Great (590–604), and is of monastic origin, the monks calling themselves "servants of God," and this Pope, to reprove the arrogance of the Byzantine patriarch, styled himself "Servant of the servants of God."

8 Cf. *Cironii Observationes,* ed. Riegger, 1761, p. 5.

9 Thus ordained by Leo XIII, Dec. 29, 1878; cfr. *Archiv für kath. Kirchenrecht,* Vol. 41, p. 399; Aichner, *Compendium Juris Ecclesiastici,* § 10.

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cyclical letters, though these generally refer to the persons addressed (viz.: the hierarchy) and contain less juridical matter (*v. g.*, "Rerum novarum," of Leo XIII, 1891).

β) *Decrees;* or *decretals*, to which belong those letters issued "Motu proprio" and "ad instantiam" (rescripts), broadly speaking, touch upon particular affairs and contain favors and privileges or answers to questions proposed by private individuals. It must, however, be added that "Motu proprio" does not exclude insistence or a request from interested parties.

ARTICLE 3

THE CANONS OF COUNCILS

Councils, as history testifies, were generally called at times when a crisis threatened the Church at large, or at least a considerable portion thereof. Although the first four general councils were convoked by the emperors, the "Bishop of old Rome" was represented by legates, and the decrees adopted were acknowledged by the universal Church. St. Gregory the Great speaks of those four councils as of four gospels.[10] Besides these imposing assemblies there were held provincial councils, *v. g.*, at Antioch, Ancyra, Sardis, which also enjoyed great authority. Still a distinction was always made between universal and particular synods; the canons of the former were received by all, whilst those of the latter had only local force, except when they were inserted in an authentic collection of Canon Laws. No authentic collection of conciliary decrees as such exists. Of general Councils, two were held at Nicaea in Bythinia (325, 787),

10 *Registrum Greg.*, P. I, 24, ed. Ewald-Hartmann (*M. G.*), 1891, I, 36 (this is a model *epistola synodica*).

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four at Constantinople (381, 553, 680, and 869), one at Ephesus (431) and Chalcedon (451), four at the Lateran (1123, 1139, 1179, 1215), two at Lyons (1245, 1274), one at Vienne (1311–13), one at Constance (1414–18), one at Basel-Ferrara-Florence (1431–45), one at Trent (1545–63), and one at the Vatican.

ARTICLE 4

THE UNWRITTEN LAW

A certain amount of traditional law is in vogue everywhere. It is the living spirit of the people's judgment, or "common sense." The Church, too, has her *traditions,* which testify to the observance of discipline, although there may be no corresponding law. Thus the celebration of the Sunday instead of the Jewish Sabbath [11] is called a divine tradition. Human traditions are, *e. g.,* that which causes Easter to be celebrated on a certain day and the existence of minor orders.

Besides, there are *writings* of *ecclesiastical authors* which prove the existence of certain customs in ancient times. These, however, if not embodied in an authentic collection, have merely historical value.

Leaving traditions aside as being now defined and to a great extent determined, Canon Law is more especially interested in *custom,* which shall be treated in the Commentary proper.

[11] C. 5, Dist. 11.

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CHAPTER IV

HISTORY OF THE SOURCES AND LITERATURE OF CANON LAW

The chief authorities to be consulted are:

BALLERINI, Peter and Jerome, in their ed. of the *Opera Leonis M.*, t. 3 (Migne, *Pat. Lat.*, t. 56);

P. COUSTANT, O.S.B., *Epistolae Rom. Pontificum*, Parisiis, 1721, Praef.;

F. LAURIN, *Introductio in Corpus Juris Can.*, Friburgi, 1889;

F. MAASSEN, *Geschichte der Quellen u. der Literatur des Canonischen Rechts*, Gratz, 1870 (Vol. 1, the only one published);

J. F. SCHULTE, *Geschichte der Quellen u. Literatur des Canonischen Rechts von Gratian bis auf die Gegenwart*, 1875, 3 vols.;

AUG. THEINER, *Disquisitiones Criticae*, 1836.

The critical and historical method of treating the sources of Canon Law began with Humanism, or, more properly, with Nicholas of Cusa (Cusanus, + 1464). That the Pseudo-Isidorian Collection should be first attacked was natural. But this was but a beginning. Much remained to be done in regard to papal letters and conciliary decrees. A great deal had been achieved by the Spaniard Antonius Augustinus, in the sixteenth century, but his work was left incomplete. More elaborate were the critical labors of the brothers Peter and Jerome Ballerini, who deserve a distinguished place in canonistic

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literature. The names of Maassen and Schulte also are favorably known in this line of studies.

We can give only a brief historical sketch of the collections made according to the various epochs which Canon Law traversed.

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SECTION 1

FIRST PERIOD (TO ABOUT 1150)

Some disciplinary regulations are to be found in the so-called "*Constitutiones Apostolorum,*" a fifth-century collection, made up of the "Doctrina XII Apostolorum," "Didascalia Apostolorum," and "Canones Ecclesiastici Apostolorum," to which were added the "Canones Hippolyti."[1] This collection, made by an anonymous writer imbued with heretical tendencies, contains some traditional customs concerning episcopal elections, ordination and qualities of aspirants to the priesthood, minor orders, etc. But it cannot properly be termed a source of Canon Law.

A collection of conciliar canons must have existed at the time of the Council of Chalcedon (451). Most probably this collection contained the enactments of "*Seven Councils,*" *viz.:* those of Nice, Ancyra, Neo-Cæsarea, Gangræ, Antioch, Laodicæa, and Constantinople. To these were added later the canons of the councils of Ephesus, Chalcedon and Sardis (343), and the combined collection was eventually called *Collectio Decem Conciliorum.*[2] To this were prefixed the "Canones Apostolorum," 85 in number, which were received by the Trullan Synod held in the year 691–692 and are still

1 Cfr. Funk, *Didascalia et Constitutiones,* 1906; O. Bardenhewer, *Geschichte der altchristlichen Literatur,* 1903, Vol. 2, pp. 69, 255 ff.; Bardenhewer-Shahan, *Patrology,* 1908, pp. 349 ff.

2 Maassen, *op. cit.,* pp. 126 ff.; P. Coustant, *op. cit.,* pp. LVIII.

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acknowledged in the Eastern Church as "*Codex Ecclesiae Orientalis.*" [3]

Whilst these collections were chronological, the later ones were *systematic,* beginning with one by an unknown author and another by Joannes Scholasticus (c. 550), distributed into 50 titles.

Another species of systematic collections were those styled "*Nomocanones,*" containing, as the name implies, both civil (*νόμος*) and ecclesiastical (*κάνων*) laws. Several such collections were made in the sixth and seventh centuries and one of them was revised by Photius (c. 883).[4] This caesaro-papistic collection was based on the still acknowledged principle of the Oriental Church that "in illis quae canones non determinarunt, debemus sequi leges civiles." [5]

ARTICLE 1

OCCIDENTAL COLLECTIONS

The Greek collections mentioned above found their way into the Latin Church as early as the close of the fifth century, when a translation of the Greek canons was made and spread in Italy and Spain. In this latter country the spread of the Latin translation of the Eastern Councils was due especially to Isidore of Seville, and hence it goes by the name of *Isidoriana,* whilst the Latin translation used in Italy was called "*Prisca.*" [6]

In the latter country, most probably in Rome, a

3 Milasch-Pessič, *Kirchenrecht der abendländischen Kirche,* 1905, pp. 81 ff.

4 V. Scherer, *l. c.,* I, 197.

5 Cfr. *Syntagma Atheniense,* I, 68 (Milasch, *l. c.,* p. 50).

6 It was thus called from the preface of the Dionysian version, "priscae translationis." Cfr. *Voelli et Justelli Bibliotheca Juris Can.,* Paris, 1661, t. I, p. 101; Maassen, *l. c.,* pp. 87 ff; Ballerini (Migne, 56, col. 83 f.).

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Scythian monk, *Dionysius Exiguus* (Denys the Little, + before 555), made a translation of the Greek canons, 213 in number, to which he added fifty "Canones Apostolorum" and 138 canons of African councils. This collection was increased by the "Decretales SS. Pontificum" issued from the time of Siricius (384–94) to the pontificate of Anastasius (+ 498), 197 in number. A copy of this double collection of conciliar canons and papal decrees, with some additional decretals, was donated by Pope Hadrian I to Charlemagne in 774, and subsequently called *Dionysio-Hadriana.* It enjoyed great authority in Italy, Gaul, Africa, Spain, and England.[7]

In *Africa* a collection of the decrees of councils held from 397 onward was made at an early date and condensed into the "*Breviatio Canonum*" of Fulgentius Furandus towards the middle of the sixth century. A systematic handbook destined for school use was the work entitled "Concordia Canonum" of Cresconius, published in the year 690.[8]

Of *Gallic* origin are the so-called "*Statuta Ecclesiae Antiqua*" of the sixth century.[9] Another collection of French descent is that named from its editor Paschase Quesnel, *Quesnelliana,* and the one published by d'Achery, O.S.B. (+ 1685), called *Dacheriana.*[10] The latter author also edited a collection of penitential canons which goes by the same name, but was originally called "Collectio Canonum."

Spain had the *Isidoriana,* which through the magic name of St. Isidore (+ 636) gained great authority, and

7 Maassen, *l. c.*, pp. 444 ff.; pp. 965 ff.; Migne, *l. c.*, 195 f.

8 Mabillon, *Iter Italicum*, 1724, II; ed. Th. Sickel, 1889.

9 Migne, 56, 282; 273 f.; Maassen, *l. c.*, 79 f.; 806 ff.

10 Ballerini, *l. c.* (Migne, 53, 106 f.); Maassen, *l. c.*, 382 f.

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was twice revised between 589 A. D. and the close of the seventh century; and a collection made by, or published under the name of, Martin of Braga, and circulated as *"Capitula Martini."* [11]

Besides these collections of Canon Law proper, the *Penitential Books,* published especially in Ireland, England and France, enjoyed great esteem.[12]

For the *jus liturgicum* the *Sacramentaria* [13] and *Ordines Romani* [14] are of great importance. For the chancery of the Roman Curia, its style and methods of expedition, the *" Liber Diurnus "* is invaluable.

ARTICLE 2

SPURIOUS COLLECTIONS OF THE NINTH CENTURY

The ninth century was rife with fabrications, not only in hagiography, but also in Canon Law. To this category belongs a collection named *Continuatio ad Capitularia Regum Francorum,* which the Levite Benedict of Mayence professes to have taken from the archives of that Church and compiled at the request of Bishop Hatto (825–47). It contains genuine canons and decrees side by side with spurious ones manufactured by Benedict.[15] Not much different in character and style are the *Capitula Angilramni.* Both this and the former collections originated in northeastern France.[16]

11 Migne, 141 f.; 309; Maassen, 436 f.; 536 ff.; 848 ff.

12 Migne, 53, 218; Maassen, 802 ff.; 677 ff.

13 Cfr. Wasserschleben, *Die Bussordnungen der abendländischen Kirche,* 1851; Schmitz, *Die Bussbücher,* 1883.

14 Probst, *Die ältesten röm. Sacramentarien,* 1892.

15 Cfr. *Monumenta Germaniae Historica, Leges,* II, 2, 39–158.

16 Cfr. Hinschius, *Decretales Pseudo-Isidorianae et Capitula Angilramni,* 1863, Praef., CXCIII ff.; CCXXX, p. 757.

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The Pseudo-Isidorian Decretals

This collection has, since the fifteenth century, claimed the attention of critics. That it contained considerable fraudulent matter was perceived by the famous humanist, Cardinal Nicholas of Cusa,[17] and has since been acknowledged by most "Romanists," although some later writers, like Torres, Malvasia, and Cardinal d'Aguirre, defended its genuineness.

1. *Contents.* The collection consists of a preface and three parts. The *Præfatio* contains the foreword of pseudo-Isidore (*Mercator* or *Peccator*), a spurious letter of Aurelius of Carthage to Pope Damasus with the latter's equally spurious reply, and the "Ordo de Celebrando Concilio."

Part I contains 50 *Canones Apostolorum* and *decretals* of Popes from Clement I to Melchiades (+ 314) — the latter, with the exception of the Clementine letters, all manufactured by "Mercator."[18]

Part II is made up of (a) *De Primitiva Ecclesia,* (b) *Exemplar Constituti Constantini,* and (c) *Canons of Councils* from the Nicene to the second of Spain, partly in the form of the *Hispana,* partly in that of the *Quesnelliana.*[19]

Part III exhibits some excerpts from Pope Silvester and a number of genuine *decretals* from Mark (+ 336) to Gregory II (715–31) in the form of the *Hispana.*[20] The number of apocryphal decretals is about 46 and that of the chapters which the author himself compiled about 104.[21]

17 *Concordantia Catholica,* III, 2; Ballerini (Migne, 56, 210).

18 Hinschius, *l. c.,* p. LXX.

19 Hinschius, *l. c.,* pp. LXXXIII ff.

20 Hinschius, LXXXIX.

21 Cfr. Coustant, *l. c.,* CXXVI; Hinschius, CVIII.

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2. *Author* and *Time of Composition.* It is commonly held that the birth-place of these pseudo-decretals must be sought, not in Rome (as Eichhorn and Theiner claimed), but in the western part of France. The exact place still forms a matter of controversy. While some (*v. g.* Hinschius [22] and von Scherer [23]) regard the diocese of Rheims as the home of the fraudulent compiler, others (especially Fournier [24]) assign him to the province of Tours and in particular to Le Mans.

As to the *time* of compilation there is no great divergency of opinion, for it is generally set between 847 and 853.[25]

3. *Purpose of the Compiler.* It is scarcely credible that the author had for his sole purpose the aggrandizement and defense of the Apostolic See,[26] or that of the bishops of Gaul or any particular part of it.[27] He says in the preface that he desired to gather the scattered canons into one volume. However, this was not his only purpose, otherwise his fabrications would have been superfluous. There can be no doubt that the compiler had still another end in view. This was, as Fournier [28] and others set forth, a twofold one: (a) to protect the authority of the bishops and clergy against encroachments of the potentates and lay-power at large, and (b) to secure the authority of the Roman Pontiff over particular synods, and to defend the hierarchy in all its degrees. Concerning the first point the emphasis laid on immunity is most notable. As to the other point it may be noticed

22 Pseudo-Decretals, Pref., CCXI.

23 *Handbuch des Kirchenrechts,* 1887, I, 222 f.

24 *Les Fausses Décrétals,* in *Revue d'Histoire Éccl.,* 1906, 784.

25 Hinschius, *l. c.,* p. CCI.

26 Ballerini (Migne, 53, 246).

27 Hinschius, *l. c.,* CCXIII f.

28 *Revue. d'Hist. Éccl.,* 1906, p. 548.

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that the Apostolic See was not in need of apocryphal documents to assert its rights.[29]

4. *Influence of the Collection.* It has frequently been said that Pseudo-Isidore ushered in an entirely new discipline. If this were true, only a solemn anathema on that fraudulent writer could repair the damage done to Canon Law. However, we must beware of both extremes — overrating the influence exercised by this collection as well as minimizing it unduly. A little distinction may be helpful in determining its true influence.

The *material* sway it exerted we see in the greater dependence of bishops and provinces on the Holy See — more centralisation — and in the outspoken tendency of the compiler to accentuate what we comprise by the term "immunity," and by extending the matrimonial degrees, which was then unheard of.

The *formal* influence consisted in the precision and divulgation of laws which, though already existing, were not yet accurately determined, *v. g.*, concerning the confirmation and deposition of bishops, appeals, immunity. It cannot be denied that this fraud rendered a bad service to Canon Law, bringing it into discredit and evil repute for a time.[30]

In *Germany* two collections were widely known and made use of, to which may be added a third. They are:

a) Regino of Prüm's "*De Synodalibus Causis et Disciplinis Ecclesiasticis,*" which was made between 906 and 915, in which latter year Abbot Regino died.[31]

29 Ballerini (Migne, 56, 246).

30 Von Scherer, *l. c.*, I, 227; Coustant, *l. c.*, Praef., CXXVII. An excellent monograph in English, by a Protestant lawyer, is now available in *The False Decretals,* by E. H. Davenport, Oxford, 1916.

31 Cfr. Ballerini (Migne, 56, 319); Regino's collection was published in Migne, 132, 17 f. and by Wasserschleben, 1840.

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b) More renowned is the "*Decretum Burchardi.*" Burchard was Bishop of Worms, and composed his collection for practical purposes, especially for the visitation of his diocese. It consists of twenty books, the nineteenth of which is called "Corrector sive Medicus" and treats of penitential discipline. Burchard's chief sources were the "Collectio Anselmo Dicata," whose arrangement he adopted, and Regino's collection. Besides, he quoted many false decretals (about 173 in number), and invented new ones (about 59). He also changed or mutilated the inscriptions of titles and chapters.[82] But despite all these shortcomings the work found a ready reception, not only in Germany, but also in Italy, where Gratian introduced it into his Decretum[83] as "Brocardicae."

c) Belonging to the "Gregorian" group is the "*Capitulare*" or "*Breviarium Hattonis,*" composed about 1080.[84]

ARTICLE 3

COLLECTIONS OF THE TENTH AND ELEVENTH CENTURIES

The Pseudo-Isidorian Decretals were followed by other collections, more or less spurious, not only in France, but in Italy and Germany as well. The age was prolific in forgeries.

1. In *Italy* there was one published which is not as yet printed, although it would, according to our view, based upon inspection of the original MSS.,[85] deserve

82 Cfr. Fournier, *Études Critiques.*

83 See Friedberg, *Decretum Magistri Gratiani,* Leipsic, 1879, pp. XLV ff.

84 Edited by Mai, *Nova Bibliotheca Patrum,* VII, P. III, 1–76; v. Scherer, *l. c.,* I, 240.

85 Contained in the Cod. Paris. 15392, Cod. Mutinens.; besides in the Palat. Vat. 580 and 581, which

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more attention. This, the "*Collectio Anselmo Dicata,*" was made towards the end of the ninth century.

The investiture controversy brought forth some collections which are all imbued with the spirit of Gregory VII and therefore called "*Collectiones Gregorianae.*" To this group belong:

a) The *Collectio Anselmi Lucani* (Anselm of Lucca, + 1086);

b) The "*Collectio Canonum Cardinalis Deusdedit,*" dedicated to Pope Victor III (1086–87);[36]

c) The "*Decretales Bonizonis,*" composed soon after 1089;

d) The "*Polycarpus*" of Cardinal Gregory, issued soon after the death of Pope Calixt II (+ 1124).

The Vatican Library furthermore contains some interesting MSS. pertaining to collections of that period, which await publication.[37]

3. In *France* some notable special treatises were published, *e. g.,* Hincmar of Rheims' "*De Divortio Lothari Regis,*"[38] and Jonas of Orleans' (+ 843) "*De Laicali et Institutione Regali.*"[39] *Collections* proper are:

a) The "*Canones Domni Abbonis*" of Fleury (+ 1004), dedicated to King Hugh and his son Robert, a collection of genuine canons and papal decretals, also containing *Capitularia Regum Francorum* and *Novellae.*[40]

b) A "*Compilatio Juris Canonici*" of about the

are written in the Carolingian minuscules. This Anselm, to whom it is dedicated, was Archbishop of Milan, 883–97; cfr. Ballerini (Migne, 56, 315 ff.), Coustant, *l. c.*, Praef., CXXVI; Fournier, *Études Critiques sur le Décret de Burchard de Worms,* 1910, p. 10.

36 Published by Martinucci, 1869, and by Wolf von Glanvell, 1905.

37 Cod. 1339 in 5 books; Cod. 1346 in 7 books, more or less dependent on Pseudo-Isidore.

38 Migne, *Pat. Lat.*, 125, 623 ff.

39 Migne, *l. c.*, 106, 121 ff.

40 Ballerini (Migne, 56, 320, 139, 473 ff.).

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same date, treating of the reception of heretics and some of the sources of Canon Law.[41]

c) The *"Decretum Ivonis Carnotensis"* (+ 1117), which consists of seventeen books, and the same author's *"Panormia"* in eight parts. The former is a rich collection not only of canonical matter but also of theological lore, *e. g.*, on baptism, confirmation and the Holy Eucharist. The "Panormia" was said to be the compilation made from Ivo's Decretum by the Catalonian Hugo, but it is probably Ivo's work.[42]

d) A *"Collectio Trium Partium,"* divided into 29 titles, was made from Ivo's work soon after his death.[43] Then there is the work of *Alger* of *Liège* "De misericordia et justitia," c. 1121, consisting of three parts.[44]

In *Spain* a collection of 15 books appeared shortly after the Pontificate of Urban II (1088–1109).[45]

41 V. Scherer, I, 238.
42 Theiner, *l. c.*, pp. 162 f.; Migne, 56, 104.
43 Theiner, *l. c.*, pp. 154 ff.
44 Migne, 180, 857 ff.; v. Scherer I, 242.
45 Ballerini (Migne, 56, 352 f.).

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SECTION 2

SECOND PERIOD (TO THE COUNCIL OF TRENT)

This epoch is distinguished by two prominent characteristics. Canon Law becomes independent of theology as such and is cultivated as a *science* proper. The "Magister" ushers in that period, so glorious for canonical lore and resplendent with names immortal. The appearance of standard or *authentic collections* sheds lustre on Canon Law, which now grows into Pontifical Law and irradiates immediately from St. Peter's Chair. These authentic collections are now, first of all, to be considered. It is necessary, however, to premise a few words on the famous *Decretum Gratiani.*

ARTICLE 1

THE DECRETUM MAGISTRI GRATIANI

1. AUTHOR AND NAME.—As the glossators testify, the author of the famous Decree is *Gratian,* who lived and taught as a member of the monastery of SS. Felix and Nabor at Bologna. It is most probable that this monastery then belonged to the Camaldulese. Of Gratian's career we know nothing, except that he died before A. D. 1160.[1]

There is historical evidence that the "Magister," as he was called, had entitled his work "*Concordia Discordan-*

1 Cfr. Maurus Sarti, O. Cam., *De Claris Archigymnasii Bononiensis Professoribus,* 1769–72; Schulte, *Quellen,* 1875, Vol. I, pp. 46 f.; Laurin, *l. c.,* p. 10.

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tium Canonum." [2] His purpose, according to his disciple, the famous Magister Rolandus (later Alexander III),[3] was to make apparently contradictory canons agree and to remove latent divergencies. However, already towards the end of the twelfth century, the collection was commonly called *Decretum Magistri Gratiani,* although it was also cited by the names "Codex," "Corpus," or "Liber Decretorum," or simply, "Corpus Juris Canonici." [4]

2. DIVISION.—The threefold general division was made by Gratian himself,— *De Personis, De Causis, De Sacramentis.*[5]

Part I consists of 101 distinctions, divided into canons, — but not by Gratian. It contains a treatise on the principles of Canon Law and a long treatise "*De Electione et Ordinatione Clericorum.*"

Part II was divided by Gratian himself into 36 *Causae,* and each causa into *Quæstiones,* which, in their turn, were subdivided into *Canones.* The first ten *Causae* might be inscribed "*De Judiciis*"; *Causae* 11–20, "*De Bonis Ecclesiasticis et Regularibus.*" *Causae* 21–26 treat of benefices and privileges, *Causae* 27–36, of marriage.

Causa 33, Quaestio III, contains the "*Tractatus de Poenitentia,*" which Gratian inserted here, but did not himself divide into seven *Distinctiones,* as we now have it.

Part III was inscribed, "*Liber de Sacramentis,*" for which title Paucapalea substituted "*De Consecratione.*" It is divided into five distinctions.[6]

3. MODE OF ALLEGING.—A canonist will never quote,

2 Friedberg, *Decretum Magistri Gratiani,* 1879, Prol., X.

3 *Summa Magistri Rolandi,* ed. Thaner, 1874, p. 4.

4 Laurin, *Introductio,* p. 25.

5 Cfr. Schulte, *Quellen,* I, 50 ff.

6 *Ibid.,* I, 50 ff.

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e. g., "*in Decreto Gratiani,*" but follow the usual mode of citing the decree:

Part I: *c. i, D. i,* which would read: Canon first, Distinction first. Sometimes we find the initial words only quoted, *e. g.*, "*Si quis apostolicae,*" LXXIX, which is Can. 1, Dist. 79. Of course, in that case the index must be consulted, which now takes the place of memory, on which the law-students of former times had to rely.

Part II has the distinctive sign C (Causae, written with a capital C), taking the middle between canons and questions, thus: *c. 29, C. 17, q. 4,* or again with the initial words of the canon: "*Si quis suadente diabolo,*" which is the canon quoted in number and abbreviated letters. *De Poenitentia:* c. i, Dist. 5 de Poenit. which reads: canon 1, Distinction 5, with the characteristic sign, "*De Poenit.*" We must draw attention to the fact that two of the *Causae* exhibit a transposition of questions; in *Causa 2, quaestio* 5 is placed immediately after 3; and in *Causa* 16, *quaestio* 5 directly follows 3.[7]

Part III: *c. 16, Dist. 5 de consecr(atione),* which signifies canon 16, Distinction 5 *de consecratione;* or again with the beginning words: "*Quadragesima summae*" *de consecr.*

Note that older canonists simply quote "*in Decretis*" with the initial words of the canons, and if the text does not fully cover the proof, they say "*arg*" (*argumentum*).[8]

4. Rubricae, Dicta Gratiani, Paleae.—To show the author's method it suffices to point out the brief summaries which precede almost every canon or authority alleged by the "Magister." These summaries are placed at the head in red (ruber) ink and hence called *rubricae.*[9]

7 Laurin, *l. c.*, p. 7 (thus also in Friedberg's edition).

8 *Id.*, pp. 9 f.

9 Cfr. Schulte, *l. c.*, I, 54.

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Furthermore, the Master employed at times some longer expositions, which were either to prove his view on certain canons or a deduction from the authorities alleged. These elucidations were styled *paragraphi* or *dicta Gratiani.* They are to be found either before or after a *distinctio* or *causa* or *quaestio,* and savor of the scholastic disputation.[10] They were intended to remove contradictions between different canons by pointing out that one canon formed the rule, whereas the other was an exception, or that one contained a precept, whereas the other was only a counsel; one emanated from a higher, the other from some inferior authority; one was given for the universal Church, whereas the other referred to a particular province, etc.[11]

The *Decretum,* as now published, contains many *additions* which are not the work of Gratian. It is certain that the Master's disciple, Paucapalea, added some decretals, wherefore all the additions were called *paleae.*[12] Their number is not quite certain, perhaps they form 166 out of the 3848 chapters of which the *Decretum* consists.[13]

5. Sources and Authority.—(1) The sources are either directly or indirectly taken from their collections and collectors. The *direct* sources are 17 apostolic canons, apocryphal as well as genuine decretals from Pseudo-Isidore, the writings of the Fathers, four chapters from St. Benedict's Rule, and Roman, Visigothic and Frankish civil laws.

Indirect sources were those of the collections: Anselmo dicata, Regino, Burchard, Luccani, Deusdedit, Polycarp,

10 *Ib.,* 55 ff. A famous *"dictum Gratiani"* is that ad c. 16, C. 25, q. 1, on the nature of privileges.

11 Schulte, *l. c.,* I, 60; v. Scherer, *l. c.,* I, 243.

12 Another explanation, *viz.* that of "straw" (*palea*), is given by Huguccio, ad c. 51, C. 27, q. 2.

13 Friedberg, *l. c.,* Proleg., p. XIV; Schulte, *l. c.,* I, 56 ff.

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Ivo, Algerius.[14] But the lack of critical genius of his age is also noticeable in Gratians' work.

(2) The reception given to the *Decretum* is almost incredible in our critical time. It was called "*opus aureum*" or "*divinum decretorum opus.*"[15] There seems to be a reason for the applause with which the Magister's work was hailed: on account of the rich materials he had gathered and the scientific method he had adopted, especially in his "*dicta*" and general arrangement, the Decree soon made other collections superfluous and was generally used in schools and courts.[16]

In spite of all this veneration, however, the *Decretum Gratiani* has *never* been considered or declared an *authentic collection.* It was made by private authority and remained such. Hence its authority is neither more nor less than the sources laid under contribution are worth. A decree made by a universal council (*consideratis considerandis*) has the value of a universal law; a canon adopted by a particular council receives no additional force by being inserted in the Decree beyond that which it had before Gratian, etc. Hence each source must be examined independently as to its origin, authenticity, and authority.

At the same time it must be remembered that the Decree, on account of its popularity and the influence it exerted on teachers and judges, paved the way for other collections, which were no longer of merely private authority.

6. Time and Editions.—When Gratian composed his *Decretum* is a matter of controversy. We do not be-

14 Friedberg, *l. c.*, pp. XIX ff.; p. XLII.

15 Cfr. Berardi, *Gratiani Canones Genuini*, 1783, I; Sarti, *l. c.*, I, 247; Laurin, *l. c.*, pp. 44 f.

16 Sarti, *l. c.*, I, 247; Berardi, *l. c.*, Praef., XXVIII; Schulte, *l. c.*, I, 329.

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lieve that intrinsic reasons will ever be found to clearly determine the time of its birth. What has been urged [17] in favor of an earlier than the usually accepted date, is not solidly proved nor free from bias. Extrinsic reasons rather favor 1150–1151 as the probable year of publication. The glossa of Joannes Teutonicus ad c. 31, C. 3, q. 6 and an old MS. state these two years, respectively.[18]

In the course of centuries the *Decretum* was often copied, sometimes with and sometimes without *glossae*, and the faithful rendering of the original text depended on the care of the copyists. Mistakes and corrections were already noticed by St. Antoninus (+ 1459) and they increased after the art of printing had been invented. Antony de Mouchy, in the edition of 1547, and Antony Conte, in the Paris edition of 1556 and the Antwerp edition of 1570, drew attention to spurious decretals. The *Correctores Romani* endeavored to eliminate some palpable errors and to render the text more intelligible. In 1580 and 1582 appeared a so-called official but not authentic text.[19] Henceforward the *Decretum* was reprinted by private savants, generally in connection with the "*Corpus Juris Canonici.*" [20]

Appendices and Compilations.—Soon after the publication of the Decree some decretals were added to it or separately published, *e. g.*, the "*Appendix Concilii Lateranensis*," the "*Collectio Bambergensis*," the "*Collectio Lipsiensis*," the "*Decretales Alexandri III.*" [21]

17 The formula "*salvâ sedis apostolicae auctoritate*" has been alleged by Theiner and Schulte to prove 1139 as the year of divulgation.

18 The codex reads: "*Decretum Gratiani, monachi, Felicis Bononiensis, Ord. S. Benedicti completum in dicto monasterio anno Dmi. MCLI, tempore Eugenii tertii;*" Laurin, *l. c.*, p. 34.

19 Theiner, *l. c.*, app., p. 3; Friedberg, Prolog., LXXV ff.

20 Cfr. below on the whole C. J. C.

21 Cfr. Theiner, *l. c.*, p. 4 ff.; Schulte, *l. c.*, I, 77 ff.

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Of greater importance than these were the five so-called *Compilationes, viz.:*

a) *Compilatio I Bernardi Papiensis,* entitled by the author "Breviarium Extravagantium," issued between 1187 and 1191, divided into 5 books with titles and chapters according to the famous verse, "*iudex, judicium, clerus, connubia, crimen.*"

b) *Compilatio II,* by John of Wales (Joannes Walensis), published before 1200. Neither of these compilations is *authentic*, whereas the folowing three must be considered authentic:

c) *Compilatio III,* made at the request of Innocent III by Petrus Collavicinus or Beneventanus (1210).

d) *Compilatio IV*, perhaps made by Innocent III himself, and consequently before or about 1216, although published only in 1217.

e) *Compilatio V,* made and promulgated under the auspices of Honorius III, 1226.[22] These three collections were alleged in schools and courts in the same manner as the Decretals.

ARTICLE 2

DECRETALES GREGORII IX (1234)

1. NAME.—By a Bull dated Sept. 5th, 1234, Gregory IX promulgated a collection of "Constitutions and Decretals," to which he himself, referring to the five preceding, attributed the name "*compilatio.*" It was soon called "*nova*" (*scil. compilatio*) as well as "*Liber Extravagantium*" (*scil. extra Decretum*) and added to the five other compilations. However, the name "Decre-

22 Cfr. Theiner, *l. c.*, pp. 1 ff.; Schulte, *l. c.*, I, 80 ff.; Laurin, *l. c.*, 97 ff.; Friedberg, *Quinque Compilationes Antiquae*, 1882; v. Scherer, I, 247, 31.

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tales" became more usual and finally exclusive,[23] and is now constantly employed.

The *reason* for this collection is stated in the Bull "Rex pacificus" as follows: Some decretals, on account of their length and resemblance to each other, appeared to cause confusion and uncertainty in the schools as well as courts, and to remedy this evil, the present collection is issued as an *authentic* one, to be employed in schools and ecclesiastic courts *exclusively* of all others. This meant that (a) the former five compilations were henceforward destitute of juridical value, and therefore could not be alleged as law-texts by the ecclesiastical judges; (b) each and every chapter in its dispositive part, no matter what its source or authority, was to have full juridical value as a law-text; (c) the collection was to be considered *the* Code of Law for the universal (Latin) Church, to the exclusion of all others of a general character. But this collection did not abrogate either the *Decretum Gratiani* or existing particular laws and customs, nor did it prevent the publication of later codes.[24]

2. COMPILER AND MATTER.—As the Bull "Rex pacificus" tells us, the Pope commissioned his chaplain and confessor, Bl. Raymund de Peñaforte (+ 1275), to make this compilation, and he accomplished his task within the space of four years, so that the collection could be published in 1234.

The *material* was gathered from Holy Scripture, from the canons of particular as well as universal councils, and from papal decretals. A few are taken from the civil laws. Most of the Decretals, with the exception of those of Innocent III and Gregory IX, were copied from the "five compilations." There are 1971 chapters, of which

23 Friedberg, *Corpus Juris Can.*, II, Proleg., p. X.

24 Laurin, *l. c.*, pp. 141 ff.; v. Scherer, I, 251 f.

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1766 are borrowed from the compilations mentioned.

3. ORDER AND MODE OF QUOTING.—The whole collection is divided into five *books* according to the well-known verse quoted above (p. 36), each book into *titles*, and each title into *chapters*. Each title has an inscription, and the chapters are generally preceded by *rubrics* or brief summaries, which, however, are of purely private authority, whereas the *titles*, whenever their words exhibit a complete meaning (*e. g.*, "*Ne sede vacante aliquid innovetur*," III, 9) have legal value. When the decretals appeared too long, Raymund cut off the *arenga*, or *narratio*, retaining only the dispositive part. The cut-off parts ("*partes decisae*") were marked "*et infra.*" The modern way of *quoting* these decretals is: *c. 4, X, I, 4, i. e.*, chapter 4, liber extravangantium (viz. extra or outside the Decretum Gratiani and the five compilations), book first, title fourth. Sometimes the beginning of the chapter is quoted with "extra" and the inscription of the title, v. g., *De Consuetudine.*

ARTICLE 3

DECRETALES BONIFACII VIII (1298)

From the time of Gregory IX the Roman Pontiffs developed much legislative activity. Thus Innocent IV (Fiesco), a canonist of merit, issued various Decretals, which he himself collected and divided into 28 titles with 42 chapters. Another collection was sent by the same Pope to the famous University of Bologna, in 1253.[25] Alexander IV, Clement IV, and Urban IV also issued Decretals, which were sometimes simply added to Greg-

25 Theiner, *l. c.*, p. 66; Schulte, *Quellen*, II, 30 ff.; Laurin, *l. c.*, pp. 166 ff.

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ory's collection, sometimes remained "x," as *Novellae*.[26] These motley decretals caused some uncertainty. Whereupon three dignitaries, William, Archbishop of Embruns, Berengarius, Bishop of Beziers, and Richard of Siena, Vice-chancellor S.R.E., were ordered by the Pope to "revise" the Decretals, and after revision, to send them to the universities of Bologna and Paris. This was done in 1298, and the collection thus made at the request of Boniface VIII was added to the existing Decretals of Gregory IX as a continuation to the same, and therefore called "*Liber Sextus*." So we read in the Bull "Sacrosanctae," March 3, 1298.[27]

1. MATTER AND ARRANGEMENT.—The three above-named compilers took their materials from the canons of the first and second Councils of Lyons (1245, 1274) and from the Decretals of Gregory and his successors up to Martin IV and Boniface VIII. The Decretals of the latter form 229 chapters. The compilers made use of the preceding compilations and added the eighty-eight "*Regulae Juris*," taken from Dinus of Mugello (de Rossonibus).[28]

The title headings were taken from Gregory's, also the rubrics as well as the inscriptions of the single chapters. The latter, however, were often abridged, sometimes changed, and sometimes even wrongly quoted. The "*partes decisae*" were no longer marked "*et infra*," but simply "cut off." On the whole this collection is not as faithful and precise a rendering of the original text of the Decretals as one might have expected from Boniface VIII, but it has the character of a juridical code. Al-

26 Schulte, *l. c.*, pp. 31 f.; Laurin, *l. c.*, pp. 171 ff.

27 Friedberg, *Corpus Juris Can.*, II, 933 f.

28 Sarti, *l. c.*, I, 234 ff.; v. Scherer, *l. c.*, I, 252; Laurin, *l. c.*, 177.

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though called "*Liber Sextus*" and intended, as it were, to be a continuation of the Gregorian Decretals, it is really an independent collection, consisting, like the first authentic collection, of five *books* with their respective *titles* divided into *chapters*.

Hence the *mode of alleging* this collection is the same as that of the Gregorian compilation, with the sole difference that VI or 6° is substituted for X; hence: *c. i, 6°, I, 2* = chap. 1 (Liceat), in the Liber Sextus, book 1, title 2 de Constitutione.

2. The *juridical value* of the *Liber Sextus* is nearly the same as that of Gregory's Decretals, which were not abrogated by this collection. But it invalidated all the Decretals issued between Sept. 5, 1234, and Dec. 24, 1294, and not inserted in the "*Sextus*" or reserved, *i. e.*, indicated as such. The "*Regulae Juris*" have no legal value.[29]

ARTICLE 4

CLEMENTINAE (1317)

1. As the troublesome times required, Clement V published several constitutions, especially at the Council of Vienne in France (1313). He had them collected later, it seems, and sent to the two French universities of Orleans and Paris. This was after their promulgation at a public consistory held in the castle of Monteaux (de Montiliis), near Carpentras, in southern France. This collection, for some reason or other, was revoked by Clement himself, and only after his death (1314) were these Decretals, which had meanwhile been revised by "more skilful" hands, promulgated by his successor,

[29] Schulte, *l. c.*, II, p. 4; Friedberg, *C. J. C.*, II, 935 f.

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John XXII, in the Bull "Quoniam nulla," October 25th, 1317. This collection is styled in the manuscripts "*Liber Septimus,*" but owing to the influence of the glossators, the title was soon changed into "Constitutiones Clementinae" or simply "Clementinae." [80]

2. MATTER, ARRANGEMENT AND LEGAL VALUE.—With the exception of two decretals, one of Urban IV and one of Boniface VIII, all the "*Clementinae*" belong to the first Pope of the so-called "Babylonian Captivity." These decretals are, like the two preceding collections, divided into five *books,* and these into *titles* and *chapters,* the sum total of the latter being 106. The *mode of quoting the Clementinae* is, with the exception of the characteristic sign "*Clem.,*" the same as that of the Gregorian or Bonifacian Decretals, *viz.: c. 1, Clem. I, 2 de rescriptis* = chapter 1, Clementinae, book 1, title 2 de rescriptis; or, as in the ancient canonists, cap. Abbates, Clem. (de rescriptis, which is not seldom omitted).

John XXII in his Bull of publication commands the addressees to receive these Decretals with good will (*prompto affectu*) and to make use of them in future "in the courts and schools" (*in judiciis et scholis*). Hence the *Clementinae* enjoy the same *authentic* valor as the decretals of Gregory IX and Boniface VIII. But it must be added that the other decretals which issued from the Apostolic See after the Bonifacian collection but not inserted or mentioned in the *Clementinae,* did not lose their legal value because the *Clementinae* contain

80 Cfr. Schulte, *Quellen,* II, 451 ff.; *Corpus Iuris Can.,* ed. Friedberg, II, Prol., pp. LVII ff. Joannes Andreae in his *glossa ad verbum "de caetero" in Const. "Quoniam nulla"* narrates that Clement V himself revoked the collection on account of some decretals being too long, others faulty, others unsuitable, and that these mistakes were then corrected by "more skilled hands"; that John XXII changed them cannot be proved.

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no invalidating clause with regard to them, as was the case in the Bull of Boniface VIII, "Sacrosanctae."[31]

ARTICLE 5

EXTRAVAGANTES

1. Pope John XXII published several important constitutions, touching chiefly upon beneficiary subjects, not contained in the *Clementinae* and yet commented on by the glossators. Thus William de Monte Laudano had furnished "*glossae*" on three decretals of the aforesaid Pope: "*Sedes apostolica*," "*Suscepti regiminis*," and "*Execrabilis*," issued in the first year of John's pontificate (1317). Zenzelinus de Cassanis also composed glosses on these three constitutions and, besides, on seventeen others of the same Pontiff, in the year 1325. These *twenty* decretals became known as the "*Decretales extravagantes, quae emanaverunt post Sextum*," or later as "*Extravagantes Johannis XXII*." They were divided into 14 *titles* and 20 *chapters*.[32]

2. These "*Extravagantes*" were published by JOHN CHAPPUIS in 1501 and 1503, together with some other decretals which had emanated from the Holy See, from John XXII to Sixtus IV. Out of these materials Chappuis made a collection, which he called "*Extravagantes Communes*," in five *books* with *titles* and *chapters*. However, the fourth book (*De Matrimonio*) is missing, for lack of materials. The whole collection is poorly digested and cannot claim authenticity as a collection, though the decretals taken singly have the authority due to pontifical laws, as far as they are still in force (*v. g.*, "*Ambitiosae*" in III, 4).[33]

31 Laurin, *l. c.*, pp. 202 f.
32 Schulte, *op. cit.*, II, 59 f.
33 Laurin, *l. c.*, p. 202.

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Mode of quoting:

c. 2, Extr. Joannis XXII, tit. I (suscepti regiminis),
c. un. Extr. Comm. III, 4 (Ambitiosae).

ARTICLE 6

THE "CORPUS JURIS CANONICI"

After having considered the several collections which were all published after the art of printing had been invented, either in five or in three volumes, a word must be added concerning the whole body of them, known as "*Corpus Juris Canonici.*"

1. "*Corpus Juris*" was a term applied at first to any body of laws, and later, in the twelfth century, to the collection of civil laws.[34] In a Brief of Gregory XIII, "Quum pro munere pastorali," July 1, 1580, the collection containing the *Decretum Gratiani,* the *Decretales Gregorii,* the *Decretales Bonifacii,* the *Clementinae* and the two *Extravagantes* was styled "*Corpus Juris Canonici.*" Hence, in a *wider sense,* these five collections may be said to constitute the *Corpus.*

In the *strict sense,* however, the title can be applied only to the three *authentic* collections, *viz.:* to the Decretals of Gregory IX and Boniface VIII, and the *Clementinae.* The nomenclature "*Corpus Juris Canonici Clausum*" is arbitrary and without foundation.[35]

2. If we regard the *structure* or make-up of the C. J. C. in its strict sense, *i. e.,* of the three authentic collections, we find inscriptions prefixed to the single titles as well

34 Kipp, *Gesch. d. Quellen d. Röm. Rechts,* 1909, 168; v. Scherer, I, 270.

35 Benedict XIV, "*Jam fere sextus*" (*Bullarium,* ed. Mechlin, 1826, I, XIV); Laurin, *l. c.,* pp. 19, 25, 225 f.

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as to the chapters, which latter, moreover, have summaries put immediately before the text.

a) Concerning the *inscriptions* above the *titles* there is a twofold class. Some exhibit simply the subject they treat of, *v. g., De Consuetudine* (I, 4), while others are longer and offer a clause or sentence complete in meaning, *v. g., "Ne sede vacante aliquid innovetur"* (X, III, 9). The former inscriptions have no legal value, whereas the latter have.

b) The *"summaria"* placed at the head of nearly every chapter are additions of the glossators and, therefore, destitute of legal value.

c) Neither legal nor historical merit can be attached to the *indications* of the *sources* whence the composer pretends to have borrowed his matter.

d) As to the *text* itself, juridical value can be attributed only to the *pars decisiva* or *dispositiva,* regardless of whether the source is genuine or spurious, but not to the narrative part or to the allegations of the contending parties.[36]

3. Mention must be made of the various *editions* of the *Corpus Juris Canonici* which are not all of equal authority.

a) *Authentic* is the edition published after the commission consisting of six cardinals and fifteen "doctors" had corrected the *C. J. C.* at the command of Gregory XIII in *Rome,* in 1582.[37] But the work of the "Correctores Romani," incomplete as it is, can claim only doctrinal value.[38] However, the Roman edition had the distinction that it could be quoted in the ecclesiastical courts as well as outside of them.[39]

36 Wernz, *Jus Decretalium,* I, 325 f.

37 Theiner, *l. c.,* app. I, pp. 3 f.

38 Laurin, *l. c.,* p. 69.

39 Greg. XIII., *"Quum pro munere,"* July 1, 1580; Friedberg, II, p. LXXXII.

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b) Of purely *private authority* were the editions made by the brothers PIERRE and FRANÇOIS PITHOU, at Paris in 1687. The same holds good of the critical edition of JUSTUS H. BÖHMER, Halle, 1747, whose "emendations" are not always happy.[40] For official purposes these editions are useless.

Better and worthy of attention is the edition which EMIL FREDERICK RICHTER published at Leipsic in 1839. He used the Roman edition as basis and added textual corrections of his own. This edition can be safely used in practice, although it is not authentic.

A later critical edition is that of EMIL FRIEDBERG, published in two 4to volumes under the title, *Corpus Juris Canonici*. Vol. I, 1879, contains the *Decretum Magistri Gratiani*, Vol. II, 1881, the Decretals and Extravagantes. This edition is based on extensive MS. researches, but neglects the Roman edition and omits all glosses, though inserting the *partes decisae*.

40 Friedberg, II, XLII.

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SECTION 3

SOURCES OF THE LAST PERIOD

1. After the golden age of Canon Law, resplendent with works and authors some of whom shall be mentioned later, there was a setting of the sun, until the *Council of Trent* seemed to breathe new life into the half-motionless frame of the Church at large and the skeleton of canonistic science in particular.

This gathering of learned men had, of course, for its chief aim not a reform of laws, but of morals. Still discipline and morals cannot easily be separated, and hence we see that the Council, especially in its third period, issued many important enactments bearing directly on Canon Law. These *decrees* form a real *source* of Canon Law. Pius IV confirmed them and ordained that, after they had been duly promulgated in the city of Rome, legal force should be attributed to them from the first day of May, 1564.[1]

2. But, surprising though it be, it is a fact that, at least to our knowledge, there exists *no authentic collection of these decrees.* Some private editions were even placed on the Index.

The most noteworthy editions are:

a) AUG. BARBOSA'S "*Collectanea Bullarii aliarumve Summ. PP. Constitutionum nec non Praecipuarum Decisionum, quae ab Apost. Sede et s. Congregationibus*

1 Constitutions of Pius IV: "*Sicut ad sacrorum,*" July 18, 1564; "*Benedictus Deus,*" Jan. 26, 1564. — The promulgation was made at the Lateran, St. Peter's, the Apost. Chancery, the Campo de' Fiori; exception was made for the "Tametsi" (c. 1, sess. 24 de ref. mat.).

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S.R.E. usque ad a. 1633 emanaverunt," Lyons, 1634 (formerly on the Index).[2]

b) JOHN GALLEMART'S *"Concilium Tridentinum cum Declarationibus Cardinalium ejusdem Interpretum,"* ed. Guerra, Venetiis 1780, 2 Vols. (formerly on the Index).

c) RICHTER and SCHULTE'S *"Canones et Decreta Concilii Tridentini ex ed. Rom. a. 1834 repetiti,"* Berlin, 1864 (repr. Naples, 1869).[3]

3. Towards the close of the sixteenth century an attempt was made to gather the three authentic collections of Gregory IX, Boniface VIII, and Clement V into one body together with the decrees of the V Lateran and the Tridentine councils. Cardinal Pinello offered an undigested digest, which he styled *"Liber Septimus,"* to Clement VIII, in 1598, whence it was also called: *"Ssmi. D. N. Clementis P. VIII Decretales."* However, the Pope declined the offer and Pinello's work, though printed, was never promulgated.[4]

This was the last effort to codify the laws of the Church, until PIUS X, of happy memory (*"Arduum sane,"* March 19, 1904), instituted his commission, to which we owe the New Code.

4. After the Council of Trent (1563) the legislative activity of the Popes was by no means stayed. But this period, owing to a more intensified centralization, made it imperative for the Pontiff not to divide but rather to distribute his power among various tribunals and congregations which came into existence soon after the Council. Thus the channel of laws, as it were, was twofold: constitutions and decisions.

2 H. Reusch, *Der Index*, II, 74.

3 Concerning the history of the Council of Trent see Pallavicini, *Istoria del Concilio di Trento*, 1666; and *Concilium Tridentinum*, published by the Görresgesellschaft, Herder, 1901 ff.

4 Sentis, *Clem. VIII. Decretales*, 1870; v. Scherer, I, 275.

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a) The *Constitutions* emanated chiefly in the form of Bulls, sometimes also in the form of Briefs, directly from the Pontiff and touched upon matters of importance for the Church at large. These have so far not been published in an authentic collection. All the so-called *Bullaria,* with the exception of that of Benedict XIV,[5] are of a purely private character. The chief *Bullaria* are:

α) L. CHERUBINI'S *Bullarium seu Collectio Diversarum Constitutionum Multorum Pontificum a Gregorio VII usque ad Sixtum V,* Rome, 1586. The second and third editions of this work comprised the constitutions of the Popes from Leo I to Paul V, to which ANGELUS A LANTUSCA and JOHN PAUL A ROMA added those from Urban VIII to Clement X (Rome, 1672).

AND. BARBERI and ALEX. SPETIA published the so-called *Continuatio Bullarii* (Clement XIII to Gregory XVI), Rome, 1825–57.[6] Here must also be mentioned the *Acta Pii IX,* 1854 ff. and the *Acta Leonis XIII,* 1881 ff., which, however, appear to lack authentic character, whilst the *Acta Pii X* (Vatican Press, 1907 ff.) are authentic and official.

β) *Bullarium Luxemburgense* (first printed at Geneva), or *Bullarium Magnum Romanum a Leone I ad Benedictum XIV,* 1717–28.

γ) *Turinense* (Al. Tomasetti), *Diplomatum et Privileg. S.R. Pont. a Leone I ad Clement. XII editio,* 1857–72, without critical discernment and with a great number of printing errors.

Mention must here be made of P. COUSTANT, *Epistolae RR. Pontificum a Clem. I ad Innoc. I,* Paris, 1721; AND. THIEL, *Epistolae RR. PP. Genuinae ab Hilario ad Pelagium II,* 1868. Of value are also the *Regesta* edited by

5 "*Jam fere sextus,*" 1746, sent to Bologna University.

6 Coquelines, *Bullarum Amplissima Collectio,* Rome, 1739–44.

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JAFFÉ, LÖWENFELD, PFLUGK-HARTUNG, EWALD-HARTMANN (Greg. I.), and P. F. KEHR.

b) The *decrees* and *decisions* of the *Roman Congregations,* especially those of the Congr. of the Council, were collected and published. The only *authentic collections,* however, are the following:

S. Rit. C. Decreta Authentica, Rome, 1898–1912, 6 Vols.

Collectanea S. C. de Propaganda Fide, Rome, 1907, 2 Vols.

The collection of decrees of the Congr. of the Council, which ran first under the name of "Libri Decretorum," from 1573 on were gathered in the *Thesaurus Resolutionum S.C.C.* 1718 (resp. 1745) to 1908, in 167 vols. Strictly private collections are ZAMBONI'S *Coll. Declarationum S.C.C.,* Atrebati, 1868, 4 Vols.; PALLOTINI, *Coll. Omnium Concl. et Resolv.,* 1564–84 (alphabetic); LINGEN and REUSS, *Causae Selectae,* Ratisbon, 1871. There are also many scattered volumes of decisions of the S. R. R.[7]

STUDY OF CANON LAW

It would be worth while to enter the studio of one of those learned canonists of the past in order to observe his way of studying, not only Canon Law, but also civil law, from which was borrowed the method of applying Canon Law (*"ordinem placitandi ex legibus"*). Then we might enter a law school and learn their manner of teaching. There, in the midst of hundreds of disciples,

7 Besides the authors mentioned above, the student may consult: Doujat, *Praenotionum Canonicarum libri quinque,* Venice, 1769; Sarti, O. Camal., *De Claris Archigymnasii Bononiensis Professoribus,* Rome, 1768, t. I; Savigny, *Geschichte des Röm. Rechts im Mittelalter,* 1834–54, Vols. III and IV.

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eagerly intent on the teacher's words, a *Decretum* might be seen on the professor's table. First, with a sonorous voice, he reads the *summary* of the chapter he is about to expound. After that follows the *reading* of the *litera, i. e.,* the text of the chapter (or canon), with distinct accentuation and more slowly, that the students might be enabled to take down the wording in case they could not, because of poverty (books at that time were rare and expensive), or for other reasons, acquire the volume. Then the *litera,* if necessary,[8] is corrected, which was called *emendatio literae.* Hereupon the proper work of the teacher began — the *exposition* or expounding of the canon. This work comprised different acts: *Contradictions* were pointed out and solved by the method assigned by the "magister," then followed *casuistry* and corroboration of the explanation given and other *arguments* taken from the Decree or other sources.

The *students* under the supervision of the teacher are busy at work, engaged partly in *repetitions,* partly in *disputations.* The former are much like our modern "seminars," in which postgraduates or aspirants to the laurea expound some particular text more elaborately. *Disputations* were held *diebus Mercurii* (Wednesdays), and conducted in scholastic style — sometimes, we fear, to extravagance.

This method of training, if kept up from six to ten years, was apt to produce *thorough scholars* and future "masters," which title towards the end of the twelfth century was changed to "*doctors.*" Note must be taken of the fact that the universities, being few in number, attracted the cream of professors and were efficient in maintaining a choice staff. The *clerical* character of

8 Cfr. Huguccio's *Glossa* on c. 31, C. 2, q. 6.

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these flourishing schools, endowed by Popes and Bishops with benefices and other sources of revenue, was carefully maintained and proved no hindrance to effective teaching, intense study, and good morals.[9]

[9] Cfr. Schulte, *Quellen*, I, pp. 111 ff.; 196; II, pp. 214 f., 493, etc.

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SECTION 4

THE GLOSSATORS

If we call the epoch extending from the appearance of Gratian's *Decretum* to the Council of Trent the period of the Glossators, we look to the majority of writers (*denominatio fit a potiori*) without intending to exclude other writers and writings of a different kind.

1. Mention was made of the method the teachers were wont to employ in school. It was but natural that the work of the school should not be confined within the school-walls but also prove a fertile soil for literary products. These are, to a great extent at least, still preserved, either in the form of *Glossae,* or in the more stately shape of *Summae* and *Tractatus.*

In order of time the *Glossae* were the first literary output of the followers of the Master. A gloss [1] or verbal explanation was generally placed above the word to be explained, and therefor, called *glossa interlinearis.* Not rarely these glosses were placed on the margin or at the bottom of the page (*glossae marginales*). If continuously applied to the whole text of the Decree or the Decretals, such a series was styled *apparatus.*

Some authors, *v. g.* Bernardus Papiensis, preferred another way, *viz.:* that of writing commentaries, called *Summae.* These either followed the order of the text

1 From the Greek γλῶσσα (*lingua*); "*dicitur expositio sententiae literam continuans et exponens, unde dicitur glossa, i. e., lingua.*" Doujat, *l. c.*, l, V, c. 2, n. 2.

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(Decree or Decretals) closely and uninterruptedly, or left the order of the text and exhibited only a summary, using the text for the sake of proof. In this latter case they might just as well be called *Tractatus,* although these, properly speaking, were rather essays on some particular subject (*v. g.* Durantis' "Ordo Judiciarius"). It is sometimes difficult to distinguish between *Summae* and *Tractatus.*[2] The glossators had the custom of distinguishing their glosses from those of others by certain initials or *sigla, v. g.* Huguccio used H., Bartholomaeus of Brescia, B. or Bart., etc.

2. We will name some of the most noteworthy glossators and authors of canonical works, retaining their Latin names, as they were then known. To the *Decretum* JOANNES FAVENTINUS composed an apparatus about 1179–87. CARDINALIS introduced the *jus civile* into the Decree. BAZIANUS (+ 1197) in his glosses employed the decretals. The famous "*Glossa Ordinaria*" was furnished by JOHANNES TEUTONICUS, about the year 1215. A rich glossary based upon the preceding and on the compilations is that of BARTHOLOMAEUS BRIXIENSIS, about 1240–45; it is the last gloss on the *Decretum.*[3]

The *Decretales Gregorii* were glossed by VINCENTIUS HISPANUS and BERNARDUS PARMENSIS DE BOTONE (+ 1263), whose *glossa* is called "*ordinaria.*"

The "*Liber Sextus*" and the "*Clementinae*" were adorned with the glosses of JOANNES ANDREAE (+ 1348), one of the most illustrious canonists, "*fons et tuba juris,*" as he was called.[4]

3. SUMMAE AND TRACTATUS.—An entire catalogue would be necessary to do justice to the galaxy of writers who flourished from the twelfth to the fifteenth

2 Schulte, *Quellen,* I, 219.
3 *Ib.,* I, 145, 191, 172; II, 86 f.
4 His daughter Novella also taught Canon Law,— but behind a curtain!

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century. We select the best known without wishing to detract from the fame of the others. *Summa Magistri Rolandi* (Bandinelli), later Pope Alexander III;[5] *Summa Rufini,* about 1166; *Summa Stephani Tornacensis* (1203); *Summa Simonis de Bisiano,* made about 1174–79; *Summa Huguccionis,* about 1187; *Summa Bernardi Papiensis,* about 1191–98; this is a sort of compendium of Canon Law.[6]

What were called *Lecturae* were in fact commentaries, and might also be styled *Summae.* Such were composed by *Innocent IV* (Sinibaldus Fliscus, 1243–54), *"Apparatus in quinque libros Decretalium";* HOSTIENSIS (Henricus de Seguesia, + 1271), *"Lectura in Gregorii IX Decretales";* ABBAS ANTIQUUS, *"Lectura seu Apparatus ad Decretales Gregorii IX,"* composed about 1270; ÆGIDIUS DE FUSCARARIIS (1289); JOANNES GARSIAS HISPANUS (c. 1282); GUIDO DE BAYSIO, *"Commentarius in Sextum"* (c. 1299–1312); GUILIELMUS DE MONTE LAUDANO (1343), *"Lecturae super Sextum, Clementinas et tres Extravagantes Joannis XXII";* ZENZELINUS DE CASSANIS (the same). Of great authority are the following: PETRUS DE ANCHARANO (1416), FRANCISCUS DE ZABARELLIS (1417), ANTONIUS DE BUTRIO (1408), JOANNES AB IMOLA (1436), and especially PANORMITANUS, also called Nicolaus de Tudeschis, O.S.B., Abbas Modernus or Abbas Siculus (+ 1453),— all of whom composed commentaries on the Decretals and the *Clementinae.*

The following works rather resemble treatises or essays:

BERNARDUS PAPIENSIS, *"Summa de Matrimonio;" "Summa de Electione;"* TANCRED, *"Summa de Sponsalibus et Matrimonio,"* and *"Ordo Judiciarius;"* WIL-

[5] Ed. Thaner, 1874. [6] Ed. Laspeyres, 1860.

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LIAM OF DURANT (1296), called "SPECULATOR," "*Speculum Legatorum*," "*Speculum Judiciale*," "*Rationale Divinorum Officiorum*."[7]

Some works are especially concerned with the *papal power*, which was, at times, rather insipidly defended. To this class belong: JOANNES PARISIENSIS (+ 1306), "*Tractatus de Regia Potestate et Papali*"; ÆGIDIUS ROMANUS (Colonna, + 1315), "*De Excellentia Pontificatus*," "*De Potestate Ecclesiastica libri tres*," "*De Regimine Principum*"; AUGUSTINUS TRIUMPHUS (+ 1328), "*Summa de Potestate Ecclesiastica*";[8] RODERIC SANCIUS DE AREVALO (+ 1470), "*Defensorium Status Ecclesiastici*," "*De Monarchia Orbis*" (the Pope is the monarch of the whole universe); JOHN A TURRECREMATA (+ 1468), "*De Potestate Papae et Concilii Generalis Auctoritate;*" THOMAS DE VIO (CAJETAN) (+ 1534), "*De Auctoritate et Potestate Rom. Pont.*," "*De Auctoritate Conciliorum.*" Of some interest are the works of DOMINICUS DE DOMINICIS (+ 1478), "*De Reformationibus Romanae Curiae*," "*De Cardinalium Electione et Legitima Creatione*," etc.[9]

7 Edited, respectively, by Wunderlich, 1841, and Bergmann, 1842.

8 Cfr. Scholz, *Publizistik zur Zeit Philipps des Schönen*, K.-R. Abhandl. v. Stutz, 1903, 618.

9 Cfr. Schulte, *Quellen*, II, passim.

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SECTION 5

POST-TRIDENTINE LITERATURE

The reformation initiated by the Council of Trent was vigorously carried out by the later Popes, who proved themselves excellent legislators. The tendency of gravitation towards the centre became more accentuated. This is very noticeable in Canon Law. Besides this *centralizing* tendency there are two other characteristics which single out this period from those preceding. Humanism invaded the realm of law on a side where it was particularly vulnerable by introducing *historical criticism*. This operation was no detriment to the science, but it might have proved dangerous in the hands of an unskilful surgeon. It has produced works of great and lasting merit.

Another innovation, less necessary and rather cumbersome, is the *moralizing* strain now brought into Canon Law. This was a disadvantage because it obscured the character of the Church as a public society and made the law appear to be an appendix of the confessional. The moralists entered into the vineyard of Canon Law and — but *melius est silere quam loqui*.

The following list may serve students especially in their selection of canonical books. The works may be divided into historico-critical writings, commentaries, and manuals; those which, for one reason or another, are preferred at the Roman Curia are marked with an asterisk.

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1. HISTORICO-CRITICAL WRITINGS

Besides the authors mentioned above the following may be recommended:

CARD. JOHN BAPTIST PITRA, O.S.B., "*Juris Ecclesiastici Graecorum Historia et Monumenta,*" Rome, 1864–68; "*Analecta Novissima Spicilegii Solesmensis,*" Tusculi, 1885; L. THOMASSIN, "*Vetus et Nova Eccles. Disciplina circa Beneficia,*" Magontiaci, 1787; E. LOENING, *Geschichte des deutschen Kirchenrechts,* 1878, 2 vols. (still a standard work).

2. COMMENTARIES

Although not a commentary in the proper sense, yet as embracing almost the whole range of Canon Law, we must mention the works of the "*Princeps Canonistarum,*"[1] BENEDICT XIV, whose *Opera Omnia* (Prati, 1839 ff.) are a rich source of information.

A. BARBOSA, *Opera Omnia,* Lugdun., 1660.

C. S. BERARDI, "*Commentaria in Jus Eccl. Universum,*" Taurini, 1766 (critical).

DE ANGELIS, "*Praelectiones Juris Canonici,*" Rome, 1877 ff.

L. FERRARIS, "*Prompta Bibliotheca Canonica,*" *etc.,* various editions, the latest by J. Bucceroni, S.J., Romae, 1885–99, 9 Vols., but with little improvement as to dates of the decisions of the S. Congregations.

*CARD. VINCENT PETRA (+ 1747), "*Commentaria in Constitutiones Apostolicas,*" Romae, 1705–1726, 5 Vols., besides "*De S. Poenitentiaria Apostolica,*" 1712.

E. PIRHING, S.J., "*Universum Jus Canonicum,*" Dillingae, 1674.

1 Cfr. Hurter, *Nomenclator,* 3rd ed., Innsbruck, 1910, Vol. IV, col. 1595 sqq.

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PICHLER, S.J., "*Jus Can. Universum,*" Ingolstadii, 1735.

*ANACLETUS REIFFENSTUEL, O.F.Min., "*Jus Canonicum Universum,*" Antwerpiae, 1743, 3 Vols.

*JOHN BAPT. RIGANTI, "*Commentaria in Regulas, Constitutiones et Ordinationes Cancellariae Apostolicae,*" Romae, 1744 (an important work for the Rules of the Apostolic Chancery).

SANTI-LEITNER, "*Praelectiones Juris Canonici,*" Ratisbonae, 1898 f.

*F. SCHMALZGRUEBER, S.J., "*Jus Eccl. Universum,*" Romae, 1843 ff., 12 Vols.

*GONZALEZ TELLEZ, "*Commentaria perpetua in singulos textus quinque lib. decretal. Gregorii IX,*" Lugduni, 1673.

WERNZ, S.J., "*Jus Decretalium,*" Romae, 1898 ff.

JOHN BAPT. CARD. DE LUCA (+ 1683), "*Theatrum Veritatis et Justitiae*" (a prolix work of motley content), Romae, 1671 f., 18 Vols.

3. MANUALS

AICHNER, "*Compendium Juris Eccl.,*" Innsbruck, 1895.

J. DEVOTI, "*Juris Canonici Universi Publ. et Privati libri quinque,*" Romae, 1803, 3 Vols. (still useful).

F. HEINER (S.R.R. Auditor), "*Katholisches Kirchenrecht,*" Paderborn, 1897.

JOS. LAURENTIUS, *S.J.*, "*Institutiones Juris Ecclesiastici,*" Freiburg, 1903.

G. PHILLIPS, "*Kirchenrecht,*" 1845 ff., 8 Vols.

VON SCHERER, "*Handbuch d. Kirchenrechts,*" Graz, 1886, 2 Vols. (incomplete, but very thorough and critical).

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J. F. SCHULTE, "*Lehrbuch d. Kath. Kirchenrechts,*" 1863.

S. B. SMITH, "*Elements of Ecclesiastical Law,*" 1891, 3 Vols. These we have frequently consulted.

It may be permitted to add a few *Benedictine* authors.

PLACIDUS BOEKHN (+ 1752), "*Commentarius in Jus Canonicum Universum,*" 1735 f. (commentary-like and extensive).

*LUD. ENGEL (+ 1674 at Melk in Austria), "*Collegium Universi Juris Canonici,*" Salisburgi, 1671–74; ID., "*Tractatus de Privilegiis et Juribus Monasteriorum,*" *ibid.*

MARTIN GERBERT (S. Blasii, + 1793), "*Principia Theoriae Canonicae,*" 1758; "*De Communione Potestatis Ecclesiasticae inter Summos Ecclesiae Principes et Episcopos,*" 1761; "*De Legitima Ecclesiastica Potestate circa Sacra et Profana,*" 1761.

ROB. KÖNIG (+ 1713), "*Principia Juris Can.,*" Salisburgi, 1691–97.

MAURUS SCHENKL (+ 1816), "*Institutiones Juris Eccl. Germaniae Accommodatae,*" Ingolstadii, 1760; Ratisbonae, 1853.

*FRANCIS SCHMIER (+ 1728), "*Jurisprudentia Canonico-Civilis,*" Salisburgi, 1716.

COEL. SFONDRATI (+ 1696), "*Regale Sacerdotium R. Pontifici Assertum,*" 1684; "*Gallia Vindicata,*" S. Galli, 1687.

GREG. ZALLWEIN (+ 1766), "*Principia Juris Ecclesiastici Universalis et Particul. Germaniae,*" 1763 (considered one of the best manuals in its day).

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CHAPTER V

OLD AND NEW LAW

Our gloriously reigning Holy Father Benedict XV, in his Bull of promulgation, refers to the Motu proprio "Arduum sane," which was issued by Pius X, March 17, 1904, and gave rise to the present Code. In that memorable pronouncement the late Pontiff stated the reasons which prompted him as the supreme Pastor of souls, who has the care of all the churches, to provide for a new codification of ecclesiastic laws, with a view "to put together with order and clearness all the laws of the Church thus far issued, removing all those that would be recognized as abrogated or obsolete, adapting others to the necessities of the times, and enacting new ones in conformity with the present needs." We leave it to the reader and the watchmen of Sion to judge whether this purpose has been achieved. A fair-minded and unbiassed critic will certainly acknowledge the juridical genius of H. E. Cardinal Gasparri, who bore the heaviest part of the burden, and of his zealous collaborators in getting up, within the short space of twelve years, a collection covering centuries of legislation and volumes of laws and commentaries. Those who will have to make practical use of the New Code will not fail to admire, first and above all, its brevity as well as the convenient arrangement of the matter and the clearness of the style. The canonist is grateful and in his heart will muse over Virgil's verse, "*Redeunt Saturnia regna,*" because, after

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a long period of relative neglect, his office again becomes important and, we dare say, necessary. For although the advantages of the New Code are undeniable, a commentary is necessary in order to grasp the full meaning of the text. This is evident from the fact that the Code embodies "*nova et vetera.*"

The old laws must be explained, according to the general rules of interpretation indeed, but also in harmony with the traditional significance that can be gathered only from an acquaintance with bygone ages and authors. This is plainly stated in canon 6, which reads:

"The Code for the most part retains the discipline thus far in use, although it also offers opportune changes. Hence: 1.° All laws, both universal or particular, which are opposed to the laws prescribed in this Code, are abrogated, with the exception of those particular laws for which express provision is made."

The term *law* is to be taken in the strict sense of a written enactment. Privileges are not included, for they are special,. not particular, laws. The provision concerning particular laws must be expressly mentioned, at least in a general way. Cfr. Can. 1253 concerning feast-days, which is specially applicable to our country.

"2.° Canons which state the old law unchanged, must be understood according to the authority of the old law and therefore according to the interpretations given by recognized authors.

"3.° Canons which conform to the old law only in part, must be understood according to the old law as far as they agree with it; in so far as they differ from it, they must be explained in their own light.

"4.° When there is doubt whether an enactment of the Code differs from the old law, the latter must be upheld."

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These rules not only establish the continuity of the law, but also offer a key to the interpreter. It is evident that a society which has lasted for centuries cannot entirely overthrow and set aside all of its old laws.

Hence we find throughout the Code not only allusions to, but almost verbal restatements of, the old law. When the Code says "*ex integro,*" which we translate by "unchanged," this term must be taken in its substantial, not verbal meaning. Thus, concerning postulation, the Code (Can. 180, § 2) is almost a repetition of the text of the *Corpus Juris,* though not *ad verbum.*

When a canon is divisible, *i. e.,* when it partly rehearses an old law, and partly gives new regulations, the interpretation and application must necessarily conform to the old law, as well as to the *ratio legis* and the wording of the newly enacted part, as shall appear more fully in the course of this Commentary. It were useless to set forth examples which occur in nearly every canon. But these rules show and clearly prove that even the new Code does not make the authority of the school superfluous or useless.

"5.° All penalties not mentioned in this Code, of whatever denomination, spiritual, temporal, medicinal or vindictive (so called), whether *ferendae* or *latae sententiae,* are hereby abrogated."

The "Apostolicae Sedis" of Pius IX (1868) had a similar purpose, *i. e.,* to reduce the penal Code to a unit and to certain limits. The new Code embodies another attempt to simplify the penal law.

"6.° As regards the other disciplinary laws thus far in use, those that are neither explicitly nor implicitly contained in this Code must be held to have lost obligatory force, unless they are found in approved liturgical

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books or are part of the divine law, either positive or natural."

This is another guiding line along which the interpreter has to move. With the exception of natural and divine positive law and such rules as are contained in the approved liturgical books (the Pontifical, the Missal, the Roman Ritual, and the *Ceremoniale Episcoporum*) all disciplinary laws made by human authority cease to be binding. The commentator may take illustrations from them, but is not allowed to confound them with the existing law or to represent them as still binding.

Having before our mind these wise rules, we shall, with God's help, endeavor to comply with them scrupulously and to follow the injunction of the S. C. Sem. et Stud., Aug. 7, 1917, concerning the teaching of Canon Law.[1]

It remains to point out the *division* of the new Code. It consists of five books, doubtless as a remembrance of the Decretals. However, a mere glance at the Code will convince the student that the real principle of division is the threefold time-honored one according to *personae, res,* and *actiones.* The first book contains all that was embraced in the first book of the Decretals and is here called "general rules," whilst the fourth and fifth books form one subject, *viz.:* the *actiones,* with this sole difference that procedure is separated from the penal code. The second book is entitled *De Personis,* and the third, *De Rebus.* But the ancient trilogy certainly is apparent in the new Code.

1 *Acta Ap. Sedis,* IX, p. 439.

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CONSTITUTION "PROVIDENTISSIMA" OF BENEDICT XV, PROMULGATING THE NEW CODE

To Our Venerable Brethren and Beloved Sons the Patriarchs, Primates, Archbishops, Bishops, and Other Ordinaries, and also to the Professors and Students of the Catholic Universities and Seminaries

BENEDICT, BISHOP

SERVANT OF THE SERVANTS OF GOD

FOR A PERPETUAL REMEMBRANCE OF THE MATTER

The most provident of mothers, the Church, enriched by her Divine Founder with all the notes befitting a perfect society, from the very beginning of her existence, when, obeying the mandate of the Lord, she commenced to teach and govern all nations, undertook to regulate and safeguard the discipline of the clergy and the Christian people by definite laws.

In process of time, however, particularly when she achieved her freedom and grew greater and more widespread from day to day, she never ceased to develop and unfold the right of making laws, which belongs to her by her very constitution. She did this by promulgating numerous and various decrees emanating from the Roman Pontiffs and Ecumenical Councils, as events and times suggested. By means of these laws and precepts she made wise provision for the government of the

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clergy and Christian people, and, as history bears witness, wonderfully promoted the welfare of the State and civilization. For the Church was at pains not only to abrogate the laws of barbarous nations and to reduce their rude customs to civilized form, but, trusting in the assistance of the divine light, she tempered the Roman law itself, that wonderful monument of ancient wisdom, which has deservedly been called "written reason," and, having corrected its defects, perfected it in a Christian manner to such a degree that, as the ways of public and private life tended to greater perfection, abundant materials were supplied for the making of new laws both in the Middle Ages and more recent times.

However, owing to changes in the circumstances of the times and the necessities of men, as Our Predecessor of happy memory, Pius X, wisely declared in his Motu proprio "*Arduum sane,*" of March 17, 1904, Canon Law, no longer achieved its end with sufficient speed. For in the passing of centuries a great many laws were issued, of which some were abrogated by the supreme authority of the Church or fell into desuetude, while others proved too difficult to enforce, as times changed, or ceased to be useful to the common good. To these objections must be added that the laws of the Church had so increased in number and were so separated and scattered, that many of them were unknown, not only to the people, but to the most learned scholars as well.

Moved by these reasons, Our Predecessor of happy memory, at the very beginning of his Pontificate, considering how useful it would be for the restoration and strengthening of ecclesiastical discipline, if the serious inconveniences enumerated above were removed, decided to gather together and to digest with order and clearness all the laws of the Church issued down to our own day,

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removing all that were abrogated or obsolete, adapting others as far as needful to the necessities and customs of the present time,[1] and making new ones according as the need and opportunity should direct. When, after mature deliberation, he put his hand to this most difficult enterprise, he deemed it necessary to consult with the Bishops, whom the Holy Ghost has chosen to rule the Church of God, and to ascertain fully their views on the matter. Accordingly, he directed that, by letter from the Cardinal Secretary of State, all the Archbishops of the Catholic world should be invited to consult with their suffragan Bishops and other Ordinaries obliged to take part in Provincial Councils, and, after such consultation, to report to this Holy See what parts of the existing ecclesiastical law in their opinion stood in need of change or correction.[2]

Then, after having called upon numerous experts in Canon Law residing in Rome and other places to collaborate in the undertaking, he commanded Our Beloved Son, Cardinal Gasparri, then Archbishop of Caesarea, to direct, perfect, and, as far as necessary, complete the work of the consultors. He also instituted a Commission of Cardinals, naming as its members Cardinals Dominic Ferrata, Casimir Gennari, Benjamin Cavicchioni, Joseph Calasanctius Vives y Tuto, and Felix Cavagnis, who, in accordance with the suggestions of Our Beloved Son Cardinal Gasparri, should diligently examine the proposed canons, and change, correct, and perfect them as their judgment directed.[3] When these five men passed away, one after the other, there were appointed in their places Our Beloved Sons Cardinals Vincent Vannutelli,

1 Cfr. the Motu proprio "*Arduum sane.*"

2 Cfr. the Epistle "*Pergratum mihi,*" of March 25, 1904.

3 Cfr. the Motu proprio "*Arduum sane.*"

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Cajetan De Lai, Sebastian Martinelli, Basil Pompili, Cajetan Bisleti, William Van Rossum, Philip Giustini, and Michael Lega, who have admirably completed the work confided to them.

Finally, after again consulting the prudence and authority of all his Venerable Brethren in the Episcopate, he directed that to them and to all the Superiors of the Regular Orders, who are accustomed to be summoned to an Ecumenical Council, should be sent copies of the new Code finished and corrected, before promulgation, in order that they might freely manifest their observations on the proposed canons.[4]

But since, meanwhile, to the sorrow of the whole Catholic world, Our Predecessor of immortal memory passed out of this life, it became Our duty, as soon as by the secret will of Providence we began Our Pontificate, to receive with due honor the views thus collected from every quarter of those who with Us form the teaching Church. Then finally we acknowledged in all its parts, approved, and ratified the new Code of the whole of Canon Law, which had been petitioned for by many Bishops at the Vatican Council, and begun more than twelve years ago.

Therefore, having invoked the aid of Divine grace, and relying upon the authority of the Blessed Apostles Peter and Paul, of Our own accord and with certain knowledge, and in the fullness of the Apostolic power with which we are invested, by this Our Constitution, which we wish to be valid for all time, We promulgate, decree, and order that the present Code, just as it is compiled, shall have from this time forth the power of law for the Universal Church, and We confide it to your custody and vigilance.

4 Cfr. the Epistle "*De Mandato*," of March 20, 1912.

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But in order that all concerned may be able to have a thorough knowledge of the regulations of the Code before they begin to be binding, We ordain that they shall not come into effect until Pentecost day next year, *i. e.*, May 19th, 1918.

Notwithstanding all contrary regulations, constitutions, privileges, even those worthy of special and individual mention, and notwithstanding contrary customs, even though they be immemorial, or whatever else may run counter to this Constitution.

For no one, therefore, is it lawful willingly to contradict or rashly to disobey in any way this Our constitution, ordination, limitation, suppression or derogation. If any one should dare to do so, let him know that he will incur the wrath of Almighty God and of the Blessed Apostles Peter and Paul.

Given at Rome, from St. Peter's, on the Feast of Pentecost of the year one thousand nine hundred and seventeen, the third year of Our Pontificate.

PETER CARD. GASPARRI,
Secretary of State

O. CARD. CAGIANO DE AZEVEDO,
Chancellor of the H. R. Church.

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PROFESSION OF FAITH PRESCRIBED BY THE NEW CODE

Ego *N.* firma fide credo et profiteor omnia et singula, quae continentur in symbolo Fidei, quo sancta Romana Ecclesia utitur, videlicet: Credo in unum Deum, Patrem omnipotentem, factorem caeli et terrae, visibilium omnium et invisibilium. Et in unum Dominum Iesum Christum, Filium Dei Unigenitum. Et ex Patre natum, ante omnia saecula.— Deum de Deo, lumen de lumine, Deum verum de Deo vero. Genitum non factum, consubstantialem Patri: per quem omnia facta sunt. Qui propter nos homines, et propter nostram salutem descendit de caelis. Et incarnatus est de Spiritu Sancto ex Maria Virgine, et Homo factus est. Crucifixus etiam pro nobis, sub Pontio Pilato: passus, et sepultus est. Et resurrexit tertia die, secundum Scripturas. Et ascendit in caelum: sedet ad dexteram Patris. Et iterum venturus est cum gloria iudicare vivos, et mortuos: cuius regni non erit finis. Et in Spiritum Sanctum, Dominum et vivificantem: qui ex Patre Filioque procedit. Qui cum Patre et Filio simul adoratur, et conglorificatur: qui locutus est per prophetas. Et Unam, Sanctam, Catholicam et Apostolicam Ecclesiam. Confiteor unum Baptisma in remissionem peccatorum. Et exspecto resurrectionem mortuorum. Et vitam venturi saeculi. Amen.

Apostolicas et ecclesiasticas traditiones, reliquasque eiusdem Ecclesiae observationes et constitutiones firmissime admitto et amplector. Item sacram Scripturam iuxta eum sensum, quem tenuit et tenet sancta Mater

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Ecclesia, cuius est iudicare de vero sensu et interpretatione sacrarum Scripturarum, admitto; nec eam unquam, nisi iuxta unanimem consensum Patrum, accipiam et interpretabor.

Profiteor quoque septem esse vere et proprie Sacramenta novae legis a Iesu Christo Domino nostro instituta, atque ad salutem humani generis, licet non omnia singulis, necessaria, scilicet, Baptismum, Confirmationem, Eucharistiam, Poenitentiam, Extremam Unctionem, Ordinem et Matrimonium; illaque gratiam conferre, et ex his Baptismum, Confirmationem et Ordinem sine sacrilegio reiterari non posse.— Receptos quoque et approbatos Ecclesiae Catholicae ritus in supradictorum omnium Sacramentorum sollemni administratione recipio et admitto.— Omnia et singula quae de peccato originali et de iustificatione in sacrosancta Tridentina Synodo definita et declarata fuerunt, amplector et recipio.— Profiteor pariter in Missa offerri Deo verum, proprium et propitiatorium Sacrificium pro vivis et defunctis; atque in sanctissimo Eucharistiae Sacramento esse vere, realiter et substantialiter Corpus et Sanguinem una cum anima et divinitate Domini nostri Iesu Christi, fierique conversionem totius substantiae panis in Corpus, et totius substantiae vini in Sanguinem, quam conversionem Catholica Ecclesia Transsubstantiationem appellat. Fateor etiam sub altera tantum specie totum atque integrum Christum, verumque Sacramentum sumi.— Constanter teneo Purgatorium esse, animasque ibi detentas fidelium suffragiis iuvari. Similiter et Sanctos una cum Christo regnantes venerandos atque invocandos esse, eosque orationes Deo pro nobis offerre, atque eorum Reliquias esse venerandas. Firmiter assero imagines Christi ac Deiparae semper Virginis, necnon aliorum Sanctorum habendas et retinendas

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esse, atque eis debitum honorem ac venerationem impertiendam.— Indulgentiarum etiam potestatem a Christo in Ecclesia relictam fuisse, illarumque usum Christiano populo maxime salutarem esse affirmo.— Sanctam, Catholicam et Apostolicam Romanam Ecclesiam, omnium Ecclesiarum matrem et magistram agnosco, Romanoque Pontifici beati Petri Apostolorum Principis successori ac Iesu Christi Vicario veram obedientiam spondeo ac iuro.

Cetera item omnia a sacris Canonibus et Oecumenicis Conciliis, ac praecipue a sacrosancta Tridentina Synodo et ab Oecumenico Concilio Vaticano tradita, definita ac declarata, praesertim de Romani Pontificis primatu et infallibili magisterio, indubitanter recipio atque profiteor, simulque contraria omnia, atque haereses quascunque ab Ecclesia damnatas et reiectas et anathematizatas, ego pariter damno, reiicio et anathematizo. Hanc veram Catholicam Fidem, extra quam nemo salvus esse potest, quam in praesenti sponte profiteor et veraciter teneo, eandem integram et inviolatam usque ad extremum vitae spiritum, constantissime, Deo adiuvante, retinere et confiteri, atque a meis subditis seu illis, quorum cura ad me in munere meo spectabit, teneri et doceri et praedicari, quantum in me erit curaturum, ego idem *N.* spondeo, voveo ac iuro. Sic me Deus adiuvet, et haec sancta Dei Evangelia.

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PART II
COMMENTARY

BOOK I

GENERAL RULES

CAN. 1

Licet in Codice iuris canonici Ecclesiae quoque Orientalis disciplina saepe referatur, ipse tamen unam respicit Latinam Ecclesiam, neque Orientalem obligat, nisi de iis agatur, quae ex ipsa rei natura etiam Orientalem afficiunt.

Though the discipline of the Oriental Church is often referred to in the Code of Canon Law, the Code itself regards only the Latin Church and does not bind the Oriental Church except in matters which of their very nature concern also the latter.

In other words, the new Code binds the Oriental Church only in so far as its dicipline is expressly mentioned therein.

This point was decided in 1907 by the Sacred Congregation of the Propaganda in a decree which touches upon the binding force of the Constitutions of the Holy See.[1]

1 Cf. *Collectanea P. F.*, 1907, II, n. 1578.

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This decree establishes that laws emanating from the Holy See are binding upon the Oriental Church,

a) if they concern matters of faith or morals;

b) if they contain matters connected with the divine or the natural law, *e. g.*, the application of Holy Mass for the people at least sometimes during the year;

c) if the laws themselves expressly state that they are meant to bind the Oriental Church.

The Oriental Churches are distinguished from the Latin Church by their respective liturgical rites,[2] whilst in faith or dogma they are united with the Roman Pontiff. To the Oriental Church belong eight large groups with their respective subdivisions: the Byzantine Uniats with the Melchites, the Ruthenians, the Bulgarians, the Rumanians, the Italo-Greeks (in Calabria and Sicily), the Chaldees, the Copts, the Abyssinians, the Catholic Syrians, the Maronites, and the Armenians and Uniats of Malabar. The Oriental Catholics living in the U. S. remain subject to their respective Church, so far as rite is concerned, but in disciplinary matters, *v. g.*, celibacy of the clergy, they follow the Latin Church.

CAN. 2

Codex, plerumque, nihil decernit de ritibus et caeremoniis quas liturgici libri, ab Ecclesia Latina probati, servandas praecipiunt in celebratione sacrosancti Missae sacrificii, in administratione Sacramentorum et Sacramentalium aliisque sacris peragendis. Quare omnes liturgicae leges vim suam retinent, nisi earum aliqua in Codice expresse corrigantur.

2 Cf. *Cath. Encyclopedia*, Vol. V, *s. v.* Eastern Churches. The Orientals also gain indulgences like the Latins (S. Poenit., 7 July, 1917, *A. Ap. S.*, 1917, ix, p. 399).

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The Code, furthermore, decrees nothing about the rites and ceremonies which the liturgical books approved by the Latin Church prescribe for the celebration of the most holy Sacrifice of the Mass, the administration of the Sacraments and sacramentals, and other sacred functions. Hence all liturgical laws retain their force unless expressly corrected in the Code.

See Introduction, *supra*, pp. 60 sqq.

CAN. 3

Codicis canones initas ab Apostolica Sede cum variis Nationibus conventiones nullatenus abrogant aut iis aliquid abrogant; eae idcirco perinde ac in praesens vigere pergent, contrariis huius Codicis praescriptis minime obstantibus.

The canons of the Code in no wise abrogate or derogate from the agreements entered into between the Apostolic See and different nations; these agreements therefore remain in full force, notwithstanding contrary prescriptions of the Code.

This canon is evidently intended for those countries which maintain a so-called diplomatic or juridical relation with the Holy See. Where there is complete separation between Church and State, this canon does not apply, and hence the United States and England are not directly affected. We say *directly;* for, if one of the countries in which the aforesaid separation prevails should acquire a territory, or part thereof, which had a

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concordat with the Holy See, it would be obliged to abide by the concordat until the case could be legally settled with the Apostolic See (Congregation of Extraordinary Affairs).[3] An instance of a peaceful settlement is that with the United States concerning the Philippine Islands.

CAN. 4

Iura aliis quaesita, itemque privilegia atque indulta quae, ab Apostolica Sede ad haec usque tempora personis sive physicis sive moralibus concessa, in usu adhuc sunt nec revocata, integra manent, nisi huius Codicis canonibus expresse revocentur.

Rights otherwise acquired, as well as privileges and indults hitherto granted by the Apostolic See either to individuals or to organizations remain intact if they are still in use and have not been revoked, unless expressly revoked in the canons of this Code.

The rights here mentioned are the so-called *jura quaesita,*[4] *i. e.,* the legally acquired subjective rights of a third person. For instance, a bishop has the right of appointing one to a certain office; hence, though a corporation (monastery) has the right of appointing one of its members, this appointee must be presented to the Ordinary. *Indults* are faculties granted by the Holy See, *e. g.,*

3 A concordat (*conventio*) is a mutual agreement entered into between the Apostolic See and a State regarding matters which concern both parties, and is of the nature of a bilateral contract; cf. our *Summa Iuris Eccl. Publici,* 1910, p. 138 f.; there is no reason to relinquish that notion.

4 Cfr. the saying: "*Ius quaesitum fortius est quam ius quaerendum.*" Cf. Barbosa, *Tractatus Varii,* Axioma 135, ed. Lugd. 1660, p. 89.

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the triennial faculties. These remain unchanged unless the Code expressly abolishes them, and consequently all faculties obtained before the promulgation of the Code and not expressly abolished therein remain in vigor until they lapse.

CAN. 5

Vigentes in praesens contra horum statuta canonum consuetudines sive universales sive particulares, si quidem ipsis canonibus expresse *reprobentur*, tanquam iuris corruptelae corrigantur, licet sint immemorabiles, neve sinantur in posterum reviviscere; aliae, quae quidem centenariae sint et immemorabiles, tolerari poterunt, si Ordinarii pro locorum ac personarum adiunctis existiment eas prudenter submoveri non posse; ceterae suppressae habeantur, nisi expresse Codex aliud caveat.

Such customs, whether universal or particular, as are now in vogue contrary to the prescriptions of these canons, if they are expressly reprobated by the canons, should be amended as corruptions of the law, even though they be immemorial, and should not be allowed to revive in future; others, which are of century-long duration and immemorable, may be tolerated if the Ordinaries, with due regard to places and persons, consider that they cannot be prudently abolished; the rest shall be regarded as suppressed, unless the Code expressly provides otherwise.

On privileges and customs see *infra,* under the respective titles.

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CAN. 6

Codex vigentem huc usque disciplinam plerumque retinet, licet opportunas immutationes afferat. Itaque:

1.° Leges quaelibet, sive universales sive particulares, praescriptis huius Codicis oppositae, abrogantur, nisi de particularibus legibus aliud expresse caveatur;

2.° Canones qui ius vetus ex integro referunt, ex veteris iuris auctoritate, atque ideo ex receptis apud probatos auctores interpretationibus, sunt aestimandi;

3.° Canones qui ex parte tantum cum veteri iure congruunt, qua congruunt, ex iure antiquo aestimandi sunt; qua discrepant, sunt ex sua ipsorum sententia diiudicandi;

4.° In dubio num aliquid canonum praescriptum cum veteri iure discrepet, a veteri iure non est recedendum;

5.° Quod ad poenas attinet, quarum in Codice nulla fit mentio, spirituales sint vel temporales, medicinales vel, ut vocant, vindicativae, latae vel ferendae sententiae, eae tanquam abrogatae habeantur;

6.° Si qua ex ceteris disciplinaribus legibus, quae usque adhuc viguerunt, nec explicite nec implicite in Codice contineatur, ea vim omnem amisisse dicenda est, nisi in probatis liturgicis libris reperiatur, aut lex sit iuris divini sivi positivi sive naturalis.

The Code for the most part retains the discipline hitherto in force, but makes some opportune changes. Thus:

1.° All laws, whether universal or particular, that are opposed to the prescriptions of this Code, are abrogated, unless some special provision is made in favor of particular laws;

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2.° Those canons which restate the ancient law without change, must be interpreted upon the authority of the ancient law, and therefore in the light of the teaching of approved authors;

3.° Those canons which agree with the ancient law only in part, must be interpreted in the light of the ancient law in so far as they agree with it, and in the light of their own wording in so far as they differ from the ancient law;

4.° When it is doubtful whether a canon contained in this Code differs from the ancient law, the ancient law must be upheld;

5.° As regards penalties not mentioned in the Code, whether spiritual or temporal, medicinal or (as they say) vindictive, whether incurred by the act itself or imposed by judicial sentence, they are to be considered as abrogated;

6.° If there be one among the other disciplinary laws hitherto in force, which is neither explicitly nor implicitly contained in this Code, it must be held to have lost all force unless it is found in approved liturgical books or unless it is of divine right, positive or natural.

This canon establishes the relation between the old and the new law of the Church, as explained in the Introduction to this Commentary, *supra,* pp. 60 sqq.

Can. 7

Nomine Sedis Apostolicae vel Sanctae Sedis in hoc codice veniunt non solum Romanus Pontifex, sed

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etiam, nisi ex natura rei vel sermonis contextu aliud appareat, Congregationes, Tribunalia, Officia, per quae idem Romanus Pontifex negotia Ecclesiae universalis expedire solet.

By the term "Apostolic See" or "Holy See" in this Code is meant not only the Roman Pontiff, but also, unless a different meaning follows from the nature of the thing or the context, the Congregations, Tribunals, and Offices by means of which the Roman Pontiff is wont to transact the affairs of the universal Church.

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TITLE I

ON ECCLESIASTICAL LAWS

DEFINITION AND NATURE

An ecclesiastical law may be defined as "a stable ordinance in accordance with reason, promulgated by the legitimate authority for the common welfare of the Church."[1] It is evident that a law spells stability and should always be based upon the dictates of reason, which requires that circumstances of person, time, and place should be duly considered.

Promulgation of ecclesiastical laws is necessary because, and in so far as, the will of the legislator must, in some way or other, be manifested to his subjects.[2]

The *mode of promulgation* depends on the legislator himself, and consequently is subject to change. Formerly ecclesiastical laws were promulgated in the City of Rome, at the gates of St. John Lateran, at St. Peter's, at the Apostolic Chancery and the Campo de' Fiori. The "Tametsi" had to be promulgated in every parish. Now an ecclesiastical law is sufficiently promulgated when it is published in the *Acta Apostolicae Sedis*.

CAN. 8

§ 1. Leges instituuntur, cum promulgantur.

1 Accommodated from the definition of law in general by St. Thomas, *S. Theol.*, 1a 2ae, qu. 90, a. 4.

2 It would be subversive of authority, as all canonists maintain (cf. the commentaries on tit. II Decretal.) to assert that the validity and obligatory force of laws depends on their acceptance by the people or clergy.

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§ 2. Lex non praesumitur personalis, sed territorialis, nisi aliud constet.

§ 1. Laws go into effect when they are promulgated.

§ 2. A law is not presumed to be personal, but territorial, unless the contrary is evident.

CAN. 9

Leges ab Apostolica Sede latae promulgantur per editionem in *Actorum Apostolicae Sedis commentario officiali*, nisi in casibus particularibus alius promulgandi modus fuerit praescriptus; et vim suam exserunt tantum expletis tribus mensibus a die qui *Actorum* numero appositus est, nisi ex natura rei illico ligent aut in ipsa lege brevior vel longior vacatio specialiter et expresse fuerit statuta.

The laws enacted by the Apostolic See are promulgated by being published in the official *Acta Apostolicae Sedis,* unless some other mode of promulgation is prescribed in particular cases; and they become obligatory three months after the date affixed to the number of the *Acta* in which they appear, unless the nature of the law requires that it take effect immediately, or unless the law itself especially and expressly fixes a shorter or longer period.

Accordingly, a law published in the *Acta Apostolicae Sedis* bearing date of August 1, 1918, goes into effect at midnight Oct. 31 to Nov. 1, 1918.

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CAN. 10

Leges respiciunt futura, non praeterita, nisi nominatim in eis de praeteritis caveatur.

Laws affect the future, not the past, unless it is expressly stated therein that they are retroactive.

A famous example of a retroactive law is the Constitution "*Consensus mutuus,*" of February 15, 1892, by which Leo XIII decreed that "henceforth in those places in which clandestine marriages are regarded as valid, all ecclesiastical judges who have cognizance of such matrimonial causes should forthwith cease to treat the intervention of carnal intercourse between betrothed persons as a presumption (*iuris et de iure*) of the marriage contract, and should not acknowledge or declare such union to be a lawful marriage." (Cfr. De Smet, *Betrothment and Marriage,* tr. by W. Dobell, Vol. II, Bruges, 1912, p. 18.)

LEGISLATORS IN THE CHURCH

Although the Code in its general rules does not mention the persons who are empowered to issue laws, it is safe to state that the following are ecclesiastical lawgivers:

1. The *Supreme Pontiff,* who in matters subject to ecclesiastical legislation may issue laws binding the whole Church. This he may do without or with his counsellors, through official organs, or personally.

2. The *Bishops* or Ordinaries, respectively, are entitled to issue laws for their respective territories. Their laws must be in conformity with the general laws or go beyond them; but without special commission or facul-

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ties Bishops or Ordinaries are not empowered to issue laws *contrary* to the general law. Their legislative activity may be exercised either in synod or without.

3. *Superiors* of *communities* of *regulars* (with solemn vows), especially Generals, enjoy legislative power co-extensive with the power granted by the Supreme Pontiff and the Constitutions of their orders.

Other superiors of religious communities, if not exempt, cannot be said to possess legislative power, properly so called, although they may issue statutes and precepts.

OBLIGATION OF LAWS

In order to determine the obligatory force of a law, it must be noticed, as we have already stated, that a difference exists between divine (positive) and human laws. We may safely say that all moral laws which are based on the dictates of reason, have been laid down in Holy Writ. However, there are also positive divine laws which, *per se,* do not regulate the morality of acts, but determine the constitution of the Church and the Sacraments or the essentials of divine worship. These positive divine laws are out of the reach of human legislation and subject only to declaration or interpretation. They receive their obligatory force from divine law, natural and positive, and bind all the members of the Church without further injunction. Such laws evidently have no territoral limits. It is otherwise with *positive human laws,* which admit of distinction. Hence § 2 of Canon 8 (*supra*) says that a law must be presumed to be not personal but territorial, unless the contrary is evident, as, for instance, in case of the law prescribing the recital of the Breviary, which is manifestly personal.

Considering the *intrinsic* force of the obligation im-

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posed by ecclesiastical law, we must make a distinction between merely prohibitive and nullifying laws. A merely *prohibitive* law renders an act against that law illicit, and this may be stated in barren terms, affecting merely conscience; or it may prohibit an act under penalty. In the former case we speak, with the old Roman jurisconsults, of a *lex minus quam perfecta,* in the latter of a *lex perfecta,* which has a penal sanction attached.

There is another species of laws, called *irritantes* or *inhabilitantes,* which are nothing else but *nullifying* laws, *viz.,* such as render an act committed contrary to them null and void (*lex plus quam perfecta*).

Now the Code says:

CAN. 11

Irritantes aut inhabilitantes eae tantum leges habendae sunt, quibus aut actum esse nullum aut inhabilem esse personam expresse vel aequivalenter statuitur.

Only those laws are to be considered as nullifying which state in express or equivalent terms that either the act is null and void or that a [certain] person is incapable [of performing a valid act against the law].

Thus, *e. g.,* the first degree of consanguinity renders a marriage null and void, whilst the attempted marriage of one *in sacris* is null by reason of the incapability of the person, expressly so declared. *Equivalent* means equal in force or significance so far as concerns the matter under consideration.

(Canons 12, 13, 14, and 15, *infra* pp. 86 sqq.)

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The subject of nullifying laws is continued in Canon 15.

CAN. 15

Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti potest Ordinarius in eis dispensare, dummodo agatur de legibus in quibus Romanus Pontifex dispensare solet.

If a doubt arises as to the law, nullifying laws are not urgent; if there is a doubt regarding a fact, the Ordinary is empowered to grant a dispensation, provided there is a question of laws in which the Roman Pontiff is wont to dispense.

A *dubium juris* may arise from an imperfect knowledge of the existence of a law or its being in force. Such ignorance, of course, is not likely to be as common now as it was before the promulgation of the new Code. But even now, unless one is thoroughly acquainted with the law and the rules of interpretation, doubts may arise, without serious guilt, especially in cases or texts which refer to the old law.

A *dubium facti* may be caused by insufficient cognizance of a fact or its circumstances. Under this category falls, *e. g.*, the whole range of nullifying impediments. Ordinaries must acquaint themselves with the customs of the Roman Curia so as to know whether or not a dispensation may be granted in certain cases.

CAN. 16

§ 1. Nulla ignorantia legum irritantium aut inhabilitantium ab eisdem excusat, nisi aliud expressse dicatur.

§ 2. Ignorantia vel error circa legem aut poenam aut circa factum proprium aut circa factum alienum no-

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torium generatim non praesumitur; circa factum alienum non notorium praesumitur, donec contrarium probetur.

§ 1. Ignorance of nullifying laws does not excuse from their observance, unless the contrary is expressly stated.

§ 2. Ignorance or error concerning a law or a penalty or a fact which touches one's own person, or a notorious fact which touches another, as a general rule is not to be presumed; if, however, there is question of a fact regarding another, which is not notorious, ignorance or error may be presumed until the contrary has been established.

This canon does honor to the juridical sense of the law-framers against a certain tendency of minimizing the valor of laws. A well known instance is that of the impediment of crime, which some authors wished to cover with the cloak of ignorance.

In regard to § 2 several observations are to be made:

a) *Ignorance* is the lack of necessary knowledge, whereas *error* is a state of mind approving falsehood for truth. The former is negative, the latter positive and hence more obnoxious, but perhaps also less imputable.

b) A *notorious* fact is one which is publicly known and committed under circumstances that cannot be excused by any artifice (tergiversation) or aid of law (cf. can. 2197).

c) *Presumption* is anticipating a judgment, or forming a judgment from probable arguments and conjectures. Hence our Code defines presumption (a means of defence, but may here serve as a definition in law) as "a

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cilium vel quasi-domicilium habent et simul actu commorantur, firmo praescripto can. 14.

§ 1. General laws bind all for whom they are given, everywhere.

§ 2. Laws given for a particular territory bind only those for whom they are given and who have a domicile or quasi-domicile in that territory and actually reside therein, except as noted in Can. 14.

A general law (which term here appears to mean universal law) is one given for the entire Church and all its members, as, *e. g.*, yearly confession, hearing Mass, etc.

Particular laws are limited to the territory for which they are given, for instance, the law governing the election of bishops in the U. S., or laws made by provincial councils and diocesan synods. Particular laws suppose residence in the territory for which they are made,—residence conditioned by domicile, which the present canon limits to *domicile proper* and quasi-domicile. Domicile proper, according to the Roman law,[7] which has been adopted in this matter by canonists, is a fixed habitation in a certain place (municipality, parish) with the intention of staying there always. Hence actual residence, as manifested by the purchase or leasing of a house for an indefinite time, and the intention to remain in that place permanently, are signs of a true domicile. Now-a-days such fixed habitation is rare in large cities,

7 Cf. l. 7, *Cod. Iust.*, X, 10 de incolis: "habere domicilium non ambigitur, ubi quis larem (housegods) rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde cum profectus est, peregrinari videtur; quodsi rediit, peregrinari jam destitit."

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though frequent enough in farming districts. It is therefore entirely reasonable that a *quasi-domicile* should be admitted as meeting the requirements and order of law. This is established by actual residence in a certain parish or municipality with the intention of remaining there for the greater part of a year. This intention may be presumed if a person stays at least six months in the same place.[8] The distinction therefore between domicile and quasi-domicile consists in a difference of intention (*animus*), domicile requiring a perpetual, or at least an indefinitely protracted sojourn, whilst quasi-domicile may be established by a residence of six months. This quasi-domicile is acquired from the first day of residence if the person concerned can be proved to have had the intention of remaining there for the time stated.

This canon does not consider the monthly stay (can. 1097) peculiar to the matrimonial celebration.

The expression: "*For whom they are given*" (can. 13, § 1) calls for special attention. Laws given for laymen do not invariably apply to the clergy, and *vice versa*. Neither do all the laws intended for the secular clergy *eo ipso* bind the regular clergy; nor are the penal laws intended for the clergy meant for bishops and cardinals.

Some peculiarities are attached, by reason of laws being *per se* territorial, to foreigners (*peregrini*), *i. e.*, such persons as have for the moment relinquished their domicile or quasi-domicile, although they retain it (can. 91). Of these can. 14 treats as follows:

CAN. 14

§ 1. Peregrini:

1.° Non adstringuntur legibus particularibus sui territorii quandiu ab eo absunt, nisi aut earum trans-

8 Cf. Reiffenstuel, l. II, tit. 2, nn. 17 ff.

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gressio in proprio territorio noceat, aut leges sint personales;

2.° Neque legibus territorii in quo versantur, iis exceptis quae ordini publico consulunt, vel actuum sollemnia determinant;

3.° At legibus generalibus tenentur, etiamsi hae suo in territorio non vigeant, minime vero si in loco in quo versantur non obligent.

§ 2. Vagi obligantur legibus tam generalibus quam particularibus quae vigent in loco in quo versantur.

§ 1. Strangers:

1.° Are not obliged to observe the particular laws of their own territory while they are absent therefrom, unless non-observance of these laws should prove detrimental in their own territory, or unless the laws are personal.

2.° Neither are they bound to observe the particular laws of the territory in which they are sojourning, with the exception of those that concern the public welfare or legal formalities.

3.° General laws they must observe, even though these laws are not enforced in their home territory; they are not bound to observe general laws if these laws are not binding in the place where they sojourn.

There is little to be said concerning the first clause. Some examples may illustrate the case. There is, *e. g.*, the law binding every Catholic to support his pastor. If one is absent when the pew-rent is due, he is not, on account of his absence, free from the obligation of paying

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the same, because such an excuse would be detrimental to discipline. A bishop's obligation of applying Mass at stated times is incumbent on him even during his absence from the diocese, because it is personal.

The second clause concerns the particular laws of the territory in which one sojourns and provides that whatever is connected with the public welfare or concerns legal formalities, must be observed by strangers (*peregrini*).

The Code does not mention *scandal,* although canonists give that as a reason for the obligation of observing particular laws. The omission is probably due to the fact that scandal may negatively be reduced to considerations of public welfare. An instance may be taken from a particular diocesan statute concerning the frequenting of dramshops, which in some dioceses is forbidden under suspension, whilst in other dioceses no such sanction is attached.

Formalities (*sollemnia*) are outward details which must be observed in order to make an act legal. These are partly civil, *e. g.,* in contracts and last wills, and partly pertain to proceedings in the episcopal court.

The last clause, No. 3, touches upon general laws. An example may be furnished by the ten general holydays of obligation (can. 1247), of which only six are observed in the United States. An American travelling in countries where the ten holydays are kept, must observe them. A European, on the other hand, sojourning in this country, may conform himself to our custom.[9]

Section two added to our cannon concerns the *vagi, i. e.,* such as possess neither domicile nor quasi-domicile. They are obliged to observe both the general and the particular laws in effect at the place where they are staying. This regulation is somewhat stricter than usually ac-

[9] A stricter view is taken by Suarez, *De Leg.* III, cc. 32 f.

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cepted by commentators. Yet it is in keeping with the civil law and is really nothing else but the consistent application of the *forum competens.*[10]

INTERPRETATION OF LAWS

By interpretation we mean an explanation of the will of the legislator taken from the wording of the text. As the Roman emperors issued interpretations of obscure texts,[11] so did the popes, first and above all in matters of faith, but also, especially after authentic collections had been published, in disciplinary matters. The Council of Trent decreed that authentic interpretations should be given by the authority from which the law emanated. The S. C. Council was especially charged with interpreting the Tridentine decrees. Besides as the jurisconsults, too, rendered decisions or explanations, so did the canonists proffer their explanations, which at times were sought for, or at least accepted, by the Roman Court.

Thus we have a twofold interpretation, authentic and private. An *authentic* interpretation[12] proceeds from the maker of the law.

CAN. 17

§ 1. Leges authenticae interpretatur legislator eiusve successor et is cui potestas interpretandi fuerit ab eisdem commissa.

§ 2. Interpretatio authentica, per modum legis exhibita, eandem vim habet ac lex ipsa; et si verba legis in se certa declaret tantum, promulgatione non eget et valet retrorsum; si legem coarctet vel extendat aut

10 Cfr. c. 20, X, II, 2 de foro compet. and the commentators on the same, for instance, Reiffenstuel, II, 2, n. 44 f.; Engel, h. t., n. 11.

11 Blackstone-Cooley, *l. c.*, I, p. 58.

12 *Authentic* from the Greek αὐθέντης, means self-authorized, original, authoritative.

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dubiam explicet, non retrotrahitur et debet promulgari.

§ 3. Data autem per modum sententiae iudicialis aut rescripti in re peculiari, vim legis non habet et ligat tantum personas atque afficit res pro quibus data est.

§ 1. Laws are authentically interpreted by the legislator or his successor, or by those to whom the power of interpretation has been given by either the legislator or his successor.

§ 2. An authentic interpretation, given in the form of a law, has the same force as the law itself; if it is merely a declaratory interpretation, it needs no promulgation and its obligatory force goes back to the day when the law itself was promulgated; but if the interpretation is restrictive or extensive or settles a doubt, it is not retroactive and requires to be promulgated.

§ 3. If an interpretation is given in the form of a legal judgment, or of a rescript in a special case, it has not the force of law, but binds only those persons and affects only those matters for whom or for which it is given.

As an authentic interpretation can be given only by the lawgiver or his successor and by those to whom the power of interpretation is committed by the lawgivers, the Pope and the Roman Curia (congregations, tribunals, offices) are the authentic interpreters of all those laws which proceed from the Sovereign Pontiff, whilst the Bishops or their successors are the interpreters of their own laws.

The interpreter may be in a position where he has either to extend the law or restrict it. He *extends* by

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interpretation if he applies the wording or text to cases or persons not mentioned in the law or not included in the original intention of the lawgiver, although the extension is not against the lawgiver's will;[13] for instance, exemption or papal enclosure to religious without solemn vows.[14]

A *restrictive* interpretation takes place when the law is limited to fewer persons or cases than the wording and the mind of the legislator would seem to indicate,[15] *e. g.*, if the people are interdicted but the clergy is not included. Besides doubts may arise, *e. g.* in rubrics, which must be solved. And, lastly, there may be required a merely *comprehensive* (declaratory) explanation, *viz.*, one which explains the law literally, but in more obvious terms, by substituting other words.

The Code (can. 17, § 2) says that an *authentic* interpretation of a law is of equal force with the law itself and has the same binding power; and if it be a merely declaratory interpretation, it needs no promulgation and its obligatory force goes back to the date of the promulgation of the law itself. An interpretation that is extensive or corrective (restrictive), on the other hand, must be promulgated and is not retroactive.

There is, however, another authentic interpretation possible, *viz.*, one demanded by parties directly interested. It may happen, for instance, that a matrimonial case, or a case of precedence, must be decided by way of interpretation. This is done by a so-called *judiciary interpretation,* rendered by a legitimate judge (can. 17, § 3). Evidently such an interpretation binds only the parties

13 Cfr. c. 3, 6°, III, 14.

14 Suarez, *l. c.*, VI, cc. 2 f.; Reiffenstuel, I, 2, n. 370 f.

15 Saurez, *l. c.*, VI, 5, 1: "Omnis restrictio legis eo tendit, ut mentem ipsam legislatoris ad pauciora coarctet, quam verba vel ratio legis prae se ferre videntur."

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concerned and in the matter decided, and outsiders are not affected thereby.

Private interpretation, *viz.*, one given by jurisconsults not commissioned by the lawgiver, or by expert canonists (doctors), must be made in conformity with certain rules which are necessary for the right understanding of ecclesiastical — in fact of all — law. These rules are, of course, generally obeyed also by the authentic interpreters, but they are of importance especially in private interpretation and for those who wish to read and study Canon Law rightly. These rules are briefly the following:

CAN. 18

Leges ecclesiasticae intelligendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et obscura manserit, ad locos Codicis parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum.

Ecclesiastical laws must be understood according to the proper meaning of the words considered in their context; if the meaning remains doubtful and obscure, recourse must be had to parallel texts in the Code, if there are any, to the purpose of the law and the circumstances surrounding it, and to the mind of the lawgiver.

Ecclesiastical laws must be interpreted in the light of their wording, as borne out by the context. Hither belong various rules culled from the Roman and the Canon Law: "Ubi verba non sunt ambigua, non est locus interpretationi;"[16] "Verba sunt intelligenda secundum

[16] L. 25, Dig. 32 delegatis et fidei-com. (ed. Mommsen, 1902, p. 445).

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propriam significationem," *i. e.*, in their usual and common signification;[17] "Verba generalia generaliter sunt sumenda," and "Ubi lex non distinguit, neque nos distinguere debemus."[18]

The *context*, too, must be considered, for it may be useful to compare words or sentences in the order and connection which they have with one another.

When the terms are *doubtful* and obscure, the interpreter must have recourse to parallel texts of the Code, and study the purpose and circumstances of the law and the mind of the legistator. Parallel texts are such as have an affinity with the subject or are expressly related to the same. Here the rule holds good: "De similibus idem est judicium."[19] Note, however, that the similarity must bear on the point at issue.

The purpose or *end* of the law must be regarded in such a way that the interpretation really effects the scope, hence the rule: "Certum est, quod is committit in legem, qui legis verba complectens, contra legis nititur voluntatem." The scope is sometimes, especially in long decrees, premised in the preamble, which may then serve as a guide to the interpreter.

The *circumstances* surrounding a law are either *historical, i. e.*, facts which prompted the law, *e. g.*, the removal of a parish priest, or *real, i. e.*, actual needs and reasons of time and person.

The *mind of the legislator* must, of course, first and above all be deduced from the words of the law. Circumstances, context, subject, etc., also help to disclose the mind of the legislator, as well as the *ratio legis*, which is called the soul of the law. Hence the rule,

17 Reiffenstuel, I, 2, 390 ff.; Blackstone-Cooley, *l. c.*, I, p. 59.

18 Cf. Summarium ad l. 8, *Dig.*, 6, 2 de Publiciana.

19 Cfr. can. 701 with can. 106; c. 2, X, I, 7; c. 3, X, I, 2.

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"Non debet intentio verbis deservire, sed verba intentioni." [20]

But we must guard against the assumption that the intention of the interpreter may be carried into the text. Hence if all the means so far enumerated fail in discovering the true mind of the legislator, nothing is left but to make direct inquiry by petitioning the competent authority. Therefore we sometimes read: "Iuxta mentem," and the "mens" is set forth explicitly; but sometimes it must be guessed at, as said before.

Can. 19

Leges quae poenam statuunt, aut liberum iurium exercitium coarctant, aut exceptionem a lege continent, strictae subsunt interpretationi.

All penal laws as well as those which restrict the free exercise of rights or embody an exception to the law, are subject to strict interpretation.

The first clause of this canon is contained in the well known rule XV in Sexto: "Odia restringi, favores convenit ampliari," and rule 49, I. C.: "In poenis benignior interpretatio est facienda." Such an interpretation is neither extensive nor restrictive, but merely comprehensive; but an explanation which simply negatives the penalty is no interpretation. Strict interpretation clings to the text, and pays due regard to the mind of the legislator, but mitigates the rigor of the law as far as the *ratio legis* will permit. What is meant by restricting the free exercise of rights is best understood by the example of the Ordinary exercising his rights as diocesan in appointments, etc.

Exceptions from laws may be either privileges or fa-

[20] Cfr. c. 11, C. 22, q. 5.

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vors of a personal nature, or particular or special laws, which latter are called *exorbitantes*,[21] *i. e.*, running beyond the sphere of general or common law. For instance, a private oratory is a favor, exemption is a special law, and all these are subject to strict interpretation.

CAN. 20

Si certa de re desit expressum praescriptum legis sive generalis sive particularis, norma sumenda est, nisi agatur de poenis applicandis, a legibus latis in similibus; a generalibus iuris principiis cum aequitate canonica servatis; a stylo et praxi Curiae Romanae; a communi constantique sententia doctorum.

If a general or a particular law contains no definite prescription concerning a case, unless there is question of applying a penalty, the rule for deciding such a case must be taken from laws given in similar cases, from the general principles of Canon Law based on equity, from the method and practice of the Roman Court, or from the common and constant teaching of approved canonists.

It is evident that a lawgiver cannot foresee or anticipate all the cases that may arise in practice in connection with his law. Hence something is always left to private judgment. Now there are four sources from which private judgment may draw aid in solving exceptional cases. They are:

1. The "usus forensis" or "auctoritas rerum similiter iudicatarum." This is nothing else but the norm of customary procedure and decisions previously rendered in

21 Cf. c. 11, C. 22, q. 5.

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cases similar to the one in dispute. Although such decisions, especially if they have emanated from the Roman tribunals, must be received respectfully, and may be followed securely, yet their force does not extend so far as not to admit of a contrary verdict if the reasons are strong enough to upset former decisions.[22]

2. The second means of deciding cases is recourse to general legal principles based on the equity of Canon Law. That *equity* is a means of practical interpretation and application is evident, for reason dictates that, if a law is deficient in a particular case, it should be applied according to the principles of law, indeed, but with a human feeling.[23]

The principles, of course, must be taken from Canon, not from civil law. It is surprising that the Code does not refer to *civil laws* at all, except in so far as concordats are concerned. Hence in interpreting the Code it would be useless to refer to civil laws, and we merely note the fact that there is no palpable trace in the New Code of "canonized" civil laws, *i. e.*, civil laws formally sanctioned by the Church. On the other hand it is plain that just laws issued by the civil power are not spurned by the ecclesiastical authorities but accepted and proposed as binding the members of the Church.

3. The third means of applying the law is by rendering a decision in default of an existing law in accordance with the *stylus curiae*. From remote antiquity, as the "Liber Diurnus" [24] shows, the Roman Court or Apostolic Chancery employed a uniform, nay almost stereotyped mode of expediting affairs. This "stable method

22 Boekhn, *Comment. in Jus Universum*, 1735, I, 4, n. 39.

23 L. 8, *Cod. Iust.*, III, 1: "Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem;"— but this feeling must not be indulged too far, lest it destroy all law. Blackstone-Cooley, *l. c.*, I, p. 61.

24 Ed. Th. Sickel, 1889.

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of proceeding in ecclesiastical causes and dispatching apostolic documents" is called the style of the Roman Curia. It partakes of the nature of a law for the different tribunals and the parties engaged in litigation before them.[25]

4. The last mode of propounding or expounding a case is the *authority of the school.* That the professional canonists have exerted a decided influence since the time of Gratian, not only upon decisions but on lawmaking itself, is well known. The "school" itself distinguished a threefold class of opinions: *communissima,* when all authors agreed; *communis,* when several weighty authors held the same opinion; *controversa,* when there was disagreement among canonists.[26] And it was always regarded as rash to deviate from the *opinio communissima.* The Code mentions the "common and constant opinion" of the school as a guiding principle in deciding a doubtful case, and justly so because such a consensus is sufficient for moral certainty. For the rest, even the *opinio communissima* does not constitute law.

Applying these rules, and especially that of equity, one may persuade himself that a certain law does not apply to himself under given circumstances. This may be true. However, since the law is intended for the common welfare, it is necessary to consider the rule laid down in canon 21.

CAN. 21

Leges latae ad praecavendum periculum generale, urgent, etiamsi in casu peculiari periculum non adsit.

Laws given in order to guard against a common

25 Riganti, *Comment. in Reg. Canc. Ap.,* 45, § 1, n. 96.

26 Schulte, *Quellen,* 1860, I, p. 258.

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danger must be observed even if that danger in a particular case is absent.

The term "*generale*" here has reference to the community or body of the faithful, because a term extends to the species contained in the genus.[27] However, the term may also be taken as comprising a certain class of members, *e. g.*, the clergy, or the laity. Thus the law of reading forbidden books binds all, the law of guarding the *privilegium fori,* the clergy only, etc.

CESSATION OF LAWS

CAN. 22

Lex posterior, a competenti auctoritate lata, abrogat priori, si id expresse edicat, aut sit illi directe contraria, aut totam de integro ordinet legis prioris materiam; sed firmo praescripto can. 6, n. 1, lex generalis nullatenus derogat locorum specialium et personarum singularium statutis, nisi aliud in ipsa expresse caveatur.

A later law, given by competent authority, abrogates an earlier one if it expressly says so, or if it is directly contrary to it, or re-orders the subject-matter of the older law; however, Can. 6, No. 1 of this Code remains in full force, that is to say, a general law in no wise derogates from the laws in force in particular places or with regard to particular persons, unless the contrary is expressly provided therein.

27 Cf. Barbosa, *Tractatus Varii,* Axioma 106: "Generalis dispositio omnes species comprehendit." Suarez, *De Leg.,* III, c. 30. This is, of course, more urgent when there is necessity of professing the faith or maintaining its unity or obeying superiors.

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In other words, an existing law loses its force if a new law is made by which it is abolished. This may be done (a) by an act of explicit abrogation, or (b) in virtue of the prescriptions of the new law being directly opposed to that of the old, or (c) if the new law reorders the entire subject-matter of the old.

a) Papal constitutions sometimes contain the clause, "hac immutabili et in perpetunm valitura constitutione." This is merely an emphatic assertion that the law should not be recalled without reason; it does not bind the Pope's successor, because "par in parem non habet imperium." [28] If the successor expressly mentions his predecessor's law as abolished, the latter loses its force.

b) A later lawgiver may issue a law about a matter (*e. g.* matrimonial) which runs contrary to former laws; hence the rule, "Lex posterior generalis derogat legi priori generali."

c) A thorough overhauling of the subject-matter has the same effect, for instance, in the removal of parish priests.

However, a general law does not abrogate a particular or special law unless the intention of the lawgiver is clearly expressed to that effect in a special clause. Such a clause would be, "non obstantibus quibuscunque etiam speciali vel specialissima mentione dignis." [29] In the canon quoted the Code ordains that all particular and special laws remain in force unless the contrary is expressly stated. Thus, *e. g.*, the particular law on episcopal nominations in the U. S. remains in force even under the new Code.

CAN. 23

In dubio revocatio legis praeexsistentis non prae-

28 Cfr. c. 20, X, I, 6 de elect.

29 Cfr. the Constitution of Benedict XV prefixed to the Code, *supra*, pp. 64 sqq.

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sumitur, sed leges posteriores ad priores trahendae sunt et his, quantum fieri possit, conciliandae.

Where there is doubt whether or not a law has been revoked, [by the Code or by another general law], it may not be presumed that the law has been revoked, but the old law should be compared with the new, and both made to harmonize, as far as possible.

This canon expresses the law of continuity in the legislation of the Church. It would be unwarranted to assume — as has, strangely enough, been done — that the new Code came into being like a *Deus ex machina* and that an insurmountable wall is now erected between the *Corpus Juris Canonici* (in a wider sense) and the Code. The sources (*fontes*) quoted will show the continuity of legislation.

CAN. 24

Praecepta, singulis data, eos quibus dantur, ubique urgent, sed iudicialiter urgeri nequeunt et cessant resoluto iure praecipientis, nisi per legitimum documentum aut coram duobus testibus imposita fuerint.

Precepts given to individuals oblige those for whom they are given, everywhere, but they cannot be juridically enforced, and cease to bind when the lawgiver loses his authority, unless indeed they were imposed by a legal document or in the presence of two witnesses.

A precept (command, injunction), therefore, differs from a law, in as far as it "cleaves to the person to

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whom it is given" (*ossibus inhaeret*) and ceases with the authority or office of the one who gave it. Hence if an Ordinary has given a precept [30] to a clergyman, that precept does not bind after the death or resignation of the Ordinary, unless the precept was given peremptorily by way of an official document (not merely a paternal letter) or in the presence of two witnesses (examiners).

30 Cfr. for inst. can. 2177, against *concubinarii*.

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TITLE II

CUSTOM [1]

Logically the Code now proceeds to deal with that other source of legal obligation known as Custom. Custom (*consuetudo*) generally speaking is a "law introduced by uniform and constant usage of the people with the consent of the legitimate power." Two elements, therefore, constitute the essence of a customary law: a *material* one, which consists of a certain number of repeated acts, and a *formal* one, which is the consent of the legislator. Canon 25 asserts that an ecclesiastical custom obtains its obligatory force solely from the consent of ecclesiastical authority.

CAN. 25

Consuetudo in Ecclesia vim legis a consensu competentis Superioris ecclesiastici unice obtinet.

An ecclesiastical custom derives legal force solely from the consent of the ecclesiastical superior.

The word *unice* in the text clearly refers to *consent.*

The Code wisely abstains from determining the nature of the consent required.

Consent may be *express, i. e.,* given by words or conclusive signs explicitly approving a custom; or *tacit,*

1 Cfr. title IV of the Decretals and the commentators thereon.

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given by the fact that the lawgiver, though aware of the custom and in a condition to oppose it, does not contradict; or finally, *legal,* which is nothing else but the will of the legislator supposedly permitting a custom. The majority of canonists teach that *legal consent* suffices for introducing a custom.[2] The fact that customs have been introduced which the sovereign Pontiffs at first ignored[3] and afterwards accepted, seems abundant proof for that opinion.

That legal consent is *required* for the validity of a custom follows from the nature of the latter as a law; a law must proceed from legitimate authority.

As to the material element or *repeated acts,* these must bear the character of usage, and hence be frequent, public, and uniform. *Frequency* supposes more than one act, at least in common parlance. They must be *public* because they supply the formal act of promulgation; and *uniform* in order to demonstrate the conviction of the people.[4] This latter quality (uniformity) calls for another requisite, *viz., voluntariness.* The acts constituting a custom must be voluntary, for the people, in order to create or show the *persuasio juris,* must be free of intrinsic and extrinsic coercion,— in other words, they must not be under the impression as if they were bound to observe the custom in question because they falsely believe it to be a law.[5] Hence the intention of obliging themselves is necessarily included in the formation by the people of a custom.

One may ask, how can any one oblige himself to com-

2 Cfr. Reiffenstuel, I, 4, n. 136 ff.

3 Cfr. c. 2, 6°, I, 2: "Quia tamen locorum specialium et personarum singularium consuetudines potest probabiliter ignorare."

4 Cfr. c. 5, X, V, 41; Bockhn, *l. c.,* I. 4, nn. 31 ff.; Zallinger, *Iustit. Iuris Eccl.,* l. I, tit. 4, § 228 f.

5 Cfr. the glossa on c. 11, h. t.; v. Scherer, *l. c.,* I, p. 132.

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mit a sin? This objection supposes the distinction between *a custom against the law* and *a custom beyond the law.*

A *custom against* the *law* (*contra legem*) does not create law, but merely removes the obligation of observing a law contrary to custom, whilst a custom *beyond* or *besides the law* constitutes a law in defect of a law (*deficiente lege inducit obligationem legis*). The latter alone is a custom properly speaking.[6] The objection stated supposes *mala fides* in those who commence a custom contrary to a law which they are supposed to know. We do not deny that those who first act against the law may be *in mala fide;* for they may act with a doubtful conscience, which is not permitted except under certain well-defined circumstances. However, we fairly deny that *mala fides* is always the first cause of acting against a law. There may be a thorough conviction that a law is no longer useful or adapted to circumstances, and hence had better be disregarded. Besides, it must be maintained that the people directly and reflexly have the will only of freeing themselves from a burden or restriction opposed to liberty, which reflexive will cannot be said to be evil in itself. Therefore *mala fides* must not necessarily be supposed; and even if it were present in the beginning, it may disappear afterwards. At any rate, a custom against a law may arise[7] either with or without *mala fides.* The next query may be: what is understood by *people,* for so far we have only spoken of the people in general. Canon 26 answers that question.

6 A custom according to law (*iuxta legem*) is strictly no custom at all, but simply a vivid expression and interpretation of an existing law; hence can. 29 says: "*consuetudo optima legum interpres,*" which needs no comment.

7 Cf. Reiffenstuel, I, 4, nn. 142 ff.; Boekhn, I, 4, nn. 19 ff.; Wernz, *Ius Decretalium,* ed. 1, I, 255.

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CAN. 26

Communitas quae legis ecclesiasticae saltem recipiendae capax est, potest consuetudinem inducere quae vim legis obtineat.

A community which is capable of having an ecclesiastical law imposed on it, can introduce a custom which may obtain the force of law.

Law and custom suppose a certain amount of autonomy. This is verified in corporations acknowledged as such by the Church — for we are concerned with ecclesiastical law — and hence: (a) the Church at large, (b) ecclesiastical provinces and dioceses, and (c) ecclesiastical corporations specially designed as such, for instance, religious orders, also single exempt monasteries (*e. g.*, of Benedictines), cathedral chapters, and congregations which enjoy exemption. Congregations of religious with simple vows, or rather, let us say, diocesan institutes, are incapable of introducing a custom, primarily so-called, because they lack autonomy in the proper sense. For the same reason ecclesiastical parishes cannot form a custom, although both parishes and diocesan institutes may have observances.[8]

Two other elements essential to custom are contained in canons 27 and 28.

CAN. 27

§ 1. Iuri divino sive naturali sive positivo nulla consuetudo potest aliquatenus derogare; sed neque iuri ecclesiastico praeiudicium affert, nisi fuerit rationabilis et legitime per annos quadraginta continuos et comple-

8 Reiffenstuel, *l. c.*, nn. 110 ff.

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tos praescripta; contra legem vero ecclesiasticam quae clausulam contineat futuras consuetudines prohibentem, sola praescribere potest rationabilis consuetudo centenaria aut immemorabilis.

§ 2. Consuetudo quae in iure expresse reprobatur, non est rationabilis.

§ 1. No custom can in any wise derogate from a divine law, be it natural or positive; nor does any custom prejudice an ecclesiastical law, unless it is a reasonable custom and has obtained for forty continuous and full years; the only custom that can obtain against an ecclesiastical law containing a clause prohibiting future customs, is a reasonable custom that has existed for a century or from time immemorial.

§ 2. No custom is reasonable which is expressly reprobated by law.

If custom is a law which is essentially reasonable, the custom itself must be reasonable. Consequently no unreasonable custom is admissible. Canonists have laid down certain marks or notes by which a custom is shown to be unreasonable. A custom is unreasonable,

a) If it is contrary to natural and divine law or if it runs counter to faith and morals;[9]

b) If it is repugnant to the constitution of the Church, *e. g.*, if laymen would usurp ecclesiastical power,[10] if a council would set itself above the pope, if a priest would claim episcopal power, if the liberty of the Church were

[9] Cc. 4, 8, 11, Dist. 12; cc. 8, 9, X, V, 3 de simonia.

[10] C. 14, X, I, 6 de elect.

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curtailed, or the free communication between pastor and faithful disturbed, etc.

c) If it is subversive of ecclesiastical discipline, for instance, contempt of censures,[11] multiplicity of benefices in the same hand,[12] and for religious communities if they should elect a superior from a different order.[13]

d) If a custom is reprobated by law.[14]

The other element is *prescription*,[15] which here means the time during which a custom has prevailed. Prescription, according to the Code, requires forty continuous and complete years. By this decision the Code has cut a Gordian knot and stopped much unnecessary waste of paper. The Code has gone even farther by demanding a centennial or immemorial prescription in cases where a custom is directed *against* an ecclesiastical law which contains a clause prohibiting future customs. For a custom *beyond* the law forty full years' prescription is also required.

CAN. 28

Consuetudo praeter legem, quae scienter a communitate cum animo se obligandi servata sit, legem inducit, si pariter fuerit rationabilis et legitime per annos quadraginta continuos et completos praescripta.

A custom beyond the law, which has been knowingly observed by a community with the intention of binding itself, becomes a law if it is

11 C. 5, X, I, 4: "insordescere in censuris."

12 C. 1, 6°, I, 4.

13 C. 1, Clem. I, 3.

14 Our Code employs the term "reprobata consuetudine" quite frequently.

15 Canonists of note reject prescription as a requisite for custom, but erroneously; cfr. Schulte, *Quellen*, I, p. 223 ff.; v. Scherer, I, 133.

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reasonable and has been legitimately observed for forty full and continuous years.

Here we must revert to canon 5 (*supra*, p. 76) among the general norms, for it is directly connected with the present subject. This canon ordains, as we have seen, that all customs, either universal or particular, although immemorial, which are contrary to the canons here embodied and are expressly condemned as corruptions, must be set right nor be allowed to revive. Other customs, if centennial and immemorial, may be tolerated when the Ordinaries deem, according to circumstances of time and persons, that they cannot be abolished, while all other customs must be regarded as suppressed unless the Code provides otherwise. This canon states the relation of the customs in use at the time of the Code's going in force, *i. e.*, the 19th of May, 1918, to the canons of the new Code, but it also touches future customs. Customs which are expressly reprobated in the new Code (cfr. can. 818 etc.) must be abolished because the Church regards them as corruptions. The future is considered as far as it is incumbent upon Sion's watchmen to guard against revival.

The second clause of Canon 5 treats of customs which are *per se* reasonable but not in keeping with the new Code. Such customs, if centennial and immemorial, may be tolerated. There seems to be a difference between a centennial and an immemorial custom, because the former term denotes a precise duration, whereas the latter implies no more than a span of time that is beyond the memory of a fairly old person; for instance, two generations may suffice to accept an immemorial custom.[16]

16 All commentators agree that "consuetudo immemorialis seu inveterata sit illa cuius initii non extat memoria." Cfr. c. 26, X, V, 40,

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But canon 5 employs the conjunctive particle "*et*" (and), while canon 27, § 1, when speaking of prescription, employs the disjunctive particle "*aut*" (or). The difference lies in the introduction and abolition of customs, inasmuch as a legislator seems more ready to connive at the use of customs than at their opposition to a newly published code,— which position is entirely intelligible. However, all customs which are not of the venerable age indicated, should be suppressed, although common sense must even here have its sway; for common sense is based upon the dictates of reason and goes a long way.

CAN. 29

Consuetudo est optima legum interpres.

Custom is the best interpreter of laws.

This canon needs no further explanation in view of what we have said above.

ABOLITION OF CUSTOMS

CAN. 30

Firmo praescripto can. 5, consuetudo contra legem vel praeter legem per contrariam consuetudinem aut legem revocatur; sed, nisi expressam de iisdem mentionem fecerit, lex non revocat consuetudines centenarias aut immemorabiles, nec lex generalis consuetudines particulares.

Can. 5 remaining in full force, a custom either against or beyond the law may be revoked by a

to which the Gloss adds: "diligenter notandum quod consuetudo illa ius sive privilegium inducit."

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contrary custom or law; however, a law, unless it makes express mention thereof, does not abolish centenary or immemorial customs, nor does a general law abolish particular customs.

That a contrary custom may make another custom ineffective, is evident; for custom is law, and therefore, as a law is revoked by a contrary law, so also a custom may be revoked by a contrary custom. Only we must notice that the contrary custom must fully cover the old custom and be vested with the requisites set forth above. As to the effect which a *contrary law* exerts upon a custom, the canon says that it does not revoke a custom unless it contains an express clause to that effect. Such *clauses* are: "*nulla obstante consuetudine,*" and "*nulla obstante consuetudine etiam immemoriali.*" The first clause revokes any general (not particular) custom less than centennial or immemorial; the second abolishes also immemorial customs. If the lawgiver wishes to do away with some particular custom, he adds the clause "*non obstante consuetudine etiam particulari*" or some similar expression. A custom expressly called "*reprobata*" is abolished even by the first-quoted simple clause.[17]

One last question: *Can a custom arise against the new Code itself?* The same query was made concerning customs arising against the decrees of the Council of Trent. Hence we answer with the majority of canonists:[18] A custom branded as reprobate, being unreasonable, cannot be admitted at all or only with greatest difficulty, but other customs may arise also against the new Code. For the resp. *clausulae* are nothing but disciplinary laws, and disciplinary laws admit of a contrary custom.

17 Cf. Reiffenstuel, I, 4, n. 190. 18 Cfr. Aichner, *l. c.*, § 17, 3.

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TITLE III

ON THE RECKONING OF TIME

The present title does not deal with the chronology employed in papal documents, but with the canonical method of calculating time. It may be noted that since the pontificate of Gregory VII (1073–85) the reign of each pontiff commenced with his election, and papal documents were dated according to the year of the Incarnation (25 March) or Christmas Day. Now they are dated according to the calendar year. The indictions (periods of fifteen years) have also disappeared without detriment to chronology. This premised, we will now follow the Code in its determination of the value and duration of the different components of time.

CAN. 31

Salvis legibus liturgicis, tempus, nisi aliud expresse caveatur, supputetur ad normam canonum qui sequuntur.

Aside from the liturgical laws, time must be reckoned according to the norms established in the following canons, unless a different method is expressly provided.

The *liturgical norms* which are here excepted from the following rules, concern the liturgical year commencing with the first Sunday of Advent, the celebration of feastdays (*a vespera usque ad vesperam*), as far as the

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office is concerned, and the gaining of indulgences. In these matters then, which were noted in the *computus ecclesiasticus,* the Code does not make a change.[1]

Can. 32

§ 1. Dies constat 24 horis continuo supputandis a media nocte, hebdomada 7 diebus.

§ 2. In iure nomine mensis venit spatium 30, anni vero spatium 365 dierum, nisi mensis et annus dicantur sumendi prout sunt in calendario.

§ 1. The day consists of twenty-four hours calculated from midnight; the week of seven days.

§ 2. The law reckons the month as a period of thirty days, the year as a period of 365 days, unless it is expressly declared that month and year are to be taken as they are in the calendar.

This is to be understood in the case only of several months or years being enumerated without any further designation, or in the sense of a period, where a month would equal 30 days, and *vice versa.*

Can. 33

§ 1. In supputandis horis diei standum est communi loci usui; sed in privata Missae celebratione, in privata horarum canonicarum recitatione, in sacra communione recipienda et in ieiunii vel abstinentiae lege servanda, licet alia sit usualis loci supputatio, potest quis sequi

1 Cf. Gavanti, *Thesaurus S. Rituum,* Venet., 1740, II, 17 ff.; Van der Stappen, *Sacra Liturgia,* Mechl., 1898, I, 123 ff. Concerning indulgences S. O. (de indulg.), Jan. 26, 1911.

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tempus aut locale sive verum sive medium, aut legale sive regionale sive aliud extraordinarium.

§ 2. Quod attinet ad tempus urgendi contractuum obligationes, servetur, nisi aliter expressa pactione conventum fuerit, praescriptum iuris civilis in territorio vigentis.

§ 1. In reckoning the hours of the day, the common local usage must be followed; but in the private celebration of Mass, in the private recitation of the Breviary, in receiving Holy Communion, and in the observance of fast and abstinence, though the usual computation of time differs, one may follow the local time, true or mean, or the legal time, regional or extraordinary.

§ 2. When there is question of enforcing contractual obligations, the time prescribed by civil law should be followed, unless otherwise expressly agreed upon.

Common usage reckons the day from midnight to midnight. In some countries twice twelve hours are counted, while in others (*e. g.*, Italy) the watch shows twenty-four continuous hours. Some liberty is granted in the private celebration of Mass, the private recitation of the Breviary, receiving Holy Communion and observing the laws of fast and abstinence. In these matters one may follow local or legal custom, although both may differ from common usage. Local custom may have accepted the real or mean solar time, whilst legal custom is that assumed by law and acknowledged in a province or coun-

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try. The astronomical calculation of a day would be that of sidereal time, which differs from the mean solar time, the solar day being some three minutes and fifty-five seconds longer than the sidereal day.[2] What is of practical use, however, is to know that in the United States there are five different kinds of time, 15° of longitude corresponding exactly to one hour of time difference. The time of the 60th meridian is called *Colonial,* that of the 75th Meridian, *Eastern,* that of the 90th, *Central,* that of the 105th, *Mountain,* that of the 120th, *Pacific time.*[3] In fulfilling the duties mentioned in the canon, one may follow sidereal time, if one is a good astronomer, or the mean solar time, generally called "railroad time."

In matters of *contract* the time assumed by civil law must be followed, unless otherwise agreed upon by the contracting parties. In this country the laws of the different States will, therefore, have to be consulted.[4]

The next canon enters into details which touch more closely upon the *starting and finishing point of a given period,* and a distinction is drawn between juridical and calendar time. It is well known that the English law, for instance, has a double way of counting time. Thus when a deed speaks of a month, it is a lunar month consisting of 28 days, unless the context shows that a calendar month of 31 days was intended. Thus also, according to English law, when a calendar month's notice of action is required, the day on which it is served is included and reckoned one of the days; and therefore, if a notice be served on the 28th of April, it expires on the 27th of May, and the action may be commenced on

2 Cfr. Young, *Manual of Astronomy,* 1902, p. 84 ff.

3 Cfr. the *New International Encycl.,* 1904, Vol. XIX, p. 291.

4 Cfr. Blackstone-Cooley, *l. c.,* II, p. 141 f.

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the 28th. The same law, however, in ecclesiastical matters calculates the month according to the calendar or solar reckoning.[5] This premised, let us see what the Code determines:

CAN. 34

§ 1. Si mensis et annus designentur proprio nomine vel aequivalenter, ex. gr., *mense februario, anno proxime futuro,* sumantur prout sunt in calendario.

§ 2. Si terminus *a quo* nec explicite nec implicite assignetur, ex. gr., *suspensio a Missae celebratione per mensem aut duos annos, tres in anno vacationum menses,* etc., tempus supputetur de momento ad momentum; et si tempus sit continuum, ut in allato primo exemplo, menses et anni sumantur prout sunt in calendario; si intermissum, hebdomada intelligatur 7 dierum, mensis 30, annus 365.

§ 3. Si tempus constet uno vel pluribus mensibus aut annis, una vel pluribus hebdomadibus aut tandem pluribus diebus, et terminus *a quo* explicite vel implicite assignetur:

1.° Menses et anni sumantur prout sunt in calendario;

2.° Si terminus *a quo* coincidat cum initio diei, ex. gr., *duo vacationum menses a die 15 augusti,* primus dies ad explendam numerationem computetur et tempus finiatur incipiente ultimo die eiusdem numeri;

3.° Si terminus *a quo* non coincidat cum initio diei, ex. gr., *decimus quartus aetatis annus, annus novitiatus, octiduum a vacatione sedis episcopalis, decendium ad appellandum,* etc., primus dies ne computetur et tempus finiatur expleto ultimo die eiusdem numeri;

4.° Quod si mensis die eiusdem numeri careat, ex.

[5] Cfr. Blackstone-Cooley, I, p. 141.

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gr., *unus mensis a die 30 Ianuarii*, tunc pro diverso casu tempus finiatur incipiente vel expleto ultimo die mensis;

5.° Si agatur de actibus eiusdem generis statis temporibus renovandis, ex. gr., *triennium ad professionem perpetuam post temporariam, triennium aliudve temporis spatium ad electionem renovandam*, etc., tempus finitur eodem recurrente die quo incepit, sed novus actus per integrum eundem diem poni potest.

On account of the technical character of this canon, we shall add our explanation immediately to each paragraph.

1. If months and years are designated by their names, or in equivalent terms, they must be understood as calendar months and years. Thus the month of February must be taken as comprising 28 days; if an equivalent term is used, as, *e. g.*, "in the next following year," let us say 1920, the leap year is understood, or 366 days, while the uneven years have each but 365 days.

2. If the starting point or *date from which* anything is calculated, is neither *explicitly nor implicitly determined*,[6] the time must be reckoned from moment to moment, thus, *e. g.*, a suspension from the celebration of Mass for a month or two years commences on the day and hour when the letter was received by the suspended priest. The same holds good concerning the other example alleged, *viz.*, three months' vacation a year. The canon further explains the first example thus: if the time or period is *continuous* (as in the case of suspension), the calendar month and year are to be understood; hence

[6] Implicitly, for instance, after Easter Sunday, or on the feast of Pentecost, next month.

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if the letter of suspension arrives at 5 P. M., let us say, on the 5th of October, the suspension lasts until December 5th, 5 P. M. If the time or period is or may be *interrupted,* as in the example of leave of absence, a week means 7 days, a month 30 days, a year 365 days.

3. If the time or period consists of one or more months, or years, or of one or more weeks, or of several days, and the starting point is *explicitly* or *implicitly determined,* various hypotheses may arise.

1°. Months and years are always assumed to be calendar ones.

2°. If the starting point (*terminus a quo*) *coincides* with the beginning of the day, the first is included in reckoning the time, and the time or period expires with the beginning of the last day of the same number, *e. g.,* if a two months' vacation is given, beginning August 15th, the time runs out on the morning of October 15th.

3°. If the starting point *does not coincide* with the beginning of the day, the first day is counted in and the term expires when the last day of the same figure is completed. Thus, if one commences a year's novitiate on the afternoon, say of the 5th of October, 1917, he can make his profession on October 6th, 1918, because the last day is complete only after the last stroke of midnight, October 5th, or as soon as October 6th has commenced.

4°. If the month has no day of the same number, say one month from January 30th, then, duly considering diverse cases, the term expires either with the beginning or ending of the last day. What "due consideration" means is evident from the two foregoing hypotheses; wherefore in the first case the month from January 30th is the 28th or 29th of February in leap years, if the *terminus a quo* fell on the beginning of the day; it ends

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on March 1st, if the *terminus a quo* fell on a later part of the day.

Here the difficulty may be mooted as to what is understood by the *beginning of a day*. The Code (can. 32) merely says that the days must be completed from midnight. Civil law, generally speaking, rejects fractions of a day.[7] Canon law, by enjoining computation "from moment to moment," if nothing is said to the contrary, considers fractions.[8] Hence, speaking of the beginning of a day (*initium diei*), the law means that part which, according to common usage, forms the first portion of the day. How far that can be stretched, is mere guesswork; but to extend it to noon would, in our opinion, be against the intention of the law as well as contrary to common usage. Nine o'clock would be about the limit.

5°. If a *recurrence of the same act* at stated times is in question, the term expires on the same recurring day, but the new act may be performed throughout the whole recurring day, for instance, profession after a term of three years, temporary vows, triennial elections, for instance, October 5th, 1917 — October 5th, 1920.

Can. 35

Tempus *utile* illud intelligitur quod pro exercitio aut prosecutione sui iuris ita alicui competit ut ignoranti aut agere non valenti non currat; *continuum*, quod nullam patitur interruptionem.

The *tempus utile* is the time granted for exercising or prosecuting certain rights, so that in case one should ignore it or be unable to make use of it, the lapse of time would not damage or

7 Blackstone-Cooley, *l. c.*, p. 141. 8 Reiffenstuel, II, 27, n. 111.

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prevent him; the *tempus continuum* is that which runs without interruption.

The so-called *tempus utile* is distinguished from the *tempus continuum, i. e.,* time which runs continually without regard to ferial days or the presence or absence of persons, etc. For instance, if the *tempus utile* for a *restitutio in integrum* were four years, and one were not aware of having been wronged, the time would not commence with the day of the wrongdoing but with the day when the defendant realized that action must begin;[1] thus also in cases of summons or citations.

1 Cfr. Engel, I, 41, n. 11 de in integrum restitutione.

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TITLE IV

ON RESCRIPTS

A rescript is a written answer given by a legitimate ecclesiastical superior, either directly, or indirectly through the medium of a competent tribunal, to a question proposed or a favor asked for. As we have stated above, as early as the eleventh century there were two kinds of papal letters, *litterae gratiae* and *litterae justitiae*. *Litterae gratiae* or rescripts of favor proceed from the mere liberality — although perhaps petitioned — of the pontiff or bishop in matters wholly subject to their good pleasure and uncontested, *e. g.*, a nomination to a domestic prelacy. *Litterae justitiae* refer to justiciable matter to be settled between contending parties in legal form, *e. g.*, boundary disputes, questions of precedence, etc.

The definition says that rescripts may be granted directly or indirectly. To understand the difference between the two species note the fact that, as a general rule, the Pope issues rescripts through the ordinary Roman tribunals; yet he is not bound to use that means (can. 38).

Besides, it has become customary to send rescripts granted by the Roman Curia to an *executor*. The executor, as a rule, is a dignitary, *i. e.*, one constituted in a real or honorary dignity, most commonly the Ordinary of the diocese or, for religious, the superior general or provincial. There is a distinction between the *executor*

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voluntarius and the *executor necessarius;* the former acts as a judge, *i. e.,* he decides whether or not the rescript can be put into effect (can. 54); whereas the *executor necessarius* is obliged to sign and deliver the rescript to the person concerned. Whether an executor is *voluntarius* or *necessarius* depends on the clauses added to the rescript. If the conditional particles "*si*" or "*dummodo*" are to be found in the rescript, the executor is considered *voluntarius,* not a mere instrument for executing the will of the superior,[2] and hence is obliged to proceed as if he had received a *mandate* or authoritative commission, by which jurisdiction is given to him in the case (can. 55). These preliminary notions supposed, the Code first establishes *who are capable of demanding* a rescript, either from the Apostolic See or the Ordinaries, and lays down the rule that all may petition for a rescript, unless expressly incapacited under the law.

CAN. 36

§ 1. Rescripta tum Sedis Apostolicae tum aliorum Ordinariorum impetrari libere possunt ab omnibus qui expresse non prohibentur.

§ 2. Gratiae et dispensationes omne genus a Sede Apostolica concessae etiam censura irretitis validae sunt, salvo praescripto can. 2265, § 2, 2275, n. 3, 2283.

§ 1. Rescripts may be freely asked both from the Apostolic See and from other Ordinaries by all who are not expressly prohibited (from asking for them).

2 Sometimes an *exsecutor mixtus* is inserted between the two mentioned. An *exsecutor mixtus* is one who is authorized to execute *a gratia facienda,* which is a favor granted and only needs execution; this kind of executorship may be called a "*nudum ministerium.*"

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§ 2. Favors and dispensations of all kinds granted by the Holy See are valid, even if the beneficiaries are under censure, with due regard, however, to can. 2265, § 2, can. 2275, n. 3, and can. 2283.

Favors and dispensations of all kinds granted by the Holy See even to censured persons are valid, *exceptis excipiendis*. The law *prohibits* the following from asking for a rescript: All *excommunicated* persons, which heading includes all heretics,[3] all those excommunicated after a declaratory or condemnatory sentence, and all who are personally interdicted or suspended, unless the rescript mentions the fact of excommunication. This is frequently done by the addition of the clause, "*absolutis a censuris*," etc., which has no other effect than to render the petitioner capable of receiving the rescript; hence *de facto* he is not absolved from excommunication.

It must be furthermore noted that, according to all authors, even excommunicated persons are allowed to ask for a rescript revoking their excommunication, interdict, suspension, etc., else the way of justice would be precluded to them.

CAN. 37

Rescriptum impetrari potest pro alio etiam praeter eius assensum; et licet ipse possit gratia per rescriptum concessa non uti, rescriptum tamen valet ante eius acceptationem, nisi aliud ex appositis clausulis appareat.

A rescript may be obtained for another (or

[3] Cfr. c. 13, X, V, 7 de haereticis.

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third) person even without the latter's consent; and though this third person may not be able to avail himself of the favor conceded by the rescript, yet the rescript is valid before its acceptance, unless otherwise provided for in the appended clauses.

The wording of this canon is not entirely clear; but comparing it with c. 28, X, I, 3, § 1, we may conclude that not only rescripts of favor, as the Decretals (l. c.) state, but also rescripts of justice, *i. e.*, all kinds of rescripts, are valid before the act of acceptance is made by the party unable (*e. g.*, because a heretic) to profit by the rescript.

The "appended clauses" may regard either the capability of the third person or the acceptation, which may be conditioned by circumstances of absence or other impediments.

DATE AND REQUISITES

CAN. 38

Rescripta quibus gratia conceditur sine interiecto exsecutore, effectum habent a momento quo datae sunt litterae; cetera a tempore exsecutionis.

Rescripts by which a favor is granted without the agency of an executor, take effect from the date of their signature; all others, from the date of execution.

Hence, *e. g.*, a rescript granting a personal or, generally speaking, a private favor is valid as soon as the Pope has signed it. All other rescripts take effect from the date of the executor's signature.

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What about a *telephone* or *telegraph* message? Leaving aside matrimonial and other weighty matters, the telephone or telegraph may be used in order to transmit notice whether the petition was granted or not. It is certain that the Papal Secretary of State may use this means. Generally speaking, the person from whom notice is demanded must be an official who is in a position to know. Private persons are not to be relied upon.

According to Canon 56 (*infra*, p. 145) the rescripts which are handed over to an executor demand execution *in writing* if they regard the *forum externum*. However, after the executor has properly investigated the matter and signed the document, he may, if asked for, transmit an answer by telephone or telegraph and send the written document afterwards. Note, however, that such a transmission is the exception, not the rule.[4]

The Code insists on written execution only for those rescripts which do not directly concern the conscience, and hence those touching the *forum conscientiae* may be transmitted by these "extraordinary" means, provided, of course the *sigillum confessionis* is safeguarded.

CAN. 39

Conditiones in rescriptis tunc tantum essentiales pro eorundem validitate censentur, cum per particulas *si, dummodo,* vel aliam eiusdem significationis exprimuntur.

Conditions made in rescripts are essential to their validity only if they are expressed by the

4 The Secretariate of State, 10 Dec., 1891, has declared this kind of transmission an extraordinary one. Cfr. De Smedt, *De Spons. et Mat.*, 1910, I, p. 532, p. 547.

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particles *si, dummodo,* or others of the same meaning.

CAN. 40

In omnibus rescriptis subintelligenda est, etsi non expressa, conditio: *Si preces veritate nitantur,* salvo praescripto can. 45, 1054.

In all rescripts, even when not expressly stated, this condition must be understood: *If the request is founded on truth,* with due regard to can. 45 and 1054.

Phrases of similar meaning as *si* and *dummodo* are the ablative absolute, *e. g.* "*constito de assertis*" or "*narratis,*" which is truly a conditional clause, so that if it were not verified the rescript would be invalid.[5] This condition, "*si preces veritate innitantur,*" is implied in every rescript, with the exception of "*motu proprio,*" with some modifications (see below). The reasons for a petition, and consequently for the validity of the grant, must actually exist at the time the rescript is signed by the grantor, provided no executor is assigned; if an executor is selected, the reason must be verified at the time when the executor signs the document. For instance, a rescript permitting a private oratory is valid when all the conditions for such an oratory are fulfilled at the date when the Ordinary (to whom such rescripts are generally directed) signs the paper. This is the meaning of Can. 41.

CAN. 41

In rescriptis quorum nullus est exsecutor, preces

5 Cf. Barbosa, *Tractatus Varii,* de clausulis, n. 25, p. 375.

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veritate nitantur oportet tempore quo rescriptum datum est; in ceteris tempore exsecutionis.

In rescripts for which no executor is appointed, the conditions upon which the petition is based must be real at the time the rescript is signed; in all others, at the time of the execution.

It may happen, however, that the grantor, and perhaps the executor also, were deceived by the petitioner, who either did not state the full truth (*subreptio*) or alleged a reason which had no foundation in fact (*obreptio*). Such a deception may arise either from ignorance or malice.[6] This difference is not mentioned in the Code, which simply says:

CAN. 42

§1. Reticentia veri, seu subreptio, in precibus non obstat quominus rescriptum vim habeat ratumque sit, dummodo expressa fuerint quae de stylo Curiae sunt ad validitatem exprimenda.

§ 2. Nec obstat expositio falsi, seu obreptio, dummodo vel unica causa proposita vel ex pluribus propositis una saltem motiva vera sit.

§ 3. Vitium obreptionis vel subreptionis in una tantum parte rescripti aliam non infirmat, si una simul plures gratiae per rescriptum concedantur.

§ 1. Failure to state the full truth (*subreptio*) in the petition does not prevent a rescript from being valid and going into effect, provided men-

[6] Cfr. c. 20, X, I, 3, which chapter is called in the summary the "key of the whole title"; our canon disregards the distinction between *ignorance* and *malice*.

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tion was made of whatever the *stylus Curiae* requires for validity.

§ 2. Neither is a rescript obtained by the allegation of a falsehood (*obreptio*) invalid, provided the sole reason, or at least one of the several reasons alleged, is true.

§ 3. Either defect, *obreptio* or *subreptio*, occurring in only one part of a rescript, does not invalidate the other parts, if several favors are granted simultaneously by the same rescript.

As to the first clause (§ 1), the *stylus Curiae* prescribes certain canonical reasons for matrimony, the different lines and degrees, as well as certain formularies to be used in obtaining faculties or dispensations from the various Roman Congregations. This customary style is, of course, best known to the agents engaged in business with these Congregations. If a *petition* is not properly drawn up, it is usually *returned to the petitioner,* to be corrected.[7]

As to § 2: The *motive cause* or final reason (can. 45) is the one which moves the superior to grant a petition. If, therefore, this one is false, the rescript will be null and void, and the petitioner can neither licitly nor validly use the favor granted therein.

Note that our canon makes a distinction in favor of *subreptio,* which the Corpus Juris did not admit under the circumstance of deliberate falsehood, either expressed or suppressed.[8] The new Code is also benign in admitting the *divisibility of a rescript* which contains sev-

[7] The *stylus Curiae* has been described above; cfr. also Putzer, *Comment. in Facultates Apost.*, 1897, p. 15. The *clausulae* also belong to the "Roman Style."

[8] Cfr. c. 20, X, I, 3.

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eral favors, *e. g.*, that of saying *de requiem* and reciting other prayers instead of the Breviary.

To provide for a uniform procedure and to avoid confusion, as well as to prevent rescripts from being, as it were, received stealthily, the following two canons have been inserted:

CAN. 43

Gratia ab una Sacra Congregatione vel Officio Romanae Curiae denegata, invalide ab alia Sacra Congregatione vel Officio aut a loci Ordinario, etsi potestatem habente, conceditur sine assensu Sacrae Congregationis vel Officii quocum vel quibuscum agi coeptum fuit, salvo iure S. Poenitentiariae pro foro interno.

A favor denied by one Sacred Congregation or Office of the Roman Curia cannot validly be granted by another Congregation or Office, or by the local Ordinary, even though he have the power, except with the consent of the S. Congregation or Office which handled the case first,—without, however, violating the right of the S. Penitentiary in matters of conscience.

CAN. 44

§ 1. Nemo gratiam a proprio Ordinario denegatam ab alio Ordinario petat, nulla facta denegationis mentione; facta autem mentione, Ordinarius gratiam ne concedat, nisi habitis a priore Ordinario denegationis rationibus.

§ 2. Gratia a Vicario Generali denegata et postea, nulla facta huius denegationis mentione, ab Episcopo impetrata, invalida est; gratia autem ab Episcopo

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denegata nequit valide, etiam facta denegationis mentione, a Vicario Generali, non consentiente Episcopo, impetrari.

§ 1. No one shall ask another Ordinary for a favor refused by his own Ordinary without making mention of the refusal; if mention is made, the second Ordinary shall not grant the favor until informed of the reasons for the former Ordinary's refusal.

§ 2. A favor denied by the Vicar General and later obtained from the Bishop, without mention of the refusal, is invalid; a favor denied by the Bishop cannot validly be asked of the Vicar General without the Bishop's consent, even if mention of the refusal is made.

The underlying principle of this regulation is that the Roman Curia, as well as the Bishop and his Vicar General form a unit. Two different Bishops constitute two separate tribunals, wherefore in § 1 of Can. 44 the invalidity of the rescripts is not asserted,[9] but merely their illicitness, for the purpose touched above.

THE CLAUSE "MOTU PROPRIO"

Boniface VIII made a distinction between a rescript given "Motu proprio," which, he says, proceeds from pure liberality, and one obtained by petition.[10] In course of time, especially since Innocent VIII, "Motu proprios" became more frequent and were no longer acts of grace,

9 The "novum genus mercimonii" mentioned in c. 28, h. t., is thereby precluded.

10 Cf. c. 23, 6°, III, 4 de praebendis.

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but could be petitioned for (*ad instantiam*); the Supreme Pontiff merely added "Motu proprio" in order to give full and unlimited effect. The new Code has partly retained this custom and partly modified it, as follows:

CAN. 45

Cum rescriptis ad preces alicuius impetratis apponitur clausula: *Motu proprio,* valent quidem ea, si in precibus reticeatur veritas alioquin necessario exprimenda, non tamen si falsa causa finalis eaque unica proponatur, salvo praescripto can. 1054.

Rescripts issued with the clause *Motu proprio* are valid, even if subreptitious, unless the final reason, if it be the only one, is falsely alleged.

For instance, if a rescript were obtained dispensing the petitioner from reciting the Breviary on account of weak eyes, and this claim rested on mere imagination, the rescript would be invalid. There are three other cases in which a "Motu proprio" is of no effect:

CAN. 46

Rescripta etiam *Motu proprio* concessa personae de iure communi inhabili ad consequendam gratiam de qua agitur, itemque edita contra alicuius loci legitimam consuetudinem vel statutum peculiare, vel contra ius alteri iam quaesitum, non sustinentur, nisi expressa derogatoria clausula rescripto apponatur.

A rescript, even though granted *Motu proprio,* is of no effect if given to a person incapable of the favor granted under the common law, or against the lawful custom or particular statute of the

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place, or against the acquired right of another person, unless a derogatory clause is appended to the rescript.

A rescript is invalid if given to a person who is incapable of the favor [11] granted because the law itself makes him incapable. The superior is not supposed to contradict the law. A favor is equally invalid if given against the lawful custom or a particular statute of the place or if it trenches on the lawfully acquired right of a third person. The reason for the last two provisions is the ignorance of a superior concerning particular laws and the *jura tertii,* which he is not supposed to infringe upon.[12] However, if a derogatory clause is appended directly affecting the incapability of the person, or particular laws, or the *jus tertii,* the rescript is valid. Exception is made in favor of matrimonial dispensations from minor impediments; see can. 1054.

MISTAKES IN RESCRIPTS

CAN. 47

Rescripta non fiunt irrita ob errorem in nomine personae cui vel a qua conceduntur, aut loci in quo ipsa moratur, aut rei de qua agitur, dummodo, iudicio Ordinarii, nulla sit de ipsa persona vel re dubitatio.

Errors affecting the name of the person to whom or by whom a rescript is issued, or the place where the person dwells,[13] or the favor itself, do

11 For instance, if the petitioner suffers from irregularity, defect of age, illegitimate birth. Reiffenstuel, I, 3, n. 208 f. Of course, if the rescript is issued precisely to take away these defects, the petitioner becomes capable of the favor and consequently of the rescript.

12 Cfr. c. 8, 6°, I, 3.

13 However, a mistake about the diocese would invalidate the rescript. Cfr. c. 34, X, I, 3.

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not render a rescript invalid, if the Ordinary is persuaded that no doubt exists as to the identity of the person or the thing asked for.

We may add, however, that as formerly, so now, a manifest error or an erasure in the dispositive and essential part would cast serious suspicion upon the genuineness of a papal document.[14]

PREFERENCE, INTERPRETATION, AND PRESENTATION

If several rescripts were obtained about one and the same question or subject-matter, *e. g.*, some point of rubrics, let us say the recital of old or new canticles,[15] one rescript contradicting the other, the question arises, which one must be followed? The Code answers as follows:

CAN. 48

§ 1. Si contingat ut de una eademque re duo rescripta inter se contraria impetrentur, peculiare, in iis quae peculiariter exprimuntur, praevalet generali.

§ 2. Si sint aeque peculiaria aut generalia, prius tempore praevalet posteriori, nisi in altero fiat expressa mentio de priore, aut nisi prior impetratur dolo vel notabili negligentia suo rescripto usus non fuerit.

§ 3. Quod si eodem die fuerint concessa nec liqueat uter prior impetraverit, utrumque irritum est, et, si res ferat, rursus ad eum qui rescripta dedit, est recurrendum.

§ 1. If it should happen that two rescripts re-

14 C. 11, X, I, 3; c. 6, X, II, 22 de fide instrumentorum.

15 This happened in the Swiss-American Congregation of the Benedictine Order concerning a decree of June 9, 1915, and a rescript of later date; but the mistake was made in Rome.

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ferring to the same matter are contradictory, the rescript containing a peculiar or particular enactment must be accepted in preference to the one containing a general enactment.

§ 2. If both rescripts are alike particular or general, the one which is dated or received earlier must be preferred to that of later date, unless specific mention is made in the latter rescript of the earlier one, or unless the first petitioner, through fraud or notable negligence, has not made use of the earlier rescript.

§ 3. If the two rescripts were issued on the same day, and it is not apparent which was obtained first, both are invalid, and, if feasible, recourse must be had to the grantor.

According to § 1, a special favor is to be preferred to a general one, because "species derogat generi." [16]

Fraud may be committed by withholding the document, and notable negligence would be failure to make use of the favor granted for one year.[17]

CAN. 49

Rescripta intelligenda sunt secundum propriam verborum significationem et communem loquendi usum, nec debent ad casus alios praeter expressos extendi.

Rescripts must be interpreted according to the proper meaning of the words and common par-

16 Reg. juris 34 in 6°.

17 Cf. cc. 9, 23, X, I, 3. Fraud is possible in marriage rescripts, but especially in rescripts of justice.

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lance, nor are they to be extended to cases not mentioned therein.[18]

Four kinds of rescripts must be interpreted *strictly, i. e.,* neither extensively nor restrictively, but according to the exact wording of the text, to wit: (a) rescripts of justice which are intended to settle a controversy; (b) those which may injure the acquired rights of others; (c) those which are adverse to the special laws of private persons; and (d) those which contain an appointment to an ecclesiastical benefice. All other rescripts may be broadly and benignly interpreted; "*favores ampliandi sunt.*" The reason for interpreting the first kind strictly is that the superior wishes to prevent litigation and this object could not be accomplished if a broad interpretation were admissible.[19] The reason for interpreting the second and third kind of rescripts strictly must be sought in the intention of the superior of defending the rights of others, especially if these are acquired by privileges, *e. g.,* of exempt religious. The reason for a strict interpretation of rescripts in beneficiary matters lies in the fact that such rescripts favor ambition. Hence if, *e. g.,* a dignity or office in a cathedral chapter is conferred, the two are not to be taken promiscuously. All other rescripts of favor are susceptible of a broad interpretation, because "*plenissima alias in beneficiis interpretatio facienda.*"[20]

As to *presentation,* which is nothing else but the showing of the rescript to the Ordinary, it must be observed that this act, though not necessary, is at least very becoming, inasmuch as the diocesan Bishop is the proper guardian of law and discipline in his territory. Hence, in

18 C. 14, 6°, I, 3.
19 Cfr. c. 28, X, I, 3.
20 Cfr. cc. 4, 27, 6°, III, 4 de praebendis.

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rescripts giving faculties for various blessings the clausula is found, "*cum consensu Ordinarii.*"

CAN. 50

In dubio, rescripta quae ad lites referuntur, vel iura aliis quaesita laedunt, vel adversantur legi in commodum privatorum, vel denique impetrata fuerunt ad beneficii ecclesiastici assecutionem, strictam interpretationem recipiunt; cetera omnia latam.

In case of doubt, rescripts which pertain to disputes, or which trench on the acquired rights of others, or which reverse the law in favor of private parties, or, finally, which were given for the attainment of an ecclesiastical benefice, demand a strict interpretation; all others may be interpreted broadly.

The following canons state the duty of presentation as limited by certain conditions.

CAN. 51

Rescriptum Sedis Apostolicae in quo nullus datur exsecutor, tunc tantum debet Ordinario impetrantis praesentari, cum id in eisdem litteris praecipitur, aut de rebus agitur publicis, aut comprobare conditiones quasdam oportet.

A rescript of the Apostolic See which designates no executor must be presented to the Ordinary of the petitioner only in case the presentation is enjoined in the document itself, or if

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there is question of public affairs, or if there are conditions that are subject to probation [*i. e.*, ascertaining the truth].

The first condition is evident. The second, which concerns public acts (*de rebus agitur publicis*), seems to refer to such rescripts as contain a favor to be used publicly. Such favors would be, for instance, privileges attached to a sanctuary or benefice, or a distinctive ecclesiastical dress, or permission to collect alms.[21] The last condition evidently has reference to rescripts regarding oratories, matrimonial dispensations, etc.

As to the *time* within which rescripts must be presented, canon 52 states:

CAN. 52

Rescripta, quorum praesentationi nullum est definitum tempus, possunt exsecutori exhiberi quovis tempore, modo absit fraus et dolus.

Rescripts for the presentation of which no definite time is set, may be exhibited to the executor at any time, provided fraud and deceit are excluded.

Note that this canon does not distinguish between rescripts of justice and rescripts of favor,[22] but embraces both kinds, provided only fraud and deceit be avoided; for fraud and deceit deserve no indulgence and are contrary to the spirit of order.

21 Cfr. c. 6, X, I, 3 concerning Cistercians, who may collect tithes without heeding an apostolic rescript, unless mention is made therein of that privilege.

22 Formerly rescripts of justice had to be presented within a year from the date of receipt; the Code makes no distinction between the two species of rescripts in this regard.

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THE OFFICE OF EXECUTOR

We said above that it is the rule to choose an "executor" to investigate the matter and persons demanding a rescript. Certain duties, therefore, are incumbent on the executor, who may become the cause of grave mistakes which render a rescript invalid. Therefore the following canons more closely describe the functions of the executor.

CAN. 53

Rescripti exsecutor invalide munere suo fungitur, antequam litteras receperit earumque authenticitatem et integritatem recognoverit, nisi praevia earundem notitia ad eum fuerit auctoritate rescribentis transmissa.

The executor of a rescript acts invalidly if he acts before he has received the letters and determined their authenticity and integrity, unless he has been previously informed of their contents by authority of the grantor.

Hence, as soon as the executor has received the document, he must look at the signature and the seal, to ascertain whence it came; for this is to establish authenticity. Then he may peruse the contents, assuring himself that nothing substantial is wanting and that all the necessary papers are included. After that he will determine the subject-matter or nature of the case. Then he must carefully ponder over the clausulae, which contain certain conditions for the executor as well as the petitioner. Before he has done all this the executor cannot validly proceed to carry out the rescript, unless he

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has been informed by telegraph, telephone or other means as to the contents of the document. This information must come from the grantor or an official connected with the grantor. Next he must ascertain from the *clausulae* whether he is an *exsecutor necessarius* or *voluntarius.* Thus, *e. g.*, "*si constiterit*" or "*constito tibi*," "*conscientiam tuam oneramus*," [23] etc., are indicative of an *exsecutor voluntarius* (or at least *mixtus*), whilst the absence of such clauses permits one to presume that he is merely an *exsecutor necessarius, i. e.,* one who simply delivers the rescript. However, even if he is an *exsecutor necessarius* and cannot refuse the granting of the favor, circumstances may be such as to cause him to withhold the execution. Three cases only are enumerated.

CAN. 54

§ 1. Si in rescripto committatur merum exsecutionis ministerium, exsecutio rescripti denegari non potest, nisi aut manifeste pateat rescriptum vitio subreptionis aut obreptionis nullum esse, aut in rescripto apponantur conditiones quas exsecutori constet non esse impletas, aut qui rescriptum impetravit adeo, iudicio exsecutoris, videatur indignus ut aliorum offensioni futura sit gratiae concessio; quod ultimum si accidat, exsecutor, intermissa exsecutione, statim ea de re certiorem faciat rescribentem.

§ 2. Quod si in rescripto concessio gratiae exsecutori committatur, ipsius est pro suo prudenti arbitrio et conscientia gratiam concedere vel denegare.

23 This clausula is not, properly speaking, conditional, but intended to render the executor cautious. It means that the business is committed to the prudence of an honest man with common sense, who must follow the dictates of legal justice, but it also signifies that the executor cannot subdelegate his office. Cfr. Barbosa, *Tractatus Varii*, de clausulis, cl. 24, p. 274.

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§ 1. If a rescript commissions the executor merely to carry out its terms, he is not allowed to refuse to do so, unless it is evident that the rescript is void in consequence of a *subreptio* or *obreptio,* or the executor is satisfied that the conditions appended to the rescript are not fulfilled, or if the petitioner, in the judgment of the executor, is so unworthy of the favor granted that the grant would prove offensive to others; in the last-mentioned case the executor should not proceed to execute his commission but immediately notify the grantor.

§ 2. If the granting of a favor is committed to the executor, the latter may either grant or deny it, according to his prudent judgment and conscience.

As to the first point: The executor is supposed to know the circumstances of the petitioner, *e. g.,* in matrimonial dispensations, and as a rule it is not difficult for him to judge whether or not the truth has been concealed. *Obreptio* and *subreptio* are mentioned, hence the executor is bound to investigate the existence or absence of the reasons alleged.

As to the second point, it will be noticed that the conditions must be fulfilled at the time of the execution, but nothing is said about the future. Hence all the conditions for a private oratory, for instance, must be previously complied with, whereas, in a rescript for a mixed marriage the future fulfillment of the conditions need not concern the executor.

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As to the third point, it may be noted that the position of the executor may become very ticklish because of the vagueness of the term *indignus* (unworthy). If we speak of one being *indignus* in an election, we mean that he lacks the required qualities. Perhaps a more reliable standard is furnished by a comparison with the refusal of administering the sacraments to "*indigne petentibus.*" An "*indignus*" in the sense of our canon therefore is probably a public sinner.[24] The grant may be offensive to the faithful or to others, to whom it might give an occasion to belittle the Church. If that be the case, the executor is bound to postpone the execution and inform the grantor.

If the executor is a *voluntarius, i. e.,* may either grant or refuse the favor according to his good judgment and conscience, all depends upon him and he must bear the consequences of his action. There is one notable consequence attending such a form of commission, *viz.,* that the rescript expires with the death of the executor.[25]

CAN. 55

Exsecutor procedere debet ad mandati normam, et nisi conditiones essentiales in litteris appositas impleverit ac substantialem procedendi formam servaverit, irrita est exsecutio.

The executor is obliged to proceed as if he had received a mandate, and unless he shall have fulfilled the essential conditions laid down in the rescript, and followed in substance the required

24 A notorious Freemason, or a persecutor of the Church and hierarchy, a *concubinarius publicus,* all these would fall under the category of *indigni.*

25 "Arbitrium expirat morte illius, qui illud habet"; cfr. Barbosa, claus. 11, p. 364.

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form of proceeding, the execution is invalid.

A *mandatum,* broadly speaking, is a rescript by which a superior commands or prescribes something. There are two kinds of *mandatum* which may here come into question: the *mandatum apostolicum,* used in the provision or conferring of benefices, and the *mandatum procuratorium,* by which one is made procurator or empowered to act as proxy.[26] The latter is here to be considered, and what is said in general about a mandate of proxy applies to the present case, and therefore the executor must observe the form of the mandate. This he does if he grants neither more nor less than is expressed in the rescript, *e. g.,* if the rescript permits a secularization *ad tempus,* the executor cannot grant it *in perpetuum.* He must furthermore observe the limits of the mandate as to persons, time, and conditions.[27] Finally, in rescripts of justice, the executor must follow the summary procedure explained in Book IV.

CAN. 56

Exsecutio rescriptorum quae forum externum respiciunt, scripto facienda est.

The execution of rescripts which affect the external forum must be made in writing.

CAN. 57

§ 1. Rescriptorum exsecutor potest alium pro suo prudenti arbitrio sibi substituere, nisi substitutio prohibita fuerit, aut substituti persona praefinita.

26 Reiffenstuel, I, 3, 21; I, 38, nn. 72 ff.; de procuratoribus.

27 Barbosa, *l. c.,* Axioma 144: "quia paria sunt, non habere mandatum vel non servare formam mandati."

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§ 2. Si tamen fuerit electa industria personae, exsecutori non licet alteri committere, nisi actus praeparatorios.

§ 1. The executor of a rescript may, if he prudently judges fit, appoint another in his place, unless such substitution is forbidden or some other person has been designated.

§ 2. If, however, an executor has been chosen by reason of his personal qualities, he may not delegate his office to another, but only the preliminary acts.

CAN. 58

Rescripta quaelibet exsecutioni mandari possunt etiam ab exsecutoris successore in dignitate vel officio, nisi fuerit electa industria personae.

A rescript may be executed by the successor in dignity or office of the original executor, unless the latter had been appointed on account of his personal qualities.

Since the code mentions no special reason for not attending personally to the affair, it is left to the executor to delegate another. Thus a Bishop may give general permission to his Vicar-general or Chancellor to attend to such matters unless such action is either expressly or implicitly forbidden; for it may be that a law does not allow the Ordinary to give such a general permission, which cases will be noted in the course of this commentary. Besides, if the executor is chosen for his *personal qualities, e. g.,* his knowledge or acquaintance with

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the case and the persons involved, or for peculiar merit, substitution is not permissible. The same holds good concerning the successor in dignity or office. *Dignity* here means jurisdiction and precedence, not merely dignitaries, for such do not succeed one other. Whether the term *office* is to be taken in the general sense of an ecclesiastical office, or in the stricter sense of *officium,* which implies neither jurisdiction nor precedence but only administration, is not stated, but the text seems to indicate the latter. Hence, *e. g.,* the custodian of a cathedral church or the secretary or chancellor of a Bishop, are officials to the practical intent of this canon.[28]

CAN. 59

§ 1. Exsecutori fas est, si quoquo modo in rescriptorum exsecutione erraverit, iterum eadem exsecutioni mandare.

§ 2. Quod attinet ad taxas pro rescriptorum exsecutione, servetur praescriptum can. 1507, § 1.

§ 1. If an executor has made a mistake of any kind in the execution of a rescript, he has the right to repeat the execution.

§ 2. As regards the fees for the execution of a rescript, canon 1507, § 1 must be observed.

The fees for the execution of rescripts are governed by well-defined rules for each ecclesiastical province, which rules are prescribed by the Holy See, to whom also is reserved the approbation of taxation laws to be followed in a province (can. 1507).

28 Cfr. Barbosa, *Tractatus Varii,* Appellatio 126, p. 269; the custos of a cathedral or collegiate chapter is looked upon as a *personatus* (cf. Book II, on cathedral chapters).

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RECALL AND CESSATION OF RESCRIPTS

The effect of a rescript — except it be a mere faculty — generally lasts forever or at least as long as the reason for which the petition was made. But it may be revoked. Hence

CAN. 60

§ 1. Rescriptum, per peculiarem Superioris actum revocatum, perdurat usque dum revocatio ei, qui illud obtinuit, significetur.

§ 2. Per legem contrariam nulla rescripta revocantur, nisi aliud in ipsa lege caveatur, aut lex lata sit a Superiore ipsius rescribentis.

§ 1. If a rescript is revoked by a special act of a superior, it does not lose its validity until the revocation has been duly intimated to the petitioner.

§ 2. No rescript is recalled by a contrary law, unless the law expressly so provides, or unless it is given by the superior of the one who granted the rescript.

CAN. 61

Per Apostolicae Sedis aut dioecesis vacationem nullum eiusdem Sedis Apostolicae aut Ordinarii rescriptum perimitur, nisi aliud ex additis clausulis appareat, aut rescriptum contineat potestatem alicui factam concedendi gratiam peculiaribus personis in eodem expressis, et res adhuc integra sit.

A rescript does not lose its force by reason of the vacancy of the Holy See or of a diocese, unless

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the contrary appears from the respective *clausulae,* or unless the rescript conveys the power of granting a favor to particular persons expressly named therein, and the matter has not yet been made the subject of litigation.

A rescript might be repealed by the issuing of another rescript, but unless the second rescript mentions the former as abolished, the former rescript remains in force. Here the act of repeal is not express and explicit and must be formally intimated to the petitioner or owner of the rescript. However, a sort of tacit recall is admitted, *viz.,* by a *contrary law,* which must expressly mention the rescripts recalled or must have been issued by the superior of the one who issued the rescript. This latter clause evidently refers to the Pope in regard to a Bishop who may have granted a rescript, and means that the Sovereign Pontiff may cancel a rescript issued by an Ordinary. But here the rules of interpreting laws must be applied. The canon properly speaks of *expiring* rescripts. It was formerly held that rescripts of justice expired with the death or resignation of the grantor, *re adhuc integra.* But canon 61 makes no such distinction, and hence a rescript does not become extinct by the death of the pontiff or bishop who gave it. An exception is made when there is a clause signifying the intention of the grantor to concede the favor granted only during his life-time or for a certain limited period. *Clausulae* of that kind would apparently be the following: "*usque ad beneplacitum nostrum,*" "*usque ad beneplacitum Sedis Apostolicae,*" "*donec revocavero.*" The first clausula would extinguish a rescript [29] at the death of the grantor,

[29] Cf. c. 5, 6°, I, 3; cf. can. 73; the opinion of Laurentius, *Inst.*

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but the second (" *usque ad benep. S. Ap.*") would not, because the Apostolic See does not die;[30] nor does the last (" *donec revocavero* "), according to weighty authors, extinguish the rescript, because, they say, a positive act is required for the repeal of a rescript,[31] an opinion which seems to be supported by canon 60, § 1.

The other condition under which a rescript elapses at the death of the grantor consists in the direct faculty given to the executor to grant a favor to specially named persons. For in that case the executor acts as procurator, — at least this seems to be the underlying principle,— who has received a special mandate, which naturally ceases with the death of the *mandans*, unless the business has taken a juridical turn (*res adhuc integra*) and the juridical stage has been reached, if citations or summons have been legally issued or the parties have spontaneously appeared before the judge, or in this case, before the executor.[32]

The last canon of this title, which certainly has been dealt with liberally in our Code, says that if a rescript contains a privilege or dispensation, the rules for privileges and dispensations laid down in the following canons must be observed.

CAN. 62

Si rescriptum contineat non simplicem gratiam, sed privilegium vel dispensationem, serventur insuper praescripta canonum qui sequuntur.

If a rescript contains, not a simple favor, but a

Iuris Eccl., n. 296, is destitute of foundation.

30 Cf. c. 5, 6°, I, 3.

31 Cf. Barbosa, *l. c.*, claus. 43, p. 402; Reiffenstuel, I, 3, n. 263.

32 Cf. can. 1725, which settles the controversy about the moment when a matter ceases to be *integra*.

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privilege or dispensation, then besides [the rules laid down in the preceding canons] the regulations established in the following canons must be observed.

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TITLE V

ON PRIVILEGES

A special class of laws is that dealing with privileges. A privilege (*privilegium, lex privata*) may be defined as "a more or less permanent concession made by the legislator against (or beyond) the law."[1]

A privilege is a *law,* and hence falls under the power of the legislator only in so far as he can establish laws. If a privilege contains a concession which the law prohibits, it is a privilege *against the law.* If a privilege grants a right beyond what the law has already granted, it is said to go *beyond the law* (*praeter jus*), as *e. g.,* the privilege of absolving from reserved cases. Properly speaking only a *privilege against the law* is truly a privilege,[2] though faculties are justly enumerated among the *privileges beyond the law* (can. 66, § 1).

HISTORICAL NOTE

It is evident that the theory of privileges must have developed apace with the practice of the Roman See. Though privileges were granted and revoked by the popes before the great collections of ecclesiastic law were made, the doctrinal exposition of privileges began with Gratian.[3] In a famous dictum the Magister solves the objection raised by the necessity of strictly observing the canons of councils and the decrees of popes as follows: The

1 Cf. tit. 33, bk. V, Decretal., and the commentators thereon, for instance, Engel, Reiffenstuel, and Suarez, *De Legibus.*

2 Reiffenstuel, *l. c.,* n. 8.

3 Cf. dictum ad c. 16, C. 25, q. 1; c. 30, C. 11, q. 1; c. 4, C. 24, q. 1.

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Roman Church has the authority to establish laws, but she is not bound by them, because she is the head and support (*caput et cardo*) of all the churches, and all laws have attached to them the implicit clause, "*salvo jure sanctae Romanae Ecclesiae.*" Hence if privileges are granted which apparently are against the common law, they do not clash with the right of the Church, because all privileges are reserved to her. From this point of view it followed, of course, that no privilege would be granted except for the honor and utility of the Church, and that privileges were revocable. Gratian's teaching was an innovation only in so far as this principle had not been laid down in any law-book before him. But in substance it simply embodied the practice which the Roman Court had followed for about a century. As the papal power developed under the "protection of St. Peter," the theory of privileges assumed a more detailed and definite form. This was the case especially in the eleventh and twelfth centuries.[4] We must add that in course of time clerical privileges and exemptions to a great extent lost their original character of privileges and became, as it were, part and parcel of the common law.

DIVISION OF PRIVILEGES

Manifold is the division of privileges. It will suffice for our purpose to note the following:

a) A *personal* privilege is one granted to a person for a reason inherent exclusively in that person, *e. g.*, the wearing of the cappa magna or purple skullcap, if given not to the office but to the person. A *real* privilege is one attached to a thing, place, office, or dignity; *e. g.*, the *privilegium altaris* or a privilege given to a sanctuary.

4 Cf. Saegmueller in the *Tüb. Quartalschrift*, 1907, p. 93 ff.

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A *mixed* privilege is one granted to a corporation or society or confraternity as such.

b) A *favorable* privilege is one containing a mere favor, without prejudice to a third person. An *odious* privilege is one involving prejudice or detriment to another, *e. g.,* freedom from taxation or tithes.

c) Privileges are granted in various *forms,* either in writing or by word of mouth, either *motu proprio* or by petition, either absolutely (*per se*) or *ad instar.* A privilege granted in *writing* is always safer. A written document is required where injury to another is involved, unless an orally granted privilege can be proved by witnesses. Otherwise an *oral* privilege may be used personally as long as no legitimate authority or injured third party demands proof (can. 79).

d) A privilege given *absolutely* or *per se* is one granted without respect or reference to pre-existing privileges. A privilege *ad instar* refers directly to a pre-existing pattern. Thus, *e. g.,* most of the privileges granted to religious and confraternities are *ad instar.*

ACQUISITION OF PRIVILEGES

A privilege being a law in favor of private persons, proceeds from the same power as the law. Hence the Sovereign Pontiff can grant privileges against the common ecclesiastical law, but not against the natural or divine law. It matters little, *per se,* whether he concedes these privileges in writing or orally (*vivae vocis oraculo*), directly, *i. e.,* absolutely, or indirectly, *i. e., ad instar,* for he has the power to choose the mode of granting privileges. Hence the first canon of this title declares that privileges may be obtained both by direct concession and communication and through legitimate custom or prescrip-

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tion, and that centennial or immemorial possession creates a presumption in favor of a privilege.

CAN. 63

§ 1. Privilegia acquiri possunt non solum per directam concessionem competentis auctoritatis et per communicationem, sed etiam per legitimam consuetudinem aut praescriptionem.

§ 2. Possessio centenaria vel immemorabilis inducit praesumptionem concessi privilegii.

§ 1. Privileges can be acquired not only by direct concession on the part of legitimate authority and by communication, but likewise by legitimate custom or prescription.

§ 2. Centenary or immemorial possession of a privilege is a presumption in favor of its genuineness.

There is, then, a threefold way of acquiring ecclesiastical privileges: by direct concession on the part of a competent authority (pope or bishop), by communication, and by prescription.

The first is evident and needs no explanation.

Communication means partaking of a privilege either by extension or by aggregation (*per connectionem*). Thus if a confraternity is aggregated to an archconfraternity, it shares the privileges of the latter. A privilege may be acquired also by *explicit application*, the privileges granted to some being expressly conceded to others in the same manner, measure and form, yet with the effect that the latter grantees enjoy these privileges absolutely and independently of the former. This is called

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communicatio plena et absoluta, or *aeque principalis,* whilst the former is *communicatio imperfecta et relativa* or *accessoria.* A complete and absolute communication of privileges formerly took place between all mendicant orders. Excepted from communication are the so-called "exorbitant" privileges and such as are styled "incommunicable."[5]

The third method of acquiring a privilege is by *custom* or *prescription.* This has been the general teaching of canonists, based on a famous decretal of Innocent III. In this decretal the words "*contraria consuetudo*" occur,[6] and, since all canonists insisted on prescription, they simply said: "*privilegium potest acquiri praescriptione seu consuetudine legitime praescripta.*"[7] This *opinio communis* receives, as it were, official sanction in the present canon.

The length of time required for prescription must be measured according to canons 27 f., quoted above; it is, besides, determined more closely by § 2 of can. 63.

Possession here means, not only actual occupation but the right of possessing a thing.[8] Such possession lasting for a century or time immemorial creates a *presumption* that the privilege is real and authentic. This presumption, not being further described, is to be taken as a simple *praesumptio juris,* which must cede to truth if conclusively disproved. Thus, *e. g.,* if it be proved that regulars who have held a parish for forty or more years, never obtained a privilege to that effect, the Bishop can claim the parish for the secular clergy.

5 Only if a Bull contains the words, "etiam incommunicabilia," are these privileges included; see, *e. g.*, the Const. of Urban VIII, "Plantata," of July 12, 1633, in the *Bullarium Cong. Angl. O.S.B.,* 1912, pp. 5 ff.

6 C. 13, Novit., X, II, 1 de judiciis.

7 Reiffenstuel, V, 33, n. 39.

8 "Detentio rei corporis et animi et juris adminiculo."

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The legislator now turns to the second mode of acquiring a privilege, which is more subject to abuse.

CAN. 64

Per communicationem privilegiorum, etiam in forma aeque principali, ea tantum privilegia impertita censentur, quae directe, perpetuo et sine speciali relatione ad certum locum aut rem aut personam concessa fuerant primo privilegiario, habita etiam ratione capacitatis subiecti, cui fit communicatio.

In the communication of privileges, even that called *aeque principalis,* only those privileges are included which were imparted to the original grantee directly, forever, and without special relation to a certain place, thing or person, and with due consideration of the capability of the receiver.

Evidently the Code wishes to clear up the nature of *communicatio*, especially as espoused by religious orders; yet, in the main, it adopts the ancient solid doctrine. Privileges which were *not directly* granted cannot be communicated. This provision is perhaps new, but it is wholesome, for otherwise privileges might be claimed over which the legislator has no control, and unduly multiplied. Religious orders under this canon cannot by communication claim a privilege which was already granted to another order by communication. However, this law is not retroactive, and hence the orders may retain what they possess, except where the Code rules differently.

A privilege, to be communicable, must have been

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granted *forever.* Therefore spiritual favors granted *ad quinquennium, e. g.,* are not communicable.[9]

Lastly, privileges granted to *particular* persons, places, or things cannot be transferred to others. For instance, the privilege of wearing a purple skullcap, given on account of personal merit and distinction, the privilege given to a special sanctuary or to a particular altar or sacred object, are incommunicable.

Note, too, that the persons or subjects to whom a communication of privilege is made, are capable thereof only in so far as their condition and position render them apt. Thus nuns (*moniales*) are not capable of enjoying all the privileges granted to monks or regulars, *e. g.,* that of preaching, absolving, etc., although they may be capable of others.

The following canon determines the *extent* of a *communicatio accessoria* (*ad instar*):

CAN. 65

Cum privilegia acquiruntur per communicationem in forma accessoria, augentur, imminuuntur vel amittuntur ipso facto, si forte augeantur, imminuantur vel cessent in principali privilegiario; secus si acquirantur per communicationem in forma aeque principali.

Privileges acquired by communication in *forma accessoria,* are increased, diminished or lost to the second grantee in proportion to their increase, decrease, or loss in the original grantee; which rule is not, however, to be applied to the *communicatio absoluta* or *aeque principalis.*

9 Cf. Antonius de Spiritu S., Ord. Carm., *Directorium Regular.,* tract. I, disp. 1, sectio 3, n. 42.

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Hence, if an archconfraternity loses a part or all of its indulgences, they are also lost to the aggregated confraternities. This rule does not hold good in the communication of religious orders, wherefore, if one religious community were suppressed, another, which had received a privilege from it by communication, might continue to enjoy the same.

FACULTIES

A special canon treats of *faculties,* which term here means certain rights denied by common law but granted by special privilege. It follows from the nature of a faculty that it can be given only by one who can modify the common law. This one is primarily the Pope, though bishops also may grant faculties concerning matters subject to their legislation.[10] Since the sixteenth century special faculties were granted chiefly to the German bishops, and classified in certain formularies, *pro foro externo* and *pro foro interno, quinquennales* and *triennales,* and for a determined number of cases.[11] Their object is as wide as ecclesiastical discipline itself, and comprises especially dispensations, absolutions, and licenses for performing acts otherwise prohibited by law, *e. g.,* reading forbidden books.

The Code says with regard to these faculties:

CAN. 66

§ 1. Facultates habituales quae conceduntur vel in

10 For instance, hearing confessions, preaching, etc.

11 Cf. Putzer, *Comment. in Facult. apost.,* 1897, ed. 4.—For the formularies containing the faculties granted to the bishops of the U. S. see Sabetti-Barrett, *Theol. Moralis,* 1917. p. 1081 ff. These faculties, His Excellency the Apostolic Delegate, Most Rev. J. Bonzano, had the kindness to inform the author, are *extraordinary,* and therefore liable to modification or repeal.

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perpetuum vel ad praefinitum tempus aut certum numerum casuum, accensentur privilegiis praeter ius.

§ 2. Nisi in earum concessione electa fuerit industria personae aut aliud expresse cautum sit, facultates habituales, Episcopo aliisve de quibus in can. 198, § 1 ab Apostolica Sede concessae, non evanescunt, resoluto iure Ordinarii cui concessae sunt, etiamsi ipse eas exsequi coeperit, sed transeunt ad Ordinarios qui ipsi in regimine succedunt; item concessae Episcopo competunt quoque Vicario Generali.

§ 3. Concessa facultas secumfert alias quoque potestates quae ad illius usum sunt necessariae; quare in facultate dispensandi includitur etiam potestas absolvendi a poenis ecclesiasticis, si quae forte obstent, sed ad effectum dumtaxat dispensationis consequendae.

§ 1. Habitual faculties, granted for ever, or for a limited time, or for a definite number of cases, are reckoned among privileges beyond the law.

§ 2. Unless they were conceded for personal reasons, or unless the law provides otherwise, habitual faculties do not expire with the authority of the Ordinary (or others; see can. 198, § 1) to whom they have been granted by the Apostolic See, even though he may have begun to execute them, but pass over to those who succeed him in office; faculties granted to the Bishop are intended also for the Vicar General.

§ 3. A faculty implies all the powers necessary for its exercise; hence the faculty of dispensing includes the faculty of absolving from

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censures, if necessary, but only for the purpose of receiving the dispensation.

As to § 1 note: Habitual faculties are those which are commonly granted to bishops either for a certain time or for a limited number of cases, and are, as it were, concomitants of the episcopal office. As they are numbered among *privileges,* the rules of interpreting privileges must be applied to them, *ceteris paribus.*

As to § 2: These habitual faculties do not expire with the cessation of the Ordinary's term of office, but continue in his successors, and the faculties granted to the Bishop are also given to the Vicar General, unless the Bishop (or others to whom the faculties were given) was selected for this honor on account of personal qualities. The name "Ordinary" is applied to diocesan bishops, each for his territory, to Abbots *Nullius,* and to the Vicars-general of both, to Apostolic Vicars and Prefects, and to the Superiors of exempt religious.[12] The successor of the Ordinary to whom a faculty was granted, may complete the execution thereof which the predecessor had begun, *e. g.,* by calling witnesses, issuing summonses, etc.

As to § 3: A faculty, if given, grants the use of all the means necessary for its application, and hence the faculty of dispensing includes the power of absolving from censures, when necessary; but only for the purpose of rendering the subject capable of receiving the dispensation. Therefore, *e. g.,* an excommunication or suspension or personal interdict is, *de facto,* suspended only here and now, whilst conditions added to the censures for the case of real absolution remain.

12 Cfr. can. 198 and the declaration of the Holy Office of Feb. 20, 1888; when the term "*loci*" or "*locorum*" is added, the superiors of exempt orders are not included.

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INTERPRETATION OF PRIVILEGES

CAN. 67

Privilegium ex ipsius tenore aestimandum est, nec licet illud extendere aut restringere.

A privilege must be interpreted according to its wording or purport, and must be neither extended nor restricted.

CAN. 68

In dubio privilegia interpretanda sunt ad normam can. 50; sed ea semper adhibenda interpretatio, ut privilegio aucti aliquam ex indulgentia concedentis videantur gratiam consecuti.

In case of doubt privileges must be interpreted in accordance with can. 50, but in such a way that those who have received the privilege always retain some favor from the good will of the grantor.

The interpretation of privileges follows the general rules of interpretation, as stated above, and especially that of rescripts. The principal rule is that the wording or purport (*tenor*) of the text must be duly consulted. Neither an extensive nor a restrictive interpretation of privileges is admissible. Where a doubt exists, the rule given in can. 50 must be applied, but in such a way that some privilege or favor remains.

CAN. 69

Nemo cogitur uti privilegio in sui dumtaxat favorem concesso, nisi alio ex capite exsurgat obligatio.

No one is obliged to make use of a privilege

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granted to him solely for his own benefit, unless an obligation to that effect should arise from some other source.

CAN. 70

Privilegium, nisi aliud constet, censendum est perpetuum.

A privilege is perpetual, unless the contrary is evident.

A doubt may arise as to whether a privilege is purely personal, or real, or mixed. Such doubts can be solved by examining the subject-matter and the wording of the privilege. The purpose or scope of a privilege is, as a rule, obvious. If it is not clear whether the successor of a personally privileged Ordinary, *e. g.*, the successor of an abbot, has the use of a certain privilege, the address of the document should be examined. If the name of the grantee appears first, and his dignity second, the privilege must be regarded as merely personal. Where the dignity is mentioned first, the privilege may be taken as real and is consequently transferable to the successor in the same dignity or office, unless the wording of the text excludes this interpretation.[13]

The Code adds, "*nisi alio ex capite exsurgat obligatio,*" thereby no doubt referring to the so-called personal privileges of the clergy which cannot be renounced by the individual. It may also be that the fulfillment of a precept would urge, for instance, hearing Mass in a private oratory,[14] or absolving or dispensing, etc. Unless the contrary is clearly expressed, a privilege lasts for ever.

13 Cfr. Engel, V, 33, n. 4.
14 Laurentius, *Inst. Iuris Eccl.*, 1903, p. 247.

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LOSS OF PRIVILEGES

Although its nature would seem to spell perpetuity, a privilege may be lost, either by law, or lapse, or renunciation, or by one's own fault.

CAN. 71

Per legem generalem revocantur privilegia in hoc Codice contenta; ad cetera quod attinet, servetur praescriptum can. 60.

A general law repeals the privileges contained in this Code; otherwise can. 60 concerning the recall of rescripts must be applied.

Formerly a certain class of privileges was called "*clausa in corpore juris*" and sometimes "*privilegia in corpore juris clauso,*" which signified those privileges contained in the Corpus Juris.[15] In like manner the privileges contained in the New Code, *e. g.*, clerical, religious, and real, form a special class, and as such may be abolished by a general law issued by the supreme lawgiver.

CAN. 72

§ 1. Privilegia cessant per renuntiationem a competente Superiore acceptatam.

§ 2. Privilegio in sui tantum favorem constituto quaevis persona privata renuntiare potest.

§ 3. Concesso alicui communitati, dignitati, locove renuntiare privatis personis non licet.

§ 4. Nec ipsi communitati seu coetui integrum est renuntiare privilegio sibi dato per modum legis, vel si

15 The authors, however, did not agree as to what constituted the "Corpus Juris," some admitting only the three authentic collections, others including the Decretum and the Extravagantes.

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renuntiatio cedat in ecclesiae aliorumve praeiudicium.

§ 1. Privileges cease by renunciation if the renunciation is accepted by the competent superior.

§ 2. A merely personal privilege may be given up by any private person.

§ 3. A privilege granted to a community, dignity, or place cannot be renounced by private persons.

§ 4. Nor is the community or congregation (society) itself free to renounce a privilege granted by way of law, or if its renunciation should cause a prejudice to the Church or to others.

For a commentary on this point see p. 167, *infra.*

CAN. 73

Resoluto iure concedentis, privilegia non exstinguuntur, nisi data fuerint cum clausula: *ad beneplacitum nostrum,* vel alia aequipollenti.

Privileges are not extinguished even if the grantor goes out of office, unless they contain the clause: *ad beneplacitum nostrum,* or some other clause of like import.

A clause of like import would be, *e. g.,* "*durante pontificatu.*"

CAN. 74

Privilegium personale personam sequitur et cum ipsa exstinguitur.

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A personal privilege follows the person to whom it has been granted and expires with that person.

Here a note may be allowed as to the first clause. While it is true that the personal privilege cleaves, as the canonists say, to the bones of the person, the use of such a privilege may be limited or perhaps subject to the consent of another. Thus, *e. g.*, the wearing of the Cappa Magna is granted to some abbots not in virtue of their office, but to the person, and hence is restricted to their own churches.

Can. 75

Privilegia realia cessant per absolutum rei vel loci interitum; privilegia vero localia, si locus intra quinquaginta annos restituatur, reviviscunt.

Real privileges cease upon the complete destruction of the thing or place, whilst local privileges revive if the place is restored within fifty years.

This enactment is of great importance for churches and monasteries, which, though the new proprietors or occupants have no relation whatever with the former, can enjoy their privileges without an act of renewal, if only a record be kept of the time of ruin and restoration. Of course it is understood that the restored places serve the same purpose as before,— the purpose for which, or in view of which, the privilege was given.

Renunciation of a privilege (as dealt with in canon 72, *supra*) is the voluntary giving up of a privilege ac-

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quired.[16] This is permissible because, as a rule, everyone is at liberty to relinquish his own rights.[17] However, to be effective, renunciation must be accepted by competent authority. Hence

§ 1 says that privileges cease by renunciation if the latter is accepted by the competent authority, which is none other than the grantor or his legitimate successors.

According to § 2, a merely personal privilege may be surrendered by any private person. The reason is because such privileges are supposed to affect the holder exclusively.

§ 3 declares that a privilege granted to a community, dignity or place cannot be renounced by private persons. It follows that the superior of a community, or a religious, or a clergyman cannot renounce such a privilege, *e. g.*, of exemption or the *privilegium canonis* and *fori*.[18]

§ 4 provides that not even a community or congregation is free to renounce a privilege if it has been granted by way of law, or if its renunciation would cause a prejudice to the Church or to others. A privilege granted by way of law is one contained in the Code, *e. g.*, clerical exemption, immunity. Such a privilege cannot be renounced, even if the community by common consent, or an assembly by general assent or a majority of votes, were ready to give it up. It is also forbidden to renounce a privilege, even though not contained in the Code, if

16 "Resoluto juris concedentis" (rescribentis, ferentis legem) is an expression often occurring in the Code, and is of general purport, including every kind of cessation of office by death, resignation, transfer, exchange, suspension, or deposition.

17 C. 6, X, V, 33.

18 Cfr. c. 12, X, II, 2; c. 36, X, V, 39; c. 5, X, I, 43: "Cum etsi sponte volueris, de jure tamen nequiveris, sine licentia Rom. Pontificis renunciare privilegiis vel indulgentiis libertatis, quae monasterium illud indicant ad jus et proprietatem Rom. Ecclesiae pertinere."

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giving it up would result in detriment to the Church or others, *e. g.*, the faculty of binating or absolving from reserved cases. On the other hand, a community or chapter *may* give up such privileges as have become more or less useless or of little importance.[19] A sort of tacit renunciation seems to be what canon 76 calls *non-usus* or contrary usage.

Can. 76

Per non usum vel per usum contrarium privilegia aliis haud onerosa non cessant; quae vero in aliorum gravamen cedunt, amittuntur, si accedat legitima praescriptio vel tacita renuntiatio.

By non-use or contrary use a privilege which is not injurious to others does not cease; but a privilege that is burdensome to others loses its force by legitimate prescription or tacit renunciation.

It may be useful to recall the distinction between an onerous and a non-onerous privilege. The former causes a burden or damage to others, *e. g.*, collecting tithes or alms, whilst the privilege of eating flesh-meat on certain days cannot be called injurious to others (except perhaps to the cook or the treasury).

There is also a difference between *prescription* and *tacit renunciation.* Prescription means a certain space of time, say forty years, during which the privilege has not been made use of, although there was occasion for using it. *Tacit renunciation* means that one has knowingly and willingly performed an act contrary to the privi-

[19] Cfr. c. 8, X, I, 2 de const.

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lege, either negatively by not using the privilege when one should have used it, or positively, by doing the contrary to that which the privilege entitled one to.[20] The canon says that only onerous privileges, namely, such as follow the *jus patronatus* or right of presentation, cease by non-use or contrary use.[21]

CAN. 77

Cessat quoque privilegium, si temporis progressu rerum adiuncta sic, iudicio Superioris, immutentur ut noxium evaserit, aut eius usus illicitus fiat; item elapso tempore vel expleto numero casuum pro quibus privilegium fuit concessum, firmo praescripto can. 207, § 2.

A privilege also ceases if in course of time conditions change to such a degree that, in the judgment of the superior, the privilege becomes harmful or its use illicit; or if the time for which the privilege has been granted expires, or the number of cases for which it was given is full; without detriment, however, to canon 207, § 2.

This canon states what is self-evident under regula juris 61 in 6°: "quod ob gratiam alicuius conceditur, non est in eius dispendium retorquendum." In can. 207, § 2, the *forum internum* is excepted from the rule here laid down.

CAN. 78

Qui abutitur potestate sibi ex privilegio permissa,

20 Cf. Reiffenstuel, V, 33, nn. 201 ff.

21 Cf. c. 6, X, V, 33: "De privilegio tamen indulto tanto tempore vobis detrahere voluistis." The length of time is not expressed, but forty years may safely be assumed.

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privilegio ipso privari meretur; et Ordinarius Sanctam Sedem monere ne omittat, si quis privilegio ab eadem concesso graviter abutatur.

Whoever abuses the power granted to him by a privilege, deserves to be deprived of the privilege itself; and the Ordinary shall not fail to notify the Apostolic See if anyone grievously abuses a privilege granted to him by the same.

The wording of this canon leaves no doubt that abuse does not, *eo ipso,* annul a privilege, but only after a sentence issued by the Apostolic See.[22] By the name of "Ordinary" is meant not only the diocesan Ordinary and his Vicar General, but the superior of exempt religious. On the other hand, it is also true that certain crimes are stated and singled out in the law itself as attended by the loss of certain privileges, *e. g.,* if one commits a crime in a church, presuming on immunity, or fails to wear the clerical dress, of which more *loco suo.*

The last canon on privileges treats of privileges granted *vivae vocis oraculo, i. e.,* by word of mouth.

CAN. 79

Quamvis privilegia, oretenus a Sancta Sede obtenta, ipsi petenti in foro conscientiae suffragentur, nemo tamen potest cuiusvis privilegii usum adversus quemquam in foro externo vindicare, nisi privilegium ipsum sibi concessum esse legitime evincat.

Although privileges orally granted by the Holy See, may be used by the grantee in the internal

22 Cf. c. 7, Dist. 74 (Greg. M.); c. 24, X, V, 33; the abuse may touch upon time or place or persons exceeding the limits thereof.

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court of conscience, no one should claim their use against another *in foro externo*, unless he can prove that the privilege was legitimately obtained.

For example, I know of a religious who received from Pius X, of happy memory, the privilege of reciting the Breviary, when traveling, according to the rubrics used at S. Anselmo. This privilege was given orally, and consequently touches the conscience rather than the *forum externum*. A privilege for the *forum externum* (*e. g.*, one granted to an order against the jurisdiction of the Ordinary) requires proof. Hither belong the Constitution "Romanus Pontifex," of Gregory XV, of July 2, 1622, and that of Urban VIII, "Alias," of December 20, 1631, which abrogated all *vivae vocis oracula* both *in foro interno* and *externo*, except those obtained by the petitions of sovereigns and cardinals. The new Code admits the existence and use of orally given privileges, as long as conscience alone is concerned; but in justiciable cases such a privilege cannot be alleged, unless proven by witnesses. What witnesses are required? The Code does not specify, but we believe that the testimony of the cardinal-protector of a religious order, or any other cardinal, would be sufficient proof of the privilege having been granted by the Holy See.[23] (Can. 239, § 1, 17.)

In order to complete the subject of privileges, we may be permitted to add a few words on a topic which the Code does not explicitly treat, namely, the *confirmation* or *ratification* of privileges. A privilege may be ratified *in forma communi* or *in forma specifica*. *Confirmatio in*

[23] Cfr. Reiffenstuel, V, 33, nn. 149 ff.

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forma communi leaves the value and valor of a privilege *in statu quo,* without determining whether the privilege is valid or invalid, and hence adds no juridical force either to the first or second grant. *Confirmatio in forma specifica* is given after mature consideration of the privilege in case, and is executed either by verbal insertion of the former privilege or by using the clausulae: "*ac si de verbo ad verbum inserta fuissent,*" or "*ex certa scientia.*" In this latter case the confirmation gives juridical value to the privilege and is tantamount to a new valid concession; and the new grantee enjoys the privilege, even if the former should lose it.

Note, also, that privileges are sometimes granted especially by way of communication, or ratified with the clausula "*dummodo*" or "*quatenus sunt in usu.*" This means that the grantor does not wish to ratify or grant anew by corroboration a privilege which has been lost by non-use or contrary usage, or for another reason.

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TITLE VI

ON DISPENSATIONS

It is natural that a society spread over the whole globe and comprising members of the most diverse types living in different climes and under various conditions cannot apply the law with equal rigor at all times and in all circumstances. Even in the first four centuries of her existence the Church was compelled to mitigate the strictness of her penitential discipline. This is briefly and appropriately expressed by Abbo of Fleury (died 1004): "We must take into consideration the situation of countries, the character of the times, the frailty of men, and other reasons which of necessity change the laws of different provinces. The same is true concerning papal decress, which are of such authority that many judges expect the verdict of the Roman Pontiff. In these things, therefore, utility and equity (*utilitas et honestas*) must prevail, but not the enticing enjoyment of desires."[1] The same idea recurs in the prologue to the *Decretum* of Yvo of Chartres (died 1115). He, too, reduces the reasons for granting dispensations to two — utility and necessity, and compares the Church to a crew who throw merchandise over board in order to save the ship.[2] Gratian did not go further, for all his texts are taken from Yvo.[3]

1 *Collectio Canonum*, c. VIII (Migne, 139, 483), which is untouched by Pseudo-Isidorian influences.

2 *Proleg. in Decretum* (Migne, 161, 47 ff.).

3 Cfr. c. 56, Dist. 50; c. 41, C. 1, q. 1; c. 16, C. 1, q. 7.

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That with the outward growth of the papacy the power of papal dispensation also increased, goes without saying. Hence it cannot surprise us that Innocent III (1196–1216) said that "the fullness of power confers the right of dispensation."[4] Some bishops and provincial synods also exercised the right of dispensation, although in a limited way. Before Gratian's time, this power touched an accomplished fact rather than something to be done in future, although even this latter species of dispensation (*super faciendum*) was not entirely unknown. Dispensation came to comprise cases of simony, celibacy (especially the *filii presbyterorum*), irregularities, vows, and above all matrimonial cases.[5] The Council of Trent enacted into law what Abbo and Yvo had taught,—that a dispensation should be granted only for urgent and just reasons, for the greater utility of the faithful, and after previous deliberation and cognizance of the case.[6] We shall now see what the new Code has to say on the subject.

CAN. 80

Dispensatio, seu legis in casu speciali relaxatio, concedi potest a conditore legis, ab eius successore vel Superiore, nec non ab illo cui iidem facultatem dispensandi concesserint.

A dispensation, *i. e.*, a relaxation of the law in a particular case, may be granted by the lawgiver, his successor or superior, and by those to whom the faculty of dispensing has been delegated.

There is a distinction between *epikeia,* so-called, or

4 Cf. c. 4, X, III, 8.

5 Cf. Stiegler, *Dispensation, Dispensationswesen und Dispensationsrecht im Kirchenrecht*, 1901, Vol. I (only one).

6 Trid., Sess. 25, c. 18 de ref.

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benign interpretation, which is related to equity, and a dispensation; for the latter is an act of jurisdiction flowing from the legislative and judiciary power, whilst the former is nothing more than either an interpretation or an excuse based on private judgment. Hence a dispensation presupposes legislative power, nay is, so to speak, coextensive with it. Therefore the *Pope* can dispense in all matters subject to his legislation, that is to say, in ecclesiastical, but not in divine laws.[7] The same power is vested in his *successor,* because he is his equal, and "*par in parem non habet imperium.*" But the Pope can also dispense from episcopal laws, for he is superior to the bishops. On the other hand a *bishop* may dispense from papal laws if he has received the necessary faculties from the Apostolic See. The same right belongs to *superiors* of exempt religious orders.

The Pope is not bound by the existence or validity of reasons, but can dispense validly without reason, although it is not to be presumed that he would proceed thus, since a dispensation is a sore on the law and should not be used for destruction. This is not the case with those inferior to the Pope, hence canon 81 establishes the power of those *inferior* to the *Roman Pontiff.*

CAN. 81

A generalibus Ecclesiae legibus Ordinarii infra Romanum Pontificem dispensare nequeunt, ne in casu quidem peculiari, nisi haec potestas eisdem fuerit explicite vel implicite concessa, aut nisi difficilis sit recursus ad Sanctam Sedem et simul in mora sit pericu-

7 A difficulty might arise from vows and the *matrimonium ratum;* but in such laws, the obliging force of which depends on the free will of man, the Pontiff can, in virtue of his vicarious power, render the obligation ineffective. (Cfr. Wernz, *l. c.,* I, n. 122.)

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lum gravis damni, et de dispensatione agatur quae a Sede Apostolica concedi solet.

Ordinaries inferior to the Pope cannot dispense from the general laws of the Church, not even in a particular case, unless they have received that power either explicitly or implicitly, or in cases in which recourse to the Holy See is difficult and there is at the same time grave danger in delay, and the dispensation requested is one which the Holy See is wont to grant.

Two sources for dispensing, therefore, are open to the Ordinaries, either a communicated power or the nature of the case requiring dispensation. *Explicit* power is granted through faculties which now will probably be forwarded in certain formularies newly to be issued and communicated directly to the Ordinaries; *implicit* power belongs to those who partake of the faculties by virtue of their office, *e. g.*, Vicars General. Implicit concession is furthermore granted by the "*caput liceat*" of the Council of Trent,[8] which empowers Ordinaries to dispense in all cases of irregularity and suspension which arise from a secret crime, with the exception of voluntary homicide and such crimes as have been brought before the episcopal court by citation.

The class of cases mentioned in the second part of our canon may also be said to afford an *ordinary reason* for which those inferior to the Pope can dispense from the common law.

Three conditions must concur to make a dispensation valid[9] and licit: recourse to the Holy See must be dif-

8 Sess. 24, c. 6 de ref.

9 The canon simply says "nequeunt," which might be restricted to licitness; yet because dispensa-

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ficult, there must be danger of grave damage, and the case must be subject to dispensation. The concurrence of these conditions may especially be verified in matrimonial cases, but also in irregularities arising from a hidden defect or crime. By *recourse to the Holy See* is here understood ordinary recourse, *i. e.,* by mail, not by telegraph, which is an extraordinary means of communication. A *grave danger* is present when escape is almost, not entirely, impossible, and hence it is not necessary that it be a *casus fortuitus,* or unforeseen incident.[10] How grave the danger must be, cannot be determined by a general rule; but scandal or injury of reputation would suffice to constitute a serious danger. Finally, the case must be one from which the *Holy See* is wont *to dispense,* for nothing is included in the general concession which the superior is not likely to grant.[11] Hence, whatever is rare, extraordinary, unusual, or difficult to obtain from the Holy See, does not come within the sphere of episcopal power, for instance, irregularities *in defectu corporis enormi.* This is the viewpoint which the Ordinaries — and religious superiors also, for the canon does not add "*loci*" or "*locorum*" — must take in relation to the common law as contained in the Code.

The next canon deals with the power of Ordinaries regarding *diocesan laws* and laws *of provincial councils.*

CAN. 82

Episcopi aliique locorum Ordinarii dispensare valent

tions must be strictly interpreted, and because "negatio plus tollit quam affirmatio ponit," we believe that the interpretation given above is correct.

10 Barbosa, *Tractatus Varii,* p. 278, p. 108.

11 Regula juris in 6°; Reiffenstuel, *Comment in Reg. Iuris;* Putzer, *l. c.,* p. 36 f., enumerates still other cases, but with the exception of *dubium juris or facti* (cfr. can. 15) these cannot now be admitted, because the Code is silent about them.

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in legibus dioecesanis, et in legibus Concilii provincialis ac plenarii ad normam can. 291, § 2, non vero in legibus quas speciatim tulerit Romanus Pontifex pro illo peculiari territorio, nisi ad normam can. 81.

Bishops and other diocesan Ordinaries can dispense from diocesan laws and from the laws of provincial and plenary councils, according to the rule contained in canon 291, § 2, but not from laws specially given by the Roman Pontiff for that territory, except in conformity with canon 81.

There is a gradation in this canon as to the power of dispensing. Bishops can dispense from their own (diocesan) laws with or without reason, for of their own laws they are the lawgivers in the proper sense. The second class of laws referred to comprises those of provincial or plenary councils whose decrees are supposed, according to canon 291, to be recognized by the Holy See. From these the *Ordinarii locorum* cannot licitly dispense except in particular cases and for just reasons. Now a particular case is one which occurs less frequently, and, generally speaking, touches single persons or parishes. For to dispense a whole diocese or province, if it should happen at stated or frequent intervals, would be a general not a particular dispensation. Thus to dispense the whole clergy would also be a general dispensation. Finally, the canon adds that the Ordinaries cannot dispense from particular laws given by the Holy See for that particular territory; for instance, from the law governing the nomination of candidates for vacant sees in the United States (S. C. Cons., July 25, 1916), or, perhaps,

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from the law regarding holy-days. The clause, however, permits dispensation in accordance with canon 81.

Descending in the scale of the hierarchy the Code says:

CAN. 83

Parochi nec a lege generali nec a lege peculiari dispensare valent, nisi haec potestas expresse eisdem concessa sit.

Parish priests can dispense neither from a general nor from a particular law, unless they have expressly received that power.

This text states an obvious truth, and at the same time deals a blow to a certain tendency which permitted *parochi ex consuetudine* to dispense in several cases.[12] For the law requires an explicit communication of that power. If parish priests need a dispensation from a general law, as embodied in our Code, the faculty must come from the Pope, either directly or indirectly through the Ordinary; if a particular law is to be dispensed from, a distinction must be made. If the law in question has been enacted by a plenary council, the habitual faculty of dispensing therefrom must be obtained from the Pope, either immediately or mediately, as in the case of the general law. For single cases, we believe, the bishops can without special faculties communicate the power of dispensing to their parish priests, for they have received this power by law (can. 291), and not from man. To dispense from merely diocesan laws depends exclusively on the bishop, who may therefore grant that faculty, either habitually or *ad certum numerum casuum,* to parish

12 Cfr. Putzer, *l. c.*, p. 36, as to dispensations from fast and abstinence; servile work prohibited; see can. 1245.

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priests. However, it must be done expressly, either orally or in writing, and must not be presumed, for a presumption is no express concession.

After having determined the persons who may exercise the power of dispensation, the Code emphatically reinforces the Tridentine decree concerning the causes of dispensation:

CAN. 84

§ 1. A lege ecclesiastica ne dispensetur sine iusta et rationabili causa, habita ratione gravitatis legis a qua dispensatur; alias dispensatio ab inferiore data illicita et invalida est.

§ 2. Dispensatio in dubio de sufficientia causae licite petitur et potest licite et valide concedi.

§ 1. No dispensation from an ecclesiastical law is to be granted without a just and reasonable cause, and due regard must always be had to the importance of the law from which the dispensation is given; otherwise the dispensation given by an inferior is illicit and invalid.

§ 2. When there is doubt as to the sufficiency of the cause, a dispensation may be lawfully asked for, and licitly and validly granted.

The *cause* may be the motive or impelling reason, the former being the *raison d'être* of the dispensation, the latter only an aid, or, as the Scholastics express it: the motive cause is "*ad esse simpliciter*," the impelling cause, "*ad facilius esse*." Here the *causa* must be understood as the *motive* cause.[18]

18 If one reason is sufficient, two reasons perhaps convince: "rationes duae vincunt unam." Barbosa, *Tractatus Varii*, Axioma 197, *l. c.*, p. 130.

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Concerning the *time* when the *causa* must be verified, we refer to Can. 41 *de rescriptis:* If no executor is appointed, the cause must exist at the time of granting the dispensation; if an executor handles the dispensation, the cause must be verified at the moment of his signature.

As to the *nature* of the cause, the Code says that it must be *just and reasonable.* Justice refers to law, which admits certain causes and rejects others. Thus a list of canonical causes is set up, *e. g.,* for matrimonial dispensations. The cause must be reasonable because, as law pertains to reason, so also must a dispensation partake of reason. The judgment as to the latter quality lies with the grantor.

Furthermore there must be a *proportion* between the seriousness or importance of the law and the dispensation, which is a *vulnus legis.* Hence for relaxing a serious law a serious and solid reason must be advanced; a graver cause is required to dispense from a major impediment than from a minor.[14]

Besides, it is but just that the persons should be considered for whom a dispensation is issued, because influential persons are more important for the public welfare than ordinary mortals.[15]

Lastly, the *circumstances* must be considered, not only of persons, but also of consequences which might probably follow, *e. g.,* scandal, damage, injury, etc. If the reason alleged is not just and reasonable, the dispensation granted by an inferior is illicit and invalid. Notice that the canon does not say, as the Tridentine Decree did (Sess. 25, c. 18) that it is subreptitious; hence there can be no longer any doubt as to the view taken by the Church. Therefore, if, after the application of a dis-

14 Cfr. can. 1042 f.

15 Cfr. Putzer, *l. c.,* p. 76 f.

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pensation, the alleged cause is found to be without foundation, the dispensation is null and void (with the exception of can. 1054).

§ 2 mitigates the apparent harshness of § 1, inasmuch as it declares that, if the sufficiency of the reason alleged is doubtful, the dispensation holds.

The next canon treats of the *interpretation* of dispensations.

Can. 85

Strictae subest interpretationi non solum dispensatio ad normam can. 50, sed ipsamet facultas dispensandi ad certum casum concessa.

Dispensations must be strictly interpreted, according to canon 50; also the faculty of dispensing granted for a certain case is subject to strict interpretation.

In order not to repeat what has been said before, we only remind the reader of the rule that dispensations must never be extended to cases and persons not comprised in the faculties, as will be further explained in matrimonial cases. But other dispensations, too, *e. g.* from vows, must be strictly interpreted; thus the power of dispensing from vows does not include that of dispensing from oaths. Besides, the *clausulae* and the *stylus Curiae* must be closely observed.[16] Canon 85 further mentions dispensations granted *ad certum casum*. Here, *a fortiori,* extension of restriction is inadmissible, because no argument from *dispositio similis* can be drawn, *e. g.,* if one receives the faculty to dispense a certain person, this cannot be applied to another, although he or she be similarly situated.

16 Cf. Putzer, *l. c.*, p. 12 f., p. 165 f.

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The term "*facultas*" must be strictly interpreted in a determined case, for the general supposition is that there are personal qualities, as well as a mandate implied, which are subject to strict interpretation. The last canon treats of the *cessation* of dispensations.

CAN. 86

Dispensatio quae tractum habet successivum, cessat iisdem modis quibus privilegium, nec non certa ac totali cessatione causae motivae.

A dispensation which permits of successive application ceases the same way as privileges, and with the certain and complete cessation of the motive cause.

What has been said concerning the manner in which privileges cease, must be applied here also, because habitual faculties are numbered among the *privileges beyond the law* (can. 66, § 1), and hence cease by renunciation, repeal, or the death of the grantor, if there is a clause that says so, otherwise not. To ask whether a dispensation can be lost by contrary usage and prescription seems, at first sight at least, silly. Yet a dispensation which permits of successive application (*tractum successivum*), *e. g.*, eating flesh-meat, saying a "black Mass," etc., is not exhausted by one act and may therefore be forfeited, if contrary usage and an imperative act of the superior combine. Since the Code says that such dispensations lose their force in the same way as privileges, we must apply that disposition of the law also to the case in hand.

Finally, the Code provides that if the motive cause ceases entirely and for certain, the dispensation also ceases. The two conditions ("entirely and for cer-

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tain") must be taken conjointly. For instance, if one has received a dispensation from the vow of chastity *ad usum matrimonii* on account of temptations, he may continue the use of marriage even after the cessation of these temptations, because there is no certainty. But if one has obtained a dispensation from reciting the Breviary on account of weak eyes, he cannot continue the use of the dispensation after his eyesight has been completely restored. Taking into consideration can. 85, regarding a faculty given for a determined case, the dispensation last mentioned must be held to be exhausted after application, and is therefore *negotium finitum.* For it is generally supposed that in such a case the faculty was given in *forma mandati,* which expires after application and admits of no extension or *epikia.*

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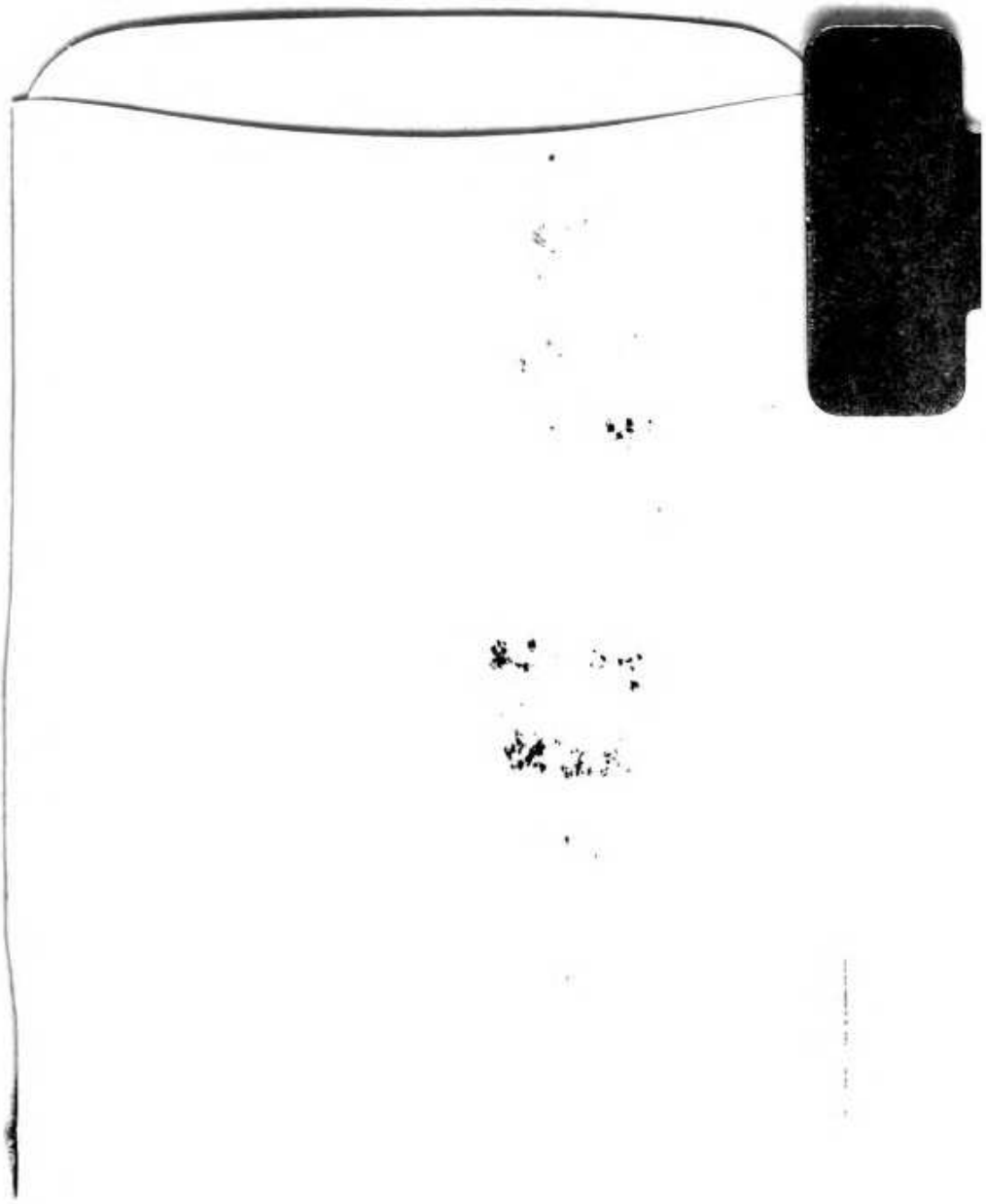
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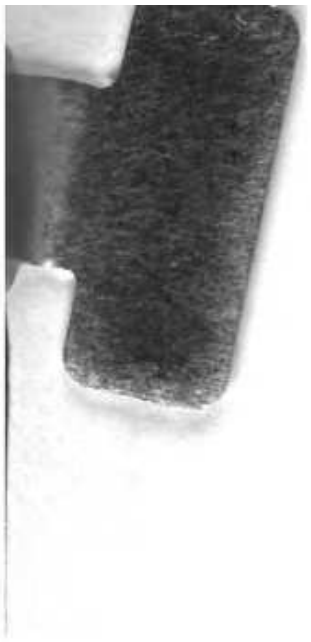
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A COMMENTARY *on* CANON LAW

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A COMMENTARY ON
THE NEW
CODE OF CANON LAW

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Professor of Canon Law

VOLUME II
Clergy and Hierarchy

THIRD EDITION

B. HERDER BOOK CO.
17 SOUTH BROADWAY, ST. LOUIS, MO.
AND
68 GREAT RUSSELL ST. LONDON, W. C.
1919

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TO

THE BELOVED HIERARCH OF OUR DIOCESE

THE RT. REV. MAURICE FRANCIS BURKE, D.D.

BISHOP OF ST. JOSEPH, MO.

THIS VOLUME IS RESPECTFULLY DEDICATED

1893-1918

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FOREWORD

This second volume is dedicated to the *Rt. Rev. Bishop M. F. Burke, D.D.* (By mistake the dedication appeared in Vol. I.) On June 24, 1918, Msgr. Burke celebrated, amidst a gathering of the clergy, the silver jubilee of his episcopal career in our diocese. During this time our monastery as well as the author himself have enjoyed the most cordial and unruffled relations with the noble-hearted prelate. Wherefore it seemed appropriate to offer this book as a token of gratitude and esteem to his Lordship.

A word may be added concerning the make-up of the Commentary. Semi-official notice received from Rome, in response to our inquiry, caused us to limit our work to a commentary proper, since translations into the vernacular are not only not desired by the authorities, but rather discouraged, nay, at least for the whole Code as such, forbidden. Therefore we had to embody the contents of the Code in the Commentary, and rendered the Latin text into English only when it seemed absolutely necessary, or where no commentary was needed. Some canons have been neither translated nor paraphrased because the person concerned might have been offended by a translation or paraphrase.

THE AUTHOR

Conception Abbey, Mo.,
July, 1918.

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THE NEW CODE OF CANON LAW

BOOK II

ECCLESIASTICAL PERSONS

INTRODUCTORY — PERSONS IN GENERAL

Person (*persona*) physically signifies a being endowed with life, intelligence, free will, and individual existence. The Roman law, however, restricted its meaning to one capable of right (*subjectum iuris capax*), and slaves were not considered to be persons.[1]

Roman[2] and civil, as well as canon law, also know artificial or *moral persons, i. e.*, such as are created by human law for the purposes of society and government (corporations or bodies politic).[3] Such a corporation may be called "*e pluribus unum*," as our coins express it, or a subject consisting of several physical persons.

Three elements must combine to constitute a moral person or corporation: (a) a plurality of persons, according to the well known adage, "*Tres faciunt collegium;*"[4] (b) corporate rights embodied in the constitu-

1 Cf. § 4, *Inst.*, I, 16. The slaves were called ἀπρόσωποι or personless; cfr. Cassiodorius, *Variarum*, VI, 8 (Migne, 69, 689).

2 Dig., 1, 5; *Ins.*, I, 3; Vering, *Gesch. und Pandekten d. röm. und heutigen Rechts*, ed. 5, p. 104.

3 Blackstone-Cooley, *Commentary*, I, 122.

4 Fr. 85, *Dig.*, 50, 16; *New International Encyc.*, 1904, V, 438.

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tion and pertaining to the members as such, *i. e.*, because they are members of the corporation; (c) legal acknowledgment or sanction. Only when these three conditions are verified, do we have a corporation in the proper sense. It is not amiss to add that the civil law does not create these corporations but finds and accepts them as products of the social life.[5]

English law distinguishes between *corporations aggregate* and corporations sole, the former being what we have defined above, whereas a *corporation sole* consists of one person only and his successors, incorporated by law in order to give them certain legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not enjoy. In this sense the King of England is a corporation sole; so is a bishop; so are some deans and prebendaries, distinct from their several chapters; and so is every parson and vicar of the established Church.[6] The U. S. acknowledge no ecclesiastical but various civil corporations.[6]

In order to construe a corporation, some authors resorted to a *fictio iuris,* which consists in the assumption or supposition of many physical persons as forming one body or person. There is no necessity whatever to maintain this theory. For the sum-total of corporate rights embodied in the community which is represented by its legal head or manager is a reality in the realm of law no less than the persons endowed with those rights. The legal fiction theory results from a too material conception of right or law.

But neither can the theory which takes the *end* or purpose of a moral person as the base and bearer of corporate rights, satisfy the inquirer after the constitu-

5 Blackstone-Cooley, *Commentary,* I, 472.

6 Zollmann, *Am. Civil Church Law,* 1917, pp. 38 ff.

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ent element of a corporation. The end indeed specifies, and gives coloring to, a corporation, but it cannot create or produce rights. The creation or production of rights must in the last analysis be attributed to human reason and will, whence every law arises, subordinate, of course, to the eternal law.[7] Therefore a corporation or legal community is the bearer of corporate rights and if not fully autonomous, only requires the sanction of the competent authority to actuate itself.

CAN. 100

§ 1. Catholica Ecclesia et Apostolica Sedes moralis personae rationem habent ex ipsa ordinatione divina; ceterae inferiores personae morales in Ecclesia eam sortiuntur sive ex ipso iuris praescripto sive ex speciali competentis Superioris ecclesiastici concessione data per formale decretum ad finem religiosum vel caritativum.

§ 2. Persona moralis collegialis constitui non potest, nisi ex tribus saltem personis physicis.

§ 3. Personae morales sive collegiales sive non collegiales minoribus aequiparantur.

This first paragraph sketches the charter of the Church founded by Christ. The following two establish the relation of dependent corporations and societies to the Church.

Here we might enlarge upon the constitution of the Church. However a brief summary must suffice to explain the necessary elements of that society which derives its origin from God. For a more elaborate exposition we must refer the reader to fundamental theology and to that part of canon law which goes by the name of public ecclesiastical law.

7 Cfr. Bachofen, *Summa Iuris Eccl. Pub.*, 1910, p. 14 ff.

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The *Catholic Church*[8] *claims a divine foundation,* because Christ, its Founder, came to establish the Kingdom of God, or the Kingdom of Heaven, which He embodied in the flock gathered by Him and placed upon the rock that was Peter, the prince of the Apostles. Here we find two essential elements of a corporation: a plurality of persons and corporate rights embodied in the visible head of the college or society.

The most important and essential element of the Church, as of every other corporation, is the *constitution,* which determines the nature and purpose of the corporation as well as the mode of organization and the rights of the members. That constitution, in its essential features, was mapped out by God and hence is of divine origin. The *nature and purpose* of the Church is the same as that for which Christ was sent into the world, *viz.:* the establishment of the Kingdom of God. This end and purpose is plainly *supernatural* or religious. This does not mean, however, that the Church does not need natural, even material, *means* to realize its end. A corporation consisting of men composed of body and soul, who can be led to spiritual apprehension only through the medium of the senses, cannot forego material, bodily means. This is very palpable in the support of ministers and external worship.

To direct a society to the end for which it is instituted an *authority is needed.* For uniform, constant, and unswerving direction of a multitude with many and different views and aspirations is impossible without some one having power to impose obligations and to distribute rewards. This authority Christ has built into the foundation of His Church, as it were, by conferring on *St. Peter a supreme and indivisible power* similar to that

[8] See *ibid.*, p. 22 ff.

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which He Himself enjoyed.[9] However, this power, indivisible and supreme, was not the only one which the Lord imparted to His Apostles. Besides St. Peter He appointed others who should be heard and should rule portions of the flock.[10] These are the *bishops* (or seniors) mentioned in the Acts of the Apostles.

If Christ wished His Kingdom to be stable and permanent, He must have provided means of perpetuation and continuity. This He did by providing successors to St. Peter and the other Apostles. The Fisherman's Throne was erected above Peter's tomb, and ever since the *Roman Pontiffs, viz.*, those who succeeded St. Peter in the see of Rome, were acknowledged as *Vicars of Christ*. To them, therefore, belongs in equal measure the supreme and indivisible power over the whole Church. Under them the *bishops* by divine institution rule their respective districts. This is the essential organization of the Church as far as its external constitution is concerned. *Priests* and *ministers* also share in the power of the hierarchy, but their jurisdiction, as such, does not comprise external acts of a public nature.

How is this power exercised? Through a *threefold function,* called legislative, judiciary, coercive. If we speak of a threefold power, we do not mean to distribute it among various functionaries and bodies, as Montesquieu has done, but we consider it merely under various aspects or effects, which differ in procedure and execution. Thus *legislation* means the power inherent in the Supreme Pontiff to make laws for the entire Church; *judiciary power* applies these laws by means of judgment and trials or simple decisions, whilst *coercive or executive power* renders the law and its application effective

[9] Cfr. Matt. 16, 18; Luke 22, 31; John 21, 15.

[10] Cfr. Matt. 18, 18; Acts 20, 28.

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and respected, whilst at the same time it conserves the public welfare and provides satisfaction for violations of the public order.

A moral person endowed with such prerogatives is called a "*perfect society.*" This term necessarily involves: (a) an existence independent of every other society, in other words, autonomy or sovereignty; (b) independence of end or purpose; (c) independence in the attainment of end or pursuit of means proportionate to the end.

The question arises: Are these conditions verified in the Catholic Church? What about the third requisite of a moral person, *viz., legal sanction?* If legal would mean only what the State sanctions, then the Church would have had no legal existence for more than three hundred years. But legal here means the *natural right of existence.* If God is the author of nature, and as such also of the State, He certainly enjoys power sufficient to give legal existence to a society which He Himself wished to found. The God of nature can not contradict the God of grace; neither does legal sanction given by God to the State exclude legal sanction given by the same God to the Church. When Constantine issued his edict of toleration 312–313, he did not legalise the Church, but merely acknowledged publicly what was due to her.

Legal sanction accrues to the Church by virtue of her divine foundation. The Church is a moral person in the most perfect sense of that word. The plurality of members is shown in her *catholic* character, whilst *unity* is manifest from her constitution, which was set up expressly for the preservation of one faith and one rule or government. In that same constitution is also included diversity of members. Not all the members of the Church are endowed with governing powers. There-

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fore the Church is called a *societas inaequalis,* which implies different rights and obligations on the part of its members,— a distinction *between the clergy* and *laymen* — between pastors and flock, between those who sanctify and those who are sanctified, between those who teach and those who are taught.[11]

Hierarchy in the strict sense means "a body of persons who enjoy ecclesiastical power in a different, gradually determined, degree."[12] Such is the case in the *Catholic Church,* of which can. 100 asserts that is a *moral person.* However, the Church forms a juridical person only in conjunction with the Roman Pontiff, because without him it would lack one of its essential constituents. The Supreme Pontiff (Apostolic See) would form a moral person even if the entire body of the faithful would cease to exist — an unlikely hypothesis, which is here stated merely to illustrate the necessity of a supreme head. Without exaggeration we may say that the Pope is a corporation sole by virtue of his sovereignty, like the King under English law. For this reason the Pope is said to have all laws *in ventre,*[13] *i. e.,* he combines the whole legislative as well as judiciary and coercive power in his own person.

Besides the Church universal, or rather within it, there are other, inferior or *minor juridical persons.* As their purpose is subordinate to that of the whole Church, and they are therefore dependent on her with regard to the attainment of their end and the pursuit of the means leading thereto, these minor juridical persons necessarily owe their very existence to her. This is to be particularly emphasized from the legal point of view.

11 Cfr. *Schema Conc. Vatic. de Ecclesia Christi,* c. 10.

12 Aichner, *Compendium Juris Eccl.,* § 26; Smith, *Elements,* I, p. 83.

13 Cfr. c. 1, 6°, I, 2 de Constitut.

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For if such a subordinate corporation would renounce allegiance to the Apostolic See, *i. e.,* fall away from the Church, it would lose all its corporate rights, and consequently also its legal hold on church property, which would in that case belong to those members who remained faithful to their allegiance.[14]

Such inferior corporations, also called *imperfect societies,* may come into existence and obtain a legal standing in the Church either by law or by a formal decree of any competent superior. Legal consent is understood to be given for the formation of a diocese or cathedral chapter as soon as all the requisites are present. (On *religious corporations* see the next section.)

The Code expressly mentions moral persons whose end is charity. Such *charitable corporations* can be juridical persons only if the physical persons constituting them devote their time to charity, but do not themselves live on charity for the sake of charity. Some ancient confraternities, *e. g.,* the Brothers of Mercy and various guilds, were of such a character. An orphanage, a hospital, etc., is not a juridical person in the strict sense; it may be called a charitable institute, or *pia causa,* because those who partake of its benefits are not members with definite rights, but mere beneficiaries of charity. In these therefore the end or purpose may be said to be the subject of rights.[15] Paragraph 3 of our canon compares such inferior or subordinate corporations and fellowships or societies in a wider sense to physical persons who are not yet of age (minors). The

14 Cfr. Bachofen, *Summa,* p. 43 ff.

15 Meurer, *Die Juristischen Personen,* 1901, p. 21, contradicts our exposition and holds that the *de stinatarii* (orphans, sick, etc.) are the subjects of quasi-corporate rights. Cfr. Bachofen, *Summa,* p. 16.

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tertium comparationis is the dependence of both as to free and unhampered action (see can. 89).

After this necessary explanation of the Church as a perfect juridical person or corporation in the highest sense, we now proceed with our commentary *secundum ordinem.*

CAN. 87

Baptismate homo constituitur in Ecclesia Christi persona cum omnibus christianorum iuribus et officiis, nisi, ad iura quod attinet, obstet obex, ecclesiasticae communionis vinculum impediens, vel lata ab Ecclesia censura.

Baptism is the sacrament of initiation, "the sacrament of Christian grace," the "receiving of Christ's livery," [16] concerning which more is said in the third book of the Code.[17] The effect of baptism consists in obtaining certain rights and assuming certain obligations. These are partly general, partly particular. All Christians have the same general rights and obligations with regard to spiritual favors and aids to salvation.[18] But not every Christian is obliged to embrace the clerical or religious state, although all who are called to it have a right to enter that state. In this respect the Catholic Church is truly democratic.

It would be wrong to hold that children, when they attain the use of reason, have a right to decide whether or not they wish to keep their baptismal vows.[19] One who by formal heresy or schism or apostasy rends asunder the bond that unites him with the Church, is yet bound by

16 Cfr. Coustant, *Epistolae RR. Pont.*, 1721, pp. 875, 545, 550.
17 Cfr. Canon 737 ff.
18 Cfr. Canon 682.
19 Cfr. *Conc. Trid.*, Sess. 7, c. 8, 14 de bapt; Pohle-Preuss, *The Sacraments*, 1915, II, 273 ff.

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the obligations resulting from his baptismal vow. Again, one who commits a crime upon which the penalty of excommunication (*censura*) has been laid by law or inflicted by legitimate authority, loses his rights until absolution is obtained, but his obligations remain.[20]

CAN. 88

§ 1. Persona quae vicesimum primum aetatis annum explevit, maior est; infra hanc aetatem, minor.

§ 2. Minor, si masculus, censetur pubes a decimoquarto, si femina, a duodecimo anno completo.

§ 3. Impubes, ante plenum septennium, dicitur infans seu puer vel parvulus et censetur non sui compos; expleto autem septennio, usum rationis habere praesumitur. Infanti assimilantur quotquot usu rationis sint habitu destituti.

English and American law agree in fixing the age of minors at from fourteen to twenty-one.[21] Between these two *termini* lie the years of discretion, wherefore minors are capable of some, but not of all, legal actions. A margin is left to premature malice ("*malitia supplet aetatem*"), so that the limit, like the one from the seventh to the fourteenth (or twelfth) year, is only proximate or presumptive.[22]

Concerning *infants*[23] the same term "*censetur*" is employed, which involves supposition and not absolute certainty; hence, even after the seventh year the use of

20 Cfr. Heiner, *Kirchenrecht*, 1897, I, 125 ff. The disjunction in the canon is only apparent, for by heresy, etc., one *eo ipso* incurs censure.

21 Blackstone-Cooley, *l. c.*, I, 463.

22 Cfr. Canon 1254, § 1.

23 *Infantes dicuntur qui fari nesciunt, i. e.*, who are speechless; cfr. Cicero, *De Divinatione*, I, 53; cfr. l. 18, *Cod. Just.*, VI, 30; 16, *ib.*, l. 3, V, 60. Cfr. Canon 1254, § 1; Ulpian, *Frag.*, tit. XI; Lachmann, *Gaii Institution.*, 1841, p. 138 ff.

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reason is only "presumed." Presumption must, of course, always cede to proven facts. Hence, if a boy or girl of seven is by medical attestation proved to be destitute of reason, all acts performed by him or her are null and void before the canon law. On the other hand the age-limit of seven is not so strict that infants could not share in the benefits which the law grants to such as are "*compotes sui*," even if they have not yet reached the seventh year, provided they actually enjoy the use of reason. But this is only to be understood with regard to favors. Thus, *e. g.*, infants, even though they enjoy the use of reason, are not obliged to fast if they have not yet attained the seventh year.[24]

CAN. 89

Persona maior plenum habet suorum iurium exercitium; minor in exercitio suorum iurium potestati parentum vel tutorum obnoxia manet, iis exceptis in quibus ius minores a patria potestate exemptos habet.

The Code makes no *distinction between the sexes*, hence males and females are considered equally capable of legal action after they have attained the age of twenty-one.[25] *Minors* enjoy habitually or radically the same rights as those of age, but are hampered in their enjoyment because they depend on parents or tutors. This disability, as Blackstone well observes, is in fact a privilege, because it prevents children from hurting themselves by their own acts.[26] The Code adopts this universal principle by placing minors under the tutelage of parents

24 Cfr. can. 1254.

25 The earlier Roman law considered a woman of age only when married. Cfr. Blackstone-Cooley, I, 463.

26 Cf. Reiffenstuel, III, 38, n. 38; Blackstone-Cooley, I, 464.

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and guardians, at least in certain cases. Thus we shall see that minors, except in certain cases, are incapable of electing or of being witnesses. They may be presented for a benefice, but only through their tutors.[27] They are exempt from observing the law of tutelage in choosing their vocation (clerical or religious state) as also in marrying, provided, however, that they have reached the age of puberty.

The new Code does not distinguish between *tutor* and *curator,* although in Roman law this distinction was made; a *tutor* was given to infants or *impuberes,* whilst a *curator* was assigned to *puberes* until they were of age.[28] However, this distinction is juridically unimportant.

We may observe that, although the Code has ecclesiastical laws in view, the civil laws, too, in as far as they do not clash with those of the Church in the matter of tutelage or guardianship, must be observed and may be followed in conscience; for instance, in deeds and contracts and in the alienation of land.[29]

DOMICILE

The term *domicilium* is derived from *domum colere,* to foster or inhabit the home. Hence it has reference primarily to the place where one is born. Place (*locus*) was taken by the Roman lawyers in a very narrow sense, *viz.,* as a place or parcel of a larger property, called *fundus,* upon which one's affection was supposed to be especially centered.[30] Analogously, *domicile,* too, was restricted to the birthplace or origin or legal status which the citizen was supposed to possess in virtue of his belong-

27 Blackstone-Cooley, I, 464.

28 Cf. *Dig.,* 26, 5; *Cod. Just.,* V, 42; V, 33.

29 Cf. l. 60, *Dig.* 50 de verborum significatione: "locus est non fundus, sed portio aliqua fundi."

30 Cfr. *Dig.,* l. c.; *Cath. Enc.,* V, 103.

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ing to a determined municipality or city. This was, we say, supposed, because even if born elsewhere, a man was a citizen of the municipality in which in the natural course of events he would have been born. Hence, the son shared the domicile of his father. Now let us see what the Code establishes concerning domicile.

CAN. 90

§ 1. Locus originis filii, etiam neophyti, est ille in quo, cum filius natus est, domicilium, aut, in defectu domicilii, quasi-domicilium habebat pater vel, si filius sit illegitimus aut postumus, mater.

§ 2. Si agatur de filio vagorum, locus originis est ipsemet nativitatis locus; si de exposito, est locus in quo inventus fuerit.

The Roman Law is here again followed. The canon applies it not only to children but also to *neophytes, i. e.,* persons baptized as adults,[31] although such were supposed to have their legal domicile in the place of baptism. Concerning illegitimate children, the old law is followed entirely; but an innovation appears to be introduced concerning posthumous children, *i. e.,* such as are born after the father's death. These are put on a level with the illegitimate, which seems rather strange, because the civil law treats them as equals of legitimate children and entitled to share in all their rights. Perhaps this was assumed to make sure of the birthplace of the child.[32] Paragraph 2 restates the law as contained in the Constitution "*Cupientes*" of Paul III.

CAN. 91

Persona dicitur: *incola,* in loco ubi domicilium,

31 *Conc. Nic.*, c. 2 (c. 1, Dist. 48). 32 Cfr. *Dig.*, 28, 2; *Cod. Just.*, VI, 29.
32 Paul III, "*Cupientes,*" 21 March, 1542; cfr. Aichner, § 62.

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advena,[33] in loco ubi quasi-domicilium habet; _peregrinus_, si versetur extra domicilium et quasi-domicilium quod adhuc retinet; _vagus_, si nullibi domicilium habeat vel quasi-domicilium.

CAN. 92

§ 1. Domicilium acquiritur commoratione in aliqua paroecia aut quasi-paroecia, aut saltem in dioecesi, vicariatu apostolico, praefectura apostolica; quae commoratio vel coninuncta sit cum animo ibi perpetuo manendi, si nihil inde avocet, vel sit protracta ad decennium completum.

§ 2. Quasi-domicilium acquiritur commoratione uti supra, quae vel coniuncta sit cum animo ibi manendi saltem ad maiorem anni partem, si nihil inde avocet, vel sit reapse protracta ad maiorem partem anni.

§ 3. Domicilium vel quasi-domicilium in paroecia vel quasi-paroecia dicitur _paroeciale;_ in dioecesi, vicariatu, praefectura, non autem in paroecia vel quasi-paroecia, _dioecesanum_.

The definition of domicile is partly taken from the Code of Justinian, where we read: "Doubtless every *incola* has his domicile where he has established his house-goods, the bulk of his chattels and property, and which he does not intend to abandon unless called elsewhere, which he leaves as traveller and to which he returns after ceasing to travel."[35] This is the famous definition which, at least tacitly, had always been admitted by canonists and was enlarged after the twelfth century by the notion of quasi-domicile.

[33] "*Advena est quem graeci ἄποικον appellant*," *i. e.*, one absent from home. (l. 239, *Dig.*, 50, 16).

[34] L. 7, Cod. X, 40 de incolis. Cfr. Boudinhon in the *Cath. Encycl.*, V, 103. This is one of the best articles in matters of Canon Law contained in that valuable reference work.

[35] Boudinhon, *l. c.*

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The *difference between a domicile and a quasi-domicile* [36] consists first and above all in the *intention*. If one has the intention to reside, for instance, in a parish forever, he contracts a domicile from the very first day of his stay in the same. Of course, in the case of ordination, he would have to make oath to that effect. This intention is supplied by actual residence for ten full years.

Note that one and the same person may have two domiciles, for instance, a summer and a winter residence; for the intention in that case is equally directed to both, and perhaps the time almost equally divided between both.[37]

Quasi-domicile is determined by the intention of abiding in a place for the greater part of a year, which is generally taken to be at least six months,[38] although in common estimation seven months is properly speaking the greater part of a year. One's stay may be morally, but it must not necessarily be physically, continuous. In other words, a man may be absent from his domicile for a considerable time, say, two or three months each year, without losing his domicile, provided, of course, his intention to stay there forever is not changed. But one who has only a quasi-domicile may not be absent from it for more than five months, because quasi-domicile requires a stay of at least six months in a year in one and the same place. But an absence of a few days each month would not interrupt his quasi-domicile, as long as he has not given up the intention of remaining in the place at least six months.

What surprises us, to some extent at least, is the as-

[36] Cfr. l. 6, § 2, *Dig.* 50, 1, ad municipalem.

[37] Cfr. decree of the Holy Office, 9 Nov., 1898. Bened. XIV, "Paucis," March 19, 1758. Students and soldiers have such a quasi-domicile.

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sumption of a *diocesan domicile*. This is a recent notion, and it is not true to say that "many canonists,"[38] even after the "*Ne temere*," adopted it. Cardinal Gennari promoted the theory which has now prevailed. "The canon law," says Boudinhon[39] truly, "has never recognized as domicile an unstable residence in different parts of a diocese, without intent to establish oneself in some particular parish." Now a Catholic of, *e. g.*, the diocese of Cheyenne, with its more than 100,000 square miles, has a pretty wide range for his domicile. Let it be confessed, however, that the "*Ne temere*" has turned the tide in favor of a diocesan domicile; for since the Ordinary is looked upon as equal to the *parochus proprius*, it is logical to regard the whole diocese as a domicile.

Paragraph 3 tells us that the *parochial* is not to be identified with the *diocesan domicile*, and consequently they may be two distinct juridical concepts. The question is therefore not quite useless: May one have a parochial and a diocesan domicile at one and the same time? The answer is rather difficult. One may move about the diocese from parish to parish for the time necessary to establish either a domicile or quasi-domicile, and, being tired of that nomadic life, settle permanently in one particular parish. As said above, from the first day of his intention to make his permanent abode in one parish a man acquires a domicile in that parish. But in that case it is clear that he intentionally gives up his domicile in another parish, because one intention excludes the other.[40] However, it is not impossible to contract two quasi-domiciles, one diocesan and the other parochial. For by staying a little over six months in one parish, a

38 *Cath. Ency., l. c.*, p. 105.
39 *Am. Eccl. Review, ibid.; Cath. Encyc., l. c.*, p. 105.
40 Cfr. l. 19, *Dig.*, 1, 5; l. 27, § 2, *Dig.*, 50, 1; c. 4, C., 34, q. 1, 2.

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man contracts a quasi-domicile, and since the intention is supplied by this six months' stay, he is not compelled to change his intention.

CAN. 93

§ 1. Uxor, a viro legitime non separata, necessario retinet domicilium viri sui; amens, domicilium curatoris; minor, domicilium illius cuius potestati subiicitur.

§ 2. Minor infantia egressus potest quasi-domicilium proprium obtinere; item uxor a viro legitime non separata, legitime autem separata etiam domicilium.

The juridical status of wives and minors under the new Code is the same as under the Roman law.[41] But there is a difference concerning quasi-domicile, the Church law granting to wives, though not legally separated, the right to establish a quasi-domicile. This may be necessary in case of desertion, or of lawfully protracted absence from the husband; *e. g.,* if he be called to military service. Concerning minors, the Roman law too acknowledged the possibility of their acquiring a domicile.[42]

CAN. 94

§ 1. Sive per domicilium sive per quasi-domicilium suum quisque parochum et Ordinarium sortitur.

§ 2. Proprius vagi parochus vel Ordinarius est parochus vel Ordinarius loci in quo vagus actu commoratur.

§ 3. Illorum quoque qui non habent nisi dioecesanum domicilium vel quasi-domicilium parochus proprius est parochus loci in quo actu commorantur.

41 Cfr. l. 17, § 11, *Dig.*, 50, 1, ad municipalem; Engel, II, 2, n. 12.

42 Cfr. Can. 1097.

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CAN. 95

Domicilium et quasi-domicilium amittitur discessione a loco cum animo non revertendi, salvo praescripto can. 93.

These two canons complete the subject of domicile or quasi-domicile, without mentioning the *commoratio mensilis* which the *"Ne temere"* decree had introduced, and which is adopted in the Code with regard to matrimony.[43] But this is the only case in which a monthly stay suffices for performing a legal act; in all other judiciary matters the domicile or quasi-domicile decides the *forum competens* with all its consequences, concerning which the fourth book is to be consulted. Here we will only mention the fact that the law makes no distinction between domicile and quasi-domicile so far as pastor and Ordinary are concerned. Hence the pastor of one's domicile has no preponderance over the pastor of one's quasi-domicile in the administration of the sacraments. In case, therefore, one has both a domicile and a quasi-domicile, it is he, not the pastor, who may decide from whom he wishes to receive the sacraments.

Concerning *vagi,* the new Code embodies the juridical norm of the Council of Trent,[44] which is practically followed also by our civil law. As if to prove that diocesan domicile is a vague notion, the Code compares those who have only a diocesan domicile to *vagi;* their pastor is the one in whose parish they happen to live at the moment. This is import in regard to marriages, but investigation must be made as to their free status.

Why can. 95 exempts wives, minors, and the insane

43 Cfr. Can. 1097.

44 Cfr. *Conc. Trid.,* Sess. 24, c. 7, de ref. mat.

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from losing their domicile is evident from the juridical assumption that they have no domicile of their own choice.

It is not so easy to see why a wife lawfully separated from her husband (by ecclesiastical and civil court) and who can have a domicile of her own, can not lose it by departing from it with the intention not to return.

BLOOD RELATIONSHIP AND AFFINITY

If a common dwelling place, *e. g.*, a municipality or city, is determined chiefly by origin and domicile, and hence may be called a civic or ecclesiastical relation, there is a still nearer connection possible, *viz.*, by blood and affection. Hence the Code now proceeds to the determination of those relationships,— consanguinity and affinity.

CAN. 96

§ 1. Consanguinitas computatur per lineas et gradus.

§ 2. In linea recta, tot sunt gradus quot generationes, seu quot personae, stipite dempto.

§ 3. In linea obliqua, si tractus uterque sit aequalis, tot sunt gradus quot generationes in uno tractu lineae: si duo tractus sint inaequales, tot gradus quot generationes in tractu longiore.

CAN. 97

§ 1. Affinitas oritur ex matrimonio valido sive rato tantum sive rato et consummato.

§ 2. Viget inter virum dumtaxat et consanguineos mulieris, itemque mulierem inter et viri consanguineos.

§ 3. Ita computatur ut qui sunt consanguinei viri, iidem in eadem linea et gradu sint affines mulieris, et vice versa.

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Little practical value would ensue here from a further explanation, which must be deferred to the canons on marriage. Note that affinity has shared the fate of public honesty, in as far as also from a non-consummated marriage relationship results, which formerly was limited to *matrimonium consummatum,* or rather to carnal intercourse, licit or illicit.

VARIOUS RITES

CAN. 98

§ 1. Inter varios catholicos ritus ad illum quis pertinet, cuius caeremoniis baptizatus fuit, nisi forte baptismus a ritus alieni ministro vel fraude collatus fuit, vel ob gravem necessitatem, cum sacerdos proprii ritus praesto esse non potuit, vel ex dispensatione apostolica, cum facultas data fuit ut quis certo quodam ritu baptizaretur, quin tamen eidem adscriptus maneret.

§ 2. Clerici nullo modo inducere praesumant sive latinos ad orientalem, sive orientales ad latinum ritum assumendum.

§ 3. Nemini licet sine venia Apostolicae Sedis ad alium ritum transire, aut, post legitimum transitum, ad pristinum reverti.

§ 4. Integrum est mulieri diversi ritus ad ritum viri, in matrimonio ineundo vel eo durante, transire; matrimonio autem soluto, resumendi proprii ritus libera est potestas, nisi iure particulari aliud cautum sit.

§ 5. Mos, quamvis diuturnus, sacrae Synaxis ritu alieno suscipiendae non secumfert ritus mutationem.

What this canon says concerning the different rites, of which mention was made in the first book (can. 1),

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was determined in the Constitutions of Benedict XIV,[45] Pius IX,[46] and Leo XIII, especially in the latter's Apostolic Letter "*De disciplina Orientalium conservanda et tuenda.*"[47] The solicitude of the Apostolic See for the reunion of the Oriental dissidents and, at the same time, for the preservation of their peculiar rites, has been amply illustrated by Benedict XIV in his "*Allatae.*"

The reason why *baptism* is the characteristic mark of distinction between the different rites, must be sought in the ceremonies employed by the Orientals in conferring this sacrament,[48] which is the gate to the Church. The Oriental formula, though deprecatory rather than indicative, is equivalent to the Latin: "*Ego te baptizo.*" The attending ceremonies, however, especially the confirmation connected with baptism, differ greatly. Hence it is proper that the difference of ceremony in conferring the sacrament of initiation should mark the distinction between the rites at large.

If a Latin minister baptizes "by fraud," *e. g.*, pretending to be an Oriental minister, the child nevertheless belongs to his father's rite, for the rite of the father determines that of the child. A case of necessity, when by reason of not having an Oriental minister a Latin priest should have to baptize the child of an Oriental, is mentioned by Benedict XIV.[49] The last clause of paragraph 1 of our canon is an amplification of the case cited in Leo's "*Orientalium,*" where mention[50] is made of one

45 "*Etsi pastoralis,*" May 26, 1742; "*Demandatam,*" Dec. 24, 1743; "*Allatae,*" Feb. 20, 1755 (*Bull. Bened.*, ed. Prat., 1845, I, 197 ff; 328 ff; 249 ff.

46 "*In suprema,*" Jan. 6, 1848; "*Romani Pontifices,*" Jan. 6, 1862; "*Amantissimus,*" Apr. 8, 1862 (*Coll. Lac.*, II, 484 ff.).

47 "*Orientalium,*" Nov. 30, 1894 (*Leonis XIII Allocutiones, Epistolae, Constitutiones;* ed. Desclée, 1898, v, 303 ff.).

48 Cf. Benedict XIV, "*Etsi pastoralis,*" § II (*l. c.*, p. 199).

49 "*Demandatam,*" § 18 (*l. c.*, p. 322).

50 No. XI (*l. c.*, p. 308).

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converted to the unity of faith under the condition of embracing the Latin rite. Such a one is not bound to remain a Latin forever, but may return to his native (of course Catholic) Oriental rite.[51]

Paragraph 2 prohibits proselytizing, without, however, mentioning the penalty of suspension inflicted in "*Orientalium*" [52] and "*Demandatam.*" Paragraph 3 is a modification of Leo's Constitution which permitted a return to the former rite if the Apostolic See had been asked — *Apostolica Sede exorata.*

Paragraph 4 is taken almost verbally from Leo's Constitution, with the exception of the clause, "unless otherwise provided by particular law." Under this clause a provincial council might issue regulations contrary to this canon.

As to the last paragraph, the respective passage in "*Orientalium*" is somewhat wider: "The faithful are at liberty to communicate in either rite, not only in places where there are no churches or priests of their own rite, but also where their places of worship are too distant to be conveniently frequented. But they must not on that account be supposed to have changed their rite, but remain in all other offices subject to their own pastor." [53]

Since this canon offers us an opportunity which, as far as we are aware, does not recur in the whole Code, it may not be amiss to complete the subject from the Constitution of Leo XIII. Religious who conduct schools frequented by members of the Oriental rite, should employ a priest of that rite for the respective functions. Every Oriental who lives outside the territory of his Patriarch is under the care of the Latin priest, but re-

51 *Ib.*, n. I (p. 306 ff.). Neither could we discover this penalty in the penal code.

52 *L. c.*, n. II (p. 307).

53 *Ib.*, n. III, IV, IX, XII, (*l. c.*, p. 307 ff.).

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mains subject to his own rite, so that nothing is changed in his relation to the Oriental rite. Matrimonial and other ecclesiastical causes appealed to the Apostolic Delegate must be submitted to the *S. C. pro Ecclesia Orientali.* These general rules also hold good for the Orientals in this country.

MORAL OR JURIDICAL PERSONS

CAN. 99

In Ecclesia, praeter personas physicas, sunt etiam personae morales, publica auctoritate constitutae, quae distinguuntur in personas morales collegiales et non collegiales, ut ecclesiae, Seminaria, beneficia, etc.

(For can. 100, see p. 3, *supra.*)

CAN. 101

§ 1. Circa actus personarum moralium collegialium:

1.° Nisi aliud expresse iure communi aut particulari statutum fuerit, id vim iuris habet, quod, demptis suffragiis nullis, placuerit parti absolute maiori eorum qui suffragium ferunt, aut, post duo inefficacia scrutinia, parti relative maiori in tertio scrutinio; quod si suffragia aequalia fuerint, post tertium scrutinium praeses suo voto paritatem dirimat aut, si agatur de electionibus et praeses suo voto paritatem dirimere nolit, electus habeatur senior ordine vel prima professione vel aetate;

2.° Quod autem omnes, uti singulos, tangit, ab omnibus probari debet.

§ 2. Si de actibus personarum moralium non collegialium agatur, serventur particularia statuta ac normae iuris communis, quae easdem personas respiciunt.

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CAN. 102

§ 1. Persona moralis, natura sua, perpetua est; extinguitur tamen si a legitima auctoritate supprimatur, vel si per centum annorum spatium esse desierit.

§ 2. Si vel unum ex personae moralis collegialis membris supersit, ius omnium in illud recidit.

What has been said, *supra,* pp. 1 sqq., about moral persons may now be detailed. Canon 99 draws a distinction between corporate and non-corporate bodies. What is required for the former has been stated above. Properly speaking, *non-corporate* bodies cannot be called juridical persons at all. For such the term "*moral entities*" (the Italians style all corporations "*enti morali*") would be more suitable. But it was precisely the Italian government, or rather some extremely radical jurists, who, in order more readily to suppress ecclesiastical corporations, denied the existence of such moral entities.[54] On the other hand, civil governments, especially in Europe, have acknowledged the legal title of corporations even to *parishes*.[55] Here a parish is not considered a corporation, because it lacks an end sufficiently distinct from others,— all parishes having one and the same end, the care of souls,— and because of the want of a subject proper as bearer of corporate rights. The parish as such is not the bearer of distinctly ecclesiastical rights, as it is composed of lay people who enjoy rights only as far as they are members of the Church. Hence the cor-

54 Thus Scaduto and Giorgi, *La Dottrina delle Persone Giuridiche,* Firenze 1897. But what about Italia Unita? Is it no *ente* or *corpo morale*?

55 Cf. Lampert, *Die rechte Stellung der Landeskirchen in den Schweizer. Kantonen,* 1908; ID., *Doc. Stifungen,* 1912; *Schul-System,* p. 252.

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porate rights would be vested in the pastor, who, however, cannot form a corporation, since to constitute a corporation requires at least three physical members. English law perceived the difficulty and assumed, very logically, a corporation sole. Our States, after some changes and development, assume either a corporation aggregate, or the trustee corporation, or the modern form of the corporation sole.[56]

As stated under can. 100, § 3, such corporations have an end subordinate to that of the universal Church, and depend for their legal existence on the supreme authority, and hence share the lot of minors placed under guardians. It follows that their *corporate acts* are subject to common law and to those particular laws which conform to the former, or if they do not conform, are at least approved of by higher authority. For just as the State requires conformity to its own common laws when approving a corporation, so also the Church approves only such corporations as correspond with her general end and are conducive thereunto. Hence can. 101 establishes some general rules to be observed at *meetings* held to decide a matter proposed to the vote of the members of a corporate body. Under 1°, the law speaks only of such acts as are voted on by the members *present* (*"qui suffragium ferunt"*). Now it is generally presumed that two-thirds of the members present form a quorum capable of making a decision.[57] Therefore the general law considers the absent members as not claiming their right of voting, and as having no right to remonstrate against a resolution adopted by the majority. We say, the common law treats absent members thus. If the particular statutes of the corporation contain a contrary

[56] Cfr. Zollmann, *l. c.*, p. 63. [57] Bouix, *De Capitulis*, p. 182.

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clause, *viz.*, that the votes must be counted according to the total number of members, either present or absent, this statute must be followed. If no such statute exists, votes of the members present only are counted.

Number 2 provides that the invalid votes (*demptis suffragiis nullis*) must be subtracted from the sum-total of the voters present.

A suffrage is null and void, according to the Code,[58] if extorted, or not given secretly,— if secrecy be required by the particular statutes, in matters not touching election, — or if given conditionally. Such votes, therefore, must be thrown out.

An *absolute majority* is one vote more than half of those given; for instance, if there are thirteen who cast a vote for or against selling a certain property, and seven are for, while six are against selling, the resolution carries in favor of selling. A *relative majority* can take place only when more than two resolutions or more than two candidates are at issue. Thus, in the case just mentioned, there may be question not only of selling or not selling, but also of renting or borrowing money. If four of twelve members present would vote for selling, and three against, and five for taking up money, the last vote would carry, but only in the third scrutiny, not in the first and second, because for these two an absolute majority is required, and hence seven votes out of twelve would have to be cast for taking up money if it should carry in the first or second ballot.[59]

The last means of deciding an even vote is the *president* or presiding officer, who may give his vote in

58 Can. 169. These rules affect the moral and juridical liberty of the voters.

59 Cfr. Bouix, *De Capitulis*, p. 184. This rule was formerly rejected by weighty canonists; but it is very reasonable in that it prevents waste of time.

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favor of either side. But there may be cases, especially in elections, when the president does not wish to cast the deciding vote. If two or three candidates come out with an even number of votes in three scrutinies, and the presiding officer refuses to decide in favor of any one, how is the election to be settled? First the rank and seniority of sacred orders must be considered, and therefore a priest must be preferred to a deacon, and a deacon to a subdeacon (minor orders are not taken into consideration). If in a religious community two priests are elected who were ordained on the same day, the date of their simple profession decides the preference, and if by a fanciful hypothesis both should have been ordained and made their profession on the same day,[60] the priority of age must decide who is elected; because then the rule would hold: *"Prior in tempore, potior in iure,"* as will be seen under the canon governing precedence.

No. 2 of § 1 (canon 101) apparently sets up a contradictory rûle by ordaining that "what touches all, as individuals, must be approved by all," in accordance with the regula juris 29 in 6°: *"Quod omnes tangit, debet ab omnibus approbari."*[61] But our text by way of explanation adds: *"ut singulos."* These two words clear up the apparent contradiction. For in every corporation there are rights which touch the corporation as such (*e. g.*, corporation property) and rights which are intrinsically inherent in each member as such. Concerning the latter class the law requires that the approval of all must be given, if rights are to be given up, or changed, or retained. An example of the former would be, according to our

60 *Reg. S. Bened.*, c. 58; cfr. l. 5, *Cod. Just.*, v, 59 de auctoritate praestanda; l. 11 *Dig.* 8, 3, De servitut. praed. rust; Reiffenstuel, t. ult., Reg. 29.

61 Reiffenstuel, *Com. in Reg. Iuris*, 29, n. 7 ff.

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opinion, a change of statutes, of the latter, a change of election and compromise.[62]

As to paragraph 2, nothing need be added except that the acts mentioned therein are not properly speaking corporative acts or enactments, but mere rules set forth by proper authority.

That a *moral person is perpetual,* as can. 102 states, follows from the nature of its organization and end, which is enduring. That the legitimate authority which has sanctioned its existence, can also dissolve a corporation, needs no proof.

§ 2 enacts that corporate rights devolve on the *surviving member.* This follows from the generally accepted rule: *"Collegium remanet in uno."* Although at least three persons are required for constituting a corporation, yet by way of devolution the corporate rights would, in case of death or defection of all but one member, devolve on that member, who would become the bearer of all those rights, though he could not exercise all of them, for instance, he could not elect himself.[63]

ETHICAL QUALITIES OF LEGAL ACTS (VIS, METUS, ERROR)

If we speak here of moral qualities, we do not mean to deny the juridical character inherent in these qualities. It is evident that violence, fear, and error, of which the two following canons treat, affect chiefly the intrinsic or ethical side of corporate acts, and only indirectly their juridical nature. This is quite obvious, for it is impossible to sever morality from right or law.

62 Cfr. Bouix, *De Capitulis,* p. 184, p. 601; Aichner, *l. c.,* § 82, 1. Cfr. can. 162 (on election); can. 172 (on compromise).

63 Cfr. Bouix (as under note 62).

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CAN. 103

§ 1. Actus, quos persona sive physica sive moralis ponit ex vi extrinseca, cui resisti non possit, pro infectis habentur.

§ 2. Actus positi ex metu gravi et iniuste incusso vel ex dolo, valent, nisi aliud iure caveatur; sed possunt ad normam can. 1684–1689 per iudicis sententiam rescindi, sive ad petitionem partis laesae sive ex officio.

CAN. 104

Error actum irritum reddit, si versetur circa id quod constituit substantiam actus vel recidat in conditionem *sine qua non;* secus actus valet, nisi aliud iure caveatur; sed in contractibus error locum dare potest actioni rescissoriae ad normam iuris.

These are general norms, universally accepted by canonists, except the second paragraph of Can. 103 in its broad sense. Civil law is more lenient with regard to accidental errors.

Violence, or physical force, whether justly or unjustly exercised, if irresistible, of necessity excludes free consent of the will. Wherefore an act posited — we cannot well say performed — under such influence, can neither be imputed nor does it entail a moral or juridical obligation. Note, however, the clause, "which cannot be resisted." For if the assailant *can* be resisted, at least by using equal violence, he should be resisted; violence must be warded off by violence, unless perhaps reverence or respect would dictate otherwise. Thus a child may not use violence against his parents, even though they should physically try to force him into a state of life distasteful to him. Violence is less practicable in case of a cor-

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poration, because a crowd is less liable to be attacked. Yet even a body of men, for instance, electors, may be subjected to violence. The people of Viterbo gave actual proof of this.[64]

Physical violence, thus brought to bear on the mind in order to force a man to do something against his will creates no *voluntarium,* and therefore produces no human act.[65] Notice, however, that this violence must affect the person himself; violence done to parents, near relatives, or friends, is not the violence of which § 1 of our canon speaks, but is rather *fear* or alarm, which the Code considers next.

Fear is an emotion excited by threatening evil or impending pain, accompanied by a desire to escape or avoid it. All violence, as the Pandects say,[66] is fear or causes fear; but *metus* does not always include physical force. The law then goes on to determine the nature of fear. Fear, to render an act involuntary, must be grievous, vehement, and at the same time unjustly threatened. Concerning the first condition authors generally describe fear as grievous when it is such as may befall a man of robust body and mind, not a nervous or weak-minded person. Wherefore, they add, two things are required to constitute grievous or vehement fear, *viz.,* that the threatened evil exists objectively, not merely in the imagination, and that the evil threatened be important and weighty, *e. g.,* death, mutilation, imprisonment, loss or confiscation of property, defloration,[67] and, we might add, the loss of

64 The incident of Viterbo, 1270–71, was instrumental in framing the decretal of Gregory X on papal elections, c. 3, 6°, I, 6.

65 *S. Th.,* I-II, q. 6, a. 5; cfr. c. 4, X, I, 40 *de his quae vi metusve causa fiunt; Dig.* 4, 2; *Cod. Just.,* 2, 19.

66 L. 1, *Dig.* 4, 2: "*Metus instantis vel futuri periculi causa mentis tripidatio.*"

67 Reiffenstuel, I, 40, n. 28.

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reputation for a person in good standing, or of social position and remunerative occupation.

The other condition is that fear be *unjustly threatened* or inflicted. Unjust would be a fear excited by private authority, or by one not entitled to threaten an evil in order to obtain consent. We should likewise consider a fear unjustly threatened if there were no proportion between the greatness of the evil threatened and the reason for which it is threatened. Thus a judge might unjustly threaten one to force him to marry a certain person for futile reasons, or threaten one so that he would give up a position because of political disagreement.

This remark leads to another observation made by canonists. The connection between the evil threatened and the special act which is to be extorted by the threat, is expressed by the disjunctive formula: either — or; either death or marriage; — in other words, the evil must be threatened *ad hoc,* for that very purpose, and no other.[68] Lastly, as the term "*incussus*" seems to imply, the fear must come from outside, *ab extrinseco,* or, as it is also termed, from a *causa libera, i. e.,* an agency existing outside the one who suffers fear, and not from a natural phenomenon such as lightning or shipwreck.

Now an act performed under the influence of fear, thus described, or inspired by fear, is not necessarily invalid, because it may still be truly voluntary, though, under a certain aspect (*secundum quid*), it is involuntary. For there is in the intellect the knowledge of an end, and that end is wished for, along with what is chosen as a necessary means to it. In this respect, such actions are, in themselves, truly and properly called voluntary. On the other hand, these same acts are performed against the in-

68 Cf. *S. Th.,* I–II, q. 6, a. 6; Hill, *Ethics,* 8 ed., pp. 51 ff.

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clination of the will and with reluctance; and although the person cannot say, "I will not," yet he could truly say, "I would I could not." Hence, actions performed under the influence of fear are in a certain respect involuntary [69] and, according to our Code, give the victim the right to have the act rescinded. However, on account of possible hallucinations, and for the sake of the public welfare, a legal procedure must be followed. The first step will be to gather proofs in the form of affidavits; the next, to secure a lawyer, unless the person is able to act as his own lawyer. Then the judge of the defendant, or in other words, the competent judge [70] — *actor sequitur forum rei* — must be sought.

A *judge* may of his own accord proceed against one who has threatened another unjustly, for such conduct is detrimental to the public welfare. As soon as the judge is morally convinced that evil has been unjustly threatened, he may cite the injured party, even though the latter would wish to escape a trial. It is left to the prudent and conscientious judgment of the judge to proceed further, unless the validity of a marriage is at stake.

The same legal benefit is granted to one who suffers from another's *deceit* (*dolus*), which is called a connivance to cheat or deceive another, who thereby suffers injury. This occurs especially in matters of contract, wherein the law takes it for granted that every transaction is fair and honest.[71] Whether deceit is committed by hiding the truth (*calliditas*) or telling a lie (*fallacia*), or by some machination employing both words and deeds, is immaterial. But it is important to ascertain whether

69 This will be further explained in Book IV; cfr. cc. 1684–1689.

70 Cfr. X, II, 14 *de dolo; Dig.* IV, 3 *de dolo malo.*

71 Blackstone-Cooley, *l. c.*, III, 164.

72 Reiffenstuel, II, 14, n.

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the deceit practiced is the cause of one's acting in such a way; for if the *dolus* is only concomitant, and not the impulsive cause of the act, the benefit of law (writ of deceit) cannot be invoked.

Deceit generally causes error, and therefore the following canon speaks of *error*. Error is a state of mind in which one approves falsehood for truth. It differs from ignorance, which is a lack of due knowledge. The Code distinguishes between a mistake regarding the *substance of a thing*, and one which concerns a quality as a *condition sine qua non*. The former would be the case if one bought brass for gold, a pearl of glass for a jewel, or if he married Anna instead of Mary, whom he had intended to marry.[78] An essential or *sine qua non condition* (this clause evidently refers to matrimonial law), would be a quality inherent in a woman by which alone she is known to the wooer, and on account of which alone he wishes to marry her (for instance, she is the first-born daughter of his friend). Such an essential condition might also occur in buying a registered steer of a certain stock. Now if the would-be groom or the buyer is in error or deceived, no matter by whom, the marriage or purchase is void, because the essential consent is wanting by reason of a false object presented to which the intention was not directed.

The *circumstances* which render an object less desirable may, however, be purely accidental, as when the person married is not as peaceful or as rich as pretended and believed before marriage. Such accidental errors do not render the act null and void, because consent, at least in persons acting reasonably, is not directed exclusively to such accidents.

78 This may occur in the case of twins or other persons resembling each other very closely.

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But marriage is a peculiar affair, which shall be treated more fully in its proper place. The Code says that in *matters* of *contract* room is left for *rescinding the act.* Here especially enters the writ of deceit, which is granted also by the civil law.

It is then in the power of the plaintiff to approach the judge either to obtain damages or to put in a claim for annullment of the act performed under deceit, and the judge will have to decide whether he is competent to give a verdict in the case.[74] That the procedure must be legal is required by the public welfare, which demands equity as well as order and justice.

CONSENT OR ADVICE TO BE ASKED BY THE SUPERIOR

CAN. 105

Cum ius statuit Superiorem ad agendum indigere consensu vel consilio aliquarum personarum:

1.° Si consensus exigatur, Superior contra earundem votum invalide agit; si consilium tantum, per verba, ex. gr.: *de consilio consultorum,* vel *audito Capitulo, parocho,* etc., satis est ad valide agendum ut Superior illas personas audiat; quamvis autem nulla obligatione teneatur ad eorum votum, etsi concors, accedendi, multum tamen, si plures audiendae sint personae, concordibus earundem suffragiis deferat, nec ab eisdem, sine praevalenti ratione, suo iudicio aestimanda, discedat;

2.° Si requiratur consensus vel consilium non unius tantum vel alterius personae, sed plurium simul, eae personae legitime convocentur, salvo praescripto can. 162, § 4, et mentem suam manifestent; Superior autem pro sua prudentia ac negotiorum gravitate potest eas

74 Cfr. cc. 1679–1683, which correspond to the *actio erroris.*

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adigere ad iusiurandum de secreto servando praestandum;

3.° Omnes de consensu vel consilio requisiti debent ea qua par est reverentia, fide ac sinceritate sententiam suam aperire.

The general rule, says Engel,[75] is that every important matter should be treated by the superior (prelate) either with the consent or with the advice of his chapter.

Such advice, though it does not bind the superior, is not to be looked upon as superfluous. For by counsel, observes the same author, hasty and foolish acts are prevented, and several pairs of eyes see more than one. This rule, of course, applies especially to cathedral and religious chapters, where the *bonum privatum* must cede to the *bonum commune*. Which cases require consent or advice is stated in the law. We merely observe that, unless expressly provided in the Code, advice only, not consent must be asked.[76]

The next number treats of convocation required in case several persons must be asked at the same time. This is the case with our *diocesan consultors*, who, therefore, must be called together for a meeting whenever their consent or counsel is demanded by law. For though our consultors do not as yet, like the diocesan chapter, form an ecclesiastical corporation, they take the place of such in the government of the diocese, and, besides, constitute among themselves,[77] a "*coetus*," which is the meaning of "*plures simul*."

Of course, if all the consultors should accidentally be present, for instance, at a diocesan meeting or clerical

75 Cfr. ad X, III, t, 10, n. 1, *de his quae fiunt a praelatis sine consensu capituli;* Engel, III, 10, n. 1. *Reg. S. Bened.*, which, however, speaks only of advice, not consent.

76 Cfr. Can. 427.

77 Cfr. Can. 162 § 4.

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retreat or on some festive occasion,[78] the bishop may make use of that opportunity and consult them there and then, but not in the presence of others, *i. e.,* not in such a way that others may hear the counsel and the consultors thereby perhaps be compromised or hindered in their free speech.

Whether a matter is of sufficient importance to require secrecy, is left to the judgment of the superior.

PRECEDENCE

Precedence, first and above all, means priority in rank or dignity, and this, in turn, is chiefly, though not exclusively, based upon the authority or power one enjoys over another. Hence the relation between superior and inferior, between *maioritas* and *obedientia,* as defined in the Decretals (I, 33). Similarly, our Code establishes jurisdiction as the primary rule of distinction.[79]

CAN. 106

Circa praecedentiam inter varias personas seu physicas seu morales, serventur normae quae sequuntur, salvis normis specialibus quae suis in locis traduntur:

1.° Qui alius personam gerit, ex eadem obtinet praecedentiam; sed qui in Conciliis alliisque similibus conventibus procuratorio nomine intersunt, sedent post illos eiusdem gradus qui intersunt nomine proprio;

2.° Cui est auctoritas in personas sive physicas sive morales, eidem ius est praecedentiae supra illas;

3.° Inter diversas personas ecclesiasticas quarum nulla habeat in alias auctoritatem: qui ad gradum potiorem pertinent, praecedunt eis qui sunt inferioris

78 Cfr. Can. 162 § 4. K.-R., I, 431 f.
79 Cfr. c. 15, X, I, 33; v. Scherer,

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gradus; inter eiusdem gradus personas sed non eiusdem ordinis, qui altiorem ordinem tenet, praecedit iis qui in inferiore sunt positi; si denique ad eundem gradum pertineant eundemque ordinem habeant, praecedit qui prius est promotus ad gradum; si eodem tempore promoti sint, senior ordinatione, nisi iunior ordinatus fuerit a Romano Pontifice; et si eodem tempore ordinem receperint, senior aetate;

4.° In praecedentia diversitas ritus non attenditur;

5.° Inter varias personas morales eiusdem speciei et gradus, illa praecedit quae est in pacifica quasi-possessione praecedentiae et, si de hoc non constet, quae prius in loco, ubi quaestio oritur, instituta est; inter sodales vero alicuius collegii, ius praecedentiae determinetur ex propriis legitimis constitutionibus; secus ex legitima consuetudine; qua deficiente, ex praescripto iuris communis;

6. Loci Ordinarii est in sua dioecesi statuere praecedentias inter suos subditos, ratione habita principiorum iuris communis, legitimarum dioecesis consuetudinum et munerum ipsis commissorum; et omnes de praecedentia controversias, etiam inter exemptos, quatenus ii collegialiter cum aliis procedant, componere in casibus urgentioribus, remota omni appellatione in suspensivo, sed sine praeiudicio iuris uniuscuiusque;

7.° Circa personas quae ad Domum pontificalem pertinent, praecedentia moderanda est secundum peculiaria privilegia, regulas et traditiones eiusdem pontificiae Domus.

This question of precedence may come up at a future council just as it did at the Vatican Council,[80] where prece-

80 Cf. Granderath-Kirch, *Gesch. des Vatik. Konzils*, 1903, I, p. 391 ff.

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dence was established as follows: (1) Cardinals according to their titles, episcopal, presbyterial, diaconal; (2) Patriarchs; (3) Primates, but only by a special grant of the Pope; (4) Archbishops according to the time of their promotion; (5) Bishops in the same way; (6) Superiors general of religious orders with solemn vows.[81] Procurators were excluded from both a consultative and a decisive vote, just as they are now under the new Code.[82] To plenary councils no procurators are admitted, except coadjutors or auxiliary bishops,[83] who, therefore, will have to take their seats after the ordinaries who are personally present. Since the general rule is that precedence must be determined according to the rank of the person represented, an apostolic legate precedes all others, provided he be a cardinal.

This is the principle of distinction regarding rank or precedence. However, it may happen that many are present of equal authority, wherefore, to avoid unpleasant contention, the following rules are to be enforced:

It may happen, not only in conciliar meetings, but also on any festal occasion, that this "*crux magistrorum ceremoniarum*" (the question of precedence) may arise. Our canon furnishes the solution. We will add only a few remarks. *Cardinals* always have precedence over all other dignitaries except an apostolic legate. They rank according as they are Cardinal bishops, priests, or deacons, and are followed by the Patriarchs, the residential archbishops and bishops,[84] titular archbishops and titular bishops, who have no "authority," properly speaking.

81 Concerning the Council of Trent, to which procurators of the German bishops were admitted, *ib.* p. 108 ff.; *Concilium Trid.*, 1901, I, 202, 349, 368 etc.; can. 224, § 2.

82 Cfr. can. 282.

83 But in his own territory the diocesan bishop precedes even archbishops — with the exception of his Metropolitan — and all other bishops. Can. 347.

84 This rule was observed at the Vatican Council; Granderath-Kirch, *l. c.*, I, p. 392.

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Among those of equal rank, *e. g.*, bishops, the one who has been promoted earlier to the episcopal rank precedes the one whose promotion occurred later. Notice the term *promotion,* for it means the publication of the bishop's name in Consistory, not the date of his election or consecration.[85]

The next step in deciding the question of precedence between two prelates of equal rank, order, and promotion, is to ascertain the date of their *ordination.* Now ordination, according to our Code,[86] includes the conferring of the tonsure, wherefore the date of clerical initiation decides seniority. One case, however, is excepted, *viz.,* if one is ordained by the Roman Pontiff.[87] But the term "Roman Pontiff" is here to be interpreted strictly, wherefore ordination by the Cardinal Vicar of Rome or another Cardinal does not involve that privilege. A special delegation, however, given by the Pope to ordain a cleric in his name would have the same effect as ordination performed by the Pontiff himself.[88] Finally the last hypothesis is clear enough, *viz.,* if two were equal in rank, order, promotion, time of ordination, then the natural *age* would have to decide.

Hence Latin and Oriental bishops or priests are equal, *ceteris paribus.*

The rule of precedence among religious is settled in the section on religious, can. 491, but since this bone of contention has always troubled the house of God, as we know from innumerable decisions of the S. C. EE. et RR., several pontifical Constitutions[88] have been issued

85 Can. 350.

86 Can. 950; cfr. c. 12, X, I, 11 de temp. ord.; Bened. XIV, "In postremo," Oct. 20, 1756 (*Bull.,* Prati, t. III, 388 ff.).

87 "In postremo," § 19 (p. 398).

88 Pius V, "*Divina,*" Aug. 17, 1567; Greg. XIII, "*Exposcit,*" July 25, 1583. Cfr. the Gloss ad c. 1, 6°, III, 13; c. m. 6°, v, 6; Santi-Leitner, *l. c.,* I, 33, n. 2 (vol. I, p. 380).

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on this matter, which we shall quote in their proper place.

The first clause of n. 5 is taken from "*Exposcit*" of Gregory XIII, July 25, 1583. There the question was settled concerning the Mendicant Orders in the way now prescribed for all. If a Mendicant Order could prove its quasi-possession,[89] that is, undisturbed and uncontested precedence for a time at least sufficient for prescription, it was supposed to have a just title thereto. If no such proof could be furnished, the historical fact of being founded in a place earlier than a competitor was to settle the question. This is still the rule concerning corporations of the same *kind*. It also applies to corporations of the same *rank*. A cathedral is of higher rank than a collegiate chapter, a distinguished chapter higher than a non-distinguished.[90] A clerical order enjoys precedence over a non-clerical one, etc.[91] Corporations which have their own constitutions must consult these, or else custom and the common law, especially the present paragraph, and others treating the question of precedence.

This latter ruling is very wise because apt to maintain order and decorum on solemn occasions, without prejudice to the rights of religious.

During procession, the decision of the Ordinary must be obeyed, and only after the function is over, have those who think they are wronged a right to defend their claim, first before the bishop, and then before the S. C. Relig.

The rules under § 7, concerning the *Papal Household*

89 It is called quasi-possession because of the nature of right, which is not corporeal; *vide* Reiffenstuel, II, 12, n. 143 ff.

90 Cfr. can. 391, § 2; can. 408; can. 491.

91 If men strike each other with the staffs of their banners and crosses — and we read of such instances in genuine records — the decorum is gone.

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or Famiglia Pontificia are contained in the Caeremoniale of the papal palace and do not enter into our present purpose. Precedence, like etiquette, belongs to every well regulated government, and not even a thorough-going democrat has a right to ridicule it, for it is based on human nature and the dictates of right reason.

CAN. 107

Ex divina institutione sunt in Ecclesia *clerici* a *laicis* distincti, licet non omnes clerici sint divinae institutionis; utrique autem possunt esse *religiosi*.

After treating generally of the members of the Church who are such by baptism, and of the different physical and moral persons who may exist within the Church, the Code draws the line of demarcation between clergy and laity. This distinction, as pointed out above, is based upon the nature of the Church, which, because of its divine and therefore legal and necessary existence, has a constitution of its own, neither made nor to be changed by men, at least in its essential features. One essential feature of this constitution is the *hierarchy* in the broad sense, involving a distinction between clergy and laity.

The term *clergy* is derived from the Greek κλῆρος, (Latin *sors*), a lot.[92] According to St. Jerome, clerics are so called because they are called into the lot of the Lord, or because the Lord is their portion, or because they are chosen by lot. Therefore every clergyman may in a particular sense be called a servant of God. That the clergy, distinguished into its hierarchic orders, has gradually grown into a minutely arranged system, is owing to

92 Cfr. c. 5, C. 12, q. 1; c. 7, ib. (*incerti auctoris, saec. XI*).

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circumstances of necessity and natural development, excepting, of course, the divinely ordained distinction between bishops, priests, and deacons.

The word *laity* is derived from λαός (*plebs*), people, in which sense it occurs in the epistle of St. Clement to the Corinthians.[93] Hence this organisation or distinction can claim divine institution.

[93] C. 40; cf. Bruders-Villa, *La Costituzione della Chiesa*, 1906; German: *Die Verfassung der Kirche* in Ehrhard's *Kirch. Forschungen*, 1904, IV.

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PART I

THE CLERGY

SECTION I

THE CLERGY IN GENERAL[1]

CAN. 108

§ 1. Qui divinis ministeriis per primam saltem tonsuram mancipati sunt, clerici dicuntur.

§ 2. Non sunt omnes in eodem gradu, sed inter eos sacra hierarchia est in qua alii aliis subordinantur.

§ 3. Ex divina institutione sacra hierarchia ratione ordinis constat Episcopis, presbyteris et ministris; ratione iurisdictionis, pontificatu supremo et episcopatu subordinato; ex Ecclesiae autem institutione alii quoque gradus accessere.

In connection with the custom of cutting the hair of those who were to be servants (*mancipati,* serfs, slaves) of the Church, *tonsure* occurs as early as the fifth century.[1] It may be defined as a rite whereby a Christian (Catholic) is constituted in the clerical state and made fit to receive minor orders.[2] Hence tonsure [3] can be con-

1 Cf. Coustant, *l. c.,* p. 73; Martène, *De Antiquis Eccl. Ritibus,* l. i, c. 8, art. 7 (ed. Antwerp, 1736, t. II, 40 ff.); Conc. Agath., an. 506, c. 19. *Mancipia* were serfs or a higher grade of slaves; cfr. *Cod. Just.,* XI, 63.

2 Cfr. *Pont. Rom., De Clerico Faciendo;* Lämmer, *K.-R.,* p. 81.

3 Cfr. *Conc. Trid.,* Sess. 23, c. 4, *De Ref.*— The difference between the Scottish and Roman tonsure

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ferred only on such as are validly baptized and confirmed and ask for it of their own free will and without deceit. Tonsure is not enumerated among the minor orders, nor is it considered an order at all.[4]

Those, then, who have received the tonsure are called clerics — *i. e.,* men bound to the sacred ministry. As that ministry has various functions, necessitating the exercise of various powers, which are distributed by degrees, it follows that there must be a sacred authority ruling over the whole ministry. This sacred authority is the *hierarchy,* an organization by virtue of which clerics are subordinate to one another and enjoy ecclesiastical power in various degrees.

Three orders are of *divine origin:* the episcopate, the priesthood, and the ministry [5] or diaconate, taking it in the sense of the Church. The words *episcopi, presbyteri,* and *diaconi* occur in the pastoral letters of St. Paul as well as in the Acts of the Apostles. But we do not meet with a fixed terminology until St. Ignatius of Antioch, and even after that there is a certain vagueness in the use of *sacerdotes* and *episcopi,* the terms being often employed synonymously.[6] This fact, however, does not prove that the functions or powers of the two orders were considered to be identical.

Besides these three, other minor ranks were introduced at an early date, owing to the manifold needs of the Church and the increased occupations of the clergy. From the beginning of the second to the middle of the third century there was an almost continual develop-

caused quite a controversy in France and England up to the beginning of the VIIIth century.

4 This is now *sententia communis,* although Fagnani held the opposite opinion; ad c. 11, X, I, 14, n. 43 ff.; cf. v. Scherer, I, 313.

5 *Conc. Trid.,* Sess. 2, 3, can. 6, *De sacr. ord.*

6 Cf. Bruders, *Die Verfassung der Kirche, passim* (we are using the Italian translation by Villa).

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ment of lower functions, some of which disappeared later, but most of which have survived to our own day. While the *cantores, exceptores,* and *fossores* are no longer among the orders proper, the subdeacons *(hypodiaconoi)*, the acolytes, exorcists, lectors, and janitors *(ostiarii)* have retained their position as clerics. Since the eleventh century,[7] subdeaconship has even entered the ranks of the *ordines maiores,* while the four others are styled *ordines minores.*[8] These latter, though a complement of the diaconate, are of purely human origin.

The *supreme pontificate* and the *episcopate* are of divine origin, though they are distinct one from the other by reason of their jurisdictional institution. The supreme pontificate, which is an office not only of honor, but of jurisdiction in the proper sense,[9] comprises the legislative, judiciary, and coercive power in their full and unlimited extent, as far as required by the purpose of the Church. Therefore the jurisdiction of the Pope is coextensive with the Church itself, and comprises all members of the same, whatever their rank or condition, as well as all those objects which fall under ecclesiastical jurisdiction. Therefore the jurisdiction of the Sovereign Pontiff is called *plena et suprema.*

However, the *power* of the *bishops,* though subject to and dependent upon, this supreme jurisdiction of the Pope, is really *ordinary,*[10] *i. e.,* given by virtue of the episcopal office, radically or *aptitudinaliter* by consecration, fully and expeditely by confirmation or promotion.

7 Cfr. c. 11, Dist. 32 (Alex. II.); c. 9, X, I, 14.

8 Cf. Wieland, *Die Entwicklung der sog. Ordines Minores* (*Röm. Quartalschrift*) 1897. The theological question whether all the orders are distinct does not touch the canonist. Cfr. St. Thomas, Suppl., q. 36, art. 5; q. 37, art. 2; Bened. XIV, "*In postremo,*" Oct. 20, 1756, § 10 ff. (*Bull.*, t. III, p. 391 ff.); Pohle-Preuss, *The Sacraments,* IV, 1917, p. 93.

9 *Conc. Vatic., De Eccl.,* c. 1–3.

10 *Conc. Vatic., De Eccl.,* c. 3.

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Whether this jurisdiction is given to the bishop immediately by the Pope or by God Himself through the medium of his Vicar on earth, is a question which may agitate a speculatively inclined theologian, but does not excite the canonist. The more common opinion is the one mentioned first, because it is certain that no bishop is constituted without the consent and confirmation of the Holy See; and hence we may say that all jurisdiction in the Church comes immediately from the Pope.[11] Since, however, the episcopal jurisdiction is an ordinary one, it cannot be set aside by the Supreme Pontiff, as if he could rule the Church by his vicars, or restrict the episcopal jurisdiction by undue reservations.[12] No such power is included in the papal sovereignty, for the simple reason that the episcopate is established by God, and forms part and parcel of the divine organism of the Church. On the other hand, subordination of the episcopal jurisdiction to that of the supreme head is a necessary requirement of unity of faith and government. An illustration is furnished by the Oriental Church.

Canon 108 says, lastly, that the other degrees existing among the clergy are of (purely) human institution. Concerning the *orders* and the *potestas ordinis* given by ordination, we have said enough. There are eight of them, now permanently fixed. As to the degrees of *jurisdiction,* introduced in course of time, they are especially the following: cardinals, patriarchs, primates, metropolitans, and other prelates endowed with jurisdiction *in foro externo.* All these will occur again.

11 Cfr. Mazzella, *De Rel. et Ecc.,* ed. 5, p. 786, whose historical arguments, however, are not cogent, as it is hardly possible to prove that, in the first ten centuries, all the bishops received their jurisdiction from the Pope. Wernz, *Jus. Dec.,* II, n. 737, calls the old opinion "antiquated."

12 Aichner, *l. c.,* § 99.

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CAN. 109

Qui in ecclesiasticam hierarchiam cooptantur, non ex populi vel potestatis saecularis consensu aut vocatione adleguntur; sed in gradibus potestatis ordinis constituuntur sacra ordinatione; in supremo pontificatu, ipsomet iure divino, adimpleta conditione legitimae electionis eiusdemque acceptationis; in reliquis gradibus iurisdictionis, canonica missione.

This canon, the first clause of which is taken from the dogmatic canons of the Council of Trent,[18] is directed against certain innovations which cropped out throughout the history of the Church, but were introduced especially by the so-called reformers of the sixteenth century. The "*consent of the people*" was the favorite cry of Arnold of Brescia and his followers, in the twelfth century. It was repeated by Wiclif and Huss, Calvin and Zwingli. Against these the Council of Trent declared it as an article of faith that the people have no voice in the choice of ministers. The *consent of the civil power* was favored by Luther, and partly also by Zwingli at the Council of Zurich. Both demands are excluded by the very organization of the Church and its nature as a *societas inaequalis*.

The next clause establishes the human agency by which the papal power is conferred, *i. e.*, legitimate election accepted by the person elected. On this subject more shall be said in its proper place. The reason for the law here laid down is that the papal power is supreme, and there is no superior who could either ratify election to it or accept the person elected.

18 *Conc. Trid.*, Sess. 23, can. 4, *De Eccl. Hierarchia et Ordinatione;* those chosen in the way here condemned, are called "robbers and thieves." (John 10, 1).

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The "*missio canonica*" is necessary for all who are inferior to the Pope. For as the Lord sent his Apostles,[14] so in turn they sent others to exercise their spiritual power with authority, and without such credentials no one has authority in the Church. Formerly (up to the twelfth century) the *missio canonica* was believed to be included in ordination, but now that absolute ordination is possible, a distinct *missio canonica,* by which jurisdiction is conferred, is always required.[15]

CAN. 110

Quamvis Praelati titulo, honoris causa, a Sede Apostolica etiam nonnulli clerici donentur sine ulla iurisdictione, proprio tamen nomine Praelati in iure dicuntur clerici sive religiosi qui iurisdictionem ordinariam in foro externo obtinent.

The name *prelate* is derived from *praeferre,* to prefer [some one] to others. It is applied in the ninth century to abbots and abbesses,[16] and later occurs frequently in the Decretals.[17] At the Roman Curia, especially since the college of cardinals shared more largely in the government of the universal Church,—*i. e.,* since the twelfth century,—are mentioned *praelati de curia* and *praelati domus* (employed in the personal service of the pope). Both classes constitute the *Praelatura Romana,* now distributed among the various congregations, tribunals, and offices, and the *Famiglia Pontificia.*[18] A new organization of the Prothonotaries Apostolic has been created

14 Matt. 28, 18; Rom. 10, 15.

15 Cfr. Sägmüller, *K.-R.,* ed. I, p. 147.

16 Cfr. Du Cange, *Glossarium,* s. v. "*Praelatus*"; Tertullian, *De Corona,* III, 3.

17 Cfr. cc. 41, 44, X, I, 6; c. 2, X, II, 1; c. 3, X, I, 31 etc.

18 Cfr. Phillips, *Kirchenrecht,* Vol. VI, 297 ff; Hinschius, *K.-R.,* I, 375 ff.

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by Pius X. The Bull "*Inter multiplices,*" of Feb. 21, 1905, determines the rights and privileges of the four classes of prothonotaries,[19] but does not touch the *domestic prelates,* nor the private *chamberlains* residing in or outside of Rome.[20] All these are honorary prelates.

The Code says that *prelates in the proper sense* are such only as enjoy jurisdiction *in foro externo. Forum* in the primitive sense meant a market-place, where wares were exposed for sale. There were many such *fora* in ancient Rome. The term was also used to designate a judgment place, or court, on account of the publicity given to trials, and in this sense was transferred to the power of the judge, or rather to his competency.[21] From these two significations it is easy to construe the meaning of *forum externum,* which is nothing else but the power of jurisdiction in matters concerning the public order of the Church. This power is manifested in the exercise of the legislative, judiciary, and coercive function, especially in the infliction of censures and vindictive penalties, as will be seen in the fifth book.[22]

19 Cfr. *Amer. Eccl. Rev.,* Vol. 32, p. 612 ff.

20 Cfr. *Cath. Encycl.,* Vol. X, 510, *s. v.* "Monsignore;" *Am. Eccl. Rev.,* Vol. 31, p. 605.

21 Cf. l. 5, *Cod. Just.,* III, 13: "*in criminali negotio rei forum accusator sequatur.*"

22 Cfr. Putzer, *Comment.,* p. 24.

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TITLE I

INCARDINATION IN A DIOCESE

After describing the constituted hierarchic order of clerics who enjoy ecclesiastical power in different degrees, it is natural that the code should treat of the local [1] hierarchy, or incardination in a diocese.

The Council of Chalcedon [2] forbade so-called *absolute ordinations,* and hence every cleric was assigned at ordination to a specified diocese, or city, or martyr's cell, or monastery, where he had to perform his functions. Hence clerics were called *incardinated* in a certain church as subdeacons, deacons, or priests. Incardination in another diocese was allowed only with the permission of both bishops concerned, unless the ordinary was in the hands of enemies or otherwise impeded.[3] *Litterae commendatitiae* were required for receiving strange clerics or monks into dioceses and monasteries not their own.[4] In course of time, especially since the twelfth century, the old discipline was relaxed and various titles of ordination were, at least practically, admitted. But the Council of Trent [5] returned to the old discipline, and the new Code upholds its decision.

1 See the historical note under canon 216.

2 Can. 6; cfr. c. 1, dist 70; c. 1, dist. 71; c. 17, 6°, III, 4, *De Praeb.*

3 Cfr. c. 5, dist 71; c. 6, dist. 74.

4 Cfr. *Reg. S. Bened.*, c. 61; c. 7, 8, dist. 71.

5 Sess. 23, c. 16, *De Ref.*

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CAN. 111

§ 1. Quemlibet clericum oportet esse vel alicui dioecesi vel alicui religioni adscriptum, ita ut clerici vagi nullatenus admittantur.

§ 2. Per receptionem primae tonsurae clericus adscribitur seu, ut aiunt, *incardinatur* dioecesi pro cuius servitio promotus fuit.

After having stated, in can. 107, that there are two classes of persons, clerics and laymen, and that both may be religious, the Code decrees that every cleric must belong either to a diocese or to a religious order. Both dioceses and religious orders or congregations may be looked upon as corporations in the canonical sense. Every clergyman must therefore be a member of one or the other. This is necessary even from a juridical point of view. For a regulated administration requires that every subject should belong to some municipality or corporation, whose duties and obligations he shares.

A cleric becomes incardinated in a diocese or religious community at the moment when he receives the *first tonsure,*[6] because at that moment he enters the clerical state, which, though *in abstracto* it signifies the sacred ministry in general, yet *in concreto* means that part of the Church which is assigned for a cleric's activity. The phrase, "*to the diocese to which he is promoted,*" includes not only the *titulus servitii,* but any title on which one is ordained. For § 1 simply forbids vagrant clerics.

CAN. 112

Praeter casus de quibus in can. 114, 641, § 2, ut

[6] It is called first tonsure because it presupposes the renewal of the tonsure.

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clericus alienae dioecesi valide incardinetur, a suo Ordinario obtinere debet litteras ab eodem subscriptas excardinationis perpetuae et absolutae; et ab Ordinario alienae dioecesis litteras ab eodem subscriptas incardinationis pariter perpetuae et absolutae.

CAN. 113

Excardinationem vel incardinationem concedere nequit Vicarius Generalis sine mandato speciali, nec Vicarius Capitularis, nisi post annum a vacatione sedis episcopalis et cum consensu Capituli.

CAN. 114

Habetur excardinatio et incardinatio, si ab Ordinario alienae dioecesis clericus beneficium residentiale obtinuerit cum consensu sui Ordinarii in scriptis dato, vel cum licentia ab eodem in scriptis concessa e dioecesi discedendi in perpetuum.

CAN. 115

Etiam per professionem religiosam quis a propria dioecesi excardinatur, ad normam can. 585.

CAN. 116

Excardinatio fieri nequit sine iustis causis, et effectum non sortitur, nisi incardinatione secuta in alia dioecesi, cuius Ordinarius de eadem priorem Ordinarium quantocius certiorem reddat.

CAN. 117

Ad incardinationem alieni clerici Ordinarius ne deveniat, nisi:

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1.° Necessitas aut utilitas dioecesis id exigat, et salvis iuris praescriptis circa canonicum ordinationis titulum;

2.° Ex legitimo documento sibi constiterit de obtenta legitima excardinatione, et habuerit praeterea a Curia dimittente, sub secreto, si opus sit, de clerici natalibus, vita, moribus ac studiis opportuna testimonia, maxime si agatur de incardinandis clericis diversae linguae et nationis; Ordinarius autem dimittens, graviter onerata eius conscientia, advigilare debet ut testimonia sint veritati conformia;

3°. Clericus iureiurando coram eodem Ordinario eiusve delegato declaraverit se in perpetuum novae dioecesis servitio velle addici ad normam sacrorum canonum.

Many decrees[7] were issued in the course of about twenty years for the purpose of regulating the matter of excardination and incardination. They were all based on the Tridentine law and upon the Constitution "*Speculatores,*" of Innocent XII, Nov. 4, 1694. This pontiff, a canonist of renown, determined the question of the *episcopus proprius* and in connection therewith, also touched the subject of excardination. According to the Constitution mentioned every layman who left the diocese where he was born or where he had a legitimate domicile, had to be excardinated by his own bishop if he wished to receive tonsure from another.[8] Our Code does not mention excardination proper, but simply says that by the first tonsure one becomes attached to the diocese for which one is to be ordained or promoted. Hence the case of laymen now no longer enters the question of excardination or incardination.

7 Cfr. *A. Ap. S.*, II, 105; IV, 249; V, 34; VI, 182 ff.; *Am. Eccl. Rev.*, Vol. 30, 293 ff.

8 Cfr. Richter, *Trid.*, p. 536, § 3

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The new legislation may be summarized as follows:

a) Letters of excardination and incardination are required;

b) Such letters cannot be given except for just reasons;

c) Both excardination and incardination must be absolute and perpetual;

d) Excardination does not take effect until incardination has been granted.

These are the four salient points. Hence everything must be done in *writing,* with signature and seal. In former decrees it was required that the cleric should be minutely described as in a passport. The vicar-general needs a special mandate to issue such letters, and the vicar-capitular is allowed to grant them only after a year's vacancy. The *reason for excardination* must be just, and considered carefully by the Ordinary. It may be based either on necessity or utility;[9] hence a reason of either kind suffices. Necessity could be urged if there were a *penuria sacerdotum,* either temporary or permanent; *utility,* if there were need of help in diocesan institutions,— schools, seminaries, parishes of diverse languages, etc. The bishop himself is the judge about the existence of such reasons.

Excardination or incardination is *absolute* and *perpetual* if no condition is added; such a condition would be, for instance, "if you do not stay in my province," or "if you do not apply to such and such a bishop." No conditions are admitted, and if they be added, must be looked upon as non-existent. What "perpetual" means is clear; it precludes incardinating a cleric for a time only, *e. g.,* as long as help is needed.

[9] *Conc. Trid.,* Sess. 23, c. 16, *De Ref.*

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Excardination does not take effect until incardination is consummated. This is a noteworthy clause. It protects clerics against harsh measures unauthorized by law, and is simply a consequence of the law which ordains that every cleric should belong to some diocese. A bishop may dismiss a priest *usque in indefinitum,* but the priest continues to belong to his diocese as long as he has not been incardinated elsewhere, and, therefore, is entitled to decent support.

The bishop, however, has the right to give one written permission to *take leave of absence* from his diocese *in perpetuum* (can. 114). Permission (*licentia*), however, generally presupposes a demand, as the word "*concessa*" also implies. Wherefore, in that case, the cleric asking for such a permission has to take the consequences upon himself. As to a *residential* benefice, *i. e.,* one which requires lasting residence in a strange diocese, for instance, a parish or canonical office, excardination and incardination are implied in the very grant thereof. The same is to be said concerning *religious profession* which is made by perpetual (either solemn or simple) vows (can. 505). For by such a vow one becomes a member of a religious body.

The *oath* to be given at incardination is that which is taken by touching the Gospels as a witness of one's earnest intention. The S. C. Cons. has decided that, if this oath was perchance omitted at the time of incardination, the bishop cannot therefore declare the incardination invalid.[10] This decision, we believe, is not overthrown by the Code, because the wording of can. 107, though prohibitive, is not nullifying.

[10] Jan. 31, 1913 (*A. Ap. S.*, V, 34).

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TITLE II

RIGHTS AND PRIVILEGES OF CLERICS

If the clerical state, on account of its hierarchic power, is superior to the lay state, it follows that this superiority must be manifested by outward signs or rights. This is a dictate of reason, as the history of all civilized nations attests. Wherever there was a legally acknowledged priesthood, it enjoyed marked distinctions, not only under the Jewish theocracy, but also in the Oriental empires as well as in the Greek and Roman States.[1] The Christian priesthood and ministry could not form an exception. But it would be shooting beyond the mark if we were to assert that each and every privilege or right vindicated to the clergy in the following canons is of natural or divine law. For not only is it contrary to logic to deduce a particular conclusion from a general and vague premise, on the ground of their being of the same nature, but even scriptural and historical indications would fail to bear out such conclusions regarding some of these privileges.

We premise this in order to caution the reader against certain unproved assumptions.

The caption of our Title reads: "Rights and Privileges of Clerics." No precise distinction is made between rights and priviliges, and hence a margin is left for controversial speculation. The whole class of these rights

1 Cfr. *Handbuch der Klass. Altertumswissenschaften,* O. Gruppe, *Griech. Mythologie,* 1906, II, 1020 and *passim;* Wissowa, *Religion und Kultus der Römer,* 1902, pp. 63 ff.; 339 f.; 410 ff. Ramsay-Lanciani, *Manual of Roman Antiquities,* 1901, pp. 374 ff.

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is known by the general name of *immunities*.[2] Immunities comprise the *privilegia canonis et fori, beneficium competentiae,* and *immunity* in the strict sense. All these privileges belong to the clergy by virtue of their state, and remain as long as they are not forfeited by the loss of that state or by virtue of the penal law.

CAN. 118

Soli clerici possunt potestatem sive ordinis sive iurisdictionis ecclesiasticae et beneficia ac pensiones ecclesiasticas obtinere.

This is a strict *right,* not a mere privilege; a right reserved to the clergy because the divine organization of the Church enjoys the peculiarity that ecclesiastical power is granted only to those chosen by Christ. Hence whatever pertains to the hierarchical power, order, and jurisdiction can be conveyed only to such as belong to the hierarchy. Besides, since the material emoluments are granted on account of the spiritual office, which can be exercised only by hierarchical persons, ecclesiastical benefices and pensions can be obtained only by clerics. Therefore *laymen,* as such, cannot be ordained, as long as they have not received the first tonsure.[3] If the examples of St. Nicholas and Ambrosius are urged against this principle, we need not resort to Gratian's expedient,[4] but simply answer that their calling was divinely sanctioned, and rather forms an "*exceptio quae firmat regulam,*" than a breach of principle. *Laymen,* as such, cannot obtain *jurisdictional* power in matters strictly spiritual or ec-

2 Cfr. X, III, 49, *De Imm. Eccl.,* and the commentators thereon.

3 Cfr. c. 8, Dist. 61, *e contra,* c. 7, X, II, 26, *De praescript.*

4 Cfr. c. 8, Dist. 61, where he speaks of insufficient education and spiritual inferiority.

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clesiastical;[5] neither can they obtain any benefice which is of a purely ecclesiastical nature; though by special concession they may be *patrini* of benefices,[6] or have the advowson, as the English law puts it.

THE PRIVILEGIUM CANONIS

CAN. 119

Omnes fideles debent clericis, pro diversis eorum gradibus et muneribus, reverentiam, seque sacrilegii delicto commaculant, si quando clericis realem iniuriam intulerint.

The relation existing between a superior and an inferior enjoins respect for authority and obedience on the part of the subordinate. Therefore the clergy always take precedence over the laity.

The second clause of our canon contains the so-called *privilegium canonis,* which dates back to the second Lateran Council, A. D. 1139. The violent acts perpetrated by Arnold of Brescia and his followers against priests and religious led the Council to repeat and summarize previous synodal acts of Rheims and Pisa in *one canon;* hence the name. This canon, the fifteenth of the Lateran Council,[7] decreed that "whoever maliciously lays hands on any cleric or monk, thereby incurs *ipso facto* excommunication, from which, except in danger of death, no bishop shall dare to absolve him, until he presents himself before the pope to await his sentence."

Our canon speaks of a *sacrilege,* but does not mention its penalty, which belongs to the penal Code.[8] Who are

5 C. 2, X, II, 1: "*Laici ecclesiastica negotia tractare non praesumant*"; c. 8, X, I, 43, *De arbitris;* concerning matrimonial causes cfr. *Trid.*, 24, can. 24, *De Matr.*

6 Cfr. Reiffenstuel, II, I, p. 75.

7 Cfr. c. 29, C. 17, q. 4.

8 Cfr. c. 2343, which mitigated

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meant by *clerici* is evident from can. 108, § 1, *viz.:* all those who have received the first tonsure, but also all religious of both sexes, even novices, as well as tertiaries who live in common and wear the religious habit, and hermits who live in common and have received the habit from the competent authority.[9]

The *injury* which is declared to be a sacrilege, must be *real,* that is, done to the cleric himself by act or deed, not in words only; thus imprisoning[10] a cleric or throwing mud at him, would be a real injury.

The action must be *injurious,* which implies that the offended person is justly[11] indignant at the perpetrator and that the latter was aware of the sacred character of his victim. Self-defence against a cleric is no injurious action. Though there is, according to our view at least, no specific difference between a sacrilegious act committed against a higher and one committed against a lower cleric, yet on account of the public order the penalties imposed differ according to the rank of the injured party. This is clearly stated in the penal Code.

THE PRIVILEGIUM FORI

CAN. 120

§ 1. Clerici in omnibus causis sive contentiosis sive criminalibus apud iudicem ecclesiasticum conveniri debent, nisi aliter pro locis particularibus legitime provisum fuerit.

§ 2. Patres Cardinales, Legati Sedis Apostolicae, Episcopi etiam titulares, Abbates vel Praelati *nullius,* supremi religionum iuris pontificii superiores, Officiales

the penalty for injury done to the lower clergy (not prelates) by reserving it to the Ordinary.

9 Cfr. D'Annibale, *Comment. in Ap. Sedis,* 1894, p. 73.

10 Cfr. c. 1, 3, 4, 10, 24, 54, X, V, 39.

11 If a clergyman has provoked

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maiores Romanae Curiae, ob negotia ad ipsorum munus pertinentia, apud iudicem laicum conveniri nequeunt sine venia Sedis Apostolicae; ceteri privilegio fori gaudentes, sine venia Ordinarii loci in quo causa peragitur; quam tamen licentiam Ordinarius, praesertim cum actor est laicus, ne deneget sine iusta et gravi causa, tum maxime cum controversiae inter partes componendae frustra operam dederit.

§ 3. Si nihilominus ab eo qui nullam praehabuerit veniam, conveniantur, possunt, ratione necessitatis, ad vitanda maiora mala comparere, certiore tamen facto Superiore a quo venia obtenta non fuit.

This canon contains, as it were, the ancient and modern history of the *privilegium fori* in a nutshell. The privilege, then, signifies that clerics in civil as well as criminal causes should be judged by an ecclesiastical, and not by a lay tribunal. It has been frequently asserted [12] that this privilege is of divine or natural law, and arguments from the Old Testament as well as from pagan customs have been brought forth in proof. However, a little historical reflection is sufficient to disprove these pretensions. For neither theory nor practice has always been uniform. Rather extensive prerogatives were granted to *bishops*. Constantine permitted them to have some influence in deciding between dissentient secular judges.[13] Valentinian III granted the right of deciding civil cases of the clergy who sought the episcopal tribunal; but criminal cases of clerics had to be brought before the lay judge.[14] Justinian excluded from the competency

such treatment by an insult offered to the perpetrator's wife, mother, daughter or sister, he cannot be said to be *justly* indignant.

12 Cfr. the Commentators on X, II, 1, and X, III, 49.

13 Cf. Euseb., *Vita Const.*, IV, 27; *Cod. Theod.*, VI, 281.

14 Nov. 34, Am. 452; Gothofred,

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of lay judges all causes of monks and nuns; and concerning the civil causes of clerics he ordained that they might be brought before the bishops, and only in case these should fail to reach a sentence should the lay judges be called upon to decide. In criminal cases the accused cleric was first to be cited before the episcopal court and then punished by the civil court.[15] With little differences the same practice was followed in the West, though here the influence of Pseudo-Isidore cannot be denied, as a glance into Gratian's Decree shows.[16] Since the ninth century the prelates and inferior clerics claimed immunity from lay courts. After the Reformation, and even more so after the French Revolution, under the influence of Rationalism, the *privilegium fori* was curtailed, in some instances (Austria, Bavaria, Sicily) with the consent of the Holy See by way of concordats.[17]

The latest occasion where the *privilegium fori* was publicly and emphatically reasserted was in the Verdesi-Briccardelli case, in which certain Cardinals were cited to appear in court, and were excused only on the ground that exemption was attached to the royal order of the Annunziata, to which they happened to belong. This incident called forth the famous Motu proprio of Pius X, "*Quantavis diligentia*" of Oct. 9, 1911, which caused unnecessary disturbance in more than one parliament.[18]

After this historical preliminary let us see what the Code states. It first vindicates (§ 1) the *privileged court for the whole clergy* as far as the term clergy extends, *i. e.*, all those who enjoy the *privilegium canonis*. But it also

VI, 417; Baronius, *Annal. Eccl. ad Annum 452.*

15 *Nov.*, 83, § 1; 123, c. 27.

16 Cfr. cc. 1, 3, 9, 10, C, 11, q. 1 (all Pseudo-Isidorian sources); see Bachofen, *Summa Juris Eccl. Pub.*, p. 78 ff.

17 Austrian Concordat, art. 13; Aichner, Appendix, p. 6; Nussi, *Conventions*, 1809, p. 193.

18 Cfr. *A. Ap.*

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makes an exemption, *viz.*, for those countries or places for which special provision has been made. Such provision is made by concordats and in other ways. § 2 distinguishes between the higher and the lower clergy. The higher clergy are the cardinals, legates of the Apostolic See, bishops, *praelati nullius,* the superiors general of papal orders, and the higher officials of the Roman Curia. Who these officials are is not apparent either from this canon or the organization of the Roman Court, but the Prefect, the Secretary and the Subsecretary are doubtless included. The term *legates* most probably includes Apostolic delegates.[19]

After the enumeration of the higher officials of the Roman Court follows a comma, and then, "on account of affairs pertaining to their office." The question may arise whether this addition refers to all the persons (cardinals, legates, bishops, prelates *nullius,* superiors general, higher officials of the Roman Court) or to the last-named only. In the latter case the higher officials of the Roman Curia might be cited before a civil court for matters not pertaining to their office, whilst the other persons named could not be summoned at all. Can. 2341 refers the clause, "on account of affairs, etc.," without a comma, only to the higher officials of the Roman Court, and we believe there was a special reason to mention these matters in connection with the Roman officials, on account not only of the importance of the matter, but also because they belong to the papal authority, and, we might say, household. On the other hand, the *privilegium fori* must be vindicated to these officials to the full extent, according to § 1.

19 Cfr. can. 267. § 2.— The *maiores religionum iuris pontificii superiores* are Abbot Primate, abbots president, abbots, generals, and provincials of communities or congregations approved by the Holy See. Cfr. c. 488.

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The next clause of § 2 treats of clerics of inferior rank, such as vicars-general, honorary prelates, pastors and their assistants, and religious. All these must first obtain permission of the Ordinary before they may licitly appear before a civil court. Here no mention is made of matter pertaining to their office. Note that religious, though exempt, must have leave from the Ordinary of the diocese, not only the permission of their own superior, who cannot, however, withhold it if the Ordinary has given his. Ordinaries are in the last clause of the same § 2 exhorted to be liberal unless they have special and weighty reasons for refusing permission.

§ 3 of canon 120 provides for cases where clerics are summoned without the necessary permission, and establishes that only in cases of necessity and when greater evils might follow if the clergy would not appear, the higher as well as inferior clergy are allowed to obey the summons of a civil court. However, from can. 2341 it is evident that the penalty of excommunication reserved to the Holy See *modo speciali* would be incurred if a cardinal, an Apostolic legate, a higher official of the Roman Court, or the Ordinary of the diocese would be summoned by civil authorities without the necessary permission. The same penalty would be incurred if another than the diocesan bishop, though but titular, or a prelate *nullius*, or a religious superior general of a papal institute would be summoned. If any of the lower ranks of the clergy would be called to court, the penalty for a cleric would be suspension, and for a layman some penalty to be determined by the Ordinary.

Now two questions of importance must be answered:

(a) Do the *privilegium fori* and its concomitant penalty also apply in the case where one is called as a *witness* only? The text *ibique adesse* as well as the interpreta-

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tion given by Cardinal Gennari answer affirmatively.[20] We also know that this was the stand taken by the Roman Curia in the Verdesi case.

(b) May a *custom be admitted against the privilegium fori?* This may also be affirmed, as appears from the answer of Cardinal Merry del Val to the ambassador of Prussia, Mühlberg, officially [21] printed in the *Osservatore Romano* of Dec. 16, 1911. Whether this custom may be upheld in the U. S. is difficult to say in view of the enactments of the Second Pl. Council of Baltimore, n. 156, and the Third, n. 84. The clause inserted by the latter: "as far as it may be defended among us," seems to admit the contrary custom. Besides, there is no doubt that English customs prevail in our country, and these would point to the existence of a contrary custom.[22] Lastly, our canon does not reprobate such a custom.

PERSONAL IMMUNITY

CAN. 121

Clerici omnes a servitio militari, a muneribus et publicis civilibus officiis a statu clericali alienis immunes sunt.

This canon comprises the whole range of personal immunity which the clergy have *de iure et facto* enjoyed for centuries. On just what ground, or law, or custom this freedom is based, the Code does not decide. Neither has any dogmatical definition ever been given in this regard. For the text in the Decretals [23] that churches and

20 Cfr. *Monitore Eccles.*, 1912, p. 507.

21 The *Osservatore* is not the official organ of the Vatican, but in this case the latter employed it to give an official answer. Cfr. *Archiv f. K.-R.*, 1915, 297 f.; *Monitore Eccles.*, 1911, p. 507.

22 Cfr. *Am. Eccl. Rev.*, Vol. 47, 312 ff.

23 c. 4, 6°, III, 20, *De Immunitate.*

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ecclesiastical persons and things enjoy immunity by divine right, is merely an assumption not contained in the dispositive part of the law. The Council of Trent [24] appeals to the rulers to respect the privilege, but advances no definition. The Syllabus condemns the propositions that clerical immunity originated in a grant of the civil government, and that it could and should be abolished.[25] Hence no authentic or *de fide* definition has been issued by the Apostolic See concerning the immunity of the clergy. What we said concerning divine law in reference to the *privilegium fori* applies here also.

The clergy are free from *military service*. That priests at least should be exempt from carrying and using arms seems very becoming and just. For their state demands charity, meekness, and forbearance, which shrink from bloodshed. Besides their high calling requires that they hold themselves aloof from the strife and turmoil of warfare. In times of war especially are they the messengers of spiritual and even corporal mercy. The sacerdotal character resembles that of the Prince of peace, whose hands were not stained with blood, whose lips spoke nought but love, even for His enemies, whose heart embraced all. We will not speak of the dangers accruing to the priestly life from the atmosphere of garrisons and trenches. If any one should trump up democracy — a term much abused but seldom rightly understood — as demanding equality of all citizens, we answer that the Athenians and the Romans were as good democrats as we moderns, and yet accorded a privileged place to their priests. True democracy does not exclude respect for the things that pertain to God, who, being the author of nature, is also the author of the *democratic*

24 Sess. 25, c. 20, *De Ref.*

25 Syllabus, n. 30, n. 32; Heiner, *Der Syllabus*, 1905, p. 167.

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form of government as well as of the monarchical. We have dwelt upon this point because it seemed necessary in view of present tendencies. For the day will come — and we hail it — that *compulsory military service* will be introduced into our republic. Why not take our little sister republic of Switzerland for a model? There, no one physically fit is exempt from military service. After having passed the medical examination and being found capable, the young man, at the age of twenty, must serve for ten weeks as a recruit of infantry, or for twelve weeks in some of the other units. After that, two or three weeks every year, when the manœuvres take place, must be spent in the military service, only those of the clergy being exempt who have received at least *subdeaconship* or definitively entered the religious state. Those who are exempt from service must pay the military tax. Of course military chaplains with the rank of captain are also drafted. We cannot see any damage either to the clerical state or to the country in such conditions. The little Swiss Republic, surrounded as it is by four great powers, has proved itself a noble country, ready and able to fight for liberty and democracy without deeming it necessary to disturb the ministers of religion in the possession of their time-honored immunity.[26]

Obligations or *munera* (*sordida*) are such kinds of labor as are commonly called base because performed only by physical labor, and were always looked upon as unbecoming to cultured persons; or, as Blackstone says,[27] such as are fit only for peasants or persons of servile rank. These were called services of villeinsocage. Hither belonged the *pedagium* (*angaria*), or

[26] Concerning the custom of the Middle Ages in England, see *Translations and Reprints*, published by the University of Penn., Vol. IV, n. 3, p. 28 ff.

[27] Commentary, II, 60 f.

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road-repairing, the *podagium,* or upkeep of bridges, the *ius metatus,* or quartering of soldiers, etc. Such services were not demanded from the clergy.[28] But now that they are commuted into poll-taxes, it would be difficult to exempt the clergy from paying these taxes. Other taxes, on personal property especially, the clergy have to pay like the rest.

Public offices of a civil character are, *e. g.,* the postmastership, the mayoralty, the offices of bailiff, constable, alderman, trustee, guardian, etc. The last-named two offices a cleric may assume for relations, orphans, and the poor.[29]

BENEFICIUM COMPETENTIAE

CAN. 122

Clericis qui creditoribus satisfacere coguntur, salva sint quae ad honestam sui sustentationem, prudenti ecclesiastici iudicis arbitrio, sunt necessaria, firma tamen eorundem obligatione creditoribus quamprimum satisfaciendi.

This is what is known as the *privilege* or *benefit of the clergy* in case of insolvency. Its origin is not only obscure, but also mystic, on account of the popular comparison of the clerical state with the military profession (*militia coelestis — militia terrena*). With this comparison in mind the commentators on the famous chapter "Odoardus" (c. 3, X, III, 23) applied to the clergy the

28 Cfr. c. 4, X, III, 49, *De Imm.* It is to be noted, however, that c. 7 enjoins the clergy to assist the commonwealth if the layman's help alone does not suffice. The "Great Charter" of England (1215), n. 22, reads: "A clergyman shall be fined only in proportion to his lay holdings, and not according to the extent of his ecclesiastical benefice." *v. Translations and Reprints,* Vol. I, n. 6, p. 10.

29 Cfr. cc. 1, 3, X, I, 37; c. 2, X, III, 50; Aichner, *l. c.,* § 73, 1; for England see Blackstone-Cooley, I, 376.

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privileges of the imperial soldiers whose salary could not be entirely garnisheed by creditors.[80] The chapter alleged really mentions only the dictum of Pope Gregory IX, that a clergyman declaring himself insolvent should not, on that account, be excommunicated, but should give security that in case of his obtaining a better income, he would pay his debts. This is the sole basis for the simile of the "spiritual warfare or *militia Christi.*" Nevertheless the canonists [81] clung to the interpretation and now it has been perpetuated in the new Code. Now-a-days this matter is settled by civil laws, which are no longer as rigid as were those of the Middle Ages. The meaning of the canon therefore is that a sufficient support should be left to an indebted clergyman and, especially, that his freedom should not be curtailed. But the obligation of paying his debts — the *security* of the Decretals — certainly remains.

LOSS OF THE CLERICAL PRIVILEGES

CAN. 123

Memoratis privilegiis clericus renuntiare nequit; sed eadem amittit, si ad statum laicalem reducatur aut privatione perpetua iuris deferendi habitum ecclesiasticum plectatur, ad normam can. 213, § 1, 2304; recuperat vero, si haec poena remittatur aut ipse rursus inter clericos admittatur.

The privileges enumerated, though cleaving to the

80 Cfr. l. 33, *Cod. Just.*, I, 3; *Nov.*, 123, c. 10; l. 173, *Dig.*, 50, 17; Zipperling, *Das Wesen des beneficium competentiae*, 1907, p. 94 ff.

81 Cfr. Engel, III, 23, n. 1; Fagnani, *ad c. cit.*, where he mentions the penalty imposed on a deeply indebted clergyman who was set upon a donkey and had to wear a green biretta.

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clergyman, and in so far personal, belong to the clerical state, *i. e.*, to the clergy as a class, not to the individual in the first place, and therefore they cannot be waived by private agreement, even though this be confirmed by an oath.[32] They are lost, however, by *degradation,* whereby a cleric is reduced to the lay state.[33] The right of wearing the clerical garb is forfeited by *deposition,* followed by stubborn refusal to do penance,[34] and, furthermore, by reduction to the lay state (can. 211 ff.).

Clerics in minor orders lose their privileges *ipso iure* according to can. 132, § 2, can. 136, § 3, can. 141, § 2, because by acts done against these canons they *reduce themselves* to the lay state.

32 Cfr. c. 12, X, II, 2.
33 Can. 2305; cfr. c. 14, X, V, 39, *De sent. excom.*
34 Can. 2304.

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TITLE III

OBLIGATIONS OF CLERICS

RELIGIOUS DUTIES

CAN. 124

Clerici debent sanctiorem prae laicis vitam interiorem et exteriorem ducere eisque virtute et recte factis in exemplum excellere.

CAN. 125

Curent locorum Ordinarii:

1.° Ut clerici omnes poenitentiae sacramento frequenter conscientiae maculas eluant;

2.° Ut iidem quotidie orationi mentali per aliquod tempus incumbant, sanctissimum Sacramentum visitent, Deiparam Virginem mariano rosario colant, conscientiam suam discutiant.

CAN. 126

Omnes sacerdotes saeculares debent tertio saltem quoque anno spiritualibus exercitiis, per tempus a proprio Ordinario determinandum, in pia aliqua religiosave domo ab eodem designata vacare; neque ab eis quisquam eximatur, nisi in casu particulari, iusta de causa ac de expressa eiusdem Ordinarii licentia.

These three canons refer to the religious life of the clergy, who in virtue of their divine calling and the sacred ministry which they exercise, are obliged to gov-

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ern their conduct in accordance with these laws. The retreat master as well as the spiritual director will find ample material in the ancient sources of Canon Law [1] for fit subjects to speak on. This is not the place to enlarge upon that subject. We would merely draw attention to the fact that a retreat should not form the occasion for belittling the science and application of Canon Law or for concentrating the entire attention on the authority of the bishop. *Suum cuique!*

CLERICAL OBEDIENCE

CAN. 127

Omnes clerici, praesertim vero presbyteri, speciali obligatione tenentur suo quisque Ordinario reverentiam et obedientiam exhibendi.

CAN. 128

Quoties et quamdiu id, iudicio proprii Ordinarii, exigat Ecclesiae necessitas, ac nisi legitimum impedimentum excuset, suscipiendum est clericis ac fideliter implendum munus quod ipsis fuerit ab Episcopo commissum.

The Code mentions first the special obligation of paying *reverence* as well as obedience to the Ordinary. Reverence is due to a superior from his inferiors,[2] and consists in external marks of respect, *e. g.*, rising in his

1 Cfr. *Dist.*, 23–50; c. 5, C. 6, q. 1; X, III, 1; 6°, III, 1; *Clem.*, III, 1; *Trid.*, Sess. 22, c. 1; Sess. 23, c. 11, 13; Sess. 25, c. 1, *De Ref.*; Gasparri, *Codex Juris Can.*, p. 29, enumerates 28 Apostolic Constitutions and Letters to that effect.

2 Cf. c. 3, 6, Dist. 23; c. 24, C. 7, q. 1; c. 18, C. 11, q. 11; c. 10, C. 18, q. 2; cc. 2, 7, 9, X, I, 33. See Bened. XIV, "*Etsi minime,*" Feb. 7, 1742, § 6 (*Bull.*, Prati, Vol. I, p. 137 f.), especially concerning the duty of priests to teach the catechism.

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presence and giving him the first place.[3] Other signs, *e. g.,* kissing the Bishop's ring or hand, are more or less conventional, and depend upon local custom. Reverence, therefore, is outwardly manifested by giving precedence to the superior and showing him such signs of respect as are customary.

The *obedience* here inculcated is called *canonical,* because based upon the rules laid down by the Church. At his ordination a cleric simply promises to obey the Ordinary and his successors. The object and extent of this obedience is determined, on the one hand, by the clerical state and office, and, on the other, by the extent of the episcopal jurisdiction. The bishop is entitled to enjoin or enforce the common law which governs the clerical state and office in general. The obedience of the clergy, therefore, extends to whatever concerns their state as such, and in this matter no exemption can be claimed. The *office* of a cleric is partly general and partly particular. It is general in so far as it is given by virtue of the different orders — subdeaconship, deaconship, priesthood.[4] Therefore, whatever belongs to his respective office, a cleric is not at liberty to refuse to perform.

But there is another office attached to the clerical state (can. 145), which involves *the exercise of ecclesiastical power in a certain station or measure.* The latter is mentioned in can. 129. Canonical obedience obliges a cleric to take upon himself an office duly assigned by his Ordinary, and to discharge that office *faithfully,* be it that of parish priest, assistant, chaplain, teacher, etc. He is

[3] Cfr. Smith, *Elements,* I, p. 217.

[4] However, this binds only in general, not for a particular church. Thus, *e. g.,* a parish priest, who is not canon of a cathedral, cannot be compelled to act as deacon or subdeacon in the cathedral church. S. C. C. Nov. 26, 1701; Aug. 19, 1702, "*Auximana*" (Richter, *Trid.,* 208, n. 8). Lehmkuhl in the *Linzer Quartalschrift,* 1900 (Vol. 53), p. 86 f.

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bound to do this by virtue of his ordination for and incardination in the diocese, and because the clerical state is one of labor, not leisure. Though the promise of obedience is not an oath which would constitute clerics vassals of the bishop, it partakes of the nature of religion, which links the clergyman to the legitimate power of the diocese.

From this obligation a cleric is free in two cases only: (1) if the Church does not need him, or (2) if he has a legitimate excuse.

(1) In our country, and after the great war in most other countries, there is not likely to be an oversupply of priests.

If the bishop insists upon a priest serving in his diocese, he must provide that priest with an adequate living.[5] A clergyman not provided with any ecclesiastical benefice or office in the diocese cannot be compelled to take part in processions, unless there is a legitimate custom to the contrary.[6]

(2) A *legitimate excuse* exempting a cleric from accepting an office would be a physical impediment, for instance, poor health; or a bodily defect which might prove a serious obstacle to his exercise of the office; or a moral obstacle, such as scrupulosity; or enmity on the part of the people; or lack of practical knowledge or prudence.[7] Where no such excuse exists, a cleric is bound to obey his bishop when the latter assigns him to a charge. He must also heed the bishop's *injunctions* and *precepts*, even in matters which are only indirectly connected with the clerical state and office. In the Constitution of Leo

5 S. C. C. Jan. 26, 1833, "*Reatina*" (Richter, *Trid.*, p. 208, n. 6).

6 Richter, *ib.*, n. 9; Bened. XIV, *Inst.*, 31, n. 1 f.

7 Cfr. S. C. Cons., "*Maxima curæ*," Aug. 20, 1910.

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XIII, "*Officiorum ac munerum,*" 1897, the clergy are admonished to submit to the Ordinary any books they may write, even on subjects of natural science and art, "in order to show an example of prompt obedience," and are forbidden to assume the editorship of newspapers and magazines without the Ordinary's permission.[8] The bishop, therefore, is entitled to demand from his clergy obedience in all licit things that pertain to his episcopal jurisdiction, in so far as required by the clerical state and office.

SCIENTIFIC EQUIPMENT OF THE CLERGY

CAN. 129

Clerici studia, praesertim sacra, recepto sacerdotio, ne intermittant; et in sacris disciplinis solidam illam doctrinam a maioribus traditam et communiter ab Ecclesia receptam sectentur, devitantes profanas vocum novitates et falsi nominis scientiam.

CAN. 130

§ 1. Expleto studiorum curriculo, sacerdotes omnes, etsi beneficium paroeciale aut canonicale consecuti, nisi ab Ordinario loci ob iustam causam fuerint exempti, examen singulis annis saltem per integrum triennium in diversis sacrarum scientiarum disciplinis, antea opportune designatis, subeant secundum modum ab eodem Ordinario determinandum.

§ 2. In collatione officiorum et beneficiorum ecclesiasticorum ratio habeatur eorum qui, ceteris paribus, in memoratis periculis magis praestiterunt.

CAN. 131

§ 1. In civitate episcopali et in singulis vicariatibus

[8] *Const. cit.*, n. 22.

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foraneis saepius in anno, diebus arbitrio Ordinarii loci praestituendis, conventus habeantur, quos *collationes* seu *conferentias* vocant, de re morali et liturgica; quibus addi possunt aliae exercitationes, quas Ordinarius opportunas iudicaverit ad scientiam et pietatem clericorum promovendam.

§ 2. Si conventus haberi difficile sit, resolutae quaestiones scriptae mittantur, secundum normas ab Ordinario statuendas.

§ 3. Conventui interesse, aut, deficiente conventu, scriptam casuum solutionem mittere debent, nisi a loci Ordinario exemptionem antea expresse obtinuerint, tum omnes sacerdotes saeculares, tum religiosi licet exempti curam animarum habentes et etiam, si collatio in eorum domibus non habeatur, alii religiosi qui facultatem audiendi confessiones ab Ordinario obtinuerunt.

The Code, in insisting on knowledge or *science* in clerics, simply follows tradition and repeats old canons.[9] St. Paul's[10] warning to Timothy is as timely now as it was then, because faith is not *gnosis,* and the Church is the keeper of the *depositum fidei.* That stress is laid upon the *sacred* disciplines or studies, is as natural as to require of a physician that he study medicine and its allied sciences.

The *examination* prescribed in Can. 130 may be arranged in such a way that dogmatic and moral theology, canon law and Holy Scripture, liturgy and history may all be surveyed during the three years' course. That a thorough repetition of these sciences is difficult for many

9 Cfr. c. 1, Dist. 38; c. 2, Dist. 49; c. 2, Dist. 36; c. 15, X, III, 1; Pius II, Const. of April 4, 1460; Leo XIII, "*Plane quidem,*" May 20, 1885 (Desclée, 1887, II, 136 ff.).

10 I Tim. 6, 20.

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priests employed in parish work or teaching is evident, and hence exemptions are provided for according to the prudent judgment of the bishop.

Clerical *conferences* are to be held (the *number* is stated only approximately) *saepius in anno, i. e.,* about two or three times a year.[11] The *matter* for these conferences is to be taken chiefly, though not exclusively, from moral theology and liturgy. These two branches are of special importance, in as far as uniformity in the confessional and in the administration of the sacraments fosters unity of morals and discipline and palpably demonstrates that unity to the people. If conferences cannot be held for any solid, not imaginary, reason, the Code assigns a substitute, namely, the *written solution of questions proposed.* The matter for these questions is to be taken from the same branches and they are to be answered as often as conferences would be held. The solutions are to be sent to the Ordinary or his chancellor, and to be examined by the bishop himself or a delegate, perhaps one of the usual examiners, or any competent judge. After the examination the correct answers should be sent to the priests, while the original copy of the answers submitted may be kept in the archives.

The last paragraph mentions *those who are obliged to attend the conferences* or to send in solutions. Leo XIII, in his Constitution "*Romanos Pontifices,*" May 8, 1881, had laid down the general law concerning regulars actually employed in the care of souls, whilst the S. C. EE. et RR. had repeatedly enjoined all regulars who had received the faculty of hearing confessions to hold theological conferences in their own houses.[12] Hence the Code establishes nothing new, except in prescribing writ-

11 Barbosa, *Tractatus Varii,* Dist. 362, *l. c.,* p. 786.

12 Cf. Bachofen, *Compendium Juris Regularium,* 1903, p. 262.

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ten solutions. However, these must be sent in by regulars only in case no conferences are held in their monasteries. All religious, whether exempt or not, if they are actually in charge of souls, even though they be prelates, are obliged to attend these conferences, unless regular conferences are held in their convents. Hence religious who are pastors must attend in any case, other religious only in case no pastoral conferences are held in their respective communities. All this goes to show how important these conferences are considered by the legislator, and that they should not be set aside by bishops or religious.

Of course, in order to obtain the expected results, the conferences should be conducted on the basis of authority and in a manner which interests those who are bound to take part in them.

CELIBACY OF THE CLERGY

CAN. 132

§ 1. Clerici in maioribus ordinibus constituti a nuptiis arcentur et servandae castitatis obligatione ista tenentur, ut contra eandem peccantes sacrilegii quoque rei sint, salvo praescripto can. 214, § 1.

§ 2. Clerici minores possunt quidem nuptias inire, sed, nisi matrimonium fuerit nullum vi aut metu eisdem incusso, ipso iure e statu clericali decidunt.

§ 3. Coniugatus qui sine dispensatione apostolica ordines maiores, licet bona fide, suscepit, ab eorundem ordinum exercitio prohibetur.

CAN. 133

§ 1. Caveant clerici ne mulieres, de quibus suspicio

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esse possit, apud se retineant, aut quoquo modo frequentent.

§ 2. Eisdem licet cum illis tantum mulieribus cohabitare in quibus naturale foedus nihil mali permittit suspicari, quales sunt mater, soror, amita et huiusmodi, aut a quibus spectata morum honestas, cum provectiore aetate coniuncta, omnem suspicionem amoveat.

§ 3. Iudicium an retinere vel frequentare mulieres, etiam illas in quas communiter suspicio non cadit, in peculiari aliquo casu scandalo esse possit aut incontinentiae afferre periculum, ad Ordinarium loci pertinet, cuius est clericos ab hac retentione vel frequentatione prohibere.

§ 4. Contumaces praesumuntur concubinarii.

Can. 134

Consuetudo vitae communis inter clericos laudanda et suadenda est, eaque, ubi viget, quantum fieri potest, servanda.

The last canon, though apparently but loosely connected with the subject of celibacy, has much to do with it, according to the saying of the Preacher: "Woe to him that is alone" (Ecc. 4, 10); and there is a reason why the Code has added it to the canons enforcing the law of celibacy. The Church certainly had strong reasons for establishing the law of continency for the clergy and of *celibacy* for those in major orders. The sublimity of the sacred ministry and its constant, almost unrelenting occupations, which admit of no family cares and troubles, originally inspired her to enact this law, which was, besides, a strong safeguard against the danger of hereditary succession to office and set up a splendid example for the laity.

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The *Occidental Church* has set a more emphatic example in this matter than the Oriental Church. Already in the fourth century, Pope Siricius (384–398) obliged priests and levites to sobriety and chastity,[13] and Leo I (440–461) extended the prohibition of marriage to the subdeacons.[14] At the time of the struggle between Church and State celibacy was attacked, but successfully defended by the popes. The Second Lateran Council established the nullity of matrimony for the higher clergy, and the Council of Trent confirmed its canons.[15]

The *Oriental Church* was neither uniform nor consistent in the application of celibacy. Whilst its ancient custom tallied with that of the Western Church, the enactments of the Trullan Synod (692) admitted a laxer practice, which finally prevailed.[16] Even to-day the subdeacons of the Oriental rites are allowed to marry before they receive that order and to cohabit with their wives. However, if we may believe a modern exponent of the Oriental law, a marriage contracted by a cleric after receiving subdeaconship would be invalid,[17] though as far as we are aware, the Catholic Church has never pronounced a sentence on these marriages.[18] However, priests of the Oriental rites who wish to be employed as such in the U. S. must conform to the Latin custom.[19]

(1) In the Occidental Church, therefore, *every attempted marriage* by a cleric who has validly received subdeaconship or any higher order, unless he be constrained by violence or fear, is *null and void,* not by rea-

13 Cfr. *Ep. ad Himerium,* n. 10 (Coustant, *l.* c., p. 630).

14 Cfr. c. 1, Dist. 32.

15 Cfr. c. 40, C. 27, q. 1; c. 13, X, III, 1; c. 4, X, III, 3; c. 7, X, I, 21; c. un. 6°, III, 15; *Conc. Trid.,* Sess. 24, c. 9, *De Ref.*

16 Cfr. Milasch-Pessič. *Kirchenrecht der Abendländ. Kirche,* 1905, p. 267, p. 598.

17 Milasch-Pessič, *l. c.*

18 Cf. Bened. XIV, "*Etsi pastoralis,*" May 26, 1742; "*Eo quamvis,*" May 4, 1745 (*Bull.,* Mechl., t. I, 361 ff; III, 145 ff.).

19 *S. C. P. F.* May 10, 1892; May

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son of a supposed vow, but in virtue of positive ecclesiastical law.[20] In virtue of the obligation of perfect *chastity,* every morally imputable act, whether internal or external, directed against that obligation, involves a profanation of a sacred person and is, therefore, sacrilegious.

(2) Every *valid marriage* contracted by one in *minor orders* reduces the latter *ipso iure* to the lay state, thereby depriving him of all clerical rights and privileges and absolving him from clerical duties.[21] The Code says, "unless the marriage is null and void by reason of violence or fear." This, however, must not be presumed, but proved. Hence, though one affected by that impediment may be thoroughly persuaded of the invalidity of a marriage thus contracted, he could not continue to conduct himself as a cleric, but would have to await the final sentence of the ecclesiastical court.

(3) A *married man,* in order to receive *higher orders* licitly, now needs an *Apostolic dispensation.* If no dispensation was obtained, such a one, if ordained, is *ipso iure* debarred from the exercise of the order received. Here the Code is somewhat stricter than the old law, which permitted a married man to receive higher orders if his wife consented and the bishop sanctioned the vow of chastity to be pronounced by the wife.[22] Although the married state is not, properly speaking, an irregularity, it is an impediment to holy orders,[23] dispensation from which is reserved to the Apostolic See, and therefore the

1, 1897 (*Am. Eccl. Rev.,* 7, 66; 18, 67).

20 *S. Th.,* II–II, q. 88, a. 11; Heiner, *K.-R.,* I, 233; cfr. can. 214, § 1.

21 Cc. 1–3, X, III, 3.

22 Cf. c. 5, X, III, 32; c. 6, h. t. III, 32 required profession in a religious order if the husband was made a bishop; this requisite was extended to all wives whose age might cause misgiving, and only after the age of fifty the suspicion seemed removed.

23 Can. 987, 2°.

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married and ordained man remains suspended until the Holy See has provided; otherwise he would become irregular *ex capite delicti.*[24]

The next canon logically determines the *cohabitation* of *clergymen* with *women.* St. Paul mentions the fact that the Apostles kept a woman, a "sister," about them.[25] These women were probably virgins who led a life of celibacy and administered unto the temporal needs of the clergy. They were called "*virgines subintroductae*" and are mentioned in the epistle of the bishops against Paul of Samosata as women of suspicious character. Therefore it is not surprising that the Council of Nicaea (325) thought it necessary to regulate the relation of clerics to their female relatives. Besides those mentioned in § 2: mother, sister, aunt [26] (on either side), the Nicene canon also admits other women of good character. This was extended to the second degree of consanguinity and affinity, not by any written law, but by the canonists and doctors.[27] Our Code admits any woman whose moral character and age ward off suspicion. Concerning *age* the law does not determine a limit. For what is generally known as the "*canonical age,*" no canon can be quoted. However, since twenty-four is called *aetas superadulta,* this might be taken as indicating the canonical age. Concerning female relatives no age is stated.

The next paragraph reserves the judgment concerning permission to retain or visit women entirely to the bishop, who, although he cannot forbid clergymen to have women housekeepers,[28] has a right to know who these

24 Can. 985, 7°.

25 Cf. I Cor. 9, 5; X, III, 2, *De cohab. cleric. et mul.*

26 Euseb., *Hist. Eccl.,* VII, 30; c. 3, c. 16, Dist. 32.

27 Bened. XIV, *Inst.,* 83, n. 6 f.

28 Cf. v. Scherer I, 372; Wernz, II, p. 298 (1. ed.); the Code allows priests to have a female housekeeper, but does not determine the canonical age.

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women are and what is their reputation. Clerics must obey the Ordinary if he should forbid them to keep or visit a certain person. One who stubbornly refuses to obey his bishop is *presumed* to be a concubinarian. Strictly speaking, one is *contumax* only if he refuses to appear before the judge who summons him. Therefore one must be properly summoned and have received the summons before he can be declared contumacious. And even if he should be declared *contumax*, the presumption is a simple one, not *iuris et de iure*.[29] But this belongs to legal procedure.

The last of the three canons recommends community life to priests, doubtless as a preservative of clerical continency. What has been said concerning the chapter on canons may suffice to prove the intention of the Church. Be it also mentioned that pastors and assistants should live in the same house.[30]

DIVINE OFFICE (BREVIARY)

CAN. 13

Clerici, in maioribus ordinibus constituti, exceptis iis de quibus in can. 213, 214, tenentur obligatione quotidie horas canonicas integre recitandi secundum proprios et probatos liturgicos libros.

The clergy are the mediators between God and men, and the office of mediator involves the duty of praying according to the example of the Apostles.[31] Prayers in common were cultivated especially by the monastic institutes, but also in churches by the clergy assigned to them. Justinian expressly inculcated that duty in his Code.[32]

29 Cf. cc. 1842 ff; 1825 ff; 2176 ff.
30 Cf. c. 476, § 5.
31 Cf. Acts 2, 15; 3, 1; 10, 9.
32 L. 42, § 10, Cod. I, 3.

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The chapters of canons established in the eighth century practised public prayers, mostly according to the Rule of St. Benedict, in their churches. The Decretals urge the same duty upon the priests of cathedral, collegiate, and regular churches.[33] These texts prove the obligation of *choir service*, but are silent about the recital of prayers. The Council of Basle (1431–49) enacted that duty, but it did not establish a universal law.[34] Benedict XIV deduces the obligation of the *private recitation* of the divine office, incumbent upon all clergymen in higher orders, from "ancient tradition and immemorial custom," rather than from any written text, and adds that the Oriental Church has no law to that effect.[35]

The name *Breviary* occurs since the time of Gregory VII (1073–1085). The *Roman* Breviary contains the rules according to which it must be recited. It must be used by all clerics except those who have a special privilege for using a different book or a practice of at least 200 years previous to Pius V's Constitution "*Quod a nobis*" (July 9, 1568). Pius X by his Const. "*Divino afflatu*" (Nov. 1, 1911) rearranged the Psalter according to the early and traditional idea of its weekly recitation.

The obligation of reciting the Breviary privately has now become a universal written law, binding every cleric from subdeacons onward, except those who have been reduced to the lay state or are freed on account of having been ordained by force. A *dispensation* may be granted by the Holy See, and for a time and in particular cases also by the Ordinary.

33 Cf. cc. 1, 9, X, III, 41; c. 1, Clem. III, 14.

34 Sess. 21, c. 5; cfr. v. Scherer I, 386; Wernz, II, 273 (1. ed.); *Cath. Encycl.*, s. v. "Breviary"; Bäumer, *Geschichte des Breviers*, 1895.

35 "*Eo quamvis*," May 4, 1745, (*Bull.*, Mechl., 1826, III, 147, §43).

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CLERICAL DRESS

CAN. 136

§ 1. Omnes clerici decentem habitum ecclesiasticum, secundum legitimas locorum consuetudines et Ordinarii loci praescripta, deferant, tonsuram seu coronam clericalem, nisi recepti populorum mores aliter ferant, gestent, et capillorum simplicem cultum adhibeant.

§ 2. Annulo ne utantur, nisi id ipsis a iure aut apostolico privilegio sit concessum.

§ 3. Clerici minores qui propria auctoritate sine legitima causa habitum ecclesiasticum et tonsuram dimiserint, nec, ab Ordinario moniti, sese intra mensem emendaverint, ipso iure e statu clericali decidunt.

A *distinct clerical garb*, used by the clergy outside of the sanctuary, was introduced about the sixth century. It originally consisted of the old Roman dress: a tunic and a long white undergarment with or without sleeves. In course of time many councils and synods passed enactments on the subject, the last being the Tridentine Council, which decreed that the clergy should wear a dress proper to their state, in order to show by the decency of their outward habit the probity of their interior conduct.[86] Sixtus V styled that dress *vestis talaris* or cassock.[87] The Third Plenary Council of Baltimore enacted into positive law what may be called the legitimate custom of this country, the wearing in public or on the street of a coat of black or sombre color, reaching to the knees, with a Roman collar. Religious, too, are expected to conform to this custom.[88] The *tonsure* is not prescribed

86 Cfr. c. 15, X, III, 1; c. 2, *Clem.* III, 1; *Conc. Trid.*, Sess. 14, c. 6, *De Ref.*

87 "*Cum sacrosanctam*," Jan. 9, 1589, § 2; cfr. Bened. XIV, "*Ad militantis*," March 30, 1742, § 26.

88 *Acta et Decreta*, n. 77.

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in our country. Concerning the hair, the old canons, in warning against unbecoming vanity, used the phrase "*comam ne* [*clerici*] *nutriant.*" [39] The new Code is silent as to *beards* and *wigs,* and hence this matter is left to the prudent judgment of the Ordinary or to a council.[40]

Rings, either with or without gems, are permitted only to those whom the law or an Apostolic privilege has endowed with the right of wearing them. Hence only cardinals, bishops, and blessed abbots are allowed to wear them at Holy Mass,[41] while prothonotaries *non participantes,* doctors, and *abbates non benedicti* are not allowed to wear them at Mass.[42]

The last paragraph deals with those in *minor orders* who doff the clerical dress and tonsure and refuse to obey the injunction of the bishop to reassume them within a month. This is a modified repetition of the decretal of Pius IX, published A. D. 1860.

OCCUPATIONS AND AMUSEMENTS FORBIDDEN TO THE CLERGY

CAN. 137

A fideiubendo, etiam de bonis propriis, clericus prohibetur, inconsulto loci Ordinario.

The ancient civil law as well as the Decretals forbade the clergy to give bail,[43] but made some exceptions in favor of fellow-clerics and their own churches, as well as

39 Cfr. c. 22, Dist. 23; c. 7, X, III, 1.

40 Formerly the wearing of a wig required an Apostolic indult; cfr. Richter, *Trid.,* p. 184, n. 12; Bened. XIV, *De Syn. Dioec.,* XI, 9.

41 Cf. c. 811, §2.

42 S. R. C. Feb. 13, 1625 (Barbosa, *Apost. Dec.,* p. 26); Pius X, "*Inter multiplices,*" Feb. 27, 1905, n. 4, 27, 28, 31, 47–49.

43 Nov. 123, c. 6; c. 1, X, III, 22; Engel, III, 22, n. 4.

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for their own property and person. The Code doubtless must be given a stricter interpretation because of the general terms in which it forbids the practice. Hence every kind of bail, "whereby a man obliges himself, his heirs, executors and administrators, to pay a certain sum of money to another on an appointed day," [44] is forbidden except with the permission of the bishop. This condition must also be observed if a clergyman would give bail on his personal, patrimonial or parsimonial property. This ruling may seem harsh, but cases brought before the Roman Curia prompted a severer course in order to protect the clerical state from slanders and insinuations which are never so rife as when a clergyman makes mistakes in money matters. This and the following canons are all inspired by the *twofold purpose* of safeguarding the decorum of the clerical state and preserving its members from troublesome distraction which might impede their fruitful activity in the sacred ministry. Hence:

CAN. 138

Clerici ab iis omnibus quae statum suum dedecent, prorsus abstineant; indecoras artes ne exerceant; aleatoriis ludis, pecunia exposita, ne vacent; arma ne gestent, nisi quando iusta timendi causa subsit; venationi ne indulgeant, clamorosam autem nunquam exerceant; tabernas aliaque similia loca sine necessitate aut alia iusta causa ab Ordinario loci probata ne ingrediantur.

The principle previously stated is here announced in set terms, whereupon five occupations are specified which are more or less unbecoming to the clerical state. These

[44] Blackstone-Cooley, *l. c.*, II, 340.

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occupations comprise all *professions* or *arts* which, in the common estimation of the people, are exercised only by a low class of men or involve a degradation of the clerical state. Such are especially the profession of actors and the trade of saloon or innkeepers, butchers and executioners.[45] *Games of hazard,* if connected with staking of money, are prohibited. But moderate card playing, chess, billiard or tenpins is not forbidden if no scandal — of course pharisaical scandal cannot always be avoided — is given and no excess in time or money involved.[46]

The *carrying of arms,* fire arms as well as others, is forbidden also in the Decretals.[47] But we remember that, about ten years ago, when there was a morbid agitation against the clergy in Italy, and especially in Rome, many priests received license from the Pretor to carry a revolver. This was purely a means of self-defence; hence the very reasonable clause in the new Code.

Hunting and the chase are distinguished; the former is not entirely forbidden, but should not be indulged in. *Indulgere* implies frequent repetition. Hence, occasional hunting without dogs, or only one dog, and without a great apparatus, may be permitted if no dangerous consequences are to be feared. But the *chase, i. e.,* clamorous hunting with dogs, hawks, and falcons for the pursuit of large game, bears, deer, foxes, etc., is forbidden.[48]

Saloons and similar places must be avoided by clerics.[49] On that point we believe that in our country the necessary precautions are not wanting. Neither are the saloons, at least many of them, in the U. S., places where

45 Cfr. cc. 1–3, Dist. 34; c. 1, Dist. 35; c. 1, X, III, 50; c. 1, Clem. III, 1.

46 C. 1, X, III, 50; *Conc. Balt. II,* n. 754.

47 C. 2, X, III, 1.

48 Cfr. X, V, 24, *De clerico venatore.*

49 Cfr. c. 2, Dist. 44; c. 15, X, III, 1; *Conc. Trid.,* Sess. 24, c. 12, *De Ref.*

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clergymen should be found for purposes of amusement. The bishop might proceed against a clergyman who would not heed the prohibition of frequenting saloons after a paternal and peremptory admonition.[50] But on the other hand it is not commendable to decree *suspensio ipso facto incurrenda* for transgressors of this rule, because that penalty should be meted out only in grievous cases, lest it lose its effectiveness. A canon of the IVth Lateran Council forbids drinking bouts and drinking at command,[51] a practice which resembles our so-called "treating,"—a fertile source of drunkenness.

Can. 139

§ 1. Ea etiam quae, licet non indecora, a clericali tamen statu aliena sunt, vitent.

§ 2. Sine apostolico indultu medicinam vel chirurgiam ne exerceant; tabelliones seu publicos notarios, nisi in Curia ecclesiastica, ne agant; officia publica, quae exercitium laicalis iurisdictionis vel administrationis secumferunt, ne assumant.

§ 3. Sine licentia sui Ordinarii ne ineant gestiones bonorum ad laicos pertinentium aut officia saecularia quae secumferunt onus reddendarum rationum; procuratoris aut advocati munus ne exerceant, nisi in tribunali ecclesiastico, aut in civili quando agitur de causa propria aut suae ecclesiae; in laicali iudicio criminali, gravem personalem poenam prosequente, nullam partem habeant, ne testimonium quidem sine necessitate ferentes.

§ 4. Senatorum aut oratorum legibus ferendis, quos

50 Aichner, *l. c.*, § 72, 2.

51 C. 14, X, III, 1 to which Vallensis (*Paratitla*, III, 1, n. 7) remarks that some *aequales haustus* might be permitted in honor of prince or country, if drunkenness is avoided.

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deputatos **vocant, munus ne sollicitent neve acceptent sine licentia Sanctae Sedis in locis ubi pontificia prohibitio intercesserit; idem ne attentent aliis in locis sine licentia tum sui Ordinarii, tum Ordinarii loci in quo electio facienda est.**

The principle stated in the first paragraph is based on St. Paul's exhortation to Timothy: "No man, being a soldier to God, entangleth himself with secular business." [52] Secular business affairs are apt to distract a priest from the one necessary occupation, the sacred ministry. Hence the prohibition of offices which, in themselves, are not incompatible with the dignity of the clerical state — who would venture to say, *e. g.*, that a senatorship is degrading? — yet, because of their unwholesome effect upon the priestly office, should be accepted only in obedience to the Church.

The professions or occupations forbidden to clerics in can. 139 as "foreign to the clerical state" may be divided into two classes: such as require an Apostolic indult and such as merely demand the consent of the Ordinary.

An *Apostolic indult* is required for the practice of *medicine,* and the Code makes no distinction between medicine and surgery as to the strict necessity of obtaining the papal permission. Hence no matter whether a cleric wishes to practice simple medicine or surgery (formerly called medicine "*cum adustione et incisione*" [53]) he needs an Apostolic indult. There can be no doubt that the so-called Kneipp doctors and other "naturopaths" fall under this prohibition, [54] because the law is aimed at the exercise of the medical profession as such and intended to safeguard the honor of real physi-

52 II Tim. 2, 4.

53 Cfr. c. 19, X, V, 12, on account of the danger of irregularity.

54 Cfr. *Acta et Decreta Conc. Balt. III,* n. 82; Bened. XIV, *De Syn. Dioec.,* XIII, c. 10.

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cians against usurpers and bunglers. At the same time it must be observed that *exercere* implies a habitual exercise; hence giving a dose of quinine or other drug occasionally would not be exercising the medical profession.

The question may arise, *Whom* does the law require to ask for an Apostolic indult? The answer is: all who partake of the clerical state; hence also lay brothers and sisters, unless they merely act as assistants to physicians in giving medicine or at an operation. If they practice medicine of their own accord and on their own responsibility, they need an Apostolic indult.[55]

What about *oblates* of religious communities? These, though partaking in spiritual favors, are not religious, and hence no clerics in the proper sense, supposing, of course, that they have not received either tonsure or orders. Therefore they may exercise medicine or surgery without an indult.

Another profession which clerics may not adopt without Apostolic permission is that of *notaries public.* It was forbidden[56] to the clergy in higher orders by Innocent III, and this prohibition is now extended to all clerics, and consequently also to religious. The Code does not except those who act as notaries in favor of their own churches or monasteries if cases are taken to the civil court.[57] Only in ecclesiastical courts are clerics allowed to act as notaries public.

A third prohibition refers to *public offices* which involve civil jurisdiction or administration, *e. g.,* those of judges and administrative functionaries, mayors, governors, etc.[58] This law includes *senators and deputies* in

55 Cfr. Bachofen, *Compendium Juris Reg.*, p. 150 f.

56 C. 8, X, III, 50.

57 Engel (III, 50, n. 5) and other canonists admit an exception.

58 Cfr. c. 4, X, III, 50: "*iustitiarius principis . . . iurisdictiones saeculares.*"

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Italy, where Catholics are expressly forbidden by the Holy See to solicit or accept such offices.

All these occupations, then, in order to be licitly assumed by a cleric, require an Apostolic indult. The fact that the clause "*sine apostolico indultu*" is placed at the head of § 2 proves that the legislator wishes to include all the offices that follow.

§ 3 enumerates the offices for the exercise of which on the part of a cleric the *permission* of the *Ordinary* is required. Note that the text says "*sui,*" not "*loci Ordinarii.*" The Ordinary of exempt religious is their superior, not the bishop of the diocese.

(1) Clerics may not be *managers* of business affairs or of properties which belong to laymen or necessitate the rendering of an account to civil authorities. To this class of affairs belongs the guardianship of orphans and widows,[59] which a cleric cannot undertake without the permission of his bishop or superior. Forbidden to clerics on the same score are the offices of president, director, treasurer, secretary of banks, even though these be of a charitable or social type (rural or farmers' banks, etc.).[60]

(2) A cleric is not allowed, furthermore, to act as *procurator* or by proxy in another's name by special mandate, or as *attorney,* unless for himself or in defence of his church.[61] We may safely extend "*propria causa*" to his next relatives, who because of blood relationship may be considered as one person with him.[62]

(3) In *criminal cases* which imply either capital punishment or confinement in a penitentiary — which punishment generally entails infamy — a cleric is not allowed

59 Cfr. c. 2, X, III, 50.
60 S. C. Consist., Nov. 18, 1910 (*A. Ap. S.,* II, 910).
61 C. 2, X, III, 50; S. C. C., Aug. 4, 1883, *Nullius Cluniac.*
62 Aichner, § 73.

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to act as a *witness,* unless called by legitimate authority (the prosecuting attorney or judge), which would be a case of necessity. But even in such cases it is commendable to ask the Ordinary's permission if time permits.

(4) The last case which requires the permission of the Ordinary is the solicitation and acceptance of the offices of *senators* and *deputies.* There is not much danger in our country that clergymen will be elected to Congress; but if one wished to become a candidate, he would need the permission of his own Ordinary as well as that of the Ordinary of the district — if this were located in a different diocese — for which he sought to be elected.

AMUSEMENTS

CAN. 140

Spectaculis, choreis et pompis quae eos dedecent, vel quibus clericos interesse scandalo sit, praesertim in publicis theatris, ne intersint.

Unbecoming to the clergy are all shows which offend against the divine or the natural law, or detract from the honor and respect due to the Church and her ministers.[63]

The term *spectacula* comprises all kinds of mimic representations, either masked or not, by professional actors, likewise gladiatorial contests, bullfights and prize-fights. Concerning this last-named kind one might be tempted to condemn them as immoral, yet it would be impossible to prove their immorality from the viewpoint of natural law. Hence we are not ready to pronounce them simply unbecoming.[64] Of course a bishop might forbid his

63 Cfr. Bened. XIV, *De Syn. Dioec.,* XI, 10, 11 f.; *Inst.,* 37; 76.

64 The point of immorality would only arise from the danger to life, which no one is allowed to expose; however, properly conducted prize-fights does not necessarily involve risk of life, as statistics show.

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clergy to attend prize-fights if he were persuaded that the majority of his flock strongly opposed them.

Choreae are balls and dances. The well-known decree of March 31, 1916, is pertinent to the subject; but the Code uses more general terms, although we would not assert that said decree is now ineffective.[65] That clergymen would take an active part in dances or arrange such, although it may have happened in bygone days,[66] is, we believe, no longer to be feared.

Pompae are festivities celebrated with much ado and display, with eating, drinking, and musical programmes; for instance, at weddings or other occasions of a purely worldly character.[67] If such affairs take place in *public* theatres,[68] the clergy have an added reason for keeping away. Theatres are now often turned into *moving-picture* shows, many of which are of a low type, injurious to eyes and nerves and destructive of moral and physical health. Of course theatrical representations by school-children, college students, or members of a parish are not affected by the Code. But the holy seasons of Advent and Lent and the ember days should be respected by the latter class.

CAN. 141

§ 1. Saecularem militiam ne capessant voluntarii,

65 Cf. *A. Ap. S.*, VIII, 147 f. Card. Gasparri in his notes also refers to that decree (p. 35, n. 2). The dispositive part of said decree reads: "All clergymen, secular as well as regular, are strictly forbidden to promote or favor dances or balls, even if these should be held to help and support a good and pious cause or for any other purpose; besides all the clergy are prohibited to attend such dances if arranged by laymen." But dances in general, in which the clergy take neither the initiative nor a passive part, are not forbidden, even if given for a charitable or religious purpose by lay people. This is the tenor of the text, and nothing more.

66 Cfr. Bened. XIV, *De Syn. Dioec.*, XI, 10, 14.

67 Cfr. cc. 14, 15, X, III, 1; c. 3, Dist. 23.

68 Cfr. c. 12, X, III, 1 (theatres in churches); *Conc. Trid.*, Sess. 22, c. 1 *De Ref.*

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nisi cum sui Ordinarii licentia, ut citius liberi evadant, id fecerint; neve intestinis bellis et ordinis publici perturbationibus opem quoquo modo ferant.

§ 2. Clericus minor qui contra praescriptum § 1 sponte sua militiae nomen dederit, ipso iure e statu clericali decidit.

The first clause of the first paragraph and the second paragraph treat the same subject, *viz.: volunteering for military service,* which now-a-days is mostly done by enlisting in the army or navy. Some countries permit clerical students to escape further service by volunteering for one year. If a cleric in minor or major orders should wish to choose this course, he must first obtain the permission of his Ordinary. A cleric in minor orders who voluntarily enlists against the prescription of § 1, forfeits the clerical state.[69]

To participate in *internal troubles* (revolutions, etc.) is strictly forbidden to the clergy. Leo XIII advised the Spanish clergy not to allow themselves to be wholly absorbed by party spirit lest they might seem to care more for human than for heavenly things.[70] As to *political* activity in the U. S., which a clergyman might be called upon to take up, a time may come when the freedom of our schools will require the clergy to exert political influence. The social question, too, is becoming a "burning" problem in public life. In any combat for principles the direction of political action will rest, first and above all, with the hierarchy. Uniform procedure, firm and un-

69 Can. 188, 6.— *Decidere a statu clericali,* it seems to us, involves a radical and absolute loss of that state, wherefore the reassuming of the clerical garb, which formerly (cfr. Bened. XIV, *De Syn. Dioesc.,* XII, 3, 1) could be performed privately, is no longer sufficient.

70 "*Cum multa,*" Dec. 8, 1882; "*Postquam catholici,*" Dec. 10, 1894; S. C. P. F., Instr. of Nov. 23, 1845, n. 7; S. C. C., Jul. 12, 1900.

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flinching, will lend great strength to the cause of the Church. But moderation and loyalty must always be combined with firmness, and the clergy will usually be safe if they follow the guidance of the hierarchy.

In *purely political issues* arising between parties the clergy are free, and the bishop cannot compel them to follow his opinion, much less forbid them to vote. For the right of voting is, radically at least, an inborn right, inherent in a citizen by the fact of his belonging to the State. And the State we hold to be of natural or divine origin. Hence the clergy, remaining citizens though clerics, cannot be deprived of that natural right by any authority, except by way of penalty.

However, we would not deny ecclesiastical authorities the right to forbid the clergy to vote in some particular case which involves great disturbance to state or diocese.[71] But this only by way of exception. And what we have said concerning the clergy in general, must fully be applied to religious, for that mystic ***mors civilis*** has now ceased in most countries.

NEGOTIATIO PROHIBITA

CAN. 142

Prohibentur clerici per se vel per alios negotiationem aut mercaturam exercere sive in propriam sive in aliorum utilitatem.

This is the *negotiatio prohibita,* the forbidden commercial trading, which was proscribed by many synodal acts. That in the beginning of the Church the "Apostolic

71 Leo XIII, "*Cum multa*"; Heiner, *l. c.*, I, 229, justly remarks that the bishops are empowered to see to it that the clergy do not, on account of political activity, neglect their clerical duties or transgress the bounds of Christian charity and truthfulness.

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laborers" were such not only in the spiritual but also in the material sense, like St. Paul the tentmaker, was but natural. Later on, some clerics supported themselves on their patrimony, whereas others had to work for a living either in the fields, or at a trade, or in some other way. In the third century some bishops devoted so much time to their worldly affairs that complaints were heard, and the Council of Elvira (ca. 300) issued a special decree (can. 19) on the subject.[72] The Christian emperors forbade the clergy to engage in trading throughout the Roman empire.[73] Diocesan synods and provincial councils prohibited clerical participation in agricultural trades and businesses of a purely commercial character.[74] Nevertheless, says Benedict XIV, some clergymen are moved by such insane avarice that, not in their own name, but under the cloak of an assumed name —"*sub alieni nominis velamine*"— setting aside all fear of God, they engage in forbidden occupations.[75] Hence the Church has never ceased to admonish clerics to hold aloof from business and trading.

What, precisely, is meant by *negotiatio* and *mercatura?* These terms are generally understood to mean habitual buying and selling for the sake of gain —"*turpis lucri gratia.*" Hence, according to the teaching of canonists, a cleric is not forbidden to sell stock or produce grown on his own farm. He may even buy cattle (feeders), fatten and sell them or their offspring in the market. But to purchase or rent land in order to raise wheat or corn for the sole purpose of selling it would be *negotiatio*

72 Funk, *Manual of Church History*, 1913, I, 51.

73 Cfr. Heiner, *l. c.*, I, 227.

74 Cfr. cc. 9 ff., Dist. 88; c. 16, X, III, 1; c. 6, X, III, 50; *Conc. Trid.*, Sess. 22, c. 1, *De Ref.*

75 "*Apostolicae Servitutis,*" Feb. 25, 1741, §1 (*Bull.*, Prati, I, 38).

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illicita.[76] Now-a-days it is not forbidden for a cleric to lend money at the usual rate of interest.

An important part of our commercial life is taken by *stock companies,* which offer shares, stocks and bonds in every shape and form, as the advertisements prove *ad nauseam.* Some of these companies are solidly established and in a flourishing condition. Is a clergyman allowed to buy their stocks? We see no wrong in this, if the shares are bought with the sole object of getting the dividends.[77] But to buy for the sake of speculation is forbidden. It is also forbidden for a cleric to be a director of such a company, because this would entail a worldly and perhaps distracting occupation, not to speak of the financial risk. Gambling is most detestable in a clergyman, and one who has grown rich by such illicit means should be avoided by his fellows.[78]

The Code appears very strict, to judge from the wording, "*sive in propriam sive in aliorum utilitatem.*" However, we believe our interpretation is borne out by the common teaching of canonists. For the words "*negotiatio and mercatura*" must be taken in their proper sense, and what the authors allow does not fall under *trading* or *business,* strictly interpreted. However, there can be no doubt that clerics are forbidden to trade or transact business in the proper sense by giving their money to others that these may traffic with it for the advantage of the real owner.

76 Barbosa, *Tractatus Varii,* Appell. 162 (p. 262). Of course a cleric is not allowed to sell wine, oil, or other products at retail. Heiner, *l. c.*

77 Sanguineti, *Juris Eccl. Institut.,* 1890, p. 148 f; Buvée, *Le Commerce, les Opérations de Bourse et le Clergé,* in the *Revue Canonique,* Feb., 1899.

78 Bened. XIV, "*Apost. Servitutis,*" *l. c.*

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ABSENCE FROM THE DIOCESE

CAN. 143

Clerici, licet beneficium aut officium residentiale non habeant, a sua tamen dioecesi per notabile tempus sine licentia saltem praesumpta Ordinarii proprii ne discedant.

CAN. 144

Qui cum licentia sui Ordinarii in aliam dioecesim transierit, suae dioecesi manens incardinatus, revocari potest, iusta de causa et naturali aequitate servata; et etiam Ordinarius alienae dioecesis potest ex iusta causa eidem denegare licentiam ulterioris commorationis in proprio territorio, nisi beneficium eidem contulerit.

In point of *residence,* as we shall see further on, the law deals separately with different ranks of the clergy. Canon 143 merely states the fact that the duty of residence is connected with certain offices or benefices, and that every secular cleric belongs to a determined diocese by incardination. Being ordained for that diocese, he is supposed to have some kind of work assigned to him or at least to be at the disposition of the Ordinary under whose jurisdiction he lives. A protracted absence from the diocese would, as it were, withdraw him from that jurisdiction, and hence an Ordinary is entitled to know his clerics' whereabouts.

What "*notabile tempus*" means may be inferred from a comparison of clerical residence with quasi-domicile. A quasi-domicile, as we have seen, is constituted by a stay of about six or seven months in one place. A "considerable time" for the absence of a cleric from

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his diocese would, therefore, be less than six months. On the whole, this term is very elastic according to the comparison implied therein. But we believe four or five months would be a "considerable time."

A *presumed* or probable permission is had when the Ordinary knows of a clergyman's absence and does not recall him, for then the latter may legitimately assume that the bishop is willing to prolong his furlough. As long as a cleric remains within the limits of his diocese, he needs no permission.

Canon 144, the last of Title III, deals with the *recall* of clerics to their own diocese. For such a recall there must be a just reason, and natural equity must be observed (*naturali aequitate servata*). Equity here can mean nothing else but justice or fairness in determining conflicting claims. The bishop of the diocese whence the clergyman is to be recalled, might wish to retain him because of his usefulness, and hence a conflict might arise between the two bishops, which must be settled by compensation or mutual agreement.

An Ordinary may, if there be a just reason, order an outside cleric to leave his diocese, unless, indeed, he has conferred an ecclesiastical benefice on him, which would be tantamount to incardination.[79]

[79] Cfr. can. 114.

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TITLE IV

ECCLESIASTICAL OFFICES

After a cleric has been incardinated in a diocese and endowed with clerical rights and duties, he may and should be given an ecclesiastical office. For the clerical state is not merely a speculative state, as it were, of idle onlookers, but one with determined functions, which vary according to the various hierarchical degrees, but all tend to the realization of the end for which the Church was founded. The Church, therefore, is entitled to prescribe the manner in which clerics are to be appointed to the offices established, either divinely or humanly, within her pale.

Hence the first chapter of Title IV treats of the nature and provision of ecclesiastical offices.

CAN. 145

§ 1. Officium ecclesiasticum lato sensu est quodlibet munus quod in spiritualem finem legitime exercetur; stricto autem sensu est munus ordinatione sive divina sive ecclesiastica stabiliter constitutum, ad normam sacrorum canonum conferendum, aliquam saltem secumferens participationem ecclesiasticae potestatis sive ordinis sive iurisdictionis.

§ 2. In iure officium ecclesiasticum accipitur stricto sensu, nisi aliud ex contextu sermonis appareat.

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CAN. 146

De beneficialibus officiis in specie, praeter canones qui sequuntur, custodiantur insuper praescripta can. 1409 seqq.

What canon 145 says of an ecclesiastical office in the wider sense, may be illustrated by a consideration of certain offices which are no longer exclusively clerical, *v. g.*, those of *fossores, hermeneutae, cantores,* and deaconesses. The latter, in the first two centuries, formed a distinct category or class of ecclesiastics, though without any hierarchical or liturgical distinction.[1] The offices of grave-digger, interpreter, and chanter were enumerated among the clerical orders, but gradually sank to lay rank.[2] Nevertheless, if singers perform their task with a spiritual intention, and not for gain or vanity, they may be said to exercise an ecclesiastical office. The same holds true of janitors and organists. Laymen, according to St. Peter, may be a "holy priesthood who offer up spiritual sacrifices"[3] in the Church, and thus act as functionaries of the Church at large.

However, the divine and human organization of the Church contains a special class of persons for the performance of strictly ecclesiastical offices. Three characteristics single out these *functions properly* called *ecclesiastical:* (1) They are established by divine or ecclesiastical law; (2) they must be conferred according to the rules laid down by the Church; (3) they must communicate some sort of ecclesiastical power.

(1) The *Divine Law,* as stated above,[4] singles out

1 Cfr. Wieland, *Die Genetische Entwicklung der sog. Ordines Minores,* 1897, p. 60 ff.

2 *Ib.*, p. 165 f.; p. 170 ff.

3 I Pet. 2, 5.

4 Can. 108, § 3.

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bishops, priests, and ministers; *human law* (or rather ecclesiastical custom) has introduced other offices, partly of higher, partly of lower rank.

(2) The *rules* according to which one may hold an ecclesiastical office can only emanate from that power which confers the rights inherent in that office. And since these rights are of a spiritual nature, the power which confers them is the spiritual society established by Christ, or the Church. Hence to her must belong the right to establish the mode and means by which a man may obtain an ecclesiastical office.[5] But it must be remembered that the Church employs human factors and instruments in conveying ecclesiastical offices. Though, *e. g.,* the supreme pontificate and the episcopate are of divine origin, yet the manner in which these offices are conferred has been determined gradually by human agencies, and historical facts must not be set aside for the sake of a preconceived idea. All that is necessary is to hold fast to the principle involved.

(3) An ecclesiastical office must convey *ecclesiastical power.* This may be in the hierarchy of *order,* and thus we have the episcopate, the priesthood, and the ministry (*i. e.,* the higher orders of deaconship and subdeaconship as well as the four minor orders, with tonsure as a stepping stone); or it may be in the hierarchy of *jurisdiction,* which is supreme and ordinary in the Sovereign Pontiff, but dependent in the episcopate. Between these two there are different shades of jurisdiction, which the *lumen maius* has variously distributed. Every ecclesiastical office involves some jurisdiction, though its real and full nature appears only when exercised *in foro externo.* The term "ecclesiastical office" is generally to be taken

[5] *Conc. Trid.,* Sess. 23, *De Eccl. Hierch. et Ord.,* cc. 4, 7.

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in its proper sense as denoting ecclesiastical power.

The next canon (146) touches the *beneficiary* or material element of ecclesiastical offices. Those who serve the altar are entitled to partake of the oblations made for the benefit of the altar.[6] This fact led canonists to say that an ecclesiastical office entails "the right to receive a definite share of the ecclesiastical revenues."[7] The terms "office" and "benefice" were looked upon as correlative and therefore used promiscuously.[8] The Code, however, justly speaks of the office *in directo,* and of the benefice *in obliquo,* treating the latter as an ecclesiastical thing (*res*) in the third book. But it adds that ecclesiastical benefices fall under the rules governing ecclesiastical offices, the reason for which is evident from the mutual relation of the two.

6 I Cor. 9, 13.
7 Cf. Aichner, *l. c.*, §76, 1.
8 Cfr. c. 9, C. 1, q. 3; c. 1, X, V, 26; c. 15, 6°, I, 3.

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CHAPTER I

APPOINTMENT TO ECCLESIASTICAL OFFICES

CAN. 147

§ 1. Officium ecclesiasticum nequit sine provisione canonica valide obtineri.

§ 2. Nomine *canonicae provisionis* venit concessio officii ecclesiastici a competente auctoritate ecclesiastica ad normam sacrorum canonum facta.

CAN. 148

§ 1. Provisio officii ecclesiastici fit per liberam collationem a legitimo superiore, vel per eius institutionem, si praecesserit praesentatio a patrono aut nominatio, vel per eius confirmationem aut admissionem, si praecesserit electio aut postulatio, vel tandem per simplicem electionem et electi acceptationem, si electio non egeat confirmatione.

§ 2. De officiorum provisione per institutionem serventur praescripta can. 1448–1471.

CAN. 149

Electi, postulati, praesentati vel nominati a quibusvis personis ad ecclesiastica officia ne confirmentur, admittantur, instituantur a Superiore infra Romanum Pontificem, nisi antea fuerint a proprio Ordinario idonei reperti, etiam per examen, si id ius vel officii ratio postulet aut Ordinarius opportunum iudicaverit.

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CAN. 150

§ 1. Provisio officii de iure non vacantis ad normam can. 183, § 1, est ipso facto irrita, nec subsequente vacatione convalescit.

§ 2. Nec promissio eiusdem officii, quicunque id promiserit, ullum parit iuridicum effectum.

CAN. 151

Officium de iure vacans quod forte adhuc ab aliquo illegitime possidetur, conferri potest, dummodo rite secundum sacros canones declaratum fuerit eam possessionem non esse legitimam, et de hac declaratione mentio fiat in litteris collationis.

These five canons define in logical succession canonical appointment, its various modes, and some necessary requisites, and also touch upon vacancy. That no one can obtain an ecclesiastical office without canonical appointment follows from the necessity of the *missio canonica* and the fact that the Church is an organization.

(1) *Appointment* implies three elements: (a) the granting or conferring of an ecclesiastical office, (b) by competent authority, and (c) according to canon law.

The manner in which an ecclesiastical office may be conferred is: by free collation, investiture, confirmation or admission.

Collatio libera, i. e., a free appointment is made when he who appoints has the right not only to appoint but also to designate the person of the appointee. Thus the bishops of the U. S. are empowered to designate pastors and confer parishes on them.

Investiture or *collatio necessaria* takes place when the clergyman to be appointed is designated by a third per-

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son,— either presented by a patron (*jus patronatus*) or nominated by one who enjoys that privilege, as, for instance, the King of Spain or the Emperor of Austria.

Confirmation or ratification follows election, properly so-called, which takes place when a chapter enjoys the right of electing the prelate.

Admission, finally, is attached to postulation, which is a substitute for election when the person to be appointed suffers from a canonical impediment.[1]

The *collatio libera* confers full title to an office, or as the canonists say, *jus in re* — which means that the appointee holds a title to the office in question and may enter upon it at any time. In other words, he only needs to be installed (*introductio corporalis*). An equally valid title is conferred by investiture, confirmation, and admission; that is to say, one invested, confirmed, or admitted receives the *jus in re,* whilst before these three acts he had either a mere *jus ad rem,* as by presentation, nomination, or election, or no right at all, as in the case of postulation.

(2) The *competent authority* in conferring major ecclesiastical offices (*prelacies*) is the *Sovereign Pontiff;* lower offices may be bestowed by the *Ordinary.*[2] This is the general rule, which will be further explained when we come to treat of various offices.

(3) An ecclesiastical appointment must be made according to *canon law.* Now the law, as will be seen under the respective headings, has set up certain rules to be observed in making appointments. Of these some touch the office itself, others the act of conferring it, and again others the necessary requisites in the candidate. As to the latter, the Code lays them down under

1 Cf. c. 16, § 2, 6°, III, 4; cc. 11, 12, X, I, 6; c. 3, X, I, 5; X, III, 7.

2 Wernz, *Jus Decret.,* II, n. 291, p. 397, ed. 1.

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each office, and hence we refer to the respective canons.

But the Code mentions expressly one condition of the office to be conferred, *viz.*, that it must be *vacant*. Vacancy may be caused by resignation, privation, removal, transfer and lapse of time (can. 183, § 1), and may be either *de facto*, or *de jure* only, or *de jure et facto*.[3] An office is vacant *de facto* when no one actually holds or fills it, although some one has a lawful claim to it, *e. g.*, a bishop exiled from his see. An office is vacant *de jure* if, as stated above, according to can. 183, § 1, an intruder is in actual, though illegal, possession thereof. An office is vacant both *de facto* and *de jure* if no one holds or claims it.

An office not vacant *de jure* cannot be conferred; and if it is conferred, the appointment is null and void because against the law. Even if the office becomes vacant before the illegal appointee has taken possession, the appointment is null because made at a date when there was no vacancy. In consequence all acts, examinations or concursus performed in the interval would have to be repeated.

An office vacant not *de facto* but *de jure* can be validly conferred after a declaratory sentence to the effect that there is a *de jure* vacancy, provided mention is made of that declaration in the letter of appointment.

A brief but important paragraph is § 2 of canon 150, which precludes the so-called *expectativae*. These were introduced towards the close of the Middle Ages, and were nothing else but a practical conclusion from the right of the Pope as supreme collator of all benefices.[4]

[3] Cf. Engel, III, 8, No. 2; Maschat-Giraldi, *Institutiones Canonicae*, III, 18, n. 1; cfr. cc. 1, 2, 6, X, III, 8; cc. 18, 28, 6°, III, 4.

[4] Cfr. c. 2, X, III, 8; c. 4, X, III, 24; Wernz, II, n. 315 (p. 420, ed. 1).

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The popes sometimes granted letters or rescripts to clergymen declaring that the bearer was entitled to a benefice — for the *office* they usually cared but little — as soon as it would become vacant. The possessor of such a letter, given at first in the form of *preces,* then as mandates (*monitoriae* and even *praeceptoriae*), could lay claim to a benefice as soon as it became vacant, but had to wait (*expectare*) until it really was vacant.[5] Abuses arose in connection with these letters, and the rights of bishops and abbeys were much hampered, wherefore the Council of Trent set proper limits to these *expectativae,* admitting them only in case of coadjutors to bishops and abbots.[6] The new Code denies all juridical effect to any such promise, no matter by whom made, including, we suppose, the Pope himself, as far as he intends to bind himself by such laws.

Finally, certain conditions are attached to the *act of appointment,* but these are not here specified in general. Some are mentioned in connection with special modes of appointment. It may not be amiss to state the general conditions as described by canonists.[7]

(a) The appointment must be made *freely,* deliberately, and absolutely, *i. e.,* not extorted by fear or violence, or by attaching conditions to the office which its character does not imply and the appointer has no right to demand.

(b) An ecclesiastical office must be conferred *gratis,* otherwise it savors of simony, which would nullify the act. Chancellor's fees for expediting the document are, however, permitted.

(c) The appointment must be made *publicly.* The

5 Cfr. v. Scherer, I, 283; Sägmüller, p. 272.

6 *Trid.,* Sess. 24, c. 19; Sess. 25, c. 7, *De Ref.*

7 Cfr. Garzia, *De Re Beneficiaria,* P. VIII, c. I, n. 1; cc. 8, 9, 34; Wernz, II, n. 323 (p. 437, ed. 1).

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new Code prescribes, in addition, that it must be made *in writing*.[8]

(d) It must be made within the *time* determined by the Code for the office in question.

ART. I

FREE APPOINTMENT (LIBERA COLLATIO)

What is meant by free appointment has been explained above, both as to the designation of the person and the conferring of the office (*collatio tituli*). The present article doubtless treats of minor offices, which have no jurisdiction *in foro externo*, unless we include the office of vicar-general in the number of offices *liberae collationis*, which is admissible.

CAN. 152

Loci Ordinarius ius habet providendi officiis ecclesiasticis in proprio territorio, nisi aliud probetur; hac tamen potestate caret Vicarius Generalis sine mandato speciali.

The bishop or Ordinary of the diocese, according to the general rule, has the right to confer all the ecclesiastical offices in his diocese, except those which the law exempts from his power, or unless his right is contested and the claim proved.

(a) Exempt from this power by law are cathedral and collegiate chapters and the first dignitaries;[9] concerning canonicates the bishop must proceed in harmony with his chapter.

(b) The bishop's right may be limited by *incorporation*

[8] Cfr. cc. 392, 394, § 2.

[9] Cf. cc. 392, 394 § 2.

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and *juspatronatus,* which however must be proved by those who claim that right, as shall be seen in its proper place. Incorporation for forty years would create a prescription in favor of the corporation.[10] As to the *juspatronatus,* what is necessary for our country to note on this subject will be said later.

The above-mentioned cases excepted, the Ordinary is free in choosing his vicar-general and other officials of the diocese,[11] appointing consultors, rural deans, pastors, assistants and rectors.[12]

The *vicar-general* needs a special mandate to fill offices which the Ordinary is entitled to fill. The mandate must be given *ad hoc, i. e.,* for the purpose of making the appointment. This means a special commission for each individual appointment, because each appointment is a separate juridical act which has no connection with any other. Therefore a general commission to appoint to ecclesiastical offices would not be valid. Besides the *mandatarius* must follow strictly the terms of the mandate, else he would act invalidly.[13]

REQUISITES OF ECCLESIASTICAL OFFICE HOLDERS

CAN. 153

§ 1. Ad vacans officium promovendus debet esse clericus, iis qualitatibus praeditus, quae a iure communi vel particulari aut a lege fundationis ad idem officium requiruntur.

§ 2. Assumatur, omnibus perpensis, magis idoneus sine ulla personarum acceptione.

§ 3. Cum provisus caret qualitatibus requisitis, pro-

10 Cf. X, II, 26, and Engel h. t. n. 33.

11 Cf. can. 366, § 2; can. 373.

12 Cf. can. 424; can. 446, §2; can. 455, §1; can. 476, §3; can. 480, § 1.

13 Cfr. the commentators on X, I, 38, *De procuratoribus.*

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visio est nulla, si ita cautum sit iure communi vel particulari aut lege fundationis; secus est valida, sed per sententiam a legitimo Superiore irritari potest.

CAN. 154

Officia quae curam animarum sive in foro externo sive in interno secumferunt, clericis nondum sacerdotio initiatis conferri valide nequeunt.

Regarding the *common law,* our Code deals with the requisites for the single offices in connection with these. Note that no criminal, defamed, or censured ecclesiastic can be appointed to an office.[14] A *particular* law would be that the appointee must belong to a certain nation or family, or to the nobility, which played an important part in German cathedral chapters. The *law of foundation* is generally laid down in the founder's last will and testament, which the Church regards as sacred.

A brief remark on the "*magis idoneus.*" The Code almost studiously avoids the terms "*dignior*" and "*dignus,*" formerly used, and chooses the more flexible but also more juridical expression *idoneus,* which certainly is more in keeping with laws that deal with external qualities rather than internal. One is fit, just as one is worthy, if he lacks none of the qualifications prescribed by law. The fitter (*magis idoneus*) of two candidates is he who possesses these qualifications in a more conspicuous degree.[15] But the law inculcates the duty of appointing the fitter candidate only by way of admonition, not prohibition, and, moreover, adds: "*omnibus perpen-*

14 Cfr. c. 7, X, I, 6; c. 4, X, I, 14; c. 4, X, V, 1; cc. 7, 9, X, V, 27; Wernz, II, n. 298 (p. 404, ed. 1).

15 Cfr. Smith, *Elements,* I, n. 372, p. 169; Wernz, II, n. 309 (p. 414, ed. 1).

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sis." Therefore the judgment rests with the Ordinary, who must consider the place, time, and circumstances of the office as well as the qualifications of the clergyman to be appointed. Sometimes a good business manager is needed, sometimes an orator, sometimes an ascetic. One parish needs a democratic leader, another a more aristocratic one. If the bishop looks at the appointment merely from the point of view of necessity and utility, without sentiment, he may make a mistake but certainly will not commit a sin or breach of the law.

TIME OF APPOINTMENT

CAN. 155

Officiorum provisio cui nullus terminus fuit speciali lege praescriptus, nunquam differatur ultra sex menses utiles ab habita notitia vacationis, firmo praescripto can. 458.

The date is definitely fixed for higher offices as well as for offices *jurispatronatus;* but for minor offices of free appointment the time of six months was generally prescribed.[16] The Code employs the term *utiles,* which is analogous to *tempus utile,*[17] and implies that if the bishop should ignore the vacancy, or be prevented by a reasonable cause from making an appointment, the six months are to be counted from the time when he was free to act. In can. 458 the Ordinary is admonished to appoint permanent pastors, but allowed to put a vacant parish in charge of an administrator if this appears to him more prudent in consideration of the circumstances.

16 Cfr. cc. 2, 5 12, X, III, 8; c. un. Clem. I, 5.

17 Cfr. can. 35.

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INCOMPATIBLE OFFICES

When the rule of the Council of Chalcedon that every cleric should be ordained and assigned to a definite church or service was abandoned, avarice and ambition and the evils attendant upon an incontinent clergy caused serious abuses in the shape of the holding of several ecclesiastical offices by the same person. The third and fourth Lateran Councils [18] sought to remedy this unlawful practice, but the *cumulatio beneficiorum* flourished again during and after the "Babylonian captivity," until the Council of Trent [19] enacted wholesome reform laws and subsequent pontiffs enforced them.[20] The purpose which inspired the prohibition of holding two or more offices was twofold: — to counteract avarice and ambition and to provide efficacious and worthy ministers. The Code considers this last mentioned reason, and for the rest merely reënforces the Tridentine law.

CAN. 156

§ 1. Nemini conferantur duo officia incompatibilia.

§ 2. Sunt incompatibilia officia quae una simul ab eodem adimpleri nequeunt.

§ 3. Firmo praescripto can. 188, n. 3, concessio alterius officii a Sede Apostolica facta non valet, nisi in supplici libello mentio prioris incompatibilis habeatur, aut clausula derogatoria adiiciatur.

The law exempts no one, not even learned and deserving ecclesiastics,[21] from the general prohibition. Besides

18 Cfr. c. 3, X, III, 4; cc. 5, 28, X, III, 5; but "*sublimes et litteratae personae*" were exempt from the enforcement of c. 28.

19 Sess. 7, c. 4; Sess. 24, c. 17 *De Ref.*

20 Bened. XIV, *De Syn. Dioec.*, XIII, 8 ff.; Wernz, II, n. 318 (p. 426 ed. 1).

21 Cfr. c. 28, X, III, 5. The Trid. Council, however, excepted no one, not even Cardinals. Sess. 24, c. 17.

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the Code says, "*nemini . . . conferantur,*" which means that it is forbidden to confer, and not only to hold, incompatible offices.

Incompatible are such offices as exclude the possibility of doing justice to both. For instance, (a) offices which require *personal residence,* such as bishopries, canonries, parishes;[22] (b) offices which, though they do not require personal residence, are of the same nature and attached to the same church, chapel, or altar; for instance, chaplancies or simple canonries[23] (called *beneficia uniformia sub eodem tecto*);[24] (c) a religious cannot be prior of one monastery and abbot of another.[25]

Offices which require neither residence nor service in the same church are *compatible* if one is not sufficient for the decent support of a cleric.[26]

§ 3 adverts to a possible dispensation. This the Holy See alone can grant. However, if a petition were sent to Rome to obtain, for instance, two parishes, and it would not mention the fact of the petitioner already being in the possession of one parish, the rescript would be *ipso jure* invalid,[27] for the legislator is not supposed to act against his own law, unless he makes special mention of the exception, as by the clause, *ex certa scientia,* or *de plenitudine potestatis,* or *etiamsi de illis specialis, specifica, individualis mentio sit facienda,* or similar ones.[28] The mere clause *motu proprio*[29] would not have this effect.

Can. 188, n. 3, refers to tacit resignation implied in the

22 *Trid.*, Sess. 24, c. 17; cfr. Richter, p. 376 ff.

23 *Trid.*, Sess. 7, c. 4, *De Ref.*; Richter, p. 50 ff.; Engel, III, 5, n. 68.

24 Cfr. c. 28, X, III, 5; c. 9, X, III, 8.

25 S. C. C. 23 Febr., 1715 (Richter, *l. c.*, p. 50, n. 9).

26 Cfr. Richter, *l. c.*, p. 50 ff.

27 Cfr. c. 23, 6°, I, 4; c. 2, Clem. I, 9.

28 Barbosa, *Tract. Var.*, cl. 43; cl. 59.

29 Cfr. Can. 46.

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acceptance and possession of an incompatible office. Therefore, even if a papal rescript provided with the necessary clause would have been granted to hold two offices, if these offices were incompatible, one would have to be resigned and vacated.

CAN. 157

Officium vacans per renuntiationem vel per sententiam privationis nequit ab Ordinario, qui renuntiationem acceptavit aut sententiam tulit, valide conferri suis aut resignantis familiaribus, consanguineis vel affinibus usque ad secundum gradum inclusive.

This canon is a repetition of two Constitutions[30] of Pius IV and Pius V, and rests, though not verbatim, upon the prohibition of the Council of Trent,[31] which says that every shadow of hereditary succession in ecclesiastical offices is odious: — an effective blow against nepotism.

Familiares are such as serve one actually and dependently and belong to one's household and live at one's expense.[32] *Consanguinei* would be nephews and first cousins, while *affines* could only be spoken of in case of a once married clergyman. Upon none of these, either his own or those of the *resignatarius,* may the Ordinary confer an office made vacant by resignation or a sentence of privation. Neither may he admit any of the persons mentioned to a *concursus.*

The *juspatronatus* is not touched by this canon, nor are the familiars and relatives of the vicar-general debarred,[33] unless, of course, it was he who accepted the

30 Pius IV, "*Cupientes,*" Oct. 11, 1560, § 1; Pius V, "*Quanta Ecclesia,*" Apr. 1, 1568, § 5.

31 *Trid.,* Sess. 25, c. 7, *De Ref.;* cfr. cc. 7, 10, 11, X, I, 17, *De filiis presbyt.*

32 Reiffenstuel, II, 20, n. 122, well says: "*ut actu inserviat et ut veluti commensalis vivat expensis domini.*"

33 Reiffenstuel, I, 9, n. 118 ff.

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resignation or passed the sentence of privation, for the canon speaks of the Ordinary.

Can. 158

Qui, alius neglegentiam vel impotentiam supplens, officium confert, nullam inde potestatem acquirit in nominatum; sed huius iuridicus status perinde constituitur, ac si provisio ad ordinariam iuris normam peracta fuisset.

This canon supposes the right of devolution brought into exercise either by negligence or inability of conferring the office at the time prescribed by law. In such cases the decretals [34] permitted the interference of the metropolitan if a suffragan bishop failed to make an appointment within six months. Our Code [35] admits the metropolitan's interposition only in the case of an office to which advowson is attached, or *juspatronatus*. Speaking, however, of inability the present canon seems to take a wider range which may extend to the case of a vicar-general conferring an office by special mandate. Yet even this must be excluded, for the juridical position would not be altered even if the vicar-general were allowed to interfere. The canon, therefore, must be limited to the right of devolution. This, says the law, does not create any juridical change in the status of the person who has received an office in this extraordinary way. The reason is that if a superior supplements the negligence or inability of the lawful appointer, his right cannot be stretched beyond what is expressly and explicitly permitted by law, which admits the appointment but gives no further jurisdiction.[36]

34 Cfr. X, III, 10, *De supplenda negligentia praelat.*

35 Cfr. Can. 274, 1°.

36 Reiffenstuel, 1, 10, n. 10.

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CAN. 159

Cuiuslibet officii provisio scripto consignetur.

Every appointment must be delivered in writing either by the Ordinary or by his chancellor, and, of course, properly signed and sealed with the diocesan seal.

ART. II

ELECTION

CAN. 160

Romani Pontificis electio unice regitur const. Pii X *Vacante Sede Apostolica*, 25 Dec. 1904; in aliis electionibus ecclesiasticis serventur praescripta canonum qui sequuntur, et peculiaria, si qua sint, pro singulis officiis legitime statuta.

I. ELECTION OF A POPE

The historical evolution of the process of electing a Pope shows various phases.

(1) Up to the time of Nicholas I (1059–1061) not only the clergy but also the senate and people of Rome had a share in the election, whilst the emperor claimed the right of ratifying it.[87]

(2) Nicholas II endeavored to reduce the undue influence of senate and people. He reserved the right of electing the Pope chiefly to the clergy of the titular or cardinal churches of Rome, but did not entirely exclude the emperor. His decree[88] expressly emphasizes "the honor and reverence due to the King."

87 Cfr. Mansi, *Coll. Conc.*, XIV, 479; Bachofen, *Summa Juris Eccles. Publ.*, 1910, p. 82 f.

88 C. 1, Dist. 23.

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(3) The decretals of Alexander III (1159–81) went further, and Gregory X (1271–76) finally reserved the right of electing the Pope to the Cardinals of the Roman Church. The so-called "Veto" or "*jus exclusivae,* which the monarchs of Austria, France, and Spain arrogated to themselves and by means of which they excluded candidates unacceptable to them through the agency of one of their cardinals, was definitively abrogated by Pius X.[39]

The question whether the Pope can legally *designate his own successor* is controverted. Technically, there is no doubt that the Pope has this right, because the mode of election now in vogue is merely a human (ecclesiastical) law, by which the supreme lawgiver is not bound. Practically and morally speaking, however, such a right is not to be vindicated except in a very extraordinary and urgent case. The Pope, being a human being, might be too strongly inclined towards his family, and through nepotism the papacy might be in danger of becoming hereditary. Besides, the Pope is morally bound to respect the *jus quæsitum* of the cardinals, which would be illusory if the Pope could set it aside at his pleasure. Felix III (526–30) nominated his successor, but this extraordinary act was prompted by peculiar circumstances.[40]

At present the law concerning the election of a Pope is as follows:

1. The only authorized *electors* are the *cardinals,* who must have received at least deaconship, unless permitted by a special Apostolic indult to remain in lower orders. Even censured cardinals enjoy a vote in the conclave, but not such as have been deposed or have resigned their

[39] *A. Ap. S.*, t. v. p. 252; *Acta Pii X*, 1908, III, 289 ff.

[40] *Tueb. Quartalschrift*, 1903, p. 91 ff., Wernz II, p. 651 (1 ed.).

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dignity with the consent of the Pope. Absent cardinals must be invited by the Dean of the Sacred College or by another cardinal and admitted to the conclave as long as no election has taken place.

2. Concerning *eligibility,* the Constitution of Pius X merely admonishes the electors to choose one whom they deem fit. Since the end of the fourteenth century only cardinals, and since Hadrian VI (1523), only Italian cardinals have been elected.

3. The voting takes place by *scrutiny,* which may be performed *only* within the *conclave.* The latter point, however, no longer affects the validity of the election.

Quasi-inspiration, compromise, and *accessus* seem to be excluded, as the Constitution makes no mention of these. The election is completed only when two-thirds of the votes or suffrages, cast secretly and according to the scheduled forms, fall on the same person. The vote of the elected cardinal may not be counted. It is evident that generally more than one scrutiny is required. The ballots must be burned.

4. A purchased election would probably be valid, but those guilty of that crime (*simony*) incur excommunication *latae sententiae.* The same penalty falls upon those who in any way admit the abrogated "veto."

5. The cardinals may, during the vacancy of the Apostolic See, discuss probable candidates and their fitness for the office. This is called the *tractatus praevius.*

2. ELECTION OF BISHOPS

During the first ten centuries election in the proper sense was effected by the concurring suffrages and cooperation of the clergy and the people. Often sovereigns exercised an undue influence in the matter, espe-

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cially after an exaggerated feudal system had created the so-called investiture with ring and crozier, which abuse was rectified by the Treaty of Worms (1122). Later on the corporate chapters of the cathedral churches legally exercised the right of electing the bishop.[41] The rule that all provisions belong to the Holy See (known as Regula II of the Apostolic Chancery) was never received outside of Italy, but remained a dead letter, like most of the other rules (with the exception of III) of the same chancery.

A modification had naturally to take place when Protestantism severed many rulers and countries from the Church. The *jus praesentandi* granted to some sovereigns naturally ceased after their defection, and though a certain interference was still exercised, *contra fas jusque,* the diocesan clergy and neighboring bishops, under the supervision of the Holy See, took an important part in episcopal appointments. This happened especially in Ireland,[42] where the *ius commendandi* in course of time almost became a *ius nominandi.* Rome was careful to keep the right of appointing bishops within its proper limits. Still the right of commending candidates was acknowledged in Great Britain and the United States, and the Third Plenary Council of Baltimore (tit. II, n. 15) sanctioned the mode of selecting three candidates as *dignissimus, dignior, dignus,* respectively, at a meeting of the consultors and irremovable rectors of the diocese. This terna was revised by the bishops of the respective province and the final decision given by the Propaganda and, of late, by the S. C. of the Consistory. A new method was ushered in — *ad experimenti instar* — by a decree of the S. C. Cons. of July 25, 1916. It is difficult

41 C. 35, Dist. 63 (Lat. II, c. 28); cc. 21, 36, 42, 51, 56, X, 1, 6; c. 3, X, II, 12.

42 *Eccles. Review,* 1917 (56), p. 227.

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to describe this mode by a proper term, but we may call it a *proposal* for future appointments.

The decree may be summarized as follows:

1. The so-called *candidates,* whose names may be proposed, must enjoy certain *qualities.* They should be of mature age, but not too old, experienced in the practical administration of temporal and spiritual affairs, of sound Catholic doctrine,— which means that they must not be suspected of Modernism, especially,— of more than ordinary learning, faithfully devoted to the Holy See, of good conduct and piety, of sound manners and health. Their family affairs should also be examined (art. 2).

2. All *bishops* are called upon to send to their metropolitan the names of one or two priests, either of their own diocese or outside of it, whom they regard as possible candidates for a future choice. This should be done in Lent, every two years, beginning with 1917 (art. 1). In order that the bishops may be properly informed as to the character of the candidates, they should informally and secretly ask their consultors and irremovable rectors — a reminiscence of the old method. They are, however, in no wise bound to accept or follow the information thus obtained (art. 2 ff.). The metropolitan follows the same procedure in his archdiocese, and ultimately draws up an alphabetical list of the names received from all the bishops of the province (art. 5).

3. The bishops *meet with their metropolitan* after Easter, at a convenient place and time, without attracting the attention of outsiders. To their meeting no other ecclesiastic is admitted. One of the bishops (the youngest or the ablest) acts as secretary. After having taken the oath of secrecy, the bishops enter into a moderate (moderate, we suppose, as to time and spirit) discussion concerning the candidates proposed. Then they proceed to

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balloting, in alphabetical order, the white ballot signifying "yes," and the black one "no," and a neutral color "I abstain" (art. 12). The metropolitan and the secretary act as tellers. More than one vote may be taken. After a result has been obtained, the minutes of the discussion and the result of the balloting are drawn up in form of a document by the secretary, who reads the same to his fellow prelates and has a copy made, which must be sent to the Apostolic Delegate, by whom it is forwarded to the Consistorial Congregation (art. 15 ff.).

This, in substance, is the decree regulating the "proposal" of names, which are to be kept on record in Rome as well as in the secret archives of the metropolitan, at least as long as there is no danger of divulgation. The decree says nothing of the right of bishops, nothing about *postulatio,* nothing as to when a meeting should be called in case the metropolitan see is vacant.

The juridical effect of the "*proposal*" or the *ius nominandi seu commendandi,* as once in vogue in the United States and still customary in Ireland, England, and Canada, is not to create a *ius ad rem,* but merely, as it were, a *processus informativus,* serving as a basis to the Holy See for the appointment of suitable candidates to vacant bishoprics.

Quite naturally the question arises: Does this decree still hold good after the Code has gone into force? We believe it does, since the Code alludes to "*peculiaria,*" where lawfully established. Besides, it is not probable that the framers of the decree of 1916 knew nothing of the present Code, which was then in its final shape, so far as the regulations concerning the election of bishops was concerned. But we may be allowed to express the hope that this decree will be changed or abolished if the experiment should prove unsatisfactory.

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Other ecclesiastical elections which fall under the present article, are those held in religious communities, especially of exempt orders, who elect their prelates or superiors.

TIME AND CONVOCATION

CAN. 161

Si cui collegio sit ius eligendi ad vacans officium, electio, nisi aliud iure cautum fuerit, nunquam differatur ultra trimestre utile computandum ab habita notitia vacationis officii; quo termino inutiliter elapso, Superior ecclesiasticus, cui ius confirmandae electionis vel ius providendi successive competit, officio vacanti libere provideat.

CAN. 162

§ 1. Salvis peculiaribus constitutionibus vel consuetudinibus, collegii praeses, statuto modo, loco ac tempore electoribus convenienti, convocet omnes de collegio; et convocatio, quando personalis esse debet, valet, si fiat vel in loco domicilii aut quasi-domicilii vel in loco commorationis.

§ 2. Si quis ex vocandis neglectus et ideo absens fuerit, electio valet, sed ad eius instantiam debet, probata praeteritione et absentia, a competente Superiore irritari, etiam secuta confirmatione, dummodo iuridice constet recursum saltem intra triduum ab habita notitia electionis fuisse transmissum.

§ 3. Quod si plures quam tertia pars electorum neglecti fuerint, electio est ipso iure nulla.

§ 4. Defectus convocationis non obstat, si praetermissi nihilominus interfuerint.

§ 5. Si agatur de electione ad officium quod electus

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ad vitam retinet, convocatio electorum ante officii vacationem nullum habet iuridicum effectum.

Canon 161 establishes the *trimestre utile* within which the election must be held. What *utile* means has been explained.[43] The Code adds that the three months' period must be observed unless the law provides otherwise, and law here means the common law, not constitution or custom. Hence the general law requires that an election be held within three months, unless, of course, some unforeseen impediment should arise,[44] for which the *utile tempus* is granted. If the legitimate electors fail to meet within that time, or can not agree upon a candidate, — for *election* certainly involves a result, not mere fruitless scrutinies — then the one who is entitled to ratify the election, or to fill the vacant office by way of devolution, should make the appointment. This is the case, for instance, if a cathedral chapter allows the *tempus utile* to elapse.[45] But it also applies to religious communities, and the common law admits their constitutions only in so far as they do not conflict with the present canon. Hence privileges granting an extension of time must now be considered to be without effect.[46] Wherefore, for instance, in certain Benedictine Congregations which grant the right of ratification to the Abbot President, the latter would be entitled to appoint, *positis ponendis,* a candidate of his own.

Canon 162 treats:

(1) Of the *preliminary act of convocation,* which concerns the mode, place, and time of the election.

(a) The possible *mode,* in the juridical sense, would

43 Cf. can. 35; can. 155.
44 C. 41, X, I, 6.
45 Can. 432, § 2.
46 Can. 507. The Franciscans enjoy such a privilege; cfr. Piat. Mont, *Prael. Juris Reg.,* 2nd ed., I, 518; Bachofen, *Compendium Juris Reg.,* p. 190.

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be twofold, *viz.*, scrutiny and compromise, quasi-*inspiratio* being excluded. *Scrutiny* is the usual way of electing by votes. *Compromise* is admitted by the Code and determined in c. 172 f. But the term "*modus*" may also be taken in a wider sense, as signifying the way in which to proceed in the election, as far as not determined by law; *v. g.*, mass and other solemnities, written or printed ballots, etc.

(b) The *place* for holding elections is not determined. According to the old law, episcopal elections should take place in the cathedral.[47] For religious the whole convent is reputed to be a proper place; not even an interdicted place is excluded.[48]

(c) The *time* is to be determined by the head of the collegiate body. Any time of the day may be chosen, and it is proper that the *Missa de Spiritu Sancto* precede the act.[49]

(2) *Convocation* or summons must be served to *all* who belong to the body which is to elect. Therefore

(a) All *absent members must* be summoned in such a way that, considering the ordinary means of communication, the summons is apt to reach them wherever they may be. Hence if the summons is directed to one's domicile or quasi-domicile, or actual stopping-place (*e. g.*, in vacation time), this is sufficient. If the letter is lost on the way, or miscarries, this accident has no juridical effect. But it is advisable to have the letters registered, for the receipt would serve as a proof that summons has been duly made. Distance is a very immaterial point now-a-days. Besides, the Constitutions may provide for different emergencies.

(b) Summons must be sent also to such as are under

47 C. 28, X, I, 6.
48 Cfr. Bachofen, *Compendium Juris Reg.*, p. 189.
49 *Ibid.*, p. 195.

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censure, unless they are *excommunicati vitandi,*[50] or have been legally deprived of their vote before the summons was sent.

(c) The reason why all have a right to be summoned lies not only in the chapter-rights, of which that of having a voice in the election of superiors is the most prominent, but also in the danger of nullifying the election. For if only one member is absent by reason of not having been called, the election may be declared null and void. However, the one who feels himself slighted, in order to nullify the election, must furnish a *twofold proof:* first, that his absence was caused by not being summoned, and secondly, that he has put in his claim within three days from the date of the election. If the first proof cannot be furnished, the latter has no value. Hence the secretary of the chapter should keep a copy of the summons, with receipts for the registered letters sent out. The members should be called together *in capitulo,* and care be taken that all are present. If one is *absent* legitimately (*i. e.,* not through his own fault), he is entitled to a personal summons; but if he knows of the convocation from another source, and that source can be proved, he is not entitled to remonstrate. The proof that he appealed within three days can easily be upset if the president keeps the minutes and records.

(d) That more than *one-third of the electors* of any corporate body should be neglected in the case of an election is not probable, but should it happen, the election is null and void, and another must take place. To proceed to that, a comparison between the members entitled to the vote and the members neglected must be made, and if it is proved that the summons were not sent, the minority

[50] C. 23, X, II, 28.

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has the right to ask for another election. However, if they were present at the election, even though they did not vote, the election is valid, for summoning is only a means of calling together, not the purpose of election.

(e) Paragraph 5 speaks of an *office for life,* and enacts that any meeting of the members entitled to take part in an election held before the vacancy of the incumbent produces no juridical effect. Such a preliminary meeting or consultation about possible candidates savors of disrespect for the present incumbent, opens the way to criticism and insubordination, and is forbidden to the cardinals under penalty of excommunication.[51] From such a meeting the so-called *tractatus praevius* differs *toto caelo*. This is a meeting held in certain congregations immediately before the election of a superior, in order to discuss the qualifications of probable candidates. Our Code is silent on this subject, and we believe that the advisability of holding such *tractatus praevii* depends much on circumstances. In a monastery with many *expositi* such a preliminary discernment may accelerate an election and remove misgivings. Besides, it may bring out faults and mistakes of the former government which ought to be corrected.[52]

THE ELECTORS (VOX ACTIVA)

CAN. 163

Convocatione legitime secuta, ius eligendi pertinet ad eos qui praesentes sunt die in convocatione statuto, exclusa facultate ferendi suffragia non solum per epi-

51 Cfr. "*Vacante Sede Apostolica,*" n. 80; c. 2, Dist. 79.

52 At Einsiedeln in Switzerland they hold a so-called *Murr-Kapitel,* in which everyone is allowed to criticize what displeased him under the preceding régime.

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stolam, sed etiam per procuratorem, nisi lege peculiari aliud caveatur.

The Decretals as well as the Tridentine Council,[53] and several decisions of the Roman Curia, had forbidden voting by proxy, the common opinion of canonists also voting by letter.[54] Now the Code establishes the general law that only those actually present are allowed to vote, but voting by proxy or letter is permitted where a special law to that effect has been made by the collegiate body. Such a law may be contained in the Constitutions approved by the Holy See. Custom, however, is inadmissible in this matter because the Code speaks of laws enacted in a special manner. Where voting by proxy or letter is allowed, care must be taken that the secrecy of the vote be kept intact.

CAN. 164

Etsi quis plures ob titulos ius habeat ferendi nomine proprio suffragii, non potest nisi unicum ferre.

CAN. 165

Nullus collegio extraneus admitti potest ad suffragium, salvis privilegiis legitime quaesitis; secus, electio est ipso facto nulla.

CAN. 166

Si laici contra canonicam libertatem electioni ecclesiasticae quoquo modo sese immiscuerint, electio ipso iure invalida est.

If laymen interfere in any way with canonical liberty

[53] Cfr. c. 42, X, I, 6; Sess. 25, c. 6, *De Reg.*

[54] Benedict XV, "Dei providentis arcano," May 1, 1917; *Acta Ap. Sedis*, Vol. IX, pp. 529 ff.; cfr.

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in an ecclesiastical election, the election is *ipso iure* null and void.

Canon 164 precludes the casting of several votes by the same person, though he may technically have the right to more than one vote, for instance, as canon and dignitary, consultor and irremovable rector.

Can. 165 says that one who *does not belong to the collegiate body,* or is not a member of the chapter which has the right of election, may by custom or privilege be permitted to cast a vote,[55] provided he is himself a cleric. Unless custom or privilege — and both must be proved — warrant such a participation, no one who does not belong to the body of electors has a right to interfere, and if the chapter should consent to such interference, the election would be null and void.

Much less, says Can. 166, may a *layman,* no matter under what pretext, even though he be the patron of the monastery[56] or church, be admitted to the election. And election here means not only the casting of the votes, but whatever belongs thereto. An exception, if such it be, may be made in favor of a layman's being present at the holy Mass, to pray for a good choice.

CAN. 167

§ 1. Nequeunt suffragium ferre:

1.° Incapaces actus humani;

2.° Impuberes;

3.° Censura vel infamia iuris affecti, post sententiam tamen declaratoriam vel condemnatoriam;

4.° Qui sectae hereticae vel schismaticae nomen dederunt vel publice adhaeserunt;

55 Cfr. c. 8, X, I, 4; c. 50, X, I, 6.

56 Cfr. c. 1, Dist. 63 (Had.); c. 51, X, I, 6. (Cluny had admitted a layman, but was reprimanded by Greg. IX: "*in dispendium ecclesiasticae libertatis*"), c. 56, X, I, 6.

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5.° Carentes voce activa sive ob legitimam iudicis sententiam sive ex iure communi aut particulari.

§ 2. Si quis ex praedictis admittatur, eius suffragium est nullum, sed electio valet, nisi constet, eo dempto, electum non retulisse requisitum suffragiorum numerum, aut nisi scienter admissus fuerit excommunicatus per sententiam declaratoriam vel condemnatoriam.

Impuberes are all under the age of fourteen.[57] Those who are "incapable of [eliciting] a human act" are generally called insane, although the authors[58] exclude from voting only such as have no control over themselves at all habitually, not such as have a lucid moment (*lucidum intervallum*) at the time when they cast their vote.

By *censure* is understood any excommunication, suspension or personal interdict which has been inflicted either by the law itself for a grievous external fault and hence needs only to be *declared* to be incurred, or a penalty inflicted by legitimate ecclesiastical authority for a crime which, though not censurable in law, was imposed by the judge in the form of a *sententia condemnatoria.* Concerning the first kind, note that a declaratory sentence starts at the moment of the perpetration of the crime[59] for which it was inflicted, whilst a condemnatory sentence must be formally pronounced in order to take effect. Hence if one had committed a crime deserving of censure by a declaratory sentence, even though he would be declared guilty only at or after the election, his vote would be null and void. The same holds good concerning *infamia juris,* which is in law established for certain enormous crimes,[60] as well as with regard to *heretics* and

57 Cfr. can. 88, § 2; c. 32, X, I, 6.

58 Cfr. Reiffenstuel, I, 6, n. 166.

59 Cfr. can. 2232, § 2.

60 Such as heresy and apostasy, also crimes of a gross nature com-

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schismatics. The term *nomen dare* means to enroll one's name on the official list of members of a non-Catholic sect, *e. g.,* by taking a pew in a sectarian church, but one could not be said to have "given his name" if he merely contributed to a collection.

Those who are *deprived* of an *active voice* in an election may be so deprived either by the sentence of an ecclesiastical judge (Ordinary, Pope, Abbot), or by reason of the law stating that penalty. Such are secularized and apostatized religious.[61] The particular law sometimes inflicts that penalty, *e. g.,* when the Constitutions of an order declare that religious who own property against the will of their superior,[62] or who reveal the secrets of the chapter, lose the right to vote. Here the Code does not require either a declaratory or a condemnatory sentence. Hence such religious are *ipso iure* deprived of the vote. However, since either the fact of the perpetrated crime, or the penalty, may not be known to the electors, the president should formally exclude such members, or formally pardon them for the purpose of casting their vote.

Here we may explain the meaning of the *absolutio* imparted at the beginning of an election. This is little more than a mere ceremony and does not render those excluded from the right of voting under our canon capable of voting, but is intended *ad cautelam,* as the canonists say, *i. e.,* in order that the election, if no essential feature is omitted, may take effect, and hence may not be frivolously attacked. For if it would take away the effects of penalties, these would be a mere mockery.[63]

The last paragraph (§ 2) says that the vote cast by

mitted by clergymen *in sacris,* such as sodomy, adultery, bestiality; cfr. can. 2314, § 1, n. 2; can. 2359, § 2.

61 Cfr. can. 639 f.; can. 2385; by a sentence of the judge cfr. cc. 2331, 2336, 2342, 2360, 2368, 2389.

62 *Trid.,* Sess. 25, c. 2, *De Regg.*

63 Ferraris, *Prompta Bibliotheca, s. v. "Praelatus Regularis,"* n. 73.

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one incapable of voting does not render the election itself null and void, except in two cases: if the invalid vote were decisive, and if the electors would knowingly admit an excommunicated member. The first case is a rather difficult one. The secrecy of the ballot box, as now in use, seems to preclude an investigation. It is probably for this reason that the canon says, "*si constat*," *i. e.*, if it is evident. The fact might be evident to the tellers, whose statement in that case would be sufficient to nullify the election. The other case is more palpable, for the law requires a knowledge on the part of at least some of the electors of the fact of excommunication. If an excommunicated person were present in the room and could not be decently removed, the electors would have to protest against his presence and also state that his vote would not count.[64] The tellers could then simply throw it out.

CAN. 168

Si quis ex electoribus praesens in domo sit in qua fit electio, sed electioni ob infirmam valetudinem interesse nequeat, suffragium eius scriptum a scrutatoribus exquiratur, nisi aliter particularibus legibus vel legitimis consuetudinibus fuerit constitutum.

This rule, of course, applies only when the sick person is in a normal mental condition; otherwise there is not only no obligation to obtain his vote, but by reason of can. 167, § 1, n. 1, he is excluded from voting.

CAN. 169

§ 1. Suffragium est nullum, nisi fuerit:

1.° Liberum; et ideo invalidum est suffragium, si

64 Reiffenstuel, I, 6, n. 169.

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elector metu gravi aut dolo, directe vel indirecte, adactus fuerit ad eligendam certam personam aut plures disiunctive;

2.° Secretum, certum, absolutum, determinatum.

§ 2. Conditiones ante electionem suffragio appositae tanquam non adiectae censentur.

CAN. 170

Suffragium sibimetipso nemo valide dare potest.

The first *essential requisite* of a vote is (a) that it be given *freely*. Hence if a voter is influenced, either *directly, i. e.,* at the election itself, or indirectly, *i. e.,* before the election but for the purpose of electing a certain person, no matter whether this influence was exercised by insiders or outsiders, through grievous fear[65] or deceit, *i. e.,* bribery, or false representations, his vote is *ipso iure null* and void.[66] Undue influence of senior upon junior members would not invalidate the vote, but might endanger its liberty, so that the tellers would be obliged to reject the ballots.

(b) A vote must furthermore be *secret,* because of the probable consequences of partisanship, enmity, preference, and other evils. Hence the Decretals as well as the Council of Trent insist upon secrecy,[67] and all precautions must be taken that no one's vote is ever revealed. For this reason the names of the candidates as well as those of the electors should be printed and distributed. No mark should be put on the ballots, and no showing them to others is permitted.

(c) A vote must, in the third place, be *certain, i. e.,* cast for a determined person. It would be uncertain if

65 Cfr. can. 2205, § 2.
66 Cfr. cc. 14, 43, X, I, 6.
67 Cfr. c. 42, X, I, 6; *Trid.*, Sess. 25, c. 6, *De Regg.*

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written thus: "I elect the one who has the most votes." *Absolute* is the opposite of conditional. A conditional vote would be: "I elect N. if he accepts." A vote is *determined* if the candidate cannot be mistaken and it spells almost the same as certain.

Any stipulation made before the election is null and void; hence no "*capitulatio*," as was sometimes done before papal elections, and no promise may be made, or if made, it need and should not be kept after the election.

BALLOTING

CAN. 171

§ 1. Ante electionem per secreta suffragia deputentur, nisi iam propriis statutis deputati sint, e gremio collegii duo saltem scrutatores, qui una cum praeside, si et ipse e gremio collegii sit, iusiurandum interponant de munere fideliter implendo ac de secreto servando circa acta in comitiis, etiam expleta electione.

§ 2. Scrutatores curent ut suffragia secreto, diligenter, singillatim et servato praecedentiae ordine ab unoquoque electore ferantur; collectisque ad ultimum suffragiis, coram praeside electionis, secundum formam propriis constitutionibus vel legitimis consuetudinibus statutam, inspiciant an suffragiorum numerus respondeat numero electorum, suffragia ipsa scrutentur palamque faciant quot quisque retulerit.

§ 3. Si numerus suffragiorum superet numerum eligentium, nihil est actum.

§ 4. Suffragia statim, peracto unoquoque scrutinio, vel post sessionem, si in eadem sessione habeantur plura scrutinia, comburantur.

§ 5. Omnia electionis acta ab eo, qui actuarii munere fungitur, accurate describantur, et saltem ab eo-

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dem actuario, praeside ac scrutatoribus subscripta, in collegii tabulario diligenter asserventur.

Unless otherwise provided for in the statutes of the respective corporation, at least two tellers, who are members of the chapter, must be appointed by secret suffrage immediately before the election. These tellers, as well as the presiding officer (if he belongs to the chapter), must take an oath that they will faithfully fulfill their duty and keep the proceedings secret even after the election.

The tellers must see to it that each elector votes secretly, singly, and according to the order of precedence. After the votes have been collected the tellers shall, in the presence of the presiding officer, count them according to the constitutions and customs proper to the chapter, to see whether the number of the ballots corresponds with that of the electors; and then ascertain and announce the result.

If the number of votes cast exceeds that of the voters the election is void.

The ballots must be burnt after each scrutiny, or at least after each session, if several ballots were take in one one session.

The minutes of the election must be accurately taken down in writing by the secretary, who together with the presiding officer and the tellers must sign the record, which is to be carefully preserved in the archives of the chapter.

This important canon embodies the famous chapter 42 of the Decretals of Gregory IX (I, 6), which has been elaborately explained by the commentators. However, the new law modifies and simplifies the procedure. Thus, only *two tellers* are required, but these must be members of the chapter which elects a superior. They must be

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chosen by secret ballot, unless the statutes determine who are to serve as tellers, for instance, the two seniors, or the two juniors, or the two oldest definitors. The tellers must be chosen immediately before the election. Their *function* consists in watching that the voting takes place according to law: *secreto, i. e.,* so that no one can perceive in any way, or by any sign, to whom another gives his vote. This can best be accomplished by using printed ballots and folding them in such a way that the name does not appear. The folded ballots are cast into a chalice or urn in presence of the tellers. *Diligenter* formerly meant that the tellers had to urge the electors to give their vote to a worthy candidate and with holy zeal. This was necessary when the electors had to inquire and put down the names of those for whom the vote was cast.[68] Now-a-days *diligenter* may be taken as an exhortation to the electors to vote conscientiously and so as not to delay the election. *Singillatim* means that the electors should vote one after another, not two or three at the same time, which might furnish an opportunity for fraud. Hence the *order of precedence* is prescribed, which says that the senior member of the community should vote first. Seniority is to be taken according to the date of profession in religious bodies, or the date of appointment or choice in chapters or boards of diocesan consultors. However, if the Constitution of an order or congregation prescribes that the junior members should cast their vote first, this rule must be observed.

After all have cast their vote, the tellers, in the presence of the presiding officer, should first *compare* the number of votes cast with the total number of those

[68] Reiffenstuel, I, 6, n. 128.

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who were entitled to vote. If there are fifty lawful electors present and fifty-one votes are cast, the election is null and void and another ballot must be taken. When the number of votes cast tallies with that of the voters present, the ballots must be opened (unfolded) and examined as to their validity, which may be affected by the vote itself, by the person who cast it, or the one for whom it is cast.

(a) Every ballot must be cast according to can. 169, and hence uncertain, conditional, and undetermined votes are not counted.

(b) The *person who has cast the vote* may be incapable of voting, which would make his vote null and void; but this defect should be decided before the balloting, although such an invalid vote may be rejected after the election if its invalidity was not discovered before.

(c) The *person for whom* the vote is cast may suffer from an impediment which renders him incapable of accepting the election, at least without a dispensation. If the impediment is such that a dispensation may be obtained, the person thus affected must be *postulated* (can. 180) and the phrase "I postulate" be used in the vote or ballot. Otherwise the vote is invalid. The impediments which may arise in the case of religious are stated in can. 504 of our Code, where the Constitutions of each religious congregation are enforced and, besides, the following conditions laid down: that no one is eligible who has not been in the order at least ten years from the date of simple profession and who is not of legitimate birth;[69] that, to be elected superior general or abbess, a candidate must be forty years of age, whilst to be elected provincial or abbot or guardian, etc., the age of thirty

[69] *Regula juris* 87 in 6°: "*infamibus portae non pateant dignitatum.*"

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suffices. The Constitutions of some orders lay down other and stricter conditions for the respective offices.

Under the old law heretics and apostates, forgers of apostolic documents,[70] persons guilty of sodomy,[71] those who from ambition consent to their election before the result is published,[72] and those who used simonical means were excluded.[73] The Code does not mention these disqualifications, but it would be neither against the law nor superfluous to insert them in the Constitutions.

The *result* of an election is to be made public by the tellers, together or singly announcing how many votes each candidate has received.

Summarizing the new law governing elections we may lay down the following as its essential points:

(1) Two tellers secretly elected from the members of the body;

(2) Oath taken by the tellers;

(3) Duty of tellers respecting the casting of the votes;

(4) Collecting of the votes;

(5) Examination as to the number of votes and voters;

(6) Inspection of the ballots;

(7) Publication of the result.

The rest of the text (§§ 4 & 5) is plain enough. It is not so evident, to us at least, why no oath is required from the presiding officer if he does not belong to the *gremium collegii*. Of course, we understand why he cannot strictly be obliged to take the oath, for he does not belong to the chapter and therefore the chapter has no authority to demand an oath of him. However, the supreme legislator could oblige such a one to take the oath of secrecy because the presiding officer at an ecclesiastical election acts in the

70 C. 7, X, V, 20.

71 Pius V, "*Horrendum*," Aug. 30, 1568.

72 C. 46, X, I, 6.

73 C. 27, X, V, 33.

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name of the Church. And we believe it would be very opportune to put him under oath because strict secrecy is very important in an election, and although he is bound by the professional secret, yet the religious act of taking an oath would add weight to the natural obligation.

The oath itself may be taken upon the Holy Gospels, which is the usual form, or without the Gospel Book, by simply swearing in the name of God.

COMPROMISE

CAN. 172

§ 1. Electio, nisi aliud iure caveatur, fieri etiam potest per compromissum, si nempe electores, unanimi et scripto consensu, in unum vel plures idoneos sive de gremio sive extraneos ius eligendi pro ea vice transferant, qui nomine omnium ex recepta facultate eligant.

§ 2. Si agatur de clericali collegio, compromissarii debent esse sacerdotes, secus electio est invalida.

§ 3. Compromissarii debent pro validitate electionis conditiones compromisso appositas, quae non sint contra ius commune, observare; si nullae conditiones additae fuerint, servandum ipsis est ius commune circa electiones; conditiones autem contra ius pro non appositis habeantur.

§ 4. Si ab electoribus in unam tantum compromissum fuerit personam, haec nequit seipsam eligere; si plures designati fuerint compromissarii, nemo ex iis proprio consensu potest accedere reliquis ipsum eligentibus ut electionem sui compleat.

This canon provides that an election, unless otherwise

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provided by law, may take place "by compromise, *i.e.*, the electors may, by unanimous written consent, bestow the right of electing upon one or several fit persons, who may be either members of the chapter or outsiders, and who, by virtue of the faculty received, perform the election in the name of all.

In clerical chapters the *compromissarii* must be priests, otherwise the election is invalid.

The *compromissarii*, in order to elect validly, must observe the conditions laid down in the compromise, as far as these do not contravene the common law; if no conditions are mentioned, the common law concerning elections must be followed.

If there is only one *compromissarius*, he may not elect himself; if there are several, none of them may add his vote to the votes cast for himself in order to be elected.

The Code, following the Decretals,[74] admits the form of compromise and sets up several rules for it.

The first rule is that the compromise must be made *by unanimous consent*, because an election touches all and must therefore be approved by all.[75] The consent must be given *in writing* (formerly this was not required), and therefore all the electors must sign their names to the compromise. The electors may choose either from their own (chapter) or outside, *i. e.*, such who would not have a right to vote, as in the example referred to in the previous note concerning nuns appointing the bishop as their *compromissarius*.

The *second rule*, although not especially stated, is that the *compromissarii* must be clergymen,[76] and if the electing body is of the clerical order, the Code says they must be priests. What is meant by *clerical order* or *community*

74 Cf. c. 42, X, I, 6; in c. 8 *ib.*
75 *Reg. juris* 29 in 6°.
76 Cf. c. 8, X, I, 41, *de arbitris*, c. 2, XII, 1 *de judic.*; can. 166.

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is stated in can. 488, § 4, where a clerical order is defined as one, most of whose members are priests. A lay order, *e. g.*, is that of the Christian Brothers, who may choose brothers of another community, or even of a different order, as *compromissarii*.

The *third rule* touches a *conditional compromise*, which is sometimes called limited, or a compromise with restrictions, as, for instance, if the electors agree to elect one of the members of their own community,[77] or to employ the advice of certain persons,[78] to elect within a specified time. If the condition added militates against the common law which determines the fitness of persons or the mode of election, no attention must be paid to it. But the *compromissarii* must follow the common rules of election and, of course, observe the *trimestre*.

The *fourth rule* excludes *electing oneself*. If only one *compromissarius* is chosen he cannot elect himself. But there may be several *compromissarii*, an example of which is stated in the Decretals[79]: Seven were *compromissarii* to elect a dean of the chapter; three chose one of the seven and the other three chose another, who was not one of the seven. Pope Innocent decided that the former was elected if he consented to his election and there was no canonical impediment. Under the new Code this is impossible, because the candidate would not be allowed to *accede to* the votes given for him. But if four votes of the seven, not counting that of the elected candidate, would fall upon the same person, that person would be legitimately elected. Thus, also, in the case of three *compromissarii* casting two votes for the third *compromissarius*, the latter would be elected if there were no obstacle to invalidate his election.

77 Cf. cc. 32 f., X, I, 6.
78 Cf. c. 52, X, I, 6.
79 C. 33, X, I, 6.

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CAN. 173

Cessat compromissum et ius eligendi redit ad compromittentes:

1.° Revocatione a collegio facta, re integra;

2.° Non secuta aut non servata aliqua conditione compromisso apposita;

3.° Electione absoluta, si fuerit nulla.

Canon 173 decides when the compromise may be repeated, and when it ceases. The lawful electors may *recall* the compromise as long as it has not taken a legal turn (*re integra*). The *legal turn* has commenced, according to the old law,[80] which is not changed in this regard, when the *compromissarii* have repaired to a separate place or room and begun to treat of the person to be elected.

The right of electing *returns* to the *original electors:*

a) If any condition is not fulfilled by the *compromissarii*, for instance, if the time set for the election elapses [81] or if an unfit (*indignus*) candidate is elected. The non-observance of any reasonable condition which is not against the common law, deprives the *compromissarii* of the right of election, which consequently returns to the legitimate electors, not to the superior, because the Code explicitly says: "*ius eligendi redit ad compromittentes.*"

b) If the *compromissarii* have made an election, but this is void for any reason, *e. g.,* the unfitness of the candidate elected, the right of electing returns to the original electors.

The question may arise whether religious communities

80 C. 30, X, I, 6.

81 C. 37, 6°, I, 6; but the canon states that the right of electing passes to the superior, as the canonists taught; cfr. Reiffenstuel, I, 6, n. 93, and others, but this is rejected by the new Code.

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may employ the compromise. The answer is yes, because the Code admits it in general terms. Hence, if the Constitutions contain nothing to the contrary, a religious community may elect a superior by compromise.

THE NUMBER OF VOTES REQUIRED

CAN. 174

Is electus habeatur et a collegii praeside proclametur, qui requisitum suffragiorum numerum retulerit, ad normam can. 101, § 1, n. 1.

The one who has received the number of votes required under can. 101, § 1, n. 1, is elected and must be proclaimed by the presiding officer.

The canon referred to states that an *absolute majority* of votes is required to carry an election.

EFFECT OF THE ELECTION

CAN. 175

Electio illico intimanda est electo, qui debet saltem intra octiduum utile a recepta intimatione manifestare utrum electioni consentiat, an eidem renuntiet; secus omne ius ex electione quaesitum amittit.

The result of an election must be immediately made known to the one elected, who is obliged within eight days (*utiles* from the date of notice) to signify his intention of accepting or not accepting the election. If he fails to do this, he forfeits every right acquired by the election.

Now-a-days the means of communication are so swift and convenient that the result of an election may be made known to the one elected more rapidly than in former times, wherefore the Code uses the term *illico,* without,

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however, determining its exact meaning. Formerly intimation was to be made *quam citius,*[82] which was interpreted as meaning eight days from the date of election.[83]

Of course, the notice of election should be sent immediately to the person elected, because *illico* means without delay, and from the spot or place where the election was held. Formerly the person elected was given one month for deliberation,[84] now he is given only eight days. Still the new law leaves some margin, in as far as the eight days are *utiles* or equitable. Therefore if an unforeseen impediment, over which a man has no control (*e. g.,* sickness or delay of trains) would arise, this delay would not affect the right acquired by election. But if malice or negligence caused a delay, the right accruing from election would be *ipso iure* forfeited.

Can. 176

§ 1. Si electus renuntiaverit, omne ius ex electione quaesitum amittit, etsi renuntiationis eum postea poeniteat; sed rursus eligi potest; collegium autem intra mensem a cognita renuntiatione ad novam electionem procedere debet.

§ 2. Acceptatione electionis electus, si confirmatione non egeat, plenum ius statim obtinet; secus, non acquirit nisi ius ad rem.

§ 3. Ante acceptatam confirmationem ipsi praetextu electionis non licet sese immiscere administrationi officii sive in spiritualibus sive in temporalibus, et actus ab eo forte positi nulli sunt.

Every man is free to accept or refuse an election. Religious are no exception. Hence not even the superior

82 C. 6, 6°, I, 6.
83 C. 16, 6°, I, 6, § *Caeterum.*
84 *Ibid.*

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can compel a religious to accept an election, because the freedom to refuse office has not been taken away by profession.[85] But once having refused, he has lost his rights, nor can they be regained by a change of mind. Therefore, when an elected person refuses to accept, the electors must proceed to another election. At this second election the one who was first elected, but refused, and subsequently changed his mind, may again be elected.

Paragraph 2 mentions the *right following acceptation.* This right is either *in re* or *ad rem.* A right *in re* creates the faculty and power to dispose of a thing as one's own; thus a proprietor may do with his property as he pleases, unless the law intervenes. A *ius ad rem* is a right which creates a claim to a thing, or causes it to become one's own (*ut res fiat sua*), though he does not yet have it in his hands nor can dispose of it freely. One elected to office obtains a *ius ad rem* if the election needs ratification by a superior. But if the very act of election and acceptation puts him in possession of the office or prelacy, he has a *ius in re,* or an unimpeached right to administer the office.

§ 3 explains what one who has been elected and accepted, cannot do if the election requires confirmation. Since he is not yet the proprietor or possessor of the office, he cannot interfere with its spiritual or temporal administration, and consequently, even if he has been administrator *ad tempus* or procurator, he has to abstain from acts of jurisdiction. However, we believe that common acts of buying and selling and administrative routine affairs, provided nothing is done detrimental to the church or community, may be performed by such administrators-elect.[86] But strictly legal acts, such as appointment to

[85] Engel, I, 6, n, 46.

[86] Cf. Reiffenstuel, I, 6, n. 47; Engel, I, 6, n. 51, who even makes some allowance for provinces remote from Rome.

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offices or presentation to parishes, and acts of jurisdiction, such as giving faculties for hearing confessions, inflicting ecclesiastical censures, absolutions and dispensations, would be of no juridical effect (*actus ab eis forte positi nulli sunt*).

CAN. 177

§ 1. Electus, si electio confirmatione indigeat, saltem intra octiduum a die acceptatae electionis confirmationem a competente Superiore petere per se vel per alium debet; secus omni iure privatur, nisi probaverit se a petenda confirmatione iusto impedimento fuisse detentum.

§ 2. Superior, si electum repererit idoneum, et electio ad normam iuris fuerit peracta, nequit confirmationem denegare.

§ 3. Confirmatio in scriptis dari debet.

§ 4. Recepta confirmatione, electus obtinet plenum ius in officio, nisi aliud in iure caveatur.

This canon states the *necessity of ratification,* which is evident because the legitimate superior's power cannot be set aside. Ratification must be sought under penalty of forfeiting the rights accruing from election. Under the Decretals [87] this penalty was so severe that it rendered a person incapable of obtaining any office in future. This is abolished by the new Code. If the elect can prove, by at least one trustworthy eyewitness, or other lawful proof, *e. g.,* the testimony of a physician, that he was prevented from asking ratification, the rights acquired by the election remain intact.

The *competent* superior, from whom ratification must be demanded, is the one next in authority.[88] Thus a pro-

87 C. 17, X, I, 6; c. 5, 6°, I, 6; Engel, I, 6, n. 51.

88 Engel, I, 6, n. 50.

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vincial would have to ask the general's confirmation; bishops are confirmed by the Holy See. Religious orders and congregations mostly state in their constitutions who has the right of confirming elections.[89] Superiors of diocesan institutions are ratified by the respective Ordinary.[90] The Code says (§ 2) that a superior is not at liberty to refuse ratification arbitrarily. This does not apply to the Supreme Pontiff, who, unless bound by a concordat, may, even without reason, refuse to confirm the elect.[91] Other superiors are obliged to ratify the election if the person elected is fit and the election was valid, because an election and its acceptance produce a right.[92]

Ratification, which must be given in writing (§ 3), creates a full right to the office, unless consecration or benediction is required to enable one to exercise pontifical functions. Abbots regular, in order to be allowed the exercise of pontifical functions, must be blessed by the diocesan bishop within three months from the date of their election.[93]

DEVOLUTION

CAN. 178

Si electio intra praescriptum tempus peracta non fuerit, aut collegium iure eligendi privetur in poenam, libera officii provisio ad eum Superiorem devolvitur, a quo confirmanda esset electio vel cui ius providendi successive competit.

If an election was not performed within the term prescribed, or if the electors were legitimately deprived of the right of election, the right to appoint one to the vacant office devolves on the superior who would otherwise ratify

89 These Constitutions are admitted by the Code, can. 507, §1.
90 Can. 506, § 4.
91 Reiffenstuel, I, 6, n. 28.
92 C. 3, X, I, 6.
93 Can. 625; cf. cc. 325, 964, n. 1.

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the election, or on the one who is next as to the right of appointment.

The time prescribed in can. 161 is three months from the date when notice was given of the vacancy.[94] Therefore the electoral college loses the right of election after said term has expired. It may, moreover, forfeit the right by electing one unfit for the office, or by setting aside the substantial form required by law.[95] In such cases the right of election devolves either on the superior who has the right of ratifying the election, which is the case in religious communities, or on the superior who is called upon to supply the negligence of an inferior, as happens in cathedral chapters.[96] The case may arise that one who is elected suffers from a *hidden impediment,* for instance, illegitimacy unknown to the electors, or at least to the majority of them. Is such a one allowed to accept the election? If he can decline it without defamation or losing his reputation, he is bound to do so. But if he is reasonably afraid of losing his good name, or if the church or community would suffer by his refusal, he is allowed to accept, but should ask secretly for a dispensation.[97]

ART III

POSTULATION

CAN. 179

§ 1. Si electioni illius quem electores aptiorem putent ac praeferant, impedimentum obest, super quo dispensari possit ac soleat, suis ipsi suffragiis eum possunt, nisi aliud iure caveatur, a competente Superiore

94 Cc. 7, 41, X, I, 6.
95 C. 18, 6°, I, 6.
96 Cf. cc. 315, X, I, 10; cc. 2, 12, X, III, 8; *Trid.*, Sess. 24, c. 16, *De Ref.*; c. 18, 6°, I, 6, reserves that right to the Roman Pontiff with regard to cathedral chapters.
97 Engel, I, 6, n. 45.

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postulare, etsi agatur de officio, pro quo electus confirmatione non egeat.

§ 2. Compromissarii postulare nequeunt, nisi id in mandato aut compromisso fuerit expressum.

CAN. 180

§ 1. Ut postulatio vim habeat, pro ea stet oportet maior suffragiorum pars, imo, si cum electione concurrat, saltem duae tertiae partes requiruntur.

§ 2. Suffragium pro postulatione exprimi debet per verbum: *postulo,* aut aequivalens; formula: *eligo vel postulo,* aut aequipollens, valet pro electione, si impedimentum non exsistat, secus pro postulatione.

CAN. 181

§ 1. Postulatio saltem intra octiduum mitti debet ad Superiorem ad quem pertinet electionem confirmare, si facultatem habeat ab impedimento dispensandi; secus ad Romanum Pontificem aut ad alium habentem facultatem.

§ 2. Si intra praescriptum tempus postulatio missa non fuerit, ipso facto nulla evadit et electores pro ea vice privantur iure eligendi aut postulandi, nisi probent se a mittenda postulatione iusto detentos fuisse impedimento.

§ 3. Per postulationem nullum ius postulato acquiritur et Superiori licet eandem repellere.

§ 4. Praesentatam Superiori postulationem electores revocare non possunt, nisi Superiore consentiente.

CAN. 182

§ 1. Reiecta a Superiore postulatione, ius eligendi ad collegium redit, nisi electores scienter illum postula-

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verint qui tali detinetur impedimento in quo nequeat aut non soleat dispensari; tunc enim provisio ad Superiorem pertinet.

§ 2. Quod si postulatio admissa fuerit, id significetur postulato, qui respondere debet ad normam can. 175.

§ 3. Si eam acceptet, plenum ius in officio eidem statim acquiritur.

These four canons treat of what is called postulation, *i. e.*, "a petition directed to the competent superior or dignitary."[98] This is styled *postulatio solemnis* or proper, to distinguish it from simple postulation, which, according to all authors, takes place when an inferior, say a religious or clergyman of another diocese, is to be elected to a higher office in a monastery or diocese not his own. We are not concerned so much about the bishops of our country, as about religious communities, although it is evident that a bishop of one diocese should be postulated, not elected, for another diocese, because, as the authors say, a spiritual tie between the bishop and his diocese induces a mystic marriage, which can be dissolved only by the Roman Pontiff.[99] But this is not the case with a religious, who is, for instance, elected abbot or superior of another monastery, or even bishop of a diocese. In the first case, *viz.*, if he is elected to another monastery than that of his profession, he needs only the permission of his immediate superior and must be of the same religious order. If he is elected bishop of a diocese, he needs no permission but that of his superior, because it is he who is entitled to give permission to leave the monastery.[100] Hence there

[98] Engel, I, 5, n. 1.

[99] C, 4, X, I, 7, *de translatione Episcopi.*

[100] Cc. 27, 36, 6°, I, 6; c. 1, Clem. I, 3; a religious not abbot.

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is not the faintest idea of postulation in the proper sense to be perceived in the Decretals. Such a religious, if he is endowed with the necessary permission either before (conditionally) or after election is simply elected, not postulated.

But what about an *abbas regiminis ac benedictus?* May he be elected or must he be postulated if called to govern another monastery? Some authors [101] insist vehemently upon the spiritual marriage between an abbot and his monastery and maintain that in such a case postulation is required. However, the text quoted in 6° does not favor that opinion, and the *sententia communis* is against it.[102] Neither can we see much difference between perpetual and temporary abbots as to the spiritual relation between superior and monastery or understand how the blessing contributes to the spiritual tie. Hence, as long as no better reasons are brought forward, we cling to the old law and to the *sententia communis* which tells us that abbots can be elected in the strict sense.

Postulation in the proper sense is required if the person elected suffers from an ecclesiastical impediment, for instance, of age or lack of the necessary number of years in the order,[103] or illegitimate birth. In such cases the competent superior to be asked for a dispensation is the Apostolic See, unless the necessary faculty has been imparted to the superior general of an order or to an Apostolic legate.[104]

The next canon (180) states the *requisites* of postulation. The first is that an absolute majority of the votes

101 Molitor, *Religiosi Juris Capita Selecta*, 1909, p. 450.

102 Thus Passerini, *De Electione*, c. 24, n. 38; Engel, I, 5, n. 9; Reiffenstuel, I, 5, n. 6; Wernz, *l. c.*, II, n. 394; Aichner, § 82, 2.

103 Cf. can. 504; can. 507, § 3, admits postulation only in extraordinary cases, but insinuates nothing as to the necessity of postulating abbots.

104 C. 36, X, 6°, I, 6.

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cast is required for postulation in general. However, if a portion of the electors should wish to elect, *e. g.*, a person without an impediment, while another prefers a candidate with an impediment, the *postulantes* must form two-thirds of the electoral college,[105] and the formula used should simply be, "*ego postulo*," not "*eligo et postulo*," because such a formula is uncertain.[106] The Code, however, admits the term "*eligo vel postulo*" in case the candidate suffers from no canonical impediment.

Canon 181 mentions the *time* within which postulation must be presented to the superior and the *effects* which it produces. As to the former the Code is explicit. Concerning the latter, it must be remembered that the admission of postulation is a mere favor on the part of the superior, who, therefore, if he is supreme (*i. e.*, the Sovereign Pontiff) needs to give no reason for rejecting the postulation, whereas an inferior does. This is precisely what § 3 says. It follows that mere postulation, until fully admitted, creates no right whatever to the office, because, as stated, the admission of postulation is a favor.[107] Another consequence is that postulation depends upon the admission of the superior and creates no right for the *postulatus*, but consists in this that postulants may *change their mind* as long as postulation is not as yet in the hands of the superior.[108] But once it has reached the superior, postulation can no longer be changed, lest the superior would be derided. Of course, if the superior consents to a change, postulation may be changed or turned into election.

The last canon (182) speaks of *rejection* and *admission*

105 C. 40, X, I, 6.

106 C. un. 6°, I, 5.

107 Reiffenstuel (I, 5, n. 72) is inclined, but certainly not logically or canonically, to hold that there is an obligation of admitting postulation if the public welfare or utility are at stake.

108 C. 4, X, I, 5; Engel, *h. t.*, n. 4.

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of postulation. If postulation is rejected, for whatever reason, the electors regain their right of again electing or postulating. However, if they have knowingly postulated one afflicted with a canonically indispensable impediment, the postulants have, for the time being (not for future elections) forfeited the right of election, and the superior to whom the postulation was directed is free to appoint a person of his own choice.[109] Admission of postulation creates the same right as election and confirmation together, *i. e.*, admission produces a *ius in re*, provided the *postulatus* gives his consent within eight days from the date of the notice received of the admitted postulation. The acceptance must be intimated to the postulants as well as to the superior who admitted the postulation, although the right to the office or prelacy takes full effect from the moment one accepts. Hence, whatever pertains to administration and jurisdiction he may now perform, but if consecration or benediction is needed, he cannot exercise pontifical rights.

A last question to be solved concerns *titular bishops*. Must they be postulated? The Decretals [110] seem to favor the assumption that, although they have no flock and no clergy, such bishops are bound to their titular church, and hence need a special dispensation to transfer them to a residential cathedral church. It follows that titular bishops cannot properly be elected, but must be postulated. This, however, must and cannot be applied to titular abbots, much less to such as enjoy only the privilege of pontificals.

109 Cc. 1–3, X, I, 5.

110 Cf. Reiffenstuel, I, 5, n. 40 ff.

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CHAPTER II

LOSS OF ECCLESIASTICAL OFFICES

CAN. 183

§ 1. Amittitur officium ecclesiasticum renuntiatione, privatione, amotione, translatione, lapsu temporis praefiniti.

§ 2. Resoluto quovis modo iure Superioris a quo fuerat concessum, officium ecclesiasticum non amittitur, nisi lex aliud caveat aut nisi in concessione habeatur clausula: *ad beneplacitum nostrum,* vel alia aequipollens.

An ecclesiastical office is lost by resignation, privation, removal, transfer and lapse of time.

Although the superior who has made the appointment goes out of office, the appointee does not lose his office, unless otherwise provided by law or unless the grant was made with the clause: "*ad beneplacitum nostrum*" or a similar one.

After the legislator has stated how an office is acquired, either by free appointment or election, he now proceeds to show how it may be lost. In § 1 he completely (*taxative*) enumerates the ways by which an office may be lost. In § 2 he removes, as it were, a doubt concerning the *tenure* of office, as if it ceased in consequence of the deposition or resignation of the grantor. This, the Code says, is the case only (a) if the office was granted under a clause signifying the will of the grantor

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to confer it "*ad beneplacitum nostrum*," or "*durante nostro pontificatu*," or (b) if the law itself states that the office ceases with the superior's authority; thus, *e. g.*, the Roman Congregations and tribunals enjoy only a limited power during the vacancy of the Holy See,[1] the jurisdiction of the vicar-general ceases with the cessation of his Ordinary's office,[2] etc. Otherwise an office is supposed to be given permanently or not to be revoked by the cessation of the grantor's office, *e. g.*, that of legate.[3] After stating this general principle, the Code treats of the several ways in which an office may be lost.

RESIGNATION

CAN. 184

Quisque sui compos potest officio ecclesiastico iusta de causa renuntiare, nisi speciali prohibitione renuntiatio sit ipsi interdicta.

CAN. 185

Renuntiatio ex metu gravi, iniuste incusso, dolo aut errore substantiali vel simoniace facta, irrita est ipso iure.

CAN. 186

Renuntiatio, ut valida sit, fieri debet a renuntiante aut scripto aut oretenus coram duobus testibus aut etiam per procuratorem speciali mandato munitum; et scriptum renuntiationis documentum in Curia deponatur.

These three canons determine the objective requisites of resignation.

1 Can. 241; Pius X, "*Vacante Sede Apostolica.*"

2 Can. 371.

3 C. 2, 6°, I, 15.

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The *person* who resigns must be in full possession of his mental faculties — *compos sui* — *i. e.*, he must be able to perform a human act. Besides there must be a reason for resigning, else many might leave their charges and disturbance ensue. The valid reasons for resigning an office are stated in the Decretals,[4] as well as in the Constitution of Pius V, "Quanta Ecclesia," April 1, 1568. They are as follows:[5]

Advanced age, which may vary and should be estimated according to prudent judgment.

Sickness, bodily disease and corporal deformity which prevent one from securely, decently, and satisfactorily performing the duties connected with the pastoral office, *e. g.*, paralysis, gout, epilepsy, etc.

Consciousness of a crime and censure with one's reputation at stake.

Deadly or lasting *enmities* between a pastor and a large part of his flock; to which category also scandal, even without fault, may be referred.

Receiving another *office incompatible* with the one already possessed.

Finally, entrance and profession in a *religious order.*[6]

These are the reasons admitted by law for resigning an office. Though some authors maintain that said Decretals applied only to bishops and that the Constitution of Pius V was not everywhere received,[7] the Code by requiring in general some just reason, certainly intends to apply that enactment to each and every office to be

4 C. 10, X, I, 9, of which the summary repeats them in the following verse:

"Debilis, ignarus, male conscius, irregularis,
quem mala plebs adit, dans scandala cedere potest."

5 Cf. Barbosa, *Ius Eccl. Univ.*, l. III, c. 15, nn. 99 ff (ed. Lugd., 1660, II, 279 f.).

6 Bened. XIV, "*Ex quo,*" Jan. 14, 1747 (*Bull.*, Prati, II, 156 ff.).

7 Engel, I, 9, n. 6.

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resigned But it must be added that one or the other of the reasons named would suffice.

A *novice* is prevented by law from resigning an office which he held before entering religion.[8]

The person who resigns must be *entirely free.* Hence any grievous fear inflicted by one who has no right to bring pressure upon an office-holder, would render the resignation void.[9] This does not, of course, apply to the fear threatened by the legitimate superior, *e. g.,* a bishop who has a reason for forcing a clergyman to resign.

Physical violence, especially if exercised by laymen, would invalidate a resignation.[10] The same holds good of *fraud* or *error, e. g.,* the promise of a pension or sum of money, or a fraudulent description of conditions which supposedly exist in a parish, as also any *simoniacal* pact, either real or verbal. All these would render a resignation invalid *ipso jure.*[11]

Can. 186 establishes the *form* in which resignation must be made; *viz.,* either in writing or verbally in the presence of two witnesses. This is a very reasonable rule, for it not only safeguards liberty but also prevents litigation.

If the resignation is handed in by a *procurator* furnished with a special mandate, he must observe all the conditions of the mandate, and besides, we believe, must obey the rules established in this canon, *viz.,* submit the resignation in writing or bring two witnesses. As long as the mandate is not expressly revoked and the repeal received by the procurator, he may proceed with the resignation.[12] The procurator may be a layman.[13]

8 Can. 568.
9 C. 5, X, I, 9; c. 4, X, I, 40.
10 C. 2, X, I, 40.
11 Bened. XIV, *"In sublimi,"* Aug. 29, 1741 (*Bull.,* Prati, I, 98 f.), c. 4, X, I, 35; c. 2, X, V, 3.
12 C. un. Clem. I, 4.
13 C. 1, 6°, I, 19, *de procurat;*

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CAN. 187

§ 1. Renuntiatio generatim, ut valeat, ei fieri debet a quo est acceptanda, vel, si acceptatione non egeat, a quo clericus officium accepit vel qui eiusdem locum tenet.

§ 2. Quare si officium per confirmationem, admissionem vel institutionem collatum fuerit, renuntiatio fieri debet Superiori ad quem de iure ordinario confirmatio, admissio vel institutio spectat.

Resignation being a voluntary act, which must be accepted by a competent superior, requires that it be presented to that superior, who is the real grantor of the office. Note, however, that, although acceptance is said to be an essential part of resignation, there are cases in which it is not required. Thus the Roman Pontiff may abdicate without the consent of the College of Cardinals.[14] Besides any one may resign an office to which he has only the *ius ad rem, e. g.*, to which he has been elected but not yet ratified. Furthermore if two contend for an office, one may waive the claim; and, lastly, a clergyman who is not a bishop may resign in order to enter a religious order.[15]

In all those cases in which acceptance is required, the resignation must be presented to the one who has conferred the office or to his representative (successor). Hence bishops (and abbots) must present their resignation to the Pope.

Minor offices are resigned into the hands of the bishop or his coadjutor, if the latter has full power,[16] of the

Barbosa, *Jus Eccl. Univ.*, l. III, n. 121 f.

14 C. *I*, 6°, I, 7.

15 Barbosa, *l. c.*, III, n. 5 f.; Reiffenstuel, I, 9, n. 16 f.

16 Barbosa, *l. c.*, n. 11.

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vicar-capitular,[17] but not of the vicar-general unless he has a special mandate.[18]

§ 2 follows out the principle laid down in the preceding paragraph; for the one who actually confers the benefice is the one who ratifies the election, who admits postulation, and who confers the office. Hence neither the electors nor the *postulantes,* nor the lay or ecclesiastical patron who presents a candidate for an office, have the power to accept his resignation.[19]

Besides express or explicit resignation, both the old and the new law admit also a

TACIT RESIGNATION,

which is brought about and signified by a fact, especially one upon which the law itself has decreed the loss of an ecclesiastical office.

CAN. 188

Ob tacitam renuntiationem ab ipso iure admissam quaelibet officia vacant ipso facto et sine ulla declaratione, si clericus:

1.° Professionem religiosam emiserit, salvo, circa beneficia, praescripto can. 584;

2.° Intra tempus utile iure statutum vel, deficiente iure, ab Ordinario determinatum, de officio provisus illud adire neglexerit;

3.° Aliud officium ecclesiasticum cum priore incompatibile acceptaverit et eiusdem pacificam possessionem obtinuerit;

4.° A fide catholica publice defecerit;

5.° Matrimonium, etiam civile tantum, ut aiunt, contraxerit;

17 Can. 455, § 2.
18 Cf. can. 455, § 3; Barbosa, *l. c.*
19 Barbosa, *l. c.*, n. 10.

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6.° Contra praescriptum can. 141, § 1 militiae saeculari nomen sponte dederit;

7.° Habitum ecclesiasticum propria auctoritate sine iusta causa deposuerit, nec illum, ab Ordinario monitus, intra mensem a monitione recepta resumpserit;

8.° Residentiam, qua tenetur, illegitime deseruerit et receptae Ordinarii monitioni, legitimo impedimento non detentus, intra congruum tempus ab Ordinario praefinitum, nec paruerit nec responderit.

This canon presumes resignation, to which it applies the effect which *certain facts* are supposed to produce under the law. This effect is vacancy of the office held, whether adduced by privation, as punishment,[20] or simply due to the incompatibility of certain offices with the newly chosen state of life or other offices. Hence

(1) By *religious profession* (even *simple*) a man forfeits all parochial offices within one year from the date of said profession, and all other offices[21] within three years.

(2) The *tempus utile* within which the bishop must go to his diocese is four months from the date of confirmation;[22] the parish priest has to commence his administration within the time prescribed by the Ordinary. Note the phrase "*tempus utile*," which implies that a legitimate impediment or ignorance of the date fixed for taking hold of the office would excuse.

(3) What *incompatible offices* are was said above; by the very acceptance of one such office the others become vacant.[23]

20 Really, it would be privation, but the Code presumes resignation *ipso facto*.

21 Can. 584; c. 4, 6°, III, 14.

22 Can. 333; can. 238, § 2; c. 14, 6°, I, 6.

23 Can. 156; c. 54, X, I, 6; c. 3, 6°, I, 16; *Trid.*, Sess. 7, c. 4; Sess. 24, c. 17, *De Ref.*

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(4) *Defection* from the Catholic faith, if public, deprives one of all ecclesiastical offices he may hold;[24] not, however, mere schism, if unconnected with heresy.

(5) *Marriage,* if contracted by a public act, either validly by such as are in minor orders only, or attempted by clerics constituted in higher orders, is tantamount to giving up office.[25] Hence from the very moment a marriage is either contracted or attempted, the offices held by a clergyman would be vacant, and restitution of the revenues derived therefrom would begin from the moment of the marriage.

(6) Enlisting in the *army* has been touched above.[26]

(7) Doffing the *ecclesiastical garb* is tantamount to resignation if ostentatious and scandalous and connected with contumacy towards the Ordinary.

(8) As to *residence,* the necessary explanations are given under the respective canons.[27] We only repeat that these cases, as set forth by our canon, do not really imply a resignation, but that the law supposes and presumes resignation, which therefore is an improper renunciation or legally presumed resignation.

CAN. 189

§ 1. Superiores sine iusta et proportionata causa renuntiationes ne acceptent.

§ 2. Renuntiationem Ordinarius loci intra mensem vel admittat vel reiiciat.

CAN. 190

§ 1. Officium, renuntiatione legitime facta et acce-

24 C. 9, X, V, 7.
25 C. 2, Dist. 28; cc. 10, 13, Dist. 32; cc. 1, 3, 5, X, III, 3.
26 Can. 141.
27 Can. 143 (in general); can. 338 (bishops); can. 465 (pastors).

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ptata, vacat postquam renuntianti significata est acceptatio.

§ 2. Renuntians in officio permaneat donec de Superioris acceptatione certum nuntium acceperit.

CAN. 191

§ 1. Semel legitime facta renuntiatione, non datur amplius poenitentiae locus, licet renuntians possit officium ex alio titulo consequi.

§ 2. Acceptata renuntiatio tempestive nota fiat iis qui aliquod ius in officii provisionem habent.

The legislator admonishes (but under no invalidating clause) superiors not to accept a resignation without just and proportionate reason, as insisted upon by Pius V.[28] Besides, in order not to protract vacancies, acceptance must be notified within one month. With the same end in view Gregory XIII, by his Constitution "*Humano vix iudicio*" (Jan. 5, 1584), had prescribed that all resignations should be published within six or nine months. This Constitution is modified by the Code, which requires not publication, but notification, to be made within one month.

The effect of the notified acceptance of a resignation consists in the vacancy of the office resigned.[29] Therefore, as soon as the *resignans* has received official notice that his resignation is accepted, he is free from all obligations connected with the office, but also deprived of all rights, material and spiritual, pertaining thereto.[30]

The last canon on resignation states that if a resignation has once been accepted, it is not rendered invalid by

28 Cc. 1, 5, 9, 10, X, I, 9; "*Quanta Ecclesia*," 1568, § 3.

29 Cc. 3, 12, X, I, 9; c. 6, 6°, I, 3.

30 Barbosa, *Jus Eccl. Univ.*, III, c. 15, nn. 148 ff.

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regret or a change of mind on the part of the *resignans*, since such a step is supposed to be taken with due deliberation and for adequate reasons.[31] However, if a man who has resigned an office is again presented or elected or appointed to the same, the presentation, election, appointment or investment would constitute a new title. In that case, however, precedence and other privileges would date only from the second appointment.[32] Thus, *e. g.*, a prelate who resigned his office and obtained it anew would hold rank of seniority only from the date of the second appointment, unless the mere order would be decisive.[33]

DEPRIVATION OF OFFICE

CAN. 192

§ 1. Privatio officii incurritur sive ipso iure, sive ex facto legitimi Superioris.

§ 2. Si agatur de officio inamovibili, Ordinarius nequit clericum eodem privare, nisi mediante processu ad normam iuris.

§ 3. Si de amovibili, privatio decerni ab Ordinario potest ex qualibet iusta causa, prudenti eius arbitrio, etiam citra delictum, naturali aequitate servata, sed certum procedendi modum sequi minime tenetur, salvo canonum praescripto circa paroecias amovibiles; privatio tamen effectum non habet, nisi postquam fuerit a Superiore intimata; et ab Ordinarii decreto datur recursus ad Sedem Apostolicam, sed in devolutivo tantum.

Deprivation is incurred either by law or by the decision of a legitimate superior. A cleric who holds an irre-

31 Cc. 3, 6, 12, X, I, 9.
32 Reiffenstuel, I, 9, n. 42.
33 This agrees with St. Benedict's Rule, ch. 29.

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movable office can be deprived of it only upon trial instituted according to law. One holding a removable office may be deprived of it by his Ordinary without having committed a crime, for any just reason. No special procedure is required in such cases unless the cleric is a removable pastor, when the Ordinary has to comply with the canonical norms. Deprivation takes effect only after the subject has been notified by his superior. From the Ordinary's decision recourse may be had to the Apostolic See, but *in devolutivo* only.

Deprivation is a penalty, and hence the present canon really belongs to the penal law. However, since the legislator enumerated deprivation among the modes of losing an office in can. 183, § 1, it was necessary to deal with the subject here.

§ 1 states how deprivation is brought about, *viz.*, by law or by a judicial sentence. The law states the reasons for deprivation partly under the heading of tacit resignation (can. 188), partly in the fifth book.[84] There, too, it is stated when the judge may decree privation, and that he may inflict this penalty (for it is a vindictive penalty), for weighty reasons if the law is silent.

§ 2 and § 3 distinguish between *irremovable* and *removable* officials, and say that the former may not be deposed without an ecclesiastical trial (as described in Book IV). One holding a *removable* office is more easily deprived, unless that office is a *pastorate,* in which case the regulations laid down in the Code must be strictly followed.[85]

Of other offices one may be deprived, (a) even though he has committed no crime, (b) for a just reason, according to the prudent judgment of the Ordinary, who,

84 Can. 2298 ff. 85 Cf. cc. 2157–2161.

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however, (c) must follow the dictates of equity, although (d) he is not bound by any legal procedure.

As to (a), it was once generally held that only a crime (*delictum publicum*) could deprive a holder of his office; however, since the "welfare of the Church" came to be regarded as the "supreme law,"[86] the ancient rigor was relaxed and (b) any *reason* that satisfied the Ordinary was deemed sufficient to justify removal.

Which would be a sufficient reason? Comparing our Code[87] with the well-known decree "Maxima cura" (1910), we find that some of the reasons stated in the latter have been omitted. They are: serious *neglect of pastoral duties,* after one or two admonitions and in matters of importance, such as sick-calls, catechism class and preaching, the law of residence; *disobedience to the injunctions* of the *Ordinary,* after several admonitions, and in important matters, such as excessive familiarity with a certain person or family, cleanliness of the house of God, moderation in the exaction of taxes, etc. (pew-rent, collection). These reasons cover a large field and may enter into the Ordinary's judgment. Of course, it is evident that the other reasons stated in can. 2147, § 2 are also sufficient to remove an office holder.

Having, then, one of these reasons, the bishop is bound only by the dictates of *natural equity,* which means that merit and previous services to the diocese should be taken into consideration and some other office is available; for as long as a priest does not make himself culpably unworthy, he remains incardinated. Lastly, (d) in order to proceed to the act of removal the Ordinary need *not* employ any *legal procedure* (*strepitus iudicii*). After he has duly intimated his decision to the clergyman whom

[86] S. C. Consist., "*Maxima cura,*" Aug. 20, 1910. (*A. Ap. S.,* II, 636).

[87] Can. 2147, § 2.

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he wishes to remove, the latter may have recourse to the Holy See,— if we mistake not to the S. C. Concilii,— but the effect of an appeal will be *devolutive* only, that is to say, the decision of the Ordinary holds good and the one deprived of office is really deposed and must conduct himself accordingly, *i. e.,* neither take any part in the management of his former office nor cause trouble in the congregation or community, until a decision is given by the Roman Court.

Here the important question arises whether our so-called *removable rectors in the U. S.* fall under the category of those who must be removed according to cc. 2157–61, or whether they may be removed for the reasons described above and without trial. We premise that according to can. 454, § 3, all pastors ought to be irremovable, unless the bishop, compelled by special circumstances, deems it necessary to retain removable pastors. It is left to the prudent judgment of the Ordinary, after having heard his consultors, to determine the character of the pastorate in his diocese. This premised, the answer of the S. C. Consist. of June 28, 1915, to the bishops of the United States[38] must decide our case. This answer is that removable rectors in the U. S. may be removed according to the good pleasure of the bishop, but that the latter, under the decrees of the Second Plenary Council of Baltimore, should not make use of this right except for weighty reasons and with due regard to the merits of his priests. The reason given for this decision is that "*salus animarum suprema lex est,*" and that, according to the IInd and IIIrd Councils of Baltimore removable rectors are not equal to the *desservants* of France, but must be regarded as vicars of

[38] Card. Gasparri alleges this decision, but the date needs correction.

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their Ordinaries and hence are *amovibiles ad nutum.*[39]

TRANSFERS

CAN. 193

§ 1. Translatio ab uno ad aliud officium ecclesiasticum ab eo tantum perfici potest, qui ius habet tum acceptandi renuntiationem, tum removendi a primo officio et promovendi ad alterum.

§ 2. Ad translationem, si de consensu clerici fiat, quaelibet iusta causa sufficit; si invito clerico, eadem fere causa requiritur idemque procedendi modus ac pro privatione, firmo praescripto can. 2162–2167, quod ad translationem attinet parochorum.

CAN. 194

§ 1. In translatione prius officium vacat cum clericus alterius possessionem canonice capit, nisi aliud a iure cautum sit vel a legitimo Superiore praescriptum.

§ 2. Reditus prioris officii translatus percipit, donec aliud occupaverit.

CAN. 195

Qui clericum ad officium elegerunt vel postulaverunt aut praesentaverunt, nequeunt eundem officio privare aut ab eo revocare seu amovere aut ad aliud transferre.

By transfer is understood an exchange of offices made with the consent of the legitimate superior. The transfer of bishops is dealt with in can. 430. Canons 193 sqq. treat of transfers in general. First mention is made of

[39] *A. Ap. S.*, 1915 (VII), p. 378ff.

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the *legitimate superior,* who is entitled to transfer one from one office to another. In case of episcopal transfers the legitimate superior is the Holy See.[40] Formerly such transfers were made at synods.[41] The inferior clergy was transferred with the consent of the bishop.[42] The new Code requires that the superior who negotiates the transfer must enjoy the right of accepting resignations as well as the right of removal and promotion. Hence it is evident that, concerning minor offices, it is the bishop who is entitled to make transfers, not those who have the right of presentation (*patroni*) or election.

However, transfers, like resignations, should not be made without reason, because, unless there is a promotion to a better office, transfers are generally looked upon as odious and degrading. Hence § 2 justly requires a reason, but also distinguishes between *voluntary* and *involuntary* transfers. The former may be made at the express wish of the office-holder. For instance, a pastor advanced in years, or in poor health, or beset by serious troubles, may ask for a transfer to another parish, or even to the post of assistant.

Here the question arises whether parish priests may *exchange* places. The Code,[43] as far as we can see, touches that question only in connection with the exchange of benefices, but does not exclude an exchange of offices. Hence if made for reasons of utility or necessity, and with the consent of the Ordinary, such an exchange would be lawful.

An *involuntary* transfer, being odious and generally disgraceful,[44] not only requires reasons acknowledged by

40 C. 34, c. 7, q. 1 (Pseudo-Anterus); cc. 1–4, X, I, 7.

41 C. 37 (Carthag. IV), C. 27, q. 1.

42 *Ibid.*

43 Can. 1487 f.

44 Cf. Smith, *Elements* I, n. 394.

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law, but also the legal procedure prescribed in the IVth Book.[45]

Canon 194 mentions the *date of vacancy,* which commences from the time the other office is canonically taken possession of. The reason is that from the moment a priest holds one office, he is not supposed to hold another.[46] Hence the possessor of the former office is entitled to the revenues of the latter, until he has been actually introduced into the new office (*corporalis immissio*).

What canon 195 states is evident not only from the fact that patrons and electors do not actually confer the office, but also from can. 193, which supplements the latter canon.[47] This canon doubtless strikes at a custom which is not in keeping with ecclesiastical law, and therefore not to be imitated elsewhere, though in vogue, as we know, in Switzerland, where parishes in certain cantons claim the right to reelect their pastors or vote them out of office. The canon, though admitting the right of election, because this is not tantamount to conferring the office, justly rejects any interference with the removal or transfer of ecclesiastical office-holders.

[45] Can. 2162–2167; cf. c. 5, X, II, 19.

[46] C. 28, X, III, 5; c. 28, 6°, III, 4.

[47] C. 4, X, III, 38.

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TITLE V

ORDINARY AND DELEGATED POWER

Can. 196

Potestas iurisdictionis seu regiminis quae ex divina institutione est in Ecclesia, alia est fori externi, alia fori interni, seu conscientiae, sive sacramentalis sive extra-sacramentalis.

The legislator, after having stated the modes and means by which an office is acquired or lost, now turns to the natural foundation and end of every office: the power of jurisdiction. This, he says, is *by divine institution* twofold. For the Church, being a perfect society intended for the salvation of souls, must exercise (cfr. can. 100) a jurisdiction which chiefly looks to the welfare of society as such, and at the same time must wield a power which directly touches the realm of conscience. Thus the Apostles were endowed with spiritual power from above.[1] They as well as their successors were given the threefold power of making laws, deciding cases, and applying punishment. At the same time they also received the power of binding and loosing,[2] which is exercised in the Sacrament of Penance. Moreover, St. Paul solved cases outside a strictly speaking private or internal tribunal, yet touching the conscience of individuals, as in the case of the incestuous man of Corinth and

1 Matt. 28, 18; cf. Pohle-Preuss, *The Sacraments*, Vol. III, 1917, pp. 1 ff.

2 Matt. 16, 18; 18, 18; John 20, 21.

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the two blasphemers.[3] In addition, cases not necessarily connected with sacramental absolution may occur and have always occurred, *e. g.*, the need of dispensing from vows, occult irregularities and impediments, absolving from occult censures, etc.[4] This, then, is the range of ecclesiastical jurisdiction *in foro externo* and *in foro interno*, which latter touches the conscience of individuals. The word *jurisdiction* is derived from *ius dicendi*, which means the right of taking cognizance of a case and deciding it according to law or equity.

In general, jurisdiction may be said to be "a public faculty to rule or govern others."[5] This definition covers both jurisdiction *in foro externo* and jurisdiction *in foro interno*, because, though the latter touches conscience, it is the public authority of the church which bestows that power over the consciences of the faithful.[6]

ORDINARY JURISDICTION

CAN. 197

§ 1. Potestas iurisdictionis ordinaria ea est quae ipso iure adnexa est officio; delegata, quae commissa est personae.

§ 2. Potestas ordinaria potest esse sive propria sive vicaria.

CAN. 198

§ 1. In iure nomine *Ordinarii* intelliguntur, nisi quis expresse excipiatur, praeter Romanum Pontifi-

3 I Cor., 5, 5; I Tim. I, 20.

4 Bouix, *De Principiis Iuris Canonici*, 1852, p. 524.

5 Reiffenstuel, I, 29, n. 3 (according to Pirhing): "*Jurisdictio est potestas publica circa aliorum regimen seu gubernationem.*"

6 Berardi, *Comment. in Jus Can. Univ.*, 1746, I, p. 12, well says that the faculties of preaching and absolving belong to the court of conscience, but the power of granting them belongs to the *forum externum*, because given for the public welfare.

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cem, pro suo quisque territorio Episcopus residentialis, Abbas vel Praelatus *nullius* eorumque Vicarius Generalis, Administrator, Vicarius et Praefectus Apostolicus, itemque ii qui praedictis deficientibus interim ex iuris praescripto aut ex probatis constitutionibus succedunt in regimine, pro suis vero subditis Superiores maiores in religionibus clericalibus exemptis.

§ 2. Nomine autem *Ordinarii loci* seu *locorum* veniunt omnes recensiti, exceptis Superioribus religiosis.

The term *ordinary* in the Decretals[7] is an attribute of judges and means as much as *official*. Even archdeacons were said to enjoy ordinary jurisdiction in their respective districts.[8] But it also meant[9] the free or unhampered power of the bishops in their dioceses. Hence the term signifies a certain autonomy, but not complete independence. The root of that autonomy is the nature of the office;[10] wherefore our canon says that ordinary jurisdiction is attached to the office, not to the person; it grows out of the office as the fruit grows on the tree. *By law* it is attached to the office, because either of divine or human law (to which latter also belong privileges and customs)[11] certain office-holders enjoy jurisdiction *in foro externo*. Therefore, as soon as one is in full possession of an office, he has the power to exercise the jurisdiction appertaining to that office.

However, there is a distinction made by the Code:— ordinary power may be either *proper* or *vicarious* (*propria vel vicaria*). This somewhat modern distinction is not easily explained. Wernz says that jurisdiction

7 Cf. Tit. 31, lib. I.

8 Thomassin, P. I, l. II, c. 20, n. 7.

9 C. 1, X, I, 31.

10 L. 5, Dig. 2, 1 defines ordinary jurisdiction as possessed "*ipso iure, non alieno beneficio.*"

11 Berardi, *l. c.*, p. 19; Bouix, *l. c.*, p. 529.

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proper is that which naturally follows the existence of the Church as a perfect society and is exercised by the Church in her own name, as in her own forum (*ut in foro suo*), *e. g.*, excommunication and penalties, whereas vicarious jurisdiction is that exercised by the Church in virtue of a special divine commission and *in foro Dei, e. g.*, to declare the word of God infallibly, to remit sin, grant indulgences, solve vows, oaths, etc.[12] We must confess that we were always under the impression that the objects enumerated under vicarious power belonged to the Church as her proper domain. Where is the bishop's jurisdiction proper, and where does his vicarious power commence? If the latter signifies the so-called *iurisdictio mandata,* which is a delegated power for all cases (*ad universitatem causarum*),[13] we have delegation proper, as can. 199, § 3 plainly states. However, it may be that vicarious refers to *vicar.* A vicar differs from a delegate, inasfar as he takes the place of the ordinary (judge) and forms one tribunal with him, whereas a delegate is a distinct juridical person and has his own tribunal.[14] Here we have a more tangible distinction. If this is the meaning of the canon, the vicar-general would enjoy vicarious jurisdiction, whilst the bishop, within his sphere and territory, has jurisdiction proper. To assume that a bishop has but a vicarious power, derived from the pope, whose vicar he is, would offend against the divine institution of the Church.

The next canon (198) enumerates those who are comprised by the name of *Ordinaries.* They are: all who rule or govern a diocese or ecclesiastical district tantamount to a diocese: residential bishops, prelates *nullius*

12 *Ius Decretal.,* II, p. 7 (1 ed.); Laurentius, *Institut. Iuris Eccl.,* 1903, p. 36, n. 45, adopts the same explanation.

13 Reiffenstuel I, 29, n. 17.

14 Reiffenstuel, *l. c.,* n. 28.

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(*sc. territorii*), as well as their vicars-general; also Apostolic administrators, Apostolic vicars and prefects; the vicars-capitular or administrators during the vacancy of a see, be these such under the common law or according to approved constitutions;[15] finally, the higher superiors of exempt clerical orders of religious, *i. e.*, the superior general, abbot primate, provincials and abbots, presidents as well as abbots of single exempt monasteries, and their legitimate *locum tenentes* or representatives.[16] These latter, however,— except in cases where they are at the same time *prælati nullius* — are not *ordinarii loci,* but simply Ordinaries. Hence, if a canon[17] says that a religious needs the permission of the *Ordinarius,* the superior of his community is understood; but if the *Ordinarius loci* is mentioned, the religious, though exempt, must obtain the permission from the diocesan bishop, *e. g.*, in case of absence from a parish for some length of time.[18]

DELEGATED JURISDICTION

A delegated jurisdiction, according to can. 197, § 1, is one which has been commissioned to a person.[19] This is the cause or *raison d'être* of a juridiction which is not given by virtue of the office itself but accrues to a person by reason of a special commission which may be implied in the law or come directly from the competent authority (*delegatio a iure, delegatio ab homine*). Hence a delegated jurisdiction is not exercised in one's own name, but in the name and by commission of another.

CAN. 199

§ 1. Qui iurisdictionis potestatem habet ordina-

15 Can. 432, § 3.
16 Can. 488, 8°.
17 Cfr. can. 139, § 3.
18 Can. 465.
19 Cf. S. C. P., Nov. 8, 1882; S. O., Feb. 20, 1888.

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riam, potest eam alteri ex toto vel ex parte delegare, nisi aliud expresse iure caveatur.

§ 2. Etiam potestas iurisdictionis ab Apostolica Sede delegata subdelegari potest sive ad actum, sive etiam habitualiter, nisi electa fuerit industria personae aut subdelegatio prohibita.

§ 3. Potestas delegata ad universitatem negotiorum ab eo qui infra Romanum Pontificem habet ordinariam potestatem, potest in singulis casibus subdelegari.

§ 4. In aliis casibus potestas iurisdictionis delegata subdelegari potest tantummodo ex concessione expresse facta, sed articulum aliquem non iurisdictionalem etiam sine expressa commissione iudices delegati possunt subdelegare.

§ 5. Nulla subdelegata potestas potest iterum subdelegari, nisi id expresse concessum fuerit.

This canon treats of the relation of ordinary jurisdiction to delegation, and of the relation of the latter to subdelegation.

(1) The *Pope* may delegate his power of jurisdiction wholly or partially to another, except in certain matters. A bishop or *Ordinary* may also delegate his power to another, and our text is emphatic as to the extent of that delegation, stating that it may comprise the whole power (*ex toto*). Hence the former opinion of canonists,[20] that the whole jurisdiction of a bishop could not be delegated to another, because this would be tantamount to abdication, can no longer be held. Neither are any special qualifications laid down for a delegate. It used to be held that a *delegatus papae* had to be an ecclesiastical dignitary, *e. g.*, a canon of a cathedral chapter, a *prior*

20 Cf. Reiffenstuel I, 29, n. 56; Santi-Leitner, I, 29, n. 7.

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conventualis (but not a *prior claustralis*).[21] Now, we believe, any Catholic priest in communion with the Holy See can be entrusted by the Pope with a delegation. The priestly character seems to be required, since the Code insists upon that in every instance, but we would not assert that the Sovereign Pontiff could not make an exception in favor of a cleric in minor orders, since it is acknowledged that he can delegate even laymen.[22]

(2) If the pope has chosen a delegate, either for a certain case or for all cases that may arise, this delegate may *subdelegate* another ecclesiastic,[23]— a layman could not be admitted in the case of subdelegation, this being the exclusive privilege of the Sovereign Pontiff,— and endow him with the delegated power, either habitually (*i. e.*, without limit as to time or person or matter) or for a certain case. However, if the person delegated by the pope was chosen on account of qualities peculiar to himself and found in no one else, subdelegation is excluded. Whether such a personal choice was intended, must be gathered from the text of the document. As a rule, if the name of the person is placed first, and followed by that of the office or dignity, what canonists call *industria personae* is intended. The same holds if the writ says that the delegate must himself (*ut ipse, per temetipsum*) take cognizance of, and decide the case or cases for which he is appointed, or if the nature and circumstances of a case are fully known only to him, or if the matter concerns persons in high position.[24] Sometimes a writ of delegation contains a clause expressly prohibiting subdelegation.

§ 3 and § 4 mention *delegates appointed by ecclesiastics*

21 C. 11, 6°, I, 3; c. 2, Clem. I, 2.
22 C. 23, Dist. 63; c. 4, X, III, 8.
23 C. 62, X, II, 28.
24 Cc. 3, 43, X, I, 29; Santi-Leitner, I, 29, n. 8.

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inferior to the pope. Whoever is delegated for any purpose by a cardinal, or metropolitan, or bishop, or other Ordinary must first of all examine the document by which he is delegated, to ascertain whether he is to expedite affairs generally (*ad universitatem negotiorum*) or only a certain kind or number of cases. If he has what may be termed universal (delegated) jurisdiction (which may be the case, *e. g.*, with coadjutor bishops), he may in turn subdelegate in particular cases,[25] for instance, one special matrimonial case, or the criminal case of a clergyman. If, however, no universal (delegated) jurisdiction has been conferred on him, the delegate needs a special and an express commission to authorize him to subdelegate others. Only incidental but not juridical acts, properly so called, may be subdelegated; thus, for instance, a delegate may, even without a special commission, entrust another clergyman with the reading or translation of documents if he needs help in that direction. But the summoning and hearing of witnesses, receiving of exceptions, interlocutory sentence, etc., are juridical acts which the delegate may not subdelegate to another except with special permission.[26]

The last paragraph prohibits *subdelegation* by a subdelegate, *ne processus detur in infinitum.*[27] Even if the original *delegans* would expressly permit such a subdelegation, it would not hold good in law.

INTERPRETATION OF JURISDICTION

CAN. 200

§ 1. Potestas iurisdictionis ordinaria et ad univer-

25 There is no foundation for the distinction made by Putzer (*Com. in Fac. Ap.*, p. 38 f.) between *universalitas* and *generalitas causarum*; the Code excludes that.

26 C. 27, X, I, 29; Reiffenstuel, I, 29, n. 64 f.

27 C. 28, X, I, 29: *exonerare malitiose nequeat.*

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sitatem negotiorum delegata, late interpretanda est; alia quaelibet stricte; cui tamen delegata potestas est, ea quoque intelliguntur concessa, sine quibus eadem exerceri non posset.

§ 2. Ei, qui delegatum se asserit, incumbit onus probandae delegationis.

Ordinary and universal (delegated) jurisdiction may be interpreted broadly; all others must be interpreted strictly; however, even in delegated jurisdiction all those faculties are included without which the exercise thereof would be impossible.

Whoever claims to be delegated is obliged to prove the fact.

The difference between the two interpretations mentioned in § 1 consists in this, that ordinary and universal jurisdiction is considered favorable, whereas the other is taken to be odious; in other words, the broad interpretation is based upon one's own power, whilst the strictly delegated power depends on the consent of another, which may not be presumed. Hence if an Ordinary has doubts concerning his own power, he may nevertheless use it. But strictly delegated power must be neither extended nor restricted as to persons, number, species, or norm of procedure.[28]

That one who *pretends* to be a delegate must show his credentials, follows from the fact that delegation is an accident, which may not be presumed, but must be proved.[29]

28 C. 31, X I, 29; c. 1, Extrav. Comm. I, 3.

29 Reiffenstuel, I, 29, n. 52 f.

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EXTENT OF JURISDICTION

CAN. 201

§ 1. Potestas iurisdictionis potest in solos subditos directe exerceri.

§ 2. Iudicialis potestas tam ordinaria quam delegata exerceri nequit in proprium commodum aut extra territorium, salvis praescriptis can. 401, § 1, 881, § 2 et 1637.

§ 3. Nisi aliud ex rerum natura aut ex iure constet, potestatem iurisdictionis voluntariam seu non-iudicialem quis exercere potest etiam in proprium commodum, aut extra territorium exsistens, aut in subditum e territorio absentem.

The power of jurisdiction may be directly exercised only over subjects. Judicial power, ordinary as well as delegated, cannot as a rule be exercised for one's own benefit or outside of one's own territory.

It is otherwise with voluntary or non-judicial jurisdiction, which may be exercised in one's own favor outside one's territory, and on subjects absent from home.

As legislative power does not extend to such as are not subject to the community or society,[80] so judiciary power cannot be applied to those outside the jurisdiction of the judge. The limiting adverb "*directly*" in the text is important, especially for matrimonial cases. For although the Church does not judge those outside her own pale, she is entitled to make laws for, and judge, those who belong to her fold, and hence, while an impediment laid down by the Church may not directly bind an unbeliever or non-baptized person, yet the Catholic party is bound by the law and judgment of the Church, and conse-

80 Can. 12.

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quently, marriage being a bilateral contract, it cannot take place until the obstacle is removed.

The next two paragraphs suppose the distinction between *contentious* and *voluntary jurisdiction*. The former is exercised in judicial form even over such as do not seek the aid of the court (*in nolentes, invitos*), whereas the latter may be exercised without judiciary formalities, but only over persons who seek the benefit of jurisdiction of their own accord, *e. g.*, absolution from censures, dispensation from irregularities and impediments, etc. Contentious or judicial jurisdiction (*e. g.*, litigation between two office-holders) cannot be exercised by a judge, ordinary or delegated, upon his own person, because no one can judge his own case.[31] This principle does not, however, apply to the Sovereign Pontiff, because "*prima sedes a nemine judicatur.*"[32]

Laws being territorial, and no judge having a right outside the territory allotted to him, none can exercise jurisdiction outside his district.[33] However, the Code makes two exceptions: in favor of absolution[34] and in favor of a judge who is expelled from his territory or forcibly prevented from exercising judiciary power.[35]

Voluntary jurisdiction, on the other hand, may be exercised (a) in one's own favor; thus, *e. g.*, one who has received delegated power to dispense from fasting or abstinence may apply it to himself. Absolution from censures, however, if sacramental confession is required, must be applied by another, although a priest who has the faculty by delegation may subdelegate it to the priest who hears his confession. (b) The bishop may exercise

31 L. un. Cod. Just., III, 5; c. 18, X, II, 1.

32 Cf. 13, C. 9, q. 3.

33 C. 2, 6°, I, 2: "*extra territorium ius dicenti non parebitur impune.*"

34 Can. 401, § 2; can. 881, § 2.

35 Can. 1637; — an example would be Clemens August of Cologne (1837).

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his ordinary or delegated power over his own subjects, even if he is *hic et nunc* outside his diocese, for the law does not restrict his power in this respect.[36]

Clerics who study in a seminary or university situated outside of their home diocese must apply for any dispensation needed to their own *Ordinaries.*

CAN. 202

§ 1. Actus potestatis iurisdictionis sive ordinariae sive delegatae collatae pro foro externo, valet quoque pro interno, non autem e converso.

§ 2. Potestas collata pro foro interno exerceri potest etiam in foro interno extra-sacramentali, nisi sacramentale exigatur.

§ 3. Si forum, pro quo potestas data est, expressum non fuerit, potestas intelligitur concessa pro utroque foro, nisi ex ipsa rei natura aliud constet.

This canon establishes the *relation* between the *forum externum* and the *forum internum* and hardly needs an explanation. Of the two *fora* the more intensive and extensive is the *forum externum;* and hence, though one may be absolved from censure (*e. g.,* on account of a mixed marriage contracted against the law) in the court of conscience, he must nevertheless conduct himself like one under censure until relieved of the latter by public absolution. On the other hand, one who has received public absolution must be considered as restored to full communion. Thus, also, a marriage acknowledged to be null and void *in foro interno* cannot be so declared *in foro externo* unless external proofs are given.[37]

§ 2 states that power given for use in the court of

[36] Otherwise Putzer, *l. c.*, p. 71 f. [37] Putzer, *l. c.*, p. 28 f.

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conscience may be exercised *outside the sacrament of penance,* although this is not the usual and generally prescribed mode. Thus, *e. g.,* dispensation from secret impediments, vows, or irregularities may be applied outside the confessional if the party concerned shrinks from confession.[38] But in cases where a dispensation can be imparted by the confessor (regular) only, confession is required.

DUTIES OF DELEGATES

CAN. 203

§ 1. Delegatus qui sive circa res sive circa personas mandati sui fines excedit, nihil agit.

§ 2. Hos tamen excessisse non intelligitur delegatus, qui alio modo ac deleganti placuerit, ea ad quae delegatus est, peragit, nisi modus ipse fuerit a delegante praescriptus tanquam conditio.

A delegate who exceeds the limit of his mandate, either concerning objects or persons, acts invalidly. But a delegate does not transgress the limit if he exercises his power in a manner (*modus*) other than that which would please the *delegans,* unless the manner of exercising the faculties conferred has been prescribed by the *delegans* as a *condition* of validity.

CAN. 204

§ 1. Quod quis Superiorem adit, inferiore praetermisso, non idcirco voluntaria suspenditur inferioris potestas, sive haec ordinaria fuerit sive delegata.

§ 2. Attamen rei ad Superiorem delatae ne se immisceat inferior, nisi ex gravi urgentique causa; et hoc in casu statim Superiorem de re moneat.

[38] *Ibid.,* p. 27 f.

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The voluntary jurisdiction, ordinary or delegated, of an inferior authority is by no means suspended by direct recourse to a superior. But if a case has been brought before a superior, the inferior authority shall not interfere, unless for a weighty and urgent reason, of which the superior must be promptly informed.

Whoever acts as a delegate is supposed to have received a commission or *mandate*, which must be observed as to all its substantial injunctions. Our Code especially mentions two limits: objects and persons. When the object or matter is mentioned expressly, *e. g.*, a matrimonial case, the delegate has no power to decide other cases. In some countries there are special marriage courts, to whom no other cases are delegated. Again, when a certain *class of persons* (*e. g.*, clerics, sisterhoods) is mentioned in the mandate, the jurisdiction of the delegate cannot be extended to other classes. If exempt religious are expressly mentioned, the non-exempt are not included.

The next paragraph bears upon *procedure*. Of course, it takes for granted that the *essential form* prescribed by common law is observed, unless expressly provided otherwise in the mandate of delegation. But there is a margin for accidental formalities; these are left to the judgment of the delegate, which may differ from that of the *delegans*. As in the case of rescripts, so here the intention of the *delegans* must be ascertained from the text.[89] When a special mode of procedure, differing from that prescribed by common law, is enjoined, this must be followed. If the mode is merely insinuated, without the clause "*non aliter*," or "*sic neque alio modo*," or "*si secus fiat, irritum sit et inane*," the *delegatus* may proceed

[89] Cfr. c. 22, X, I, 3, *de rescriptis*.

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according to his good pleasure, observing, however, the essential solemnities of legal procedure, if this is prescribed, or the tenor of his faculties. If no place is stated by the *delegans,* the place of the parties must be chosen, if it is safe.[40] If *no time* is fixed, the business must be finished within the *tempus utile, i. e.,* a year from the date of delegation, with due regard, however, to the nature of the case as well as the distance of the parties.[41] The reason for keeping within the limits of the mandate is expressed in the Roman law, which states that he who does not observe them appears to do something unauthorized.[42] An analogue may be found in the case of diplomatic agents, who receive instructions of a twofold kind, some of which must be strictly followed, while others are left to their discretion.

Can. 204 speaks of *recourse* to a superior, *e. g.,* from a bishop to the Apostolic See. A recourse differs from an appeal. The latter always supposes a sentence, either interlocutory or final, whilst the former does not necessarily suppose a sentence. The way to a higher superior is open at any time. But the Code says that in case of a recourse, the *voluntary* or non-judicial jurisdiction of an Ordinary or a delegate is not suspended. Therefore, for instance, a bishop may proceed with the investigation of, say, a matrimonial case and even pronounce a non-judicial sentence. But as soon as he is notified that the parties are having recourse to the Apostolic Delegate, or to Rome, he should stop his own procedure and not vex the higher tribunals with importune insinuations, unless the case requires it, in which eventuality information shall be welcomed by the higher authorities.

40 C. 11, 6°, I, 3; c. 13, X, I, 29, I, 29, n. 21 f.
41 C. 26, X, I, 29; Santi-Leitner,
42 L. 5, dig. 17, 1.

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SEVERAL DELEGATES

CAN. 205

§ 1. Si plures iurisdictionem delegatam obtinuerint pro eodem negotio, et dubitetur utrum delegatio facta fuerit in solidum an collegialiter, praesumitur facta in solidum in re voluntaria, collegialiter in re iudiciali.

§ 2. Pluribus in solidum delegatis, qui antea negotium occupavit, alios ab eodem excludit, nisi aut posthac impediatur aut nolit ulterius in negotio procedere.

§ 3 Pluribus collegialiter delegatis, omnes simul pro actorum validitate in negotio expediendo procedere debent, nisi in mandato aliud cautum sit.

CAN. 206

Pluribus successive delegatis, ille negotium expedire debet cuius mandatum anterius est nec posteriore rescripto expresse abrogatum fuit.

A decretal [43] of Celestine III (1191–1198) says that the Apostolic See rather appoints several delegates than one, in order that the judgment may be solid. This may be done in such a manner that the several persons delegated are responsible *in solidum, i. e.,* each one of them is responsible conjointly with the others for the whole thing, for instance, a payment, or a judgment, or bail,—or severally *pro rata, i. e.,* each for his proportionate share. If they have jurisdiction *in solidum,* the whole jurisdiction resides in each one, and each may therefore decide the case by himself without the coöperation of the others. Again, several may be delegated as *one body* or quasi-

[43] C. 21, X, I, 29.

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corporation (*collegialiter*), and in that case all have to proceed conjointly in order to act validly.[44]

Concerning delegation *in solidum,* our Code says it must be presumed in voluntary or non-judicial jurisdiction, because voluntary jurisdiction does not essentially require the formalities of procedure, nor does it, generally, infringe upon the rights of others. But judiciary jurisdiction is supposed to be given to the body as such or *collegialiter*.[45] In the latter case, as § 3 states, all the judges have to proceed at the same time, like a jury, *i. e.*, they must commence the trial by a simultaneous summons,[46] which is the first judicial act. This formality is so important that the defendant may refuse to appear if not all the names of the corporate judges are named in the summons.

Then again all essential judicial acts, such as the hearing of witnesses, issuing interlocutory or final sentences, must be made by all the judges in unison.

It is otherwise with the *delegatio in solidum* (§ 2), because in that case the one who issues the summons first is entitled to proceed to the exclusion of the others. Only in case one is prevented by sickness or some other impediment, or does not proceed within the appointed time (one year) to finish the affair, another may take his place.

When several judges have been delegated, neither *in solidum* nor *collegialiter,* but merely *successive,* then it depends upon the *date of the rescript* issued by the *delegans.*

If the case is of voluntary jurisdiction the rescript is presumed to be one of favor; if the case is of contentious

44 Santi-Leitner, I, 29, n. 25.

45 Cfr. cc. 2, 16, 21, 22, 23, X, I, 29; tit. 14 in 6°.

46 C. 22, X, I, 29; — unless the rescript or mandate contains the clause that in case of a legitimate impediment two may proceed without the third one; *ibid.*

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jurisdiction, the rescript is presumed to be one of justice. In the former instance, consequently, the date is a *dies datae,* or the day when issued by the *delegans;* in the latter, it is the *dies presentatae* or date when the letters are shown to the parties interested or the execution of the rescript takes place.[47] But it is safe to say that every rescript of delegation effectively is a rescript of justice or at least one which needs an executor, and hence only the date of presentation may here be considered;[48] for the parties have a right to have the rescript "shown" to them.

CESSATION OF DELEGATED AND ORDINARY JURISDICTION

CAN. 207

§ 1. Potestas delegata exstinguitur, expleto mandato; elapso tempore aut exhausto numero casuum pro quo concessa fuit; cessante causa finali delegationis; revocatione delegantis delegato directe intimata aut renuntiatione delegati deleganti directe intimata et ab eodem acceptata; non autem resoluto iure delegantis, nisi in duobus casibus de quibus in can. 61.

§ 2. Sed potestate pro foro interno concessa, actus per inadvertentiam positus, elapso tempore vel exhausto casuum numero, validus est.

§ 3. Pluribus collegialiter delegatis, si unus deficiat, aliorum quoque delegatio exspirat, nisi aliud ex tenore delegationis constet.

CAN. 208

Ad normam can. 183, § 2, potestas ordinaria non

47 Cf. c. 8, 6°, I, 14; can. 38; can. 48.

48 C. 12, X, II, 28; c. 1, Extrav. Comm. I, 3 de electione.

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exstinguitur resoluto iure concedentis officium cui adnexa est; sed cessat, amisso officio; silet, legitima appellatione interposita, nisi forte appellatio sit tantum in devolutivo, firmo praescripto can. 2264, 2284.

CAN. 209

In errore communi aut in dubio positivo et probabili sive iuris sive facti, iurisdictionem supplet Ecclesia pro foro tum externo tum interno.

In can. 207, § 1, six modes are enumerated by which delegated power ceases. These apply indiscriminately only to jurisdiction in *foro externo,* because § 2 of the same canon modifies two of them in regard to the court of conscience by ordaining (1) that the *mandate is fulfilled* if the sentence has been pronounced or the rescript has been executed,[49] because after the sentence one ceases to be judge; (2) if the *time* has expired, if a certain time was fixed, which commences, as said above, from the date when the documenet of delegation was presented;[50] (3) if the *number* of cases (for instance, twenty) is exhausted. These two latter modes of expiration do not affect the *forum internum* if a confessor should, by oversight, absolve in one more case than allowed, or if he should absolve beyond the time granted by the indult.[51] But since the *forum internum* is generally mentioned, and this comprises the confessional as well as extra-confessional application,[52] we believe we are justified in saying that any act, either in the confessional or outside of that tribunal, performed by oversight with regard to the time or

49 C. 9, X, I, 29; l. 55, dig. 42, 1; l. 1, *Cod. Just.* VII, 52.
50 C. 4, X, I, 29; c. 12, X, II, 28.
51 Stricter Benedict XIV, "Apostolica indulta," Aug. 5, 1744, §§ 3, 6; "Apostolicum ministerium," May 30, 1753, § 3 (for England).
52 Can. 194.

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number of cases, is valid. Thus a dispensation executed outside the confessional, but intended for the court of conscience, would be valid even if applied by mistake beyond the specified time and number. (4) If the *motive cause* of a delegation ceases (*e. g.,* an indult given for a solemn occasion, as a jubilee) the jurisdiction ceases; (5) if the *delegans* expressly (not only tacitly) *revokes* the delegation and the repeal is duly made known to the delegate. Note that the *delegans* may revoke a delegation at any time, even though the delegate has given the case a legal turn by summoning the parties. But the delegate who has subdelegated the whole jurisdiction to another is not entitled to revoke the subdelegation if the business had already taken a legal turn.[53] (6) If the delegate *resigns* (or refuses) the delegation and the resignation is accepted, the delegation ceases.

Generally speaking, no one can be compelled to be a delegate, unless the *delegans* has jurisdiction proper over him. Thus the Pope can compel any prelate or clergyman to accept a delegation, an Ordinary can compel any clergyman of his jurisdiction but not a clergyman of another diocese; a metropolitan cannot force one of his suffragans to accept a delegation.[54]

The first pragraph of our canon, modifying the old law,[55] says that only in *two cases* a delegation expires by one's going out of office. They are the cases mentioned in can. 61, *viz.,* if a *clausula* to that effect had been inserted in the mandate, or if power was given to grant a favor to particular persons mentioned in the rescript, as long as the matter has not taken a legal turn.

If *several delegates* had been appointed *collegialiter,* the power of all of them ceases when one fails either by

53 C. 6, 6°, I, 14; c. 37, X, I, 29; c. 7, 6°, I, 14.

54 C. 11, X, I, 31.

55 Cc. 14, 42, X, I, 29.

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death, or accepted resignation, or by the infliction of a penalty implying the loss of ecclesiastical power.

Can. 208 speaks of the loss of *ordinary power*. It says (1) that even if the *superior* who has conferred the office to which that power is attached goes out of office by death, resignation, transfer, or privation, the power is not lost. Hence the bishops of the U. S., who are appointed by the Pope, do not lose their ordinary power by a vacancy in the Holy See. (2) The ordinary power is *lost* if the office itself is lost. Thus, if a bishop dies or resigns or is deprived of his office, his power ceases. (3) The power becomes quiescent or *silent* if an appeal is made to a higher authority or instance, provided, of course, the appeal is *in suspensivo,* not *in devolutivo,* for as the former term implies, by such an appeal the jurisdiction of the inferior is suspended.[56] If one who is excommunicated or suspended [57] has rendered a declaratory or condemnatory sentence, the sentence itself is null and void, and consequently the appeal will be of no consequence, *i. e.,* it does not suspend the ordinary power.

Can. 209 provides for the common good and public security as well as for the tranquillity of conscience by reaffirming the well-known principle that the *Church supplies the necessary jurisdiction when a common error or a positive doubt arises.* Of course, the *common error,* to have this effect, must be accompanied by a *titulus coloratus* or an apparent title to the office one exercises. An intruder has no such claim.[58] But if an Ordinary or confessor were commonly but erroneously supposed to have the necessary faculties, the Church would supply the defect of real jurisdiction. The same effect is produced by a positive and *probable doubt, i. e.,* one which

56 Concerning appeals see can. 1879 ff.

57 Can. 2264, 2284.

58 Reiffenstuel, II, 1, n. 200.

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for certain reasons and circumstances inclines more to one side than to the other, in this case more to the side of the power being vested in the person whose court is sought. Whether this doubt regards the facts or the law is immaterial. A doubt regarding a fact would be whether a particular Ordinary or priest has a certain faculty; a doubt regarding the law (*ius*), whether the case falls under his jurisdiction. To quiet consciences the Church, out of the fulness of her power, supplies the defective jurisdiction and renders valid acts which would otherwise be invalid.

POWER OF ORDER

CAN. 210

Potestas ordinis, a legitimo Superiore ecclesiastico sive adnexa officio sive commissa personae, nequit aliis demandari, nisi id expresse fuerit iure vel indulto concessum.

This canon says that the power of order attached to an office or entrusted to a person by a legitimate superior, cannot be delegated to others, except by express permission either contained in the law or granted through an indult.

The power of order is the power imparted by ordination and is separable from that of jurisdiction. The term is here used of episcopal or pontifical power, as the priestly power and that attached to lower orders can hardly have entered the mind of the legislator.[59]

Pontifical power comprises that for which either the episcopal order is required or which can not be exercised

[59] This is clearly seen from the notes of Card. Gasparri to this canon.

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without the use of holy oils.[60] To this category belong the conferring of orders, confirmation and the consecration of sacred edifices [61] and utensils with chrism. These faculties belong by right to consecrated bishops. However, the power of conferring minor orders may by a *special indult* of the Pope be delegated to a priest. The same is true of the power of confirmation and consecrating churches.[62] *By law,* abbots *nullius* and vicars Apostolic may confer confirmation, tonsure and minor orders and consecrate altars; abbots *regiminis,* if blessed, may confer minor order on their own subjects.[63] Whether the power of conferring subdeaconship and deaconship may be commissioned to a priest, is uncertain. Since the pontificate of Innocent VIII (1484–1492) we do not hear of any such privilege being granted to a priest or abbot. And even the bull ascribed to that pope has been strongly assailed as to its genuineness.[64] Some defend, others attack it, but the controversy has no *practical* value.

60 Benedict XIV, "Apostolicum ministerium," May 30, 1753, § 3.

61 *Id.,* Ep. ad Engelhardtum (*Bull.,* Prati, III, p. 445 ff.).

62 *Ibid.,* and "Apostolicum ministerium," §§ 4, 9; *De Syn. Dioec.,* VII, 2 f.

63 Can. 782, § 3; 957, § 2; 964.

64 Cfr. Bachofen, *Compendium Juris Reg.,* 1903, p. 256; Pohle-Preuss, *The Sacraments,* IV, 124; *Catholic Fortnightly Review,* 1917, St. Louis, pp. 67 ff.

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TITLE VI

RETURN OF CLERGYMEN TO THE LAY STATE

CAN. 211

§ 1. Etsi sacra ordinatio, semel valide recepta, nunquam irrita fiat, clericus tamen maior ad statum laicalem redigitur rescripto Sanctae Sedis, decreto vel sententia ad normam can. 214, demum poena degradationis.

§ 2. Clericus minor ad statum laicalem regreditur, non solum ipso facto ob causas in iure descriptas, sed etiam sua ipsius voluntate, praemonito loci Ordinario, aut eiusdem Ordinarii decreto iusta de causa lato, si nempe Ordinarius, omnibus perpensis, prudenter iudicaverit clericum non posse cum decore status clericalis ad ordines sacros promoveri.

CAN. 212

§ 1. Qui in minoribus ordinibus constitutus ad statum laicalem quavis de causa regressus est, ut inter clericos denuo admittatur, requiritur licentia Ordinarii dioecesis cui incardinatus fuit per ordinationem, non concedenda, nisi post diligens examen super vita et moribus, et congruum, iudicio ipsius Ordinarii, experimentum.

§ 2. Clericus vero maior qui ad statum laicalem rediit, ut inter clericos denuo admittatur, indiget Sanctae Sedis licentia.

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CAN. 213

§ 1. Omnes qui e clericali statu ad laicalem legitime redacti aut regressi sunt, eo ipso amittunt officia, beneficia, iura ac privilegia clericalia et vetantur in habitu ecclesiastico incedere ac tonsuram deferre.

§ 2. Clericus tamen maior obligatione coelibatus tenetur, salvo praescripto can. 214.

CAN. 214

§ 1. Clericus qui metu gravi coactus ordinem sacrum recepit nec postea, remoto metu, eandem ordinationem ratam habuit saltem tacite per ordinis exercitium, volens tamen per talem actum obligationibus clericalibus se subiicere, ad statum laicalem, legitime probata coactione et ratihabitionis defectu, sententia iudicis redigatur, sine ullis coelibatus ac horarum canonicarum obligationibus.

§ 2. Coactio autem et defectus ratihabitionis probari debent ad normam can. 1993–1998.

Although sacred ordination, once validly received, can never be annulled, a clergyman in higher orders may be reduced to the lay state by a rescript of the Holy See, by a decree or sentence issued in accordance with can. 214, or, finally, by degradation.

A cleric in minor orders is reduced to the lay state not only *ipso facto* for reasons stated in the law, but may also return thereto of his own accord, after having informed the Ordinary of the diocese, or by virtue of a decree issued by the same Ordinary for just reasons, if the latter upon due deliberation prudently judges that the cleric cannot be promoted to higher orders without disparagement to the clerical state.

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Clerics in minor orders who have returned to the lay state, cannot be again admitted to the ranks of the clergy, unless the Ordinary of the diocese in which they were incardinated grants the necessary permission, which, however, should not be given except after a careful investigation of their life and conduct, and, if deemed opportune, upon suitable trial or test of character.

A cleric in higher orders who has returned to the lay state, may be readmitted to the ranks of the clergy only by leave of the Holy See. All those who are reduced from the clerical to the lay state thereby lose their clerical offices, benefices, rights, and privileges and are no longer allowed to wear the clerical garb and tonsure.

A cleric in higher orders remains bound by the law of celibacy, save in the case mentioned in can. 214.

A cleric who was compelled under grievous fear to receive a higher order, and has not ratified the ordination at least tacitly by the performance of an act proper to the order received, should be reduced to the lay state by a sentence of the ecclesiastical judge given after the coërcion and the defect of ratification have been duly proved; in which case he is bound neither by the obligation of celibacy nor by that of reciting the canonical hours.

The first three centuries were severe in meting out penalties to clerics. They were treated much like laymen.[1] In the fourth century a noticeable mitigation was introduced. Clerics who had committed a serious crime[2] were deposed but permitted to stay in the communion of laymen. *Communio laica* then meant that a cleric was reduced to the position of a layman and could

1 Funk, *Manual of Church History*, 1913, I, 197.

2 Capital crimes were: apostasy, homicide, adultery (*moechia*); serious crimes: fornication, perjury, theft, absence from the diocese; cfr. Apost. Canons, 25, 61; Smith-Cheetham, *Dictionary of Christian Antiquities*, 1880, II, 947.

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receive holy communion, but outside the *bema* or railing which divided the nave from the presbytery. This mitigation, which certainly occurs in the fourth century, was introduced for the reason that, as St. Basil [3] as well as the Apostolic canons say, a cleric should not be punished twice. Later synods generally combine this penance with that of being confined in a monastery with the right of lay communion. As a penalty following degradation, the reduction of clerics to the lay state is amply testified to in the Decretals.[4] But examples of dispensation from higher orders, or, more correctly, from the obligations attaching thereto, are very rare in history, at least to our knowledge. Perhaps one of the best known examples is that of King Casimir of Poland in the eleventh century,[5] but not many more examples could be adduced, unless, of course, where a trial *ex metu* was instituted.

The above historical note has *touched upon the three reasons* which may bring about a reduction to the lay state, as outlined by can. 211, § 1. The first is a *rescript* of the Holy See to the effect that, notwithstanding a validly received *higher order* (which is indelible),[6] a cleric is free from the law of celibacy, the obligation of the Breviary, and other duties. It is evident that weightier reasons are required for a dispensation from the obligations attached to deaconship than from those attached to subdeaconship. The second reason is a *judicial sentence* concerning the reception of a higher order from fear or coërcion, as seen under can. 204. The third reason is *degradation,* which comprises deposition, privation of clerical prerogatives, and reduction to the lay

3 *Ad Amphiloch.*, c. 32.

4 C. 10, X, II, 1; c. 9, X, V, 7; c. 27, 4, V, 40.

5 Sczygielski, *Aquila Polono-Benedictina*, 1663, p. 94 f.

6 *Trid.*, sess. 23, can. 4, c. 4 de ordine.

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state, and can be inflicted only for crimes stated in the law and after a duly conducted trial or confession.[7]

A cleric in minor orders may be reduced to the lay state if he does not wear the clerical dress, as stated above,[8] or if he spontaneously enlists in the army;[9] thus also a dismissed religious, especially if he has made profession by deceit.[10] But the Ordinary may pass judgment, if he finds reason for not admitting a cleric to higher orders, because minor orders were instituted precisely for the purpose of testing character, or as a kind of clerical novitiate.

Can. 212 establishes the conditions for *readmission* to the clerical state. Formerly a rather mild practice was defended,[11] but to-day, in order to guard against fraud and rashness, readmission is only allowed with the direct permission of the Ordinary, if the clergyman is in minor orders; if he is in higher orders, a rescript of the Holy See is necessary.[12]

Canon 213 treats of the *effects* of the reduction of a cleric to the lay state. They are, first and above all, the *loss* of all the *ecclesiastical offices and benefices* held by the delinquent, which therefore become vacant from the moment the rescript is received, or the sentence is uttered according to can. 1993 f., or the sentence of degradation is issued. A second effect is the *loss of clerical prerogatives* and the prohibition of wearing clerical distinctions, hence the *privilegium fori, canonis,* and *immunitatis,* which the so-called *diaconi selvaggi* (roaming deacons) in the former Neapolitan Kingdom used to claim, are lost.[13]

7 Can. 2305, 2314, 2343, 2354, 2368, 2388.
8 Can. 136, § 3.
9 Can. 141 § 2.
10 Can. 648; can. 2387.
11 Benedict XIV, *De Syn. Dioec.* XII, 3, 1 ff.
12 *Pontificale Rom.*, tit. degradatonis forma.
13 Cfr. cc. 1, 3, 7, 9, X, III, 3; c. un. 6°, I, 12.

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§ 2 of can. 213 appears to us incomplete. We understand, indeed, that the law of celibacy remains after the sentence of degradation, but ceases after the sentence *ex metu*. But what if a rescript of the Holy See is obtained for a subdeacon? Is he bound to observe celibacy? If so, in most cases the object will not be achieved. From the recital of canonical hours all are freed, for the Code makes no distinction.

Can. 214 alludes to a case that may happen and has happened in the Greek (Coptic) Church, which permitted the ordination of infants, which, as Benedict XIV says,[14] was valid though illicit. Such ordinations are not likely to happen now-a-days. But moral coërcion — physical coërcion would exclude validity for lack of consent — may still be brought to bear, especially on devoted and timorous children, by importune entreaties, inducements or threats of ill will, displeasure and disinheritance.[15] When one submits to ordination under such influences,[16] the ceremony is valid, because the voluntariness of the consent is not simply excluded. The fear may be removed after ordination and the ordained person find himself between two horns of a dilemma: Should I exercise sacred functions or not? And if I do, do I thereby ratify my ordination? The answer lies in that apposition "*volens tamen*," somewhat clumsily inserted. If such a one, in exercising a sacred function, has the strict intention of complying with obligations attaching to the clerical state, he is supposed to ratify the ordination received under the pressure of fear. But if he has no such intention and performs the sacred function materially or mechanically, because he was told to do so, or for

14 "Eo quamvis tempore," May 4, 1745, § 17; "Probe te," Dec. 15, 1751, § 3; *De Syn. Dioec.*, XII, 4, 2 f.

15 Richter, *Trid.*, 175, n. 6; physical coaction, *ibid.*, n. 4.

16 Can. 103, § 2.

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fear of causing a disturbance, the intention of ratifying is absent and hence the function cannot be regarded as a sign of consent or ratification. However, in case such a one performs a sacred function, the presumption is always that he means to ratify his ordination, unless he protests to some trustworthy witness. All such cases must be referred to the S. C. Sacr. If the one thus ordained wishes to be freed from the obligations attendant upon sacred orders, the S. Congregation shall refer the case to the court of the diocese to which the plaintiff belongs. In order to be free from these obligations two uniform sentences are required.[17]

17 Cfr. can. 1993–1998.

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SECTION II

THE HIERARCHY

After having explained the difference between clergy and laity and described the clerical state with its rights and duties, as well as ecclesiastical offices in general, the Code proceeds to treat of the ecclesiastical hierarchy, beginning with the Supreme Pontiff. The term hierarchy is here chiefly, though not exclusively, taken in the jurisdictional sense. However, although the Catholic Church, in its universal aspect, forms a compact and perfect society, embracing all baptized Christians, yet *de facto* there is also a local organization, which parcels out the Catholic world into various districts with minor divisions. Hence the Code first mentions

THE LOCAL ORGANIZATIONS

CAN. 215

§ 1. Unius supremae ecclesiasticae potestatis est provincias ecclesiasticas, dioeceses, abbatias vel praelaturas *nullius,* vicariatus apostolicos, praefecturas apostolicas erigere, aliter circumscribere, dividere, unire, supprimere.

§ 2. In iure nomine dioecesis venit quoque abbatia vel praelatura *nullius;* et nomine Episcopi, Abbas vel Praelatus *nullius,* nisi ex natura rei vel sermonis contextu aliud constet.

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CAN. 216

§ 1. Territorium cuiuslibet dioecesis dividatur in distinctas partes territoriales; unicuique autem parti sua peculiaris ecclesia cum populo determinato est assignanda, suusque peculiaris rector, tanquam proprius eiusdem pastor, est praeficiendus pro necessaria animarum cura.

§ 2. Pari modo vicariatus apostolicus et praefectura apostolica, ubi commode fieri possit, dividantur.

§ 3. Partes dioecesis de quibus in § 1, sunt *paroeciae;* partes vicariatus apostolici ac praefecturae apostolicae, si peculiaris rector eisdem fuerit assignatus, appellantur *quasi-paroeciae.*

§ 4. Non possunt sine speciali apostolico indulto constitui paroeciae pro diversitate sermonis seu nationis fidelium in eadem civitate vel territorio degentium, nec paroeciae mere familiares aut personales; ad constitutas autem quod attinet, nihil innovandum, inconsulta Apostolica Sede.

CAN. 217

§ 1. Episcopus territorium suum in regiones seu districtus, pluribus paroeciis constantes, distribuat, qui veniunt nomine *vicariatus foranei, decanatus, archipresbyteratus,* etc.

§ 2. Si haec distributio, ratione circumstantiarum, videatur impossibilis aut inopportuna, Episcopus consulat Sanctam Sedem, nisi ab eadem iam fuerit provisum.

The supreme ecclesiastical power alone is competent to erect, circumscribe, divide, unite or suppress ecclesiastical provinces, dioceses, abbies or prelatures *nullius,* Apostolic vicariates and prefectures.

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Under the name of *diocese* the law comprises also an abbey or prelature *nullius;* and by the name of *bishop* it understands also an abbot or prelate *nullius,* unless the nature of the matter or the context require a different interpretation. The territory of each diocese should be distributed into districts, and to each of these assigned a special church with a determined part of the flock, over which is to be placed a local pastor, who shall take the necessary care of souls.

Similarly should be divided, wherever possible, vicariates and prefectures Apostolic.

The minor divisions of a diocese mentioned in § 1 are called *parishes;* the minor divisions of a vicariate or prefecture, if they have their own rectors, are called *quasi-parishes.*

Henceforward no parishes are to be established for faithful of diverse language or nation in the same city or territory without a special Apostolic indult. In regard to such parishes already existing, nothing is to be changed without the advice of the Holy See.

Every bishop is to divide his territory into districts, each comprising several parishes, to go by the name of foraneous vicariates, deaneries, archpresbyteries, etc. Where by reason of special circumstances such a division is impossible or infeasible, the bishop should consult the Holy See, unless the latter has already made provision.

The meaning of these canons is evident and only requires a few historical remarks.[1] When the first epoch, marked by itinerant preachers and ministers, had passed, the local organization alone remained. This extended from cities to suburbs, with areas [2] of widely dif-

1 Duchesne (tr. by McClure), *Christian Worship,* 1903, p. 14 ff.

2 A diocese, before Constantine, was a minor portion of a province,

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ferent proportions, but the center of gravitation was the city where the bishop dwelt. It was generally held that each city should have its bishop with its own clergy. That these several bishoprics or churches formed an ecclesiastical province similar to the political provinces, cannot be proved for the first three centuries. Neither did the existing prominent churches imitate the civil divisions except in so far as there was a geographical connection. It was natural that *Rome* should be looked upon as the center of Christendom, as it was not only the capital of the *Orbis Romanus,* but also the place hallowed by the two chief Apostles and consecrated by their martyrdom. Thus the successors of St. Peter were already in the first three centuries the acknowledged metropolitans of the West, which comprised the Italian peninsula, and later Western Illyricum with Gaul, and still later the Spanish provinces. The Council of Nicæa (325), comparing Rome with the sees of Alexandria and Antioch, referred to the metropolitan organization of the former as an established fact.[3] Alexandria and Antioch in the East retained for centuries their influence over the districts which had been allotted to them. In the reign of Theodosius I (379–395), the five civil provinces of the Orient (Pontus, Asia, Thrace, and Egypt) had their ecclesiastical heads, who were later (fifth century) called patriarchs: the Orient with Antioch, Alexandria with Egypt, and Pontus, Asia, and Thrace under the newly established metropolitan of Constantinople, who, as occupant of the see of New Rome,[4] claimed the right of consecrating the bishops of these three provinces — *i. e.,*

called *παροικία*, parish; but after Const. a diocese signified a district or area comprising several provinces.

3 Council of Nicaea (325), c. 6 has various readings; cfr. Maassen, *Gesch. d. Quellen,* I, 19; c. 6, Dist. 65.

4 C. 3 Constant. I; c. 28 Chalced.

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jurisdictional, hierarchic power over them. Thus the exarchs or metropolitans of Heraclea in Thrace, of Ephesus in Asia, and Caesarea of Pontus dwindled to lower rank, whilst Jerusalem, under the intriguing Juvenal, arose after the council of Chalcedon to the rank of a patriarchate, until Islam invaded the East. In the *West* we hear but little of metropolitans, if we except Milan, Aquileja, and Ravenna. Spain and Gaul show few traces of true organization with the sole exception of the *Vicariate of Arles,* founded by Pope Zosimus (417–418), which, however, proved a failure.[5]

More effective was the organization introduced by St. Boniface, the "Apostle of Germany," who acted strictly according to regulations received from Rome. A favorite theme of Pseudo-Isidore was the introduction of *Primates,*[6] of whom we hear as early as the fifth century, assuming that they are identical with the vicars of the Apostolic See. Thus, besides Arles, a vicar was created at Thessalonica,[7] and St. Boniface, as metropolitan of Mayence, was Primate of Germany. Later on the Primate of Hungary succeeded in upholding that title. In England, as we know from the history of the conversion of that country, St. Gregory had intended to erect two provinces.[8] Pope Nicholas I amalgamated the see of Bremen with the archbishopric of Hamburg. From the eleventh century onward the erection of bishoprics was reserved to the Holy See,[9] so that not even the papal legates were allowed to make a change in the territorial condition of dioceses.[10]

5 Duchesne, *l. c.*, p. 39.

6 Cfr. cc. 1, 2, Dist. 80; c. 1 f. Dist. 99.

7 Duchesne, *l. c.*, p. 42.

8 Lingard, *Anglo-Saxon Church* (*s. a.*), I, 107.

9 C. 1, Dist. 22; Dictatus Greg. VII, n. 7 (Migne 148, 407); c. 1, X, I, 7.

10 C. 2, X, I, 7; c. 4, X, I, 30; c. 4, 6°, I, 15.

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The erection and delimitation of new dioceses was generally effected *in forma bullae* or by a document called "bull of circumscription."

In countries which maintained diplomatic relations with the Holy See, the civil government coöperated with the former in the act of circumscription as well as in the carrying these documents into effect. Where, however, there was complete separation between Church and State, the Holy See established or reëstablished dioceses by papal bull. Thus Gregory XVI, by his Constitution "*Benedictus Deus,*" of July 17, 1834, laid down the boundaries of several dioceses and Pius IX, Jan. 24, 1868, increased the number of dioceses in the U. S. By the bull "*Universalis Ecclesiae,*" of Oct. 1, 1850, Pius IX re-established the hierarchy in England.[11] The whole business of erecting and changing the boundaries of dioceses now lies with the S. C. Consistorialis.[12]

The new Code insists upon strict organization of dioceses proper and parishes with due regard to the distinction between dioceses and vicariates. For the latter § 2 makes allowance, "*ubi commode fieri potest.*" But the distribution of dioceses into parishes must be enforced. For our country the passage referring to parishes of *different languages* is important, because in future none but English-speaking parishes can be erected without a special Apostolic indult. This law we consider very opportune because it does away with inconveniences arising from uncertain boundaries and puts the division on the basis of territory, which alone should be considered for administrative purposes. But as to carry the law into effect at once would cause difficulties, the legislator moderates the law as to the existing parishes. Par-

11 *Kirchenlexikon,* 2nd ed., *s. v.* "Circumscriptionsbullen."

12 Can. 248, § 2.

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ishes for a certain number or class of *families,* especially of the nobility, such as exist in Spain, are unknown in America.

The Code, with some restrictions, also insists upon the erection of rural *deaneries.* The scope of this provision is apparent from can. 131, which urges conferences of the clergy for each rural district, as also from cc. 445 ff., which define the duty of deans to watch over the clergy of their districts.

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TITLE VII

THE SUPREME POWER AND THOSE WHO PARTAKE THEREOF BY ECCLESIASTICAL LAW

CHAPTER I

THE ROMAN PONTIFF

CAN. 218

§ 1. Romanus Pontifex, Beati Petri in primatu Successor, habet non solum primatum honoris, sed supremam et plenam potestatem iurisdictionis in universam Ecclesiam tum in rebus quae ad fidem et mores, tum in iis quae ad disciplinam et regimen Ecclesiae per totum orbem diffusae pertinent.

§ 2. Haec potestas est vere episcopalis, ordinaria et immediata tum in omnes et singulas ecclesias, tum in omnes et singulos pastores et fideles, a quavis humana auctoritate independens.

CAN. 219

Romanus Pontifex, legitime electus, statim ab acceptata electione, obtinet, iure divino, plenam supremae iurisdictionis potestatem.

CAN. 220

Gravioris momenti negotia quae uni Romano Pon-

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tifici reservantur sive natura sua, sive positiva lege, *causae maiores* appellantur.

CAN. 221

Si contingat ut Romanus Pontifex renuntiet, ad eiusdem renuntiationis validitatem non est necessaria Cardinalium aliorumve acceptatio.

The Roman Pontiff, being the successor of St. Peter, possesses not only an honorary primacy, but supreme and full power of jurisdiction in the whole Church concerning matters of faith and morals as well as of discipline and government.

This power is truly episcopal, ordinary, and immediate, extending to each and every church no less than to each and every pastor, and to all the faithful, and is independent of every human authority.

The Roman Pontiff, lawfully elected, obtains by divine right full power of supreme jurisdiction at the moment when he accepts office. All affairs of major import (*causae maiores*), by their nature or by positive law, are reserved to the Roman Pontiff.

If the Roman Pontiff resigns his office, the resignation is valid without its acceptance by the cardinals or any one else.

These four brief canons embody the Catholic doctrine of the Roman Pontiff, on which many volumes have been written and which is fully treated in every manual of fundamental theology. We will limit our comments to a few canonical observations.

All those who pervert the essential divine organization of the Church as a perfect society of the monarchical type, necessarily deny the power of the Roman Pontiff.

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The so-called democrats of the later middle ages (Marsilius, Jandunus, Wiclif, and Hus) were deliberately bent on destroying the pure notion of papal power.[1] But the Jansenists, Gallicans, and Josephinists were also far from the true idea of papal power. They gave the Supreme Pontiff the title "*caput ministeriale,*" somewhat like a premier, or first among equals[2] (*primus inter pares*), but denied to him jurisdictional primacy over bishops and priests.[3] Pius VI, by the "*Auctorem fidei,*" Aug. 28, 1794, condemned the doctrine of the "*caput ministeriale,*" which meant that the supreme power was given to the Church as such, and only by and through the deference and connivance of the Church at large to the Pope. Finally the Vatican Council, summing up the traditional belief and many conciliary decisions, expressed the Catholic belief in its fourth and last session, held on July 18, 1870, which is embodied in our canon.[4]

Hence, (1) the power of the sovereign pontiff is truly a *primacy* of *jurisdiction,* which means not only inspection or direction, but legislative, judiciary, and executive power.[5]

(2) This power is *supreme* by reason of its dignity, because it is not derived from human authority, but is of divine origin, independent of any one in the same category.

(3) It is the *plentitude of power,* because it comprises all and every power needed for the attainment of the end for which the Church was founded. Therefore (a) all matters of faith and morals are subject to this power by reason of the infallible *magisterium;* (b)

1 Cf. Denzinger, *Enchiridion,* ed. 9, 1900, nn. 513, 528, 534, 589.

2 Ed. Richer, *De Ecclesiastica et Politica Potestate,* 1611.

3 Denzinger, *l. c.,* nn. 1366, 1369.

4 *Ibid.,* nn. 1667–1677 (Sess. IV, c. 3, de const. Eccl.).

5 Pius V, "Auctorem fidei," n. 5 (Denzinger, *l. c.,* n. 1368).

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the whole ecclesiastical administration belongs to it in virtue of the sacred *ministerium;* (c) the whole government of the Church may be claimed by the Pope by reason of the full and undivided *imperium.*

(4) The power of the Pope is *episcopal,* inasmuch as he is the supreme pastor whom the whole flock, of whatever rite or dignity, by reason of hierarchic subordination must follow and obey, and with whom all must be united.[6]

(5) The power of the Pope is *immediate* — a quality which naturally flows from spiritual sovereignty, but had to be specified against the Febronians,[7] who, as stated above, made the Pope the mere representative or diplomatic agent of the bishops. The supreme power accrues to the Pope not by any concession from or deference on the part of the bishops, but from Christ's promise and actual bestowal.

(6) This power, lastly, is *ordinary,* because supreme, full, and immediate jurisdiction is imparted through and with the office of the successor of St. Peter and rests with him as long as he holds that office, from the moment he accepts the lawfully performed election until his death or resignation. Neither for the validity of the election nor for a resignation is acceptance, confirmation, or anything else required. The reason is not far to seek. The pontificate, being supreme and immediate, requires merely an appropriate human factor or instrument in order to exist. (Election is, we might say, the remote material element, whilst the consent of the elect is *materia proxima,* to which is added the divine form of the primacy embodied in the Roman bishop.)

6 Vat. Conc. sess. IV, c. 3 (Denzinger, n. 1673).

7 Eybel had published a pamphlet: "What is the Pope?" against which Pius VI promulgated the Const. "Super soliditate," Nov. 28, 1786 (Denzinger, n. 1363).

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The question may be asked how the phrase "*iure divino*" in can. 219 is to be understood. No Catholic will doubt that the primacy is of divine sanction. But why is it held by the bishop of the Roman See, and not by the bishop of Antioch or the bishop of Alexandria (founded, it is said, by St. Mark, the "spiritual son" of St. Peter)? The majority of authors, theological [8] as well as canonical, maintain that it was by "divine ordinance," by the "providence of God," by a "supernal interposition" that the Roman See was chosen to be the instrument of Peter's Primacy. The proof from tradition and common conviction, therefore, is in favor of the *iure-divino* connection of the Primacy with the Roman See. Yet it must be said, with an author who has written a monograph on the subject and acted as member of the Codification Commission, that no *de fide* definition has been issued on the subject.[9] A purely academical question [10] is, whether a Pope could be deposed if he became a heretic or schismatic. *Nego suppositum.*

Canon 220 mentions the *causae maiores* which are reserved to the Roman Pontiff. Gratian's Decree and the Decretals contain several texts which refer to the so-called *causae maiores.* The text of Gratian, however, is taken largely from apocryphal sources. In one place, for instance, he says, that "all greater affairs must be referred to the Holy See, divine grace thus commanding," and vindicates to the Apostolic See "*ecclesiasticarum summas querelas causarum*" and the condemnation of bishops.[11] Besides, *appeals* to the Holy See are more than once refered to. It is safe to say that, since the synod of Sardica (343), appeals to the Apostolic

8 Cf. Mazzella, *De Religione et Ecclesia*, 1892, p. 731 ff.

9 Msgr. Hollweck, *Der Apost. Stuhl und Rom*, 1895.

10 Aichner, *l. c.*, § 25, 2.

11 C. 15, c. 24, q. 1; c. 6, 3. 3, q.

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See[12] were frequent. The canons of this synod had a peculiar fate, for in some versions they were simply attached to the canons of Nicæa, and having no special inscription or enumeration, were accepted as Nicene canons. A Latin translation containing them was circulated in Rome and Gaul, as the Codex Theatinus and others prove, whilst the African Church used copies of the Nicene Council without the canons of Sardica. When Apiarius, a priest of Sicca in Africa, appealed to Pope Zosimus, and the latter accepted the appeal by pointing to the canons of the Nicene Council, the African bishops remonstrated and denied that there were any such "Nicene canons." Both the Pope and the African bishops spoke the truth considering the state of their respective versions. But the African bishops were wrong in denying that appeals to the Holy See are permissible. For Julius I (337–352) had accepted the appeal of St. Athanasius, and the Africans themselves had sent the decrees of two of their councils to the Apostolic See.[13] Besides, it is a historical fact that questions continued to be submitted to Rome, instances of appeals being those of Himerius, Bishop of Tarragona, in 384, of Victricus, Bishop of Rouen, in 403, and of Exuperius, Bishop of Toulouse, in 404. The replies are embodied in the noble epistle of Siricius and Innocent on ecclesiastical discipline.[14] Besides appeals there were other causes brought before the Pope. Thus the restitution of deposed or sentenced bishops, doubtful or contested episcopal elec-

12 Cc. 10, 12, C. 2, q. 2; c. 9, C. 3, q. 6; c. 59, X, II, 28; as to the Sardican canons see Hefele, *Conciliengeschichte*, I, 341 f.; 539 ff.; Maassen, *l. c.*, p. 9 f.; p. 56 ff.

13 Cf. S. Aug., *Serm.* 132, n. 10: "*Jam enim de causa duo concilia missa sunt ad sedem apostolicam. Inde etiam rescripta venerunt; causa finita est, utinam aliquando error finiatur.*"

14 Coustant, *Epp. RR. Pontiff.*, 1721; Duchesne, *l. c.*, p. 37.

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tions, the concession of coadjutors, etc. Add to this the convocation of general councils and the solution of doubts concerning articles of faith or ritual questions,[15] and especially, later, the beatification and canonization of saints, the grant of exemptions, the erection of religious orders and congregations, dispensation from and commutation of certain vows, the erection and change of higher ecclesiastical benefices, etc.

An expression in the Gloss (ad. c. x, § I, 7) deserves some attention.[16] "No one," it says, "may appeal from the decision of the Holy See to another authority." The Gallicans had invented a formula, a certain panacea, as they said, for protecting the clergy and bishops from unjust sentences pronounced by Rome. This is the famous *appellatio ab abusu,* an appeal from the spiritual authority to the civil government. But that formula was a mere political measure, devised to hinder the free exercise of the spiritual power in matters proper to it. It was properly dealt with by the condemnation of the so-called Gallican Articles.[17] But there were other errors contained in the Gallican tendencies, which were transplanted to Germany and Austria and other countries, even to the Republic of Switzerland. These are known as the "*placetum regium*" and other outcroppings of a truly autocratic system, which would submit to civil power every official communication of the Supreme Pontiff and of pastors with their flocks.[18] Therefore, quite

15 Cfr. cc. 10, 12, C. 2, q. 6; c. 10, 6°, I, 6; c. un. 6°, III, 5; c. 1, X, II, 7; c. 5, Dist. 17; c. 3, X, III, 42.

16 The verse reads: "Restituit Papa solus, deponit et ipse — Articulos solvit; synodumque facit generalem — Transfert et mutat, *appellat nullus ab ipso* — Dividit ac unit, eximit atque probat."

17 Innocent XI, April 11, 1682; Alexander VIII, "Inter multiplices," Aug. 4, 1690; "Auctorem fidei," Aug. 28, 1794; "Apostolicae Sedis," 1869, n. 6–8; cfr. Charlas, *Tractatus de Libertatibus Eccl. Gallicanae,* 1725, III, 1, 166 ff.

18 Syllabus n. 28; Heiner, *Der*

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naturally, our Code insists on the supreme spiritual power being *independent* in its sphere of any human authority. And, truly, if the divinely established government were subject to temporal rulers, the mission of the Church would be jeopardized and often foiled.

In order to complete the observations made thus far, we will add some remarks on

THE PAPAL TITLES AND INSIGNIA

By the term "title" we understand not only the various nomenclatures which distinguish the Pope, but also the diverse dignities inherent in the papal office. To commence with the latter, three of which have now become merely honorary, there are

1. TITLES CONNOTING PREËMINENCE: (a) *Bishop of Rome, i. e.,* of the diocese within a circumferenece of 40 miles of the City (with the exception of six suburbicarian bishoprics), called in Italian "comarca di Roma," over which the Cardinal Vicar presides with ordinary jurisdiction.[19]

(b) *Metropolitan of the Roman Province,* which at the time of Innocent III comprised the region between the two provinces of Capua and Pisa,[20] and had some significance as long as provincial councils were held in Rome.

(c) *Primate of Italy* and the adjoining islands, Corsica, Sardinia, and Sicily (including Malta).[21]

(d) *Patriarch of the Occident,* in imitation of the Oriental patriarchates.[22]

Of these four titles only the first has a juridical value.

Syllabus, 1894, p. 151; Bachofen, *Summa Iuris Ecc. Pub.,* 1910, p. 56 f.; p. 68.

19 Benedict XIV, *De Syn. Dioec.,* II, 3, 2.

20 C. 5, X, I, 23; v. Scherer, *l. c.,* I, 463.

21 C. 11, Dist. 11.

22 C. 23, X, V, 33.

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2. HONORARY TITLES expressive of the office and dignity of the Sovereign Pontiff are the following:

Papa from the Greek πάππας, *i. e.*, father, which since the fifth century is exclusively used for the pope in the West;[23]

Apostolicus, viz. Dominus, in use since the fifth century, taken from the see, called Apostolic; *Pontifex Maximus, Summus.*[24]

Vicarius Dei or *Vicarius Christi,* also *Vicarius Petri,* to signify the primacy and source of power, in use since the thirteenth century.[25]

Servus Servorum Dei, which dates to the time of Gregory the Great (590–604). Because the monks were called "servants of God," Gregory, a former monk, called himself "*Servus Servorum Dei,*" against the "Universal Patriarch" of Constantinople.[26]

With these titles are in keeping the *cermonies* of the papal court. There is, first, the *adoratio* or reverence given to the Pope. At public cermonies the cardinals are supposed to kiss his foot and hand, the bishops his foot and knee, diplomatic representatives his hand.[27] Formerly the emperors used to hold the *strepa* of the Pope's horse. Now-a-days the Pope is considered the first of sovereigns and in Catholic countries his envoys take precedence over all other diplomatic agents.

The Pope is addressed as "Holy Father," in Latin, *Beatissime Pater, e. g.,* in petitions; *Sanctitas Vestra, Beatitudo Vestra,* although *beatitudo* is also the address of Oriental patriarchs.

23 Coustant, *l. c.*, p. 765.

24 V. Scherer, I, 468. Pontifex Maximus alludes to the pagan Summus Pontifex and to the Jewish Pontiff or Highpriest.

25 Cc. 2, 4, X, I, 7; c. 17, 6°, I, 6.

26 Io. Diac. Vita Greg. (Migne 75, 87).

27 The etiquette is the so-called Spanish; but it is useless to assert that this *adoratio* or worship is intended for the relics sewed in the tip of the slippers.

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3. The most remarkable INSIGNIA of the Sovereign Pontiff are these:

At certain solemnities the Pope wears the *tiara* or *triregnum,* a crown about 1½ ft. high with three bands or small diadems, set with precious stones, and with two lappets hanging from the rear. In its present form it dates back to the first half of the fourteenth century (Benedict XII, d. 1342). No juridical significance can be attached to the tiara.[28] It is used at the coronation of the Pope and high solemnities; at liturgical functions the Pope wears the episcopal mitre.

Instead of the crooked pastoral staff of the bishops the Pope uses the *pedum rectum,* a straight cross or staff, at the point of which is a cross, to signify the plenitude of power which the holder exercises in the name of Christ crucified.[29]

Besides, to indicate the fulness of his power, the Pope wears the *pallium* at all functions and without any restrictions as to place. The usual or daily dress of the Pope consists of a cassock of white silk, a white silken skullcap, a pectoral cross, and slippers of red silk.[30]

28 *Cath. Encycl.,* XIV, 717 f. (Braun); Wuescher-Becchi, *Ursprung d. päpstl. Tiara u. d. bischöfl. Mitra,* 1899, shows that the tiara was modelled on the Phrygian cap or *pileus,* and the mitre on a band or scarf (*taenia*) used by priests.

29 C. un. X, I, 15 § 9; v. Scherer, I, 468 f.; Wernz, *l. c.,* II, p. 684.

30 C. 4, X, I, 8; v. Scherer, *l. c.*

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CHAPTER II

GENERAL (ECUMENICAL) COUNCILS

CAN. 222

§ 1. Dari nequit Oecumenicum Concilium quod a Romano Pontifice non fuerit convocatum.

§ 2. Eiusdem Romani Pontificis est Oecumenico Concilio per se vel per alios praeesse, res in eo tractandas ordinemque servandum constituere ac designare, Concilium ipsum transferre, suspendere, dissolvere, eiusque decreta confirmare.

No general council can be held except by convocation of the Roman Pontiff, who presides over it either himself or by legates, prescribes and assigns the matters to be treated, as well as the order to be followed, transfers, suspends, and adjourns the council and ratifies its decrees.

Among the *causae maiores* reserved to the Roman Pontiff was enumerated the convocation of general councils, and hence this chapter is logically connected with the preceding. But there is also another reason why the Code treats of general councils here. The Pope being the supreme head of the universal Church, and a general council being a lawful gathering of prelates representing the whole body with the consent of the supreme head, it is evident that such an assembly must be the foremost object of the sovereign power. Besides, the bishops being the successors of the Apostles, endowed with power to rule the Church of God, can be called together author-

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itatively only by one who enjoys immediate jurisdiction over them.

History testifies that the first four general councils were convoked by civil rulers; but even at these, as the respective *acta* prove, the Popes were legitimately represented by legates.

As to the *necessity* of general councils, it is not absolute, but only *relative.*[1] For the power of the Pope is intrinsically neither enhanced by a general council nor diminished by the absence thereof. But in order to discuss matters thoroughly, and to impress the faithful as well as dissenters more effectively, to give a more widespread influence and application to universal decrees, a general council proves an effective means, especially in times of distress and spiritual calamities.

CAN. 223

§ 1. Vocantur ad Concilium in eoque ius habent suffragii deliberativi:

1.° S. R. E. Cardinales, etsi non Episcopi;

2.° Patriarchae, Primates, Archiepiscopi, Episcopi residentiales, etiam nondum consecrati;

3.° Abbates vel Praelati *nullius;*

4.° Abbas Primas, Abbates Superiores Congregationum monasticarum, ac supremi Moderatores religionum clericalium exemptarum, non autem aliarum religionum, nisi aliud convocationis decretum ferat.

§ 2. Etiam Episcopi titulares, vocati ad Concilium, suffragium obtinent deliberativum, nisi aliud in convocatione expresse caveatur.

§ 3. Theologi ac sacrorum canonum periti, ad Con-

1 Bellarmine, *De Conciliis*, I, 10; Mazzella, *De Religione et Ecclesia*, 1892, p. 809 ff.

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cilium forte invitati, suffragium non habent, nisi consultivum.

CAN. 224

§ 1. Si quis ex vocatis ad Concilium ad normam can. 223, § 1, eidem, iusto impedimento detentus, interesse non possit, mittat procuratorem et impedimentum probet.

§ 2. Procurator, si fuerit unus e Concilii Patribus, duplici suffragio non gaudet; si non fuerit, publicis tantum sessionibus interesse potest, sed sine suffragio; expleto autem Concilio, huius acta subscribendi ius habet.

If one of those called to the council is lawfully prevented from attending, let him send a procurator and prove the obstacle.

The procurator, although being perhaps a father of the council, enjoys but one vote; if he is not a father of the council he has no deliberative vote, but may be present at the public sessions and sign the acts after the council is finished.

CAN. 225

Nemini eorum qui Concilio interesse debent, licet ante discedere, quam Concilium sit rite absolutum, nisi a Concilii praeside cognita ac probata discessionis causa et impetrata abeundi licentia.

The fathers of a council are not allowed to leave until it is duly concluded, unless the president of the council grants leave after having duly considered and approved the reasons for departure.

The first of these three canons speaks of those who are called (*vocantur*) to attend a council. The term *vocantur* is to be taken as indicating a matter of fact, not a law or

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rule. This is plain from the persons enumerated. For *cardinals,* if not bishops, are called in virtue of their privileged office, which the Vatican Council silently admitted,[2] as does also our Code.

Those who *must* be called are the *bishops,* be they patriarchs, primates, archbishops, or simple bishops, provided they are residential, and not merely titular. The reason why the residential bishops must be called lies in their twofold character of pastors and teachers. This double office they exercise in a twofold way: (1) As successors of the Apostles they share in the government of the universal Church and form a body analogous to the college of the Apostles, with whom Christ remains until the end of time. (2) As residential bishops they exercise their office in a determined district or diocese, which, however, is part and parcel of the universal Church.[3] This power is jurisdictional in a particular sense, while the power they exercise over the whole Church is jurisdictional in a general sense, so far, namely, as they convene in council under their legitimate superior.

The next question would be, whether the right of a bishop to be called to a general council depends on episcopal consecration or jurisdiction. The Vatican Council doubtless took the view that it is a right emanating directly from jurisdiction. This is implicitly also the standpoint of our Code, otherwise a bishop confirmed by Rome but not yet consecrated, could not be called. The point is palpably illustrated by the debate concerning the admission of *titular bishops.* After long deliberation the commission of cardinals entrusted with the investigation of the matter decided that such bishops are to be called, as they are bound by the oath "*vocatus ad synodum*

2 Cfr. Granderath-Kirch, *Geschichte des Vatik. Konzils,* 1903, I, 83, 440.

3 *Ib.,* p. 84 ff.

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veniam." The *quaestio iuris* the commission would not touch.[4] Our Code says, § 2, "*etiam episcopi titulares, vocati ad concilium.*" The delicate question could, of course, be solved only by answering two others: (1) Is the *magisterium* an act of jurisdiction or of spiritual power based on the power of orders? and (2) Is episcopal jurisdiction derived directly from God by virtue of consecration, or from the Pope? The commission would not solve the problem, as the time was too short. It only took the historical point of view, by which it was safely guided, thus making the council what it ought to be; "*concilium episcoporum est,*" as the Council of Chalcedon says.[5]

But there is an unmistakable hint as to the viewpoint which the Vatican Council as well as our Code take with regard to the twofold question proposed above: the office of teacher and pastor follows jurisdiction, not consecration, and this jurisdiction is supposed to be given by the Supreme Pontiff. Hence abbots *nullius* are called to the council, although many of them are not consecrated;— in the Cassinese Congregation they are not even blessed, though some are real *abbates nullius.*[6] For these abbots *nullius* as well for other abbots mentioned S. Sanguineti, S. J., gave his votum.[7] He proved that since the second Nicene Council (787) the monastic bodies and their superiors took a conspicuous part in the affairs of the Church, but their participation in councils was a privilege, not a strict right, though abbots possess a quasi-episcopal jurisdiction, which is the reason of their being admitted to councils. But when he comes

4 *L. c.*, p. 93.
5 Sess. IV.
6 Those of Monte Cassino, S. Paolo fuori le mura, Cava de' Tirreni.
7 Granderath-Kirch, *l. c.*, p. 99.

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to the point — *punctum saliens* — whether all abbots, or only some of them, should be admitted, Fr. Sanguineti's conclusions seem not to tally with his premises. For in the Benedictine Order all abbots *regiminis* are endowed with quasi-episcopal jurisdiction, and neither the Abbot Primate nor the Abbot President possesses real jurisdiction over the individual abbots. Hence the distinction between heads of monastic congregations and superiors of single autonomous monasteries is merely extrinsic. We fail to perceive the intrinsic reason of the distinction made, upon the opinion of Sanguineti, by the commission of cardinals in 1868 and now adopted by the Code. One reason advanced at the meeting, why not all abbots should be admitted, we understand, namely, that their number would be so great as to displease the bishops.[8] *Transeat!* The superiors of non-exempt congregations[9] were not entitled to be present at general councils, which exclusion was logically based upon the theory of quasi-episcopal jurisdiction.

Concerning *proxies,* our Code embodies the practice of the Vatican Council.[10] If a procurator is at the same time a "father" of the council, *i. e.,* entitled by law to a deliberative vote, he enjoys only one vote, for the reason that a bishop or pastor, being judge and counsellor at the assembly, cannot impart his judgment or counsel to another. Concerning bishops, the matter is still more palpable, for, being chosen by the Holy Ghost, they cannot communicate that personal gift to another.[11] A procurator who does not belong to the "fathers" of the council enjoys no deliberative vote, unless, of course,

8 *Ib.,* p. 104.

9 Exempt congregations are the Redemptorists and the Passionists.

10 Granderath-Kirch, *l. c.,* I, 108 ff.

11 *Ib.,* p. 115; Benedict XIV, *De Syn. Dioec.,* III, 12, 4.

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the Pope expressly grants him one, as Paul III allowed [12] the procurators of some German bishops a decisive vote, which privilege, however, was repealed by Pius IV.[13] Besides, the office of a procurator is to explain and prove the reasons why his *mandans* has not personally appeared, although he was under obligation to attend.[14] The investigation of such cases must be laid either before a commission specially assigned by the council, or before the presiding officer. The latter must also take cognizance of and approve the reasons for a departure before the close of the council.

A last question may perhaps be of some juridical interest, *viz., how many fathers* must be present in order to call a council ecumenical? This question Bellarmine [15] has answered by saying that the number cannot be defined but should be such as to constitute a moral representation of the whole Church. He adds that at least some bishops should be present from the majority of provinces. The councils of the East had but few representatives from the Occident, whose small number was supplied by the papal representatives.

ORDER AND AUTHORITY OF A GENERAL COUNCIL

CAN. 226

Propositis a Romano Pontifice quaestionibus Patres possunt alias addere, a Concilii tamen praeside antea probatas.

CAN. 227

Concilii decreta vim definitivam obligandi non ha-

12 "Dudum cum fide," Dec. 5, 1545.

13 Aug. 26, 1562.

14 C. 4, X, II, 24; Benedict XIV, *De Syn. Dioec.*, III, 12, 5.

15 *De Concil.*, I, c. 17; Mazzella, *l. c.*, p. 801.

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bent, nisi a Romano Pontifice fuerint confirmata et eius iussu promulgata.

CAN. 228

§ 1. Concilium Oecumenicum suprema pollet in universam Ecclesiam potestate.

§ 2. A sententia Romani Pontificis non datur ad Concilium Oecumenicum appellatio.

To the questions proposed by the Roman Pontiff others may be added by the Fathers, provided they are approved by the presiding officer.

Conciliary decrees have no obligatory force unless they are ratified by the Roman Pontiff and promulgated by his command.

An ecumenical council possesses supreme power over the whole Church.

From the judgment of the Roman Pontiff no appeal is admissible to a general council.

CAN. 229

Si contingat Romanum Pontificem, durante Concilii celebratione, e vita decedere, ipso iure hoc intermittitur, donec novus Pontifex illud resumi et continuari iusserit.

Should the Roman Pontiff die during the council, the latter is suspended until the new Pontiff gives orders to resume and continue it.

As to the matter and the order of proposals, it is well known that preparatory sessions are held and various committees chosen. No general rule is laid down, and prelates who wish to make new proposals must submit them to the President of the council, in order that they may be sifted and discussed.

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Concerning the *vis definitiva,* it should be remembered that the fathers of the council are judges concerning all matters proposed to their acceptance or rejection. Wherefore those who are mentioned in can. 233, § 1 and § 2 subscribe the acts with the phrase *definiens subscripsi.* However, although these are regular judges, the final sentence remains with the Pope. He it is that *ratifies* the decrees either at the council itself, if he is personally present, or when they are submitted to him, generally by the secretary of the council. It may happen that some decrees are ratified, while others are rejected, as, for instance, the third cannon of the I Council of Constantinople and the twenty-eighth of Chalcedon were rejected by the Popes.[16]

As to the *authority* of a general council, it is evident that, if it deserves the name, its dogmatic decrees bind the whole Church, Oriental as well as Occidental. But the disciplinary decrees of Occidental councils, unless directly applied to the Oriental Church, are not intended for the latter.[17] But there is also another intent in can. 228, § 1, that is to reject the pretention of Hus,[18] that every council called general obliges the whole Church, and especially to condemn the 29th thesis of Luther,[19] that it is allowed to reject or even rebel against the decrees of an ecumenical council. The same canon rejects the famous "*conciliar theory,*" which, approved by Gerson, was a leading topic of discussion at the end of the fourteenth and the beginning of the fifteenth centuries, and culminated in the assertion of the superiority of a general council over the Pope, thus destroying the true idea of

16 Also the conciliar decrees of the council of Basle (1431) were not all ratified by the pope.

17 Can. 1 of our Code.

18 Art. 5 (Denzinger, *Enchiridion,* n. 551).

19 Denzinger, *l. c.,* n. 653.

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the papacy.[20] Hence no appeal is possible from the Pope to an ecumenical council. To admit such an appeal would, moreover, be tantamount to maintaining that a council can appeal to itself, since a general council is unthinkable without the supreme head. Wherefore Pope Zosimus (418) justly wrote to Aurelius, bishop of Carthage, that the authority of the Apostolic See is so great that no one can revise its sentences.[21]

Regarding the *death of the Roman Pontiff* during a council, Pius X established that as soon as the notice thereof should reach the council, wherever it be held, all sessions and meetings and enactments of decrees or canons should be immediately stopped, and nothing further done until the new Pontiff ordered its resumption and continuance. A council has no share in the election of the Pontiff, this prerogative being reserved to the Cardinals.[22]

20 Pius II (who as Aeneas Silvius inclined to the same theory) "Execrabilis," Jan. 18, 1459; Conc. Vatic., Sess. IV, c. 3.

21 Ep. 12 (Migne, 20, 676).

22 "Vacante Sede Apostolica," n. 28.

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CHAPTER III

THE CARDINALS OF THE HOLY ROMAN CHURCH

Pope Fabian (236–251) divided the (14) regions of Augustus into seven ecclesiastical districts, over which seven *deacons* should preside, who took care of the temporal affairs of the Church. With the growth of the number of the faithful the number of these *diaconiae* also increased. In the seventh century we read of *diaconiae monasterii,* entrusted to monks, from among whom the superior of each *diaconia* or charitable institute was taken. Henceforth an indefinite number of regionary deacons appear, and their office or charge is designated according to the name of the church attached to each *diaconia.* Thus in the pontificate of Hadrian I (772–775) 18 such deacons are mentioned. In the eleventh century the deacons presiding over these institutes were called *cardinales diaconi.*[1] These formed a conspicuous part of the Roman clergy and were often employed for papal legacies and other important affairs.

At the time of the same Pope, Fabian, and most probably even earlier, there were in the city of Rome a number (at first 28, later 48 or 49) churches (more particularly those built above the sepulchres of martyrs) which were called *tituli,* after the saint whose relics were there preserved, or for some other special reason (*e. g., titulus pastoris,* St. Pudenziana). Furthermore there were four

1 *Liber Pontificalis,* ed. Duchesne, 1880, I, 148, 519, 522, 364; Kehr, *Regesta Pontif. Rom.,* 1906, I, 3 ff.

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principal churches,[2] which were considered baptismal churches and penitential churches, and around which the other churches or *tituli* with their clergy were grouped. For as each church had its clergyman, especially assigned to or incardinated into it, so the principal churches had their special or incardinated clergy, who had to serve there and nowhere else. Here we have the origin of the name "cardinal"; it means a clergyman incardinated in a special church which enjoys a certain preëminence, and since the Church of Rome was considered *the* principal church among all the churches of the world, its clergy, especially those incardinated in one of the ancient *tituli,* took precedence over the rest in rank and dignity. To the Roman clergy employed in these titular churches, after the 16th century,[3] were reserved the title and rank of *cardinals.*

Add to these cardinal deacons and cardinal priests the *seven suburbicarian bishops,* who since the time of Stephen III (768–772) were summoned to perform the liturgical functions each week at the Lateran Basilica,[4] and you have the College of Cardinals.

The energetic John VIII (872–882) employed the cardinal clergy as counsellors, who had to meet at one or the other *diaconia* or church at least once a month, and twice a week at the papal palace in the Lateran.[5] Still more conspicuous and important grew the cardinal's office after Nicolaus II (1059) and Alexander III (1179) placed the papal election entirely into the hands of the

2 Pope Simplicius (468–483) "constituit ad S. Petrum apostolum et ad S. Paulum apostolum et ad S. Laurentium martyrem ebdomadas ut presbyteri manerent propter penitentes et baptismum." *Lib. Pont.,* I, 249; later on S. Maria ad praesepe was added to the three.

3 There were "cardinals" also at Cologne. Hinschius, *K.-R.,* I, 321 f.

4 Mabillon, *Museum Italicum,* 1724, II, 574.

5 Kehr, *l. c.,* I, 6, n. 8.

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cardinals of the Roman Church.[6] Under Innocent III (1196–1229), after synods had come into disuse, the Cardinals formed a permanent *consistory* of the Pope, and were convoked two or three times a week, or as often as affairs were urgent.

It was but natural that the *precedence* of Cardinals over other prelates should gradually manifest itself. At the IInd Council of Lyons (1174) they rank higher than archbishops and bishops; in the 14th century they precede even the patriarchs. Two centuries later no prelate outside the college of Roman Cardinals was allowed to call himself cardinal. Finally, the *Ceremoniale Cardinalium* (May 4, 1706) vindicated to the cardinals the title of *Princes of the Holy Roman Church.*[7]

The *number of Cardinals* differed at various times, according to the number of titular churches. The Council of Constance and Bâsle allowed only 24, but Sixtus V established 70, in imitation of the 70 seniors of the old Law, 14 deacons, 50 priests and six bishops.[8]

OFFICE AND RANK OF CARDINALS

CAN. 230

S. R. E. Cardinales Senatum Romani Pontificis constituunt eidemque in regenda Ecclesia praecipui consiliarii et adiutores assistunt.

The Cardinals form the senate of the Roman Pontiff and are his main counsellors and helpers in the government of the Church.

6 C. 1, Dist. 23; c. 6, X, I, 6; Galante, *Fontes Iuris Canonici*, 1906, p. 414 f.

7 Bangen, *Die Röm. Curie*, 1864, p. 462; Hinschius, *l. c.*, *I*, 319.

8 "Postquam," Dec. 3, 1586; "Religiosa," April 13, 1587; Galante, *l. c.*, 467 ff.

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CAN. 231

§ 1. Sacrum Collegium in tres ordines distribuitur: episcopalem, ad quem soli pertinent sex Cardinales dioecesibus suburbicariis praepositi; presbyteralem, qui constat Cardinalibus quinquaginta; diaconalem, qui quatuordecim.

§ 2. Cardinalibus ordinis presbyteralis ac diaconalis suus cuique titulus aut diaconia in Urbe assignatur a Romano Pontifice.

The Sacred College is divided into three orders: that of bishops, to which class the six suburbicarian prelates belong; that of priests, fifty in number; that of deacons, fourteen in number.

Each of the cardinal priests and deacons has his own title or *diaconia* assigned to him by the Roman Pontiff.

It is not necessary to enlarge upon the exalted office of cardinals. They are, as Eugene IV said, "the hinges upon which the government of the whole Church turns," [9] or, as Sixtus V called them, the "two eyes of the Pontiff." [10]

The six *suburbicarian bishoprics* are: Porto S. Rufina, Albano, Palestrina, Sabina, Frascati, and Velletri.[11] The cardinal priests' titles are fifty different churches, to which, as said above, a certain number of clerics, among them a presbyter, were assigned. The deacons' churches were originally charitable institutions with oratories attached to them.

The cardinals take solemn *possession* of their titles after they have been announced in the public consistory. They are, or were in former times, supposed to take ma-

9 "Non mediocri," 1439, § 4.
10 "Postquam," Dec. 3, 1586.
11 Pius X, "Edita a Nobis," May 5, 1914 (*A. Ap. S.*, VI, 219 f.).

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terial care of their churches, *juxta posse*,[12] and enjoy a certain jurisdiction over the titular clergy.[13]

CREATION AND QUALIFICATIONS OF CARDINALS

CAN. 232

§ 1. Cardinales libere a Romano Pontifice ex toto terrarum orbe eliguntur, viri, saltem in ordine presbyteratus constituti, doctrina, pietate ac rerum agendarum prudentia egregie praestantes.

§ 2. A cardinalatus dignitate arcentur:

1.° Illegitimi, etiamsi per subsequens matrimonium fuerint legitimati; itemque alii irregulares vel a sacris ordinibus impediti secundum canonicas sanctiones, etsi cum ipsis auctoritate apostolica fuerit ad ordines et dignitates etiam episcopalem dispensatum;

2.° Qui prolem etiam ex legitimo matrimonio susceptam, vel nepotem ex ea habent;

3.° Qui primo aut secundo gradu consanguinitatis alicui Cardinali viventi coniuncti sunt.

CAN. 233

§ 1. Cardinales creantur et publicantur a Romano Pontifice in Consistorio sicque creati et publicati obtinent ius ad electionem Romani Pontificis et privilegia de quibus in can. 239.

§ 2. Si tamen Romanus Pontifex creationem alicuius in Consistorio annuntiaverit, eius nomine sibi in pectore reservato, sic promotus nullis interim gaudet

12 The *Liber Pontificalis* records many donations made by popes to their former titular churches, and well known is the generosity of the late Cardinal Rampolla to S. Cecilia.

13 Cf. can. 240, § 2.

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Cardinalium iuribus aut privilegiis, sed, postquam a Romano Pontifice eius nomen publicatum fuerit, iisdem fruitur a publicatione, iure vero praecedentiae a reservatione in pectore.

CAN. 234

Promotus absens a Curia debet in recipiendo bireto rubro iurare se intra annum, nisi legitimo detineatur impedimento, Summum Pontificem aditurum.

CAN. 235

Nisi aliter in casibus particularibus fuerit a Sancta Sede provisum, per promotionem ad sacram purpuram non solum ipso facto vacant dignitates omnes, ecclesiae, beneficia quae promotus possideat, sed etiam pensiones ecclesiasticae amittuntur.

The dignity or office of a cardinal is of merely human or rather ecclesiastical institution,[14] but from time immemorial was reserved exclusively to the Pope, although, as said above, a cardinal clergy existed also elsewhere.[15] Hence the admission of so-called "*crown cardinals,*" whom certain monarchs recommended to the Pope, was really nothing else but connivance on the part of the Holy See, and constituted no right in the strict sense of the word. The question put to the Cardinals in the secret consistory: "*Placetne vobis,*" by which the Pope seems to ask the consent of the *patres purpurati* already created, is a mere ceremony.[16]

14 A solid doubt or controversy as to the ecclesiastical institution of the cardinalate, as Smith, *Elements,* I, n. 488 insinuates, cannot be maintained; cfr. Wernz, *l. c.,* II, n. 624 (p. 706, ed. 1.).

15 C. 17, 6°, I, 6.

16 Wernz, *l. c.,* n. 625.

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The *qualifications* required for the cardinalate are partly stated by the Council of Trent,[17] and partly in the Constitution "*Postquam*" of Sixtus V, Dec. 3, 1585. At present, in addition, the priesthood is absolutely required.

Excluded by law (from which, however, the Pope may grant a dispensation) are the following:

(a) Persons born of *illegitimate* wedlock, even though they be legitimated by the subsequent marriage of their parents, or rendered capable of holding ecclesiastical dignities by Apostolic dispensation; hence the parents must have lived in lawful wedlock at the birth of the candidate.

(b) Those who are *irregular,* either *defectu* or *delicto,* for the reception of sacred orders or for the exercise thereof, although made capable by Apostolic dispensation.

(c) All persons who have legitimate or illegitimate offspring, male or female, or grandsons or granddaughters;

(d) *Brothers* who are either of the same parents or of one parent only: father's or mother's, brother's or sister's sons (cousins-german), paternal or maternal uncles, and grandsons of either father's or mother's side cannot be cardinals at the same time.[18]

The *mode of creating Cardinals* is left to the Roman Pontiff. However, as a rule, the Pope creates them and publishes their names in a secret consistory,[19] at which only the Cardinals already created are *de iure* present, and from this moment the new cardinals begin to enjoy cardinalitial rights and privileges. In a sub-

17 Sess. 24, c. 1 de ref.

18 "Postquam," § 17 f.

19 Pius V, Jan. 26, 1571; Gregory XV, "Decet," March 12, 1622, modified the Constitution of Eugene IV, "In eminenti," Oct. 26, 1431.

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sequent *public consistory,* to which, among others, the diplomatic corps, dignitaries, clergy and laity are admitted, they receive the red hat and take the oath of fidelity to the Pope.

A special mode, which was first made use of by Martin V (1417–1431), is that of reserving a cardinal's name *in petto; i. e.,* the Pope, by an act of his will, creates a cardinal, but for special reasons does not immediately publish his name. The one thus made a cardinal "*in petto*" must await publication before he can exercise the rights and prerogatives of a cardinal; but his precedence dates from the time of the secret consistory when the Pope announced the reservation. Thus Pius IX, on March 18, 1875, created five cardinals "*in petto.*" Had he died before making their names known, the five *purpurae* would have died with him, had he not provided a means of carrying out his will by testament. However, this is an unsafe way, liable to cause dispute and confusion, and it is better that the names of such *reservati* be published before the Pope's demise.[20]

Persons promoted to the cardinalate while absent from Rome, generally receive the red *biretta* by a special envoy, and upon receiving it must promise under oath to visit Rome within a year.[21]

What canon 235 states is nothing else but the general prohibition of a *plurality of offices.* However, concerning the loss of *dignities,* it is evident that the episcopal dignity is not forfeited, but rather exalted by the cardinalate, though as to *churches* it must be noticed that a bishop promoted to the cardinalate only virtually, not actually, loses his bishopric, insofar namely, as the pope is entitled to keep him at his court if he deems fit. As

20 Cfr. Santi-Leitner, *l. c.,* I, 31, n. 23 f.

21 "Postquam," § 19.

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to benefices other than episcopal, they are lost; hence also *commendae* seem, at least *de iure,* now lost as well as pensions.[22]

OPTION

CAN. 236

§ 1. Per optionem in Consistorio factam et a Summo Pontifice approbatam, possunt, servata prioritate ordinis et promotionis, Cardinales ex ordine presbyterali transire ad alium titulum et Cardinales ex ordine diaconali ad aliam diaconiam et, si per integrum decennium in ordine diaconali permanserint, etiam ad ordinem presbyteralem.

§ 2. Cardinalis ex ordine diaconali, transiens per optionem ad ordinem presbyteralem, locum obtinet ante omnes illos Cardinales presbyteros, qui post ipsum ad sacrae purpurae honorem assumpti sunt.

§ 3. Suburbicaria si vacet sedes, Cardinales ex ordine presbyterali, qui momento vacationis praesentes fuerint in Curia vel ab ea absentes ad tempus ob sibi commissum negotium aliquod a Romano Pontifice, optare eam possunt in Consistorio, servata prioritate promotionis.

§ 4. Cardinales quibus una ex ecclesiis suburbicariis est assignata, aliam optare nequeunt; cum vero Cardinalis gradum Decani attigerit, dioecesim suam Ostiensi cumulat, quae proinde cum alia atque alia dioecesi suburbicaria in persona Cardinalis Decani semper coniungitur.

22 It is a fact, as Wernz (*l. c.*, II, n. 632) justly observes, that *commandae* were so far retained, and can. 1298 seems to confirm that view; but our canon is absolute, wherefore to combine both, we must say that *commendae* possessed before promotion are lost, but may be re-obtained with the permission of the Pope after promotion.

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This canon deals with the *right of option, i. e.,* the right of a Cardinal to choose a higher rank, or another church within the same rank of a better class or greater renown by reason of antiquity or distinction and income. This is especially the case in the suburbicarian bishoprics. Velletri has for centuries been united with Ostia, whose cardinal bishop always was and still is dean of the Sacred College. Pope Pius X, the solicitous pastor, rearranged the suburbicarian sees. He assigned suffragans to all of them (Velletri and Sabina had suffragans before) [23] with a salary of six thousand Lire ($1150), besides other rights and prerogatives. Four years later he separated Velletri from Ostia, which latter is no longer a suburbicarian see, but always in the hands of the Cardinal Dean. There being only six suburbicarian sees and six cardinal bishops, it happens that the Cardinal Dean is bishop of a real suburbicarian bishopric and at the same time bishop of Ostia.[24] The reason for this change is obvious. The Pope wished to remedy the frequent changes of the holders of these sees, which could only be achieved by uniting Ostia [25] with one of the six other sees and denying the right to all of the incumbents. Ostia having always been the privileged see to which the rank of dean was attached, it was natural that this see should not be suppressed, but made an additional title to one of the other suburbicarian sees: Porto S. Rufina, Albano, Palestrina, Sabina, Frascati, Velletri. Thus now the rank of dean does not depend on the see of Ostia, but solely on the time of promotion to a suburbicarian bishopric. We may add that the suf-

23 "Apostolicae Romanorum," April 15, 1910 (*A. Ap. S.*, II, 277 ff.).

24 "Edita a Nobis," May 5, 1914 (*A. Ap. S.*, VI, 219 ff.).

25 The diocese of Ostia is insignificant as to population.

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fragans of these six sees have again been abolished and the *status quo* restored.[26]

THE SACRED COLLEGE AS A CORPORATION

CAN. 237

§ 1. Sacro Cardinalium Collegio praeest Decanus, idest antiquior promotione ad aliquam sedem suburbicariam, cui tamen nulla est in ceteros Cardinales iurisdictio, sed ipse primus habetur inter aequales.

§ 2. Vacante decanatu, ipso iure succedit Subdecanus, sive is tempore vacationis sit praesens in Curia, sive in sua suburbicaria dioecesi commoretur, sive absit ad tempus ob sibi commissum munus a Romano Pontifice.

Since the time of Alexander III (1159–1181), when the cardinal clergy of Rome obtained the exclusive power of electing the Pope,[27] the tendency to corporative union among them asserted itself more and more. In course of time they also increased their independence and improved their material condition,[28] so that their revenues became far from insignificant. The temporal administration was in the hands of a chamberlain (*camerlengo*) elected by the body of cardinals, who, however, must not be confounded with the *camerlengo* of the Holy Roman Church. Their income was distributed twice a year among the cardinals *de curia,* including the papal legates. This distribution was called *rotulus cardinalitius.*[29] Our

26 Benedict XV, "Exactis," Feb. 1, 1915 (*A. Ap. S.*, VII, 229 ff.); the other enactments are left untouched in the Code.

27 C. 6, X, I, 6 de electione.

28 Cf. Sägmüller, *Tätigkeit u. Stellung der Kardinäle,* 1896, p. 170 ff.

29 Benedict XIV, "*In regimine,*" Feb. 3, 1745, complains of cardinals, who are not *de curia,* coming to Rome twice a year simply to receive the rotulus; cfr. Bened. XIII, "*Romani Pontificis,*" Sept. 7, 1724; Clement XII, "*Pastorale officium,*" Jan. 10, 1731.

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Code is silent about the *camerarius,* whilst the dean and subdean are mentioned. It is a fact that the significance of the College as such, as well as the *rotulus,* have lost much of their former importance.

DUTIES AND PRIVILEGES OF CARDINALS

CAN. 238

§ 1. Cardinales tenentur obligatione residendi in Curia, nec fas est ipsis ab eadem discedere sine licentia Romani Pontificis, salvo praescripto §§ 2, 3 huius canonis.

§ 2. Haec obligatio urget quoque Cardinales Episcopos suburbicarios; sed ipsi non indigent licentia ut sese conferant ad dioeceses sibi commissas, quoties opportunum iudicaverint.

§ 3. Cardinales qui sunt Episcopi alicuius dioecesis non suburbicariae, lege residendi in Curia eximuntur; sed cum ad Urbem venerint, Summum Pontificem adeant, nec ab Urbe discedant antequam ab eodem abeundi licentiam impetraverint.

The duty of residence follows from the nature of the cardinalitial office, the Cardinals being counsellors and assistants to the Sovereign Pontiff.[80] Although the suburbicarian cardinal bishops are bound by the law of residing in Rome, yet the Pope always grants them tacit, and now through the Code express permission to visit their dioceses, thus interpreting, not abolishing, the divine law of residence.[81]

What we said above concerning the loss of a bishopric, which naturally follows one's elevation to the cardinalate, is here corroborated. It is an implied dispensation from

80 C. 17, 6°, I, 6.

81 Benedict XIV, "Ad universae," Sept. 3, 1746; *De Syn. Dioec.,* VII, 1, 7.

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the law prohibiting a plurality of offices. Diocesan residence is here preferred to residence *in curia.*

CAN. 239

1. Praeter alia privilegia quae in hoc Codice suis in titulis enumerantur, Cardinales omnes a sua promotione in Consistorio facultate gaudent:

1.° Audiendi ubique terrarum confessiones etiam religiosorum utriusque sexus et absolvendi ab omnibus peccatis et censuris etiam reservatis, exceptis tantum censuris Sedi Apostolicae specialissimo modo reservatis et illis quae adnexae sunt revelationi secreti S. Officii; [32]

2.° Sibi suisque familiaribus [33] **eligendi sacerdotem confessionibus excipiendis, qui, si iurisdictione careat, eam ipso iure obtinet, etiam quod spectat ad peccata et censuras, reservatas quoque, illis tantum censuris exceptis, de quibus in n. 1;**

3.° Verbum Dei ubique praedicandi;

4.° Celebrandi vel alii permittendi ut coram se celebret unam Missam in feria V maioris hebdomadae ac tres Missas in nocte Nativitatis Domini;

5.° Benedicendi ubique, solo crucis signo, cum omnibus indulgentiis a Sancta Sede concedi solitis, rosaria, aliasque coronas [34] **precatorias, cruces, numismata, statuas, scapularia a Sede Apostolica probata eaque imponendi sine onere inscriptionis;**

32 This oath is imposed on the employees of the Holy Office and the S. C. Consistorialis; cfr. *A. Ap. S.*, I, 82.

33 *Familiares* are those who habitually serve cardinals or bishops as domestics and depend on them for their livelihood; cfr. Reiffenstuel, II, 20, n. 122.

34 Other *coronae* or rosaries are those of St. Brigid, of the Seven Sorrows of the B. V. Mary, and of the Immaculate Conception, the *corona Domini;* cfr. Putzer, *Comment. in Facult. Apost.*, 1897, p. 355.

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6.° Sub unica benedictione erigendi, in ecclesiis et oratoriis etiam privatis aliisque piis locis, stationes *Viae Crucis* cum omnibus indulgentiis, quae huiusmodi pium exercitium peragentibus impertitae sunt; nec non benedicendi pro fidelibus, qui causa infirmitatis vel alius legitimi impedimenti sacras stationes *Viae Crucis* visitare nequeant, Crucifixi icones [35] cum applicatione omnium indulgentiarum devoto exercitio eiusdem *Viae Crucis* a Romanis Pontificibus adnexarum;

7.° Celebrandi super aram portatilem non solum in domo propriae habitationis, sed ubicunque degunt; et permittendi ut alia Missa, ipsis adstantibus, celebretur;

8.° Celebrandi in mari, debitis cautelis adhibitis; [36]

9.° In omnibus ecclesiis et oratoriis Missam celebrandi proprio calendario conformem;

10.° Fruendi altari privilegiato personali quotidiano;

11.° Lucrandi in propriis sacellis indulgentias, ad quas acquirendas praescripta sit visitatio templi alicuius vel publicae aediculae civitatis seu loci, in quo Cardinales actu commorentur, quo privilegio etiam eorum familiares frui possunt;

12.° Benedicendi ubique populo more Episcoporum; sed in Urbe in ecclesiis tantum, piis locis et fidelium consessibus;

13.° More Episcoporum gestandi crucem ante pectus etiam supra mozetam atque utendi mitra et baculo pastorali;

14.° Sacrum celebrandi in quolibet privato sacello

[35] Cf. Putzer, *l. c.*, p. 366 f.

[36] Cfr. can. 349, where the conditions are mentioned in the commentary.

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sine praeiudicio illius qui indulto gaudet;[87]

15.° Pontificalia cum throno et baldachino peragendi in omnibus ecclesiis extra Urbem, Ordinario praemonito, si ecclesia sit cathedralis;

16.° Honoribus locorum Ordinariis tribui solitis fruendi quocunque se conferant;

17.° Fidem faciendi in foro externo, de oraculo pontificio testantes;[88]

18.° Fruendi sacello ab Ordinarii visitatione exempto;

19.° De reditibus beneficiariis libere disponendi etiam per testamentum, salvo praescripto can. 1298;

20.° Consecrationes et benedictiones ecclesiarum, altarium, sacrae suppellectilis, Abbatum aliasve similes, excepta oleorum sacrorum consecratione, si Cardinalis charactere episcopali careat, ubique locorum, servatis servandis, peragendi, firmo praescripto can. 1157;

21.° Praecedendi omnibus Praelatis etiam Patriarchis, immo ipsis Legatis Pontificiis, nisi Legatus sit Cardinalis in proprio territorio residens; Cardinalis autem Legatus a latere praecedit extra Urbem omnibus aliis;

22.° Conferendi primam tonsuram et ordines minores, dummodo promovendus habeat dimissorias proprii Ordinarii litteras;

23.° Ministrandi sacramentum confirmationis, firmo onere inscriptionis nominis confirmati ad normam iuris;[89]

24.° Concedendi indulgentias ducentorum dierum,

87 Hence the chaplain may say another Mass, at which those endowed with the indult may assist, as well as at that of the Cardinal.

88 Cfr. can. 79; a privilege given orally by the pope, but testified to by a cardinal, may be vindicated also in *foro externo*.

89 Cfr. can. 798 f.

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etiam toties quoties lucrandas, in locis vel institutis ac pro personis suae iurisdictionis vel protectionis; item in aliis locis, sed a praesentibus solummodo, singulis vicibus, lucrandas.[40]

§ 2. Cardinalis Decanus gaudet privilegio ordinandi et consecrandi electum Pontificem, si hic ordinatione vel episcopali consecratione indigeat, et tunc pallio utitur; quod privilegium, absente Cardinali Decano, competit Subdecano, eoque etiam absente, antiquiori Cardinali Episcopo suburbicario.

§ 3. Demum Cardinalis Proto-diaconus pallia Archiepiscopis et Episcopis privilegio fruentibus eorumve procuratoribus, vice Romani Pontificis, imponit; et nomen novi electi Pontificis populo annuntiat.[41]

To this specific, though not quite exhaustive,[42] enumeration of privileges we add the *insignia* of cardinals:

(1) The red hat granted by Innocent IV (1245) to cardinals of the secular and by Gregory XIV (1591) also to those of the regular clergy;

(2) The red biretta, in use probably since Paul II (1464);

(3) The red mantle or sacred purple, in use since Boniface VIII. The Cardinals of the regular (exempt) clergy, with the exception of the Society of Jesus,[43] retain in their dress the color of their order.

40 This would mean that those present in the places subject to the jurisdiction of the Cardinal could gain the indulgence as often as the Cardinal would grant it, even several times in one day, nay that the indulgence would, as it were, be attached to the place itself; whilst outside the institutes of their protection or jurisdiction, this indulgence could be gained only once a day by those personally present.

41 The announcement is made by the cardinal deacon from the balcony of St. Peter's, which is directed towards the piazza.

42 Other privileges are mentioned in can. 2227, 2241–44.

43 The former cardinal Vaszary of Hungary, O.S.B., had the privilege of wearing the purple dress.

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In the seasons of Advent and Lent the crimson gives way to violet.

(4) The title "Eminence," or *eminentissime princeps,* was so strongly insisted on by Urban VII, that a refusal to acknowledge it was held sufficient to cause a break of diplomatic relations.[44]

RIGHTS OF CARDINALS IN THEIR TITLES AND SEDE VACANTE

CAN. 240

§ 1. Cardinalis ad sedem suburbicariam promotus et in eiusdem possessionem canonice immissus est verus Episcopus suae dioecesis, eaque potestate in eam pollet, quam Episcopi residentiales in propria dioecesi obtinent.

§ 2. Ceteri Cardinales in suis titulis vel diaconiis, postquam eorundem canonicam possessionem ceperint, omnia possunt quae locorum Ordinarii in suis ecclesiis, exceptis ordine iudiciorum et qualibet iurisdictione in fideles, sed salva potestate in iis quae ad disciplinam, morum correctionem, servitium ecclesiae pertinent.

§ 3. Cum throno et baldachino Cardinalis ordinis presbyteralis potest in suo titulo pontificalia peragere et Cardinalis ordinis diaconalis in sua diaconia pontificaliter assistere, et nemo alius ibidem id potest sine Cardinalis assensu; in aliis vero Urbis ecclesiis Cardinales throno et baldachino uti nequeunt sine licentia Romani Pontificis.

The obligations and privileges attached to the suburbicarian sees, whose incumbents are bishops or ordinaries

[44] Decree of June 10, 1630.

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in the true sense of the word, have been defined by Paul IV and lately by Pius X.[45]

As to § 2 it should be remembered that Cardinals formerly[46] enjoyed a quasi-episcopal jurisdiction in their respective titles. This, however, was limited by Innocent XII in his Constitution "*Romanus Pontifex*," of Sept. 17, 1692, to what now remains: a domestic or paternal power, which consists in admonition and the infliction of penalties that require no trial, and in the proper maintenance of the divine service.

Regarding the *right of pontificals* note that even the Cardinal Vicar of Rome, if he wishes to pontificate in one of the titular churches, needs the consent of the Cardinal to whom the title belongs, as was solemnly decided by Leo XIII in the case of the Basilica Eudoxiana (S. Pietro in Vincoli).[47]

CAN. 241

Sede Apostolica vacante, Sacrum Cardinalium Collegium et Romana Curia non aliam habent potestatem, quam quae definitur in const. Pii X *Vacante Sede Apostolica*, 25 Dec. 1904.

The powers which the Sacred College of Cardinals and the Roman tribunals enjoy during the vacancy of the Apostolic See are defined by Pius X in the Constitution "*Vacante Sede Apostolica*," Dec. 25, 1904, which determines that

(1) All the powers which require the express approval

45 "Cum venerabilis," Aug. 22, 1555; Pius X, "Apostolicae Romanorum," April 15, 1909 (*A. Ap. S.*, II, 277 ff.

46 C. 11, X, I, 33; Sixtus V, "Religiosa," April 13, 1589; Fagnani, in c. cit. 11, n. 19 ff.

47 Jan. 30, 1879; S. Rit. C., Sept. 15, 1668; Dec. 1903; Santi-Leitner, *l. c.*, I, 31, n. 34 ff.

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of the Pope, *i. e.*, such as cannot be exercised except "*verbo facto cum Sño*," or "*Ex audientia SSmi.*," or "*vigore specialium et extraordinariarum facultatum*," are suspended;

(2) That the ordinary faculties remain, but should not be made use of except in cases of minor importance, or in more important cases which suffer no delay; and in the latter the matter should be entrusted to the Cardinal Prefect and some Cardinals of that Congregation which would probably decide, but their decision should be only provisional, until a new Pontiff is elected.[48]

[48] Const. cit., nn. 22–25.

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CHAPTER IV

THE ROMAN COURT

It is evident that the Sovereign Pontiff is unable to provide personally for all the needs of the universal Church. His coadjutors are the bishops and members of what is known as the Papal Court,— *Curia Romana,* from the habitual residence of the Pope.

The name *curia* is derived either from the Latin *cura* (care) or *quiris* (Roman citizen), and signifies either the temple around which the *curiae romanae* gathered, or the place where the senate assembled to look after the public welfare, as Varro insinuates.[1]

The term *Curia Romana* has a threefold meaning: (a) in the *strict sense* it comprises the Sacred Congregations, tribunals, and offices to which the business of the whole Church is entrusted; (b) in a *wider sense* it embraces not only the three above-mentioned *dicasteria* but also the so-called *familia pontificia,* which consists of the servants and coadjutors of the Papal Court as well as honorary prelates and knights. (c) In the *strictest sense* it comprises only the so-called *curiales* or minor officials — lawyers, notaries, procurators, *speditori,* agents,[2] etc. In what sense the term is used, must be determined in each instance from the context.

1 Cfr. Forcellini, *Lexicon, s. v.* "Curia."

2 Bangen, *Die Römische Curie,* 1854, p. 7; Hilling, *Die Röm. Kurie,* 1896, p. 4 (English, New York 1907). Lega, in *Annal. Eccl.,* 1896, t. 4, p. 46; *A. Ap. S.,* I, 8.

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Historically the *Curia Romana* developed *pari passu* with the Papal State and power. The term "curia" was almost unknown up to the 12th century,[3] when it occurs in the so-called *Ordo Romanus X*. But the rapid growth of the papacy during the three subsequent centuries created tribunals of far-reaching influence, especially the Chancery, the Dataria, and the Rota Romana, the Secretary Nepos who was later merged with the Secretary of State, and a host of minor offices (*officia vacabilia*). Still it was only after the Council of Trent (1545–1563) that the *Curia Romana* in its present-day sense was completed. Pius IV and his successors, especially Sixtus V (1585–1590), created the Roman Congregations, upon which devolved the burden of supervising the ordinary affairs of the universal Church. The policy established under Julius II (1503–1513) drew the various civil governments, now awakening to national consciousness, into diplomatic relations with the Papal Court.[4] All this enhanced the splendor of the papacy, and at the same time increased the legislative and administrative activities of the Curia. Hence it is not surprising that the Cardinals began to assert their importance at the court and in the special congregations and tribunals.

Of these we shall now treat, as reorganized by Pope Pius X.[5]

CAN. 242

Curia Romana constat Sacris Congregationibus, Tribunalibus et Officiis, prout inferius enumerantur et describuntur.

3 "Exit domnus papa de palatio cum episcopis et cardinalibus, et cum toto apparatu curiae." Mabillon, *Museum Italicum*, 1724, II, p. 97; Migne, *P. L.*, 78, 1009.

4 Sixtus V, "Immensa," Jan. 22, 1587.

5 "Sapienti consilio," June 29, 1908.

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CAN. 243

§ 1. In singulis Congregationibus, Tribunalibus, Officiis servanda est disciplina et tractanda sunt negotia secundum normas tum generales tum particulares, quas ipsis Romanus Pontifex praestituerit.

§ 2. Omnes qui ad Congregationes, Tribunalia, Officia Romanae Curiae pertinent, ad secretum servandum tenentur intra fines et secundum modum ex disciplina unicuique propria determinatum.

CAN. 244

§ 1. Nihil grave aut extraordinarium in iisdem Congregationibus, Tribunalibus, Officiis agatur, nisi a Moderatoribus eorundem Romano Pontifici fuerit ante significatum.

§ 2. Gratiae quaevis ac resolutiones indigent pontificia approbatione, exceptis iis pro quibus eorundem Officiorum, Tribunalium, Congregationum Moderatoribus speciales facultates tributae sint, exceptisque sententiis Tribunalis Sacrae Romanae Rotae et Signaturae Apostolicae.

CAN. 245

Controversiam, si qua exoriatur, de competentia inter Sacras Congregationes, Tribunalia vel Officia Romanae Curiae, dirimit coetus S. R. E. Cardinalium, quos Romanus Pontifex singulis vicibus designaverit.

The Code adopts the general arrangement made by Pius X in his Constitution "*Sapienti consilio*," June 29, 1908, which was followed by the "*Ordo Servandus in Romana Curia*."[6] The duty of *secrecy* is severest for the

[6] *A. Ap. S.*, I, 36 ff.

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members of the "Holy Office," who are bound to it under penalty of excommunication most especially reserved to the Holy See.[7]

The so-called routine or system observed at the Curia we need not set forth here. But it may not be amiss to cite chapter X of the "Ordo,"[8] which ordains that any Catholic may have recourse to the offices of the *Curia,* either personally or by means of an agent chosen from among those approved by the *Curia.*

Ordinaries may treat with the *Curia* either personally or by mail. If an Ordinary wishes to negotiate without a lawyer, he must direct his petition to the respective Congregation, Tribunal or Office, where note is taken thereof with the accompanying words: *personalis pro ordinario.* But if he wishes to employ the services of an agent or lawyer, he is obliged to take one of those approved by the *Curia.*

As to the agents of the bishops, the same "Ordo" prescribes that they must be Catholics of good reputation and know Latin and Canon Law. If the agent is a priest, or at least in sacred orders, he must have permission from the Cardinal Vicar to reside in Rome. One who wishes to be approved as an agent must submit a petition to the assessor of the S. C. Consistorialis. If admitted, his name is placed upon the list of official agents.[9] There are many experienced agents in Rome from among whom the Ordinaries may choose.

Can. 245 is an entirely new enactment. Formerly the Signatura Apostolica had power to settle all controversies about competency, which were quite frequent when the "*Sapienti consilio*" first went into effect.

[7] *A. Ap. S.*, I, p. 82 f.
[8] *Ib.*, p. 53 f.
[9] *Ib.*, p. 49 f.

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ART. I

THE SACRED CONGREGATIONS

Sixtus V instituted fifteen congregations;[10] but in course of time some were overburdened, while others lost their importance. This led Pius X to issue a Constitution which treats minutely of the reorganization of the Roman Court[11] (*Curia* in the strict sense). This order was to remain in force, and, despite the difficulties arising from the competency of various Congregations, has remained in force with only one exception, made by the present pontiff, Benedict XV, in his allocution of March 22nd, 1917, when the Congr. of the Index was suppressed, or rather combined with the Holy Office, whilst the department of Indulgences, formerly attached to the Holy Office, was joined to the S. Poenitentiaria.[12] Besides this, Benedict XV has given a fuller title to the S. C. of Studies.

CAN. 246

Singulis Congregationibus praeest Cardinalis Praefectus vel, si eisdem praesit ipsemet Romanus Pontifex, eas dirigit Cardinalis Secretarius; quibus adiunguntur Cardinales quos Pontifex eis adscribendos censuerit, cum aliis necessariis administris.

THE HOLY OFFICE

This Congregation developed from the Inquisition. Its first traces are discernible in the canons issued by Lucius III, A. D. 1184, against the Waldenses and Albigenses. The civil authority (Frederick II and Louis IX)

10 "Immensa," Jan. 22, 1587.
11 "Sapienti consilio," June 29, 1908 (*A. Ap. S.*, I, 7 ff.)
12 "Amplissimum collegium" (*A. Ap. S.*, IX, 161 ff.).

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lent their assistance to the Church in combatting these heretics, and the Dominicans were chiefly entrusted with the unpleasant task of prosecution and procedure. Pope Paul III established the "Supreme Universal Inquisition" (1542) and Sixtus V added it to the Roman Congregations. Paul IV (1559) and Pius IV (1564) added the Index Commission to the Holy Office.[13]

CAN. 247

§ 1. Congregatio S. Officii, cui ipse Summus Pontifex praeest, tutatur doctrinam fidei et morum.

§ 2. Iudicat de iis delictis quae sibimet secundum propriam eiusdem legem reservantur, cum potestate has criminales causas videndi non solum in gradu appellationis a tribunali Ordinarii loci, sed etiam in prima instantia, si directe ad ipsam delatae fuerint.

§ 3. Ipsa sola cognoscit ea quae, sive directe sive indirecte, in iure aut in facto, circa privilegium, uti aiunt, Paulinum et matrimonii impedimenta disparitatis cultus et mixtae religionis versantur; itemque ad eam spectat facultas dispensandi in hisce impedimentis. Quare quaelibet huiusmodi quaestio ad hanc Congregationem est deferenda, quae tamen potest, si ita censeat et casus ferat, quaestionem remittere ad aliam Congregationem vel ad Tribunal Sacrae Romanae Rotae.

§ 4. Ad eandem pertinet non solum delatos sibi libros diligenter excutere, eos, si oportuerit, prohibere, et dispensationes concedere; sed etiam ex officio inquirere, qua opportuniore licebit via, quae in vulgus edantur scripta cuiuslibet generis damnanda, et in memo-

13 Cf. Hilling, *Procedure of the Roman Court*, 1907, p. 54 ff. Pius V and Sixtus V had established the Index as a special congregation; now it is again attached to the Holy Office.

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riam Ordinariorum reducere, quam religiose teneantur in perniciosa scripta animadvertere eaque Sanctae Sedi denuntiare, ad normam can. 1397.

§ 5. Ipsa una competens est circa ea omnia quae ieiunium eucharisticum pro sacerdotibus Missam celebrantibus respiciunt.

The Holy Office, therefore, is competent in matters of faith and morals, and whatever touches the so-called *privilegium Paulinum* and the impediments of *disparitas cultus* and *mixtae religionis;* from which impediments it has the power to dispense. All such matters must be referred to that Congregation, which, however, may, if it thinks it opportune and the case permits, refer the question to another Congregation or to the tribunal of the S. R. Rota.

The Holy Office also acts as judge or censor of books, either allowing them to be published or condemning them, and this Congregation alone is competent to decide questions regarding the Eucharistic fast of priests celebrating Mass.

THE CONSISTORIAL CONGREGATION

As its name implies, this Congregation was instituted for the purpose of preparing the matter to be discussed and decided in consistory or meeting of the Cardinals with the Sovereign Pontiff. The subjects chiefly treated in these meetings were the erection of higher benefices and the provision of consistorial benefices. The present importance of this Congregation is due to the reorganization of the Curia by Pius X.

CAN. 248

§ 1. Congregationis Consistorialis Praefectus est

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ipse Romanus Pontifex. Praeter alios ad eandem pertinent ex officio Cardinales Secretarius S. Officii, Praefectus Congregationis de Seminariis et Universitatibus studiorum et Secretarius Status. Inter Consultores eiusdem semper sunt Assessor S. Officii, Secretarius Congregationis pro negotiis ecclesiasticis extraordinariis et Secretarius Congregationis de Seminariis et Universitatibus studiorum.

§ 2. Ad hanc Congregationem spectat non modo parare agenda in Consistoriis, sed praeterea, in locis Congregationi de Prop. Fide non obnoxiis, novas dioeceses ac provincias et capitula tum cathedralia tum collegialia constituere; dioeceses iam constitutas dividere; Episcopos, Administratores Apostolicos, Coadiutores et Auxiliares Episcoporum constituendos proponere, canonicas inquisitiones seu processus super promovendis indicere actosque diligenter expendere, ipsorum periclitari doctrinam, salvo praescripto can. 255.

§ 3. Ab hac Congregatione dependent ea omnia quae pertinent ad constitutionem, conservationem et statum dioecesium. Quare ipsa vigilat super impletis vel minus obligationibus, quibus Ordinarii tenentur; cognoscit ea quae ab Episcopis scripto relata sint de statu suarum dioecesium; indicit visitationes apostolicas examinatque eas quae fuerint absolutae, transmissis in utroque casu ad singulas Congregationes iis ad deliberandum negotiis quae ad eas peculiariter pertinent.

On the Consistorial Congregation at present devolves not only the preparation of matter for the consistories, but also, in places not subject to the S. C. Prop. Fide, the erection of new dioceses, provinces, cathedral and collegiate chapters; the division of dioceses; the proposal of

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bishops, Apostolic administrators, episcopal coadjutors and auxiliaries, and the so-called *processus informativus*.

To this congregation also belongs whatever pertains to the constitution, preservation, and state of the various dioceses. It sees to it that the obligations of the Ordinaries are complied with; takes cognizance of the written report of the dioceses by the bishops, etc.

THE CONGREGATION OF THE SACRAMENTS

CAN. 249

§ 1. Congregationi de disciplina Sacramentorum proposita est universa legislatio circa disciplinam septem Sacramentorum, incolumi iure Congregationis S. Officii circa ea quae in can. 247 statuta sunt, et Sacrorum Rituum Congregationis circa ritus et caeremonias quae in Sacramentis conficiendis, ministrandis et recipiendis servari debent.

§ 2. Ad illam itaque spectant ea omnia, quae decerni concedique solent tum in disciplina matrimonii, tum in disciplina aliorum Sacramentorum nec non in celebratione Sacrificii Eucharistici, iis tantum exceptis quae aliis Congregationibus reservata sunt.

§ 3. Ipsa cognoscit quoque et exclusive de facto inconsummationis matrimonii et de exsistentia causarum ad dispensationem concedendam, nec non de iis omnibus, quae cum his sunt connexa. Potest tamen cognitionem horum omnium, si id expedire iudicaverit, ad Sacram Romanam Rotam remittere. Pariter ad eam deferri possunt quaestiones de validitate matrimonii, quas tamen, si accuratiorem disquisitionem aut investigationem exigant, ad tribunal competens remittat. Eodem modo ad ipsam pertinet videre de obligationibus ordinibus maioribus adnexis, atque examinare

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quaestiones de ipsa validitate sacrae ordinationis, aut eas ad tribunal competens remittere. Et ita porro de aliis Sacramentis.

The S. Congregation of the Sacraments is entirely new. This Congregation is occupied with whatever concerns the *seven Sacraments,* with the exception of what belongs to the jurisdiction of the Holy Office and the Congregation of Rites.

To it also is referred whatever pertains to the decision and granting of dispensations in matters of marriage and other Sacraments. This Congregation is alone competent to decide whether a marriage is consummated, whether the reasons for granting a dispensation truly exist, and all matters connected therewith. However, if it deems it expedient, it may refer any matter to the S. R. Romana. To the Congregation of the Sacraments may be reported questions concerning the validity of matrimony, but it will refer these to the competent tribunal if a more accurate examination or investigation is required. This Congregation is also competent to investigate the obligations arising from higher orders and to examine the validity of ordination or remit such cases to the competent tribunal. According to the "*Sapienti Consilio,*" to the S. Congregation of the Sacraments must be addressed the following petitions:

(1) Concerning the preservation of the Blessed Sacrament in oratories which otherwise would not enjoy that privilege;

(2) Concerning the celebration of Mass in the open air, or on board a vessel, before dawn or after noon, or on Holy Thursday;

(3) Concerning the privilege of saying Mass *de Beata* or requiem on acccount of eye trouble;

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(4) Concerning the privilege of private oratories with the right of having Mass said there.

Besides, as is plain from the text, this S. Congregation, perhaps the most occupied of all, is competent to grant dispensations from impediments of a public character, to rich and poor, so that "*in forma pauperum*" no longer pertains to the S. Poenitentiaria.

THE S. CONGREGATION OF THE COUNCIL

This Congregation was originally known as "*S. Congregatio Cardinalium Concilii Tridentini Interpretum.*" It was instituted by Pius IV, Aug., 1564, and was charged with the execution of the reform decrees of the Council of Trent, to which Pius V added that of interpreting authentically the Tridentine decrees and settling controversies arising in connection therewith. The importance of this Congregation has diminished considerably since the S. C. of the Sacraments was established.

CAN. 250

§ 1. Congregationi Concilii ea pars negotiorum est commissa, quae ad universam disciplinam cleri saecularis populique christiani refertur.

§ 2. Quamobrem ipsius est curare ut christianae vitae praecepta serventur, cum facultate opportune ab eisdem fideles dispensandi; moderari quae parochos et canonicos spectant; aut quae pias sodalitates, pias uniones (etiamsi dependeant a religiosis vel erectae sint in eorum ecclesiis seu domibus), pia legata, pia opera, Missarum stipes, beneficia aut officia, bona ecclesiastica, mobilia et immobilia, tributa dioecesana, taxas curiarum episcopalium aliaquae huiusmodi attingunt. Eidem reservata est facultas eximendi a conditionibus

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requisitis ad assecutionem beneficiorum, quoties ad Ordinarios eorum collatio spectat; admittendi ad compositionem eos qui occuparunt bona ecclesiastica, etiam pertinentia ad religiosos; permittendi ut fideles acquirant bona ecclesiastica, a potestate civili usurpata.

§ 3. Videt quoque de iis omnibus, quae ad immunitatem ecclesiasticam pertinent, itemque de controversiis circa praecedentiam, salvo iure Congregationis de sodalibus religiosis et Congregationis Caeremonialis.

§ 4. Ad eandem pertinent ea omnia quae ad Conciliorum celebrationem et recognitionem atque ad Episcoporum coetus seu conferentias referuntur, extra loca quae subsunt Congregationi de Prop. Fide.

§ 5. Est autem haec Congregatio competens in omnibus controversiis negotia eidem commissa spectantibus, quas in linea disciplinari pertractandas censuerit; cetera ad tribunal competens sunt deferenda.

This Congregation, therefore, is competent in administrative matters pertaining to the secular clergy and to confraternities, beneficiary provisions, immunities, precedence. Besides it grants permission to hold councils, the documents and decrees of which must be submitted to it for approbation.

THE S. CONGREGATION OF RELIGIOUS

CAN. 251

§ 1. Congregatio negotiis religiosorum sodalium praeposita ea sibi exclusive vindicat quae respiciunt regimen, disciplinam, studia, bona et privilegia religiosorum sodalium utriusque sexus tum sollemnibus tum simplicibus votis adstrictorum, eorumque qui, quamvis sine votis, in communi tamen vitam agunt more

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religiosorum, itemque tertiorum Ordinum saecularium, incolumi iure Congregationis de Prop. Fide.

§ 2. Quapropter, quaestionibus ordine iudiciario tractandis ad tribunal competens remissis et incolumi semper iure Congregationis S. Officii et Congregationis Concilii circa negotia ad ipsas spectantia, haec Congregatio quaestiones omnes suae competentiae in linea disciplinari dirimit; sed si quaestio vertatur inter religiosum sodalem et personam non religiosam, ipsa, praesertim ad instantiam partis, potest quoque, si aequum iudicaverit, eandem quaestionem ad aliam Congregationem aut tribunal remittere.

§ 3. Huic denique Congregationi reservatur concessio dispensationum a iure communi pro sodalibus religiosis, firmo praescripto can. 247, § 5.

The S. Congregation of Religious is exclusively competent in whatever concerns the government, discipline, studies, property and privileges of religious of both sexes, either with solemn or simple vows, as also of such as have no vows but live a common life like religious, and of secular tertiaries.

Wherefore, with the exception of judiciary matters to be referred to the competent tribunals and of whatever pertains to the Holy Office and the S. C. of the Council, this Congregation settles all disciplinary questions belonging to its competency. To this Congregation is also reserved the granting of all dispensations to religious.

Formerly there existed a *S. C. Episcoporum et Regularium,* which had great authority and was probably instituted by Pius V; at least its regesta run from the end of the year 1572 and embrace a threefold division of cases: *Episcoporum, Regularium, Monialium.* The ma-

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terial was almost entirely collected by the Benedictines of St. Anselm's College when the reorganisation was effected but for some reason or another the *Collectanea* were never published.

THE S. CONGREGATION OF THE PROPAGANDA

Since the Catholic Church began to spread across the seas, to the East and West Indies, and established missions in the countries newly added to its jurisdiction, she has taken particular care of these. Peculiar conditions called for special legislation, which was adapted to the "*terrae missionum*" as distinguished from the provinces of the regular hierarchy. In order to insure an orderly and stable procedure in the transaction of missionary matters Gregory XV, in 1622, founded this Congregation.[14] By Clement IX (1720) the same was entrusted with the revision of the books of Orientals. Pius IX reformed the Propaganda and created a new section "*pro negotiis ritus orientalis*" (1862), now detached.

The *competency* of the Propaganda is *locally* circumscribed by the so-called "mission territories." Several countries which formerly were subject to its jurisdiction (the U. S., England, Ireland, Scotland, Holland, Luxemberg, Canada) are now withdrawn from it and placed either under the regular hierarchy or among the "provinces of the Apostolic See."

CAN. 252

§ 1. Congregatio de Propaganda Fide missionibus ad praedicandum Evangelium et catholicam doctrinam

14 "Inscrutabili divinae," June 22, 1622. Urban VIII erected the *Collegium Urbanum* for the training of missionaries; it is entirely under the S. C. Prop. Fide.

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praeest, ministros necessarios constituit et mutat, facultatemque habet tractandi, agendi et exsequendi omnia hac in re necessaria et opportuna.

§ 2. Curat ea omnia quae ad Conciliorum celebrationem in locis sibi subiectis pertinent.

§ 3. Eius iurisdictio iis est circumscripta regionibus, ubi, sacra hierarchia nondum constituta, status missionis perseverat. Huic Congregationi sunt etiam subiectae regiones, quae, etsi hierarchia inibi constituta sit, adhuc inchoatum aliquid praeseferunt. Eidem pariter subsunt societates ecclesiasticorum ac Seminaria quae exclusive fundata sunt eo fine, ut in eis instituantur missionarii pro exteris missionibus, praesertim quod attinet ad eorum regulas, administrationem atque opportunas concessiones ad sacram ordinationem alumnorum requisitas.

§ 4. Haec autem Congregatio tenetur ad competentes Congregationes deferre negotia quae aut fidem attingunt, aut causas matrimoniales, aut generales normas circa sacrorum rituum disciplinam tradendas vel interpretandas.

§ 5. Quod vero spectat ad sodales religiosos, eadem Congregatio sibi vindicat quidquid religiosos qua missionarios, sive uti singulos sive simul sumptos, tangit. Quidquid vero religiosos qua tales, sive uti singulos sive simul sumptos attingit, ad Congregationem religiosorum negotiis praepositam remittat aut relinquat.

This Congregation presides over the missions, provides them with ministers, and has power to do whatever it deems necessary for their benefit.

Its jurisdiction is restricted to provinces which as yet have no hierarchic constitution, but are still in the missionary state. To it are subject also those regions in

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which the hierarchy is in an incipient state and all societies of ecclesiastics and seminaries founded exclusively for the foreign missions.

As to *religious,* this Congregation is competent in whatever touches them as missionaries, either individually or as a body. But whatever concerns religious as such must be referred to the Congregation of Religious.

THE S. CONGREGATION OF RITES

CAN. 253

§ 1. Congregatio Sacrorum Rituum ius habet videndi et statuendi ea omnia quae sacros ritus et caeremonias Ecclesiae Latinae proxime spectant, non autem quae latius ad sacros ritus referuntur, cuiusmodi sunt praecedentiae iura aliaque id genus, de quibus sive servato ordine iudiciario sive in linea disciplinari discepetur.

§ 2. Eius proinde est praesertim advigilare, ut sacri ritus ac caeremoniae diligenter serventur in Sacro celebrando, in Sacramentis administrandis, in divinis officiis persolvendis, in iis denique omnibus quae Ecclesiae Latinae cultum respiciunt; dispensationes concedere opportunas; insignia et honoris privilegia tam personalia et ad tempus, quam localia et perpetua, quae ad sacros ritus vel caeremonias pertineant, elargiri, et cavere ne in haec abusus irrepant.

§ 3. Denique ea omnia agit quae ad beatificationem et canonizationem Servorum Dei vel ad sacras reliquias quoquo modo referuntur.

The business of this important Congregation is, therefore, to watch over the proper observance of the sacred rites and ceremonies in the celebration of the Mass, the

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administration of the Sacraments, the Divine Office, and everything pertaining to the worship of the Latin Church. It grants dispensations, distributes insignia and honorary privileges, either personal and temporary, or local and perpetual, which are connected with rites and ceremonies, and safeguards against abuses.

This Congregation has the right to decide what belongs to the rites and ceremonies of the Latin Church, especially to approve the official liturgical books, such as the Ritual and the Pontificale Romanum, the Missal, the approbation of feasts, etc.

It also supervises the beatification and canonization of the Servants of God and the cult of sacred relics.

THE S. CONGREGATIO CAEREMONIALIS

CAN. 254

Ad Congregationem Caeremonialem pertinet moderatio caeremoniarum in Sacello Aulaque Pontificali servandarum et sacrarum functionum quas Patres Cardinales extra pontificale sacellum peragunt; itemque eadem Congregatio cognoscit quaestiones de praecedentia tum Patrum Cardinalium tum Legatorum quos variae Nationes ad Sanctam Sedem mittunt.

This Congregation is entrusted with the direction of the ceremonies to be observed in the papal chapel and court, of the sacred functions which the Cardinals perform outside the papal chapel, and the decision of questions concerning the precedence of Cardinals and ambassadors accredited to the Holy See.

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THE S. C. FOR EXTRAORDINARY ECCLESIASTICAL AFFAIRS

CAN. 255

Ad Congregationem pro negotiis ecclesiasticis extraordinariis spectat dioeceses constituere vel dividere et ad vacantes dioeceses idoneos viros promovere, quoties hisce de rebus cum civilibus Guberniis agendum est; insuper Congregatio in ea negotia incumbit, quae eius examini subiiciuntur a Summo Pontifice per Cardinalem Secretarium Status, praesertim ex illis quae cum legibus civilibus coniunctum aliquid habent et ad pacta conventa cum variis Nationibus referuntur.

This Congregation is entrusted with the erection and division of dioceses and the promotion of ecclesiastics to vacant dioceses, whenever these matters must be settled in accord with civil governments; besides, it has charge of affairs submitted to it for examination by the Supreme Pontiff through the Cardinal Secretary, especially where civil governments or concordats are concerned.

THE S. CONGREGATION OF STUDIES

CAN. 256

§ 1. Congregatio de Seminariis et Universitatibus studiorum vigilat super omnibus quae ad regimen, disciplinam, temporalem administrationem et studia Seminariorum pertinent, incolumi iure Congregationis de Prop. Fide. Eidem pariter commissa est moderatio regiminis ac studiorum, in quibus versari debent athenaea seu quas vocant Universitates vel Facultates quae ab Ecclesiae auctoritate dependent, comprehensis iis quae a religiosae alicuius familiae sodalibus diriguntur. Novas institutiones perpendit approbatque;

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facultatem concedit academicos gradus conferendi normasque tradit quibus ii conferri debeant, et, ubi agitur de viro singulari doctrina commendato, potest eos ipsa conferre.

§ 2. In hac Sacra Congregatione connumerantur inter alios Cardinales Secretarius Congregationis Consistorialis et inter Consultores Assessor eiusdem Congregationis.

This Congregation watches over the government, discipline, and temporal administration of seminaries, except those under the Propaganda. It supervises the order and courses of studies at Catholic universities dependent on the authority of the Holy See, even those entrusted to religious communities, examines and approves new institutions, grants the faculty of and determines the rules for conferring academic degrees in the name of the Holy See, and may itself grant such degrees to men distinguished for their learning and devotion to the Church.

THE S. CONGREGATION FOR THE ORIENTAL CHURCH

CAN. 257

§ 1. Congregationi pro Ecclesia Orientali praeest ipse Romanus Pontifex. Huic Congregationi reservantur omnia cuiusque generis negotia quae sive ad personas, sive ad disciplinam, sive ad ritus Ecclesiarum orientalium referuntur, etiamsi sint mixta, quae scilicet sive rei sive personarum ratione latinos quoque attingant.

§ 2. Quare pro Ecclesiis ritus orientalis haec Congregatio omnibus facultatibus potitur, quas aliae Congregationes pro Ecclesiis ritus latini obtinent, incolumi

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tamen iure Congregationis S. Officii ad normam can. 247.

§ 3. Haec Congregatio controversias dirimit via disciplinari; quas vero ordine iudiciario dirimendas iudicaverit, ad tribunal remittet quod ipsa Congregatio designaverit.

To this Congregation appertain all affairs which touch either persons or the discipline and rites of the Oriental Churches, even such as are of a "mixed" nature, *viz.* in part concern Latins. However it can settle matters administratively only; all judiciary questions must be referred to tribunals designated by the same Congregation.

The Congregation for the Oriental Church appears to be a new creation, for it formerly formed part of the S. C. of the Propaganda, to which latter was also attached, as a special department since the time of Pius VII, the so-called *Reverenda Camera Spoliorum.* Pius VII had made a large loan of the Propaganda and, in partial payment thereof, assigned to that Congregation the revenues from vacant benefices which would otherwise be claimed by the Apostolic Exchequer.[15] The Code makes no mention of this, probably because it is of a private nature.

ART. II

TRIBUNALS OF THE ROMAN COURT

The Sacra Poenitentiaria

CAN. 258

§ 1. Sacrae Poenitentiariae praeficitur Cardinalis Poenitentiarius Maior. Huius tribunalis iurisdictio

15 "Spolii jura," June 19, 1817; Hilling, *l. c.*, p. 81.

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coarctatur ad ea quae forum internum, etiam non sacramentale, respiciunt; quare hoc tribunal pro solo foro interno gratias largitur, absolutiones, dispensationes, commutationes, sanationes, condonationes; excutit praeterea quaestiones conscientiae easque dirimit.

§ 2. Eiusdem insuper est de iis omnibus iudicare quae spectant ad usum et concessionem indulgentiarum, salvo iure S. Officii videndi ea quae doctrinam dogmaticam circa easdem indulgentias vel circa novas orationes et devotiones respiciunt.

In the eleventh and twelfth centuries so-called Apostolic confessors were chosen from the papal court, and in the thirteenth century a Cardinal held a prominent place among these *poenitentiarii,* who had the power to absolve from papal censures and to impart certain dispensations. As a corporation or college, or as a regular tribunal, these *poenitentiarii* were established by Benedict XII, in 1338.[16] After repeated reorganizations, Benedict XIV gave to this body the form which it has substantially retained to the present time.[17] It is now *composed* of the Cardinal Penitentiary, the Regens, a theologian, five prelates of the Signatura, a secretary and several minor officials.

Its jurisdiction is limited to the court of conscience, confessional and extra-confessional, and hence this tribunal grants absolutions, dispensations, commutations, sanations, condonations, and solves cases of conscience. It is also empowered to judge concerning the use of indulgences, with the exception of dogmatic questions regarding the same and of new prayers and devotions, which departments belong to the domain of the Holy Office.

16 "In agro Dominico," April 8, 1338; cf. the classical treatise of Goeller, *Die Päpstliche Pönitentiarie,* 1907, Vol. I.

17 Benedict IV, "Pastor bonus" and "In apostolica," Ap. 13, 1744; Hilling, *l. c.,* p. 127 f.; *Annuario Pontificio,* 1917, p. 369.

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The Rota and the Signatura

The assessors of the Rota are called *auditores*. The term occurs in the Decretals as well as "*Auditorium.*" [18] The auditors constituted a college in the first decades of the 14th century, for the constitution "*Ratio iuris,*" of John XXII (1326) supposes a corporate body of the "*sacri palatii causarum generales auditores.*" [19] Perhaps this was at first a worldly tribunal for the papal dominions, but in course of time it was transformed into an ecclesiastical corporation. As "*Rota*" it is mentioned in a constitution of Martin V.[20] The name has found various explanations. Some hold that it arose from the custom of the auditors of holding their meetings at a round table or, at Avignon, in a room with a fretted ceiling ("rota porphyretica lacunar"); but it seems more probable that the name owes its origin to the custom of filing the official records in the form of rolls in a barrel-shaped bookshelf (*in pluteo* or *rotulo*).[21] However this may be, the Rota since the 14th century has been often reformed as to the number of auditors and mode of procedure. It maintained its reputation, although somewhat diminished after the institution of the congregations, up to the year 1870, when it seemed that the "charioteer and master of all tribunals" was doomed to a slow death. But Pius X revived and restored the Rota.

Its *constitution* is officially established in the "*Sapienti consilio*" and the "*lex propria.*" The Rota consists of ten prelates appointed by the Roman Pontiff. The *primus*

18 Philipps, K.-R., VII, 307 f.
19 *Bull. Taurin.*, It. IV, 317 ff.
20 *Ib.*, p. 708 f. § 27.
21 Ehrle, *Historia Bibliothecae Rom. Pont.*, I, P. II, p. 696; Goeller, in *Archiv. für Kath. K.-R.*, 1911.

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inter pares is called dean. The auditors are allowed to choose an assistant (*coadjutor*), to be approved by the pope, who appoints a *promotor justitiae* and a *defensor vinculi*. Besides these there are a number of approved lawyers, from whom the litigants must choose one, and minor officials. The Rota is *competent* to try all cases which are not *causae maiores*, including criminal cases committed to it by the Pope, either *motu proprio* or at the request of the parties concerned. The Rota may also decide in the second and third instance, and in the last instance in cases tried by an inferior tribunal. The auditors give their decisions in turns of three, or in more important cases or last instances, *in pleno*. Their sentences may be overthrown for formal reasons, otherwise they are final.

Formerly there were two *segnature*, one called *gratiae*, the other *iustitiae*. In the course of time one was deemed sufficient, and hence it was but natural that at the reorganization of 1908 the two were welded into one. Benedict XV has further determined the authority of this tribunal,[22] which has entered the new Code in a modified form.

CAN. 259

Causae ordinem iudiciarium requirentes aguntur apud Sacram Romanam Rotam et apud Supremum Tribunal Signaturae Apostolicae intra fines et secundum normas traditas in can. 1598–1605, salvo iure Congregationis S. Officii et Congregationis Sacrorum Rituum in causas sibi proprias.

Causes requiring judiciary procedure are to be treated

22 *A. Ap. S.*, 1915, p. 320 ff; *Annuario Pontificio*, 1917, p. 370 f.

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by the S. Roman Rota and the Supreme tribunal of the Apostolic Signatura, according to the norms laid down in can. 1598–1605, except matters pertaining to the Holy Office and the S. Congr. of Rites.

ART. III

THE OFFICES OF THE ROMAN COURT

The Apostolic Chancery

The Apostolic Chancery grew out of the *scrinium* mentioned under Damasus I (366–384). In the eleventh century the Librarian of the Holy Roman Church appears also as Chancellor of the same, but was called vice-chancellor, because it seemed unfit that a cardinal should hold that office.[23] Now the cardinal presiding over the chancery is styled Cardinal-Chancellor, and is assisted by a regens, his substitute, and several prothonotaries Apostolic and minor officials (mostly laymen).[24]

CAN. 260

§ 1. Cancellariae Apostolicae, cui praeest Cardinalis Cancellarius Sanctae Romanae Ecclesiae, hoc est proprium munus, apostolicas expedire litteras seu bullas pro beneficiorum et officiorum consistorialium provisione, novarum provinciarum et dioecesium ac capitulorum institutione et pro aliis maioribus Ecclesiae negotiis conficiendis.

§ 2. Quae litterae seu bullae ne expediantur nisi de mandato Congregationis Consistorialis circa negotia ad eius competentiam spectantia, aut de mandato

23 Bresslau, *Urkundenlehre*, 1889, I, 173 ff.

24 Formerly lay brothers of the Cistercian Order were the *plumbatores* at the Apostolic Chancery.

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Summi Pontificis circa alia negotia, servatis in singulis casibus ipsius mandati terminis.

The Apostolic Chancery expedites pontifical documents or bulls for the provision of consistorial benefices and offices, for the erection of new provinces, dioceses, and chapters, and for other ecclesiastical affairs of importance.

These documents or bulls cannot be dispatched without the command of the S. C. Consistorialis in matters pertaining to the latter's competency, or without a mandate of the Supreme Pontiff concerning other matters; in any case the limits of the mandate must be strictly observed.

The Apostolic Datary

No later than the 13th century there was attached to the Apostolic Chancery a place or locality where petitions to the Pope were received. This was called *"communis data,"* and later on, *"tribunal gratiae concessae."* [25] It developed in course of time into a regular tribunal of dispensations, especially for matrimonial cases, and since Innocent X (1644–1655) was presided over by a cardinal pro-datary. At present it has lost much of its significance. The personnel consists of the cardinal datary, a subdatary, and a prefect.

Can. 261

Datariae Apostolicae, quam moderatur Cardinalis Datarius Sanctae Romanae Ecclesiae, commissum est cognoscere de idoneitate promovendorum ad beneficia non consistorialia Apostolicae Sedi reservata; conficere et expedire apostolicas litteras pro eorum collatione; eximere in conferendo beneficio a conditionibus requi-

[25] Bresslau, *l. c.*, p. 231.

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sitis, quoties eius collatio ad Ordinarium non pertinet; curare pensiones et onera quae Summus Pontifex in memoratis conferendis beneficiis imposuerit.

The Apostolic Datary, at the head of which is a Cardinal of the Holy Roman Church, investigates the fitness of candidates proposed for benefices that are reserved to the Apostolic See but not conferred in consistory. It also composes and dispatches the Apostolic letters for their appointment, grants exemption from qualities required in the appointees to benefices which do not belong to the Ordinary, and takes care of the pensions and taxes imposed by the Supreme Pontiff in conferring such benefices.

The Reverenda Camera Apostolica

After the office of Archdeacon of the Holy Roman Church had, especially through the efforts of Gregory VII (1073–1085), lost much of its former exorbitant power, the Camerlengo took his place and soon acquired the rank of a cardinal. The *Camera* was a place in the papal palace where the treasury and the sacred vessels and vestments (*il tesoro*) were kept.[26] Under Leo X the Camerlengo became the exchequer of the Papal State as well as of the Church, whilst the vice-camerlengo was governor and the auditor judge-in-ordinary of the City.[27]

Now the R. C. A. has a Cardinal Camerlengo (not the same as the Camerlengo del Sacro Collegio), a Vice-Camerlengo, an auditor general, and a treasurer.

CAN. 262

Camerae Apostolicae, cui praesidet Sanctae Roma-

26 Mabillon, *Iter Italicum*, 1724, II, 362, 450, 488.

27 Leo X, "Etsi pro," June 28, 1514.

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nae Ecclesiae Cardinalis Camerarius, cura est atque administratio bonorum ac iurium temporalium Sanctae Sedis, quo tempore praesertim haec vacua habeatur; et tunc adamussim serventur normae statutae in const. Pii X *Vacante Sede Apostolica*, 25 Dec. 1904.

The Camera Apostolica administers the temporal property and rights of the Holy See, especially during a vacancy, when the rules laid down by Pius X in the "*Vacante Sede Apostolica*" (Dec. 25, 1904) must be strictly observed.

The Secretariate of State

It is evident that the office of Secretary of State is one of "confidence and authority, of great prominence in the Curia."[28] Apostolic secretaries or confidential chaplains were known as early as the 14th century. Of a "College of Apostolic secretaries" we hear in the constitution of Innocent VIII, who reformed it.[29] The same Pontiff also created the office of a "domestic or intimate secretary," who often was a near relative of the Pope (*nepos*). After Julius II (1503–1513) had established permanent nuncios, the authority of the *nepos*, who received the cardinal's title and was therefore called *Cardinal Nepos*, increased so that he managed all the diplomatic affairs of the Papal Court. Many incumbents of this office also held the title of Vice-Chancellor of the H. R. Church. However after the golden age of nepotism had passed, especially through the efforts of Innocent XI (1676–1689), the Cardinal Nepos disappeared before the Cardi-

28 *Annuario Pontificio*, 1917, p. 573.

29 "Non debet reprehensibile," Dec. 31, 1487 (*Bull.*, Taur., V, 330 ff).

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nal Secretary, who thus became what he now is: Secretary of State or Prime Minister of the Pope.

CAN. 263

Officium Secretariae Status, cuius moderator est Cardinalis Secretarius Status, constat triplici parte hoc ordine:

1.° Prima pars, cui praesidet Secretarius Congregationis pro negotiis ecclesiasticis extraordinariis, versatur in negotiis quae eidem Congregationi examinanda subiici debent ad normam can. 255, ceteris pro diversa eorum natura ad peculiares Congregationes remissis;

2.° Altera pars, cui praeest Substitutus, incumbit in ordinaria negotia;

3.° Tertiam partem dirigit Cancellarius Brevium Apostolicorum, qui vacat expeditioni Brevium.

The office of Secretary of State consists of three departments. (1) The first, presided over by the Secretary of the Congregation for Extraordinary Ecclesiastical Affairs, deals with matters which (can. 255) are submitted to the authority of that congregation. (2) The second, headed by the Substitute, deals with matters of ordinary occurrence. (3) The third department, under the Chancellor of Apostolic Briefs, attends to the expedition of papal Briefs.

CAN. 264

Ad Secretarias Brevium ad Principes et Epistolarum latinarum spectat munus latine scribendi acta Summi Pontificis, ab eodem illis commissa.

The Secretariate of Briefs directed to Princes and of

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Latin Letters is charged with writing in Latin the documents with which the Sovereign Pontiff entrusts it.

Authority of the Roman Court and Its Decisions

The *Sacred Congregations* are the first and most conspicuous bodies that share in the labors of the Supreme pontificate,[30] wherefore Pius X calls these, together with the Tribunals and Offices, the Roman Court, which has "to deal with the affairs of the universal church."[31] From this it is apparent that the congregations act as true judges in their own domain, in the name and with the authority of the Pope. And although it may be truly said that their jurisdiction is ordinary, yet it is entirely dependent on the Supreme Pontiff. Hence this Court *de facto* enjoys the same authority as the Pope himself, and its decisions demand obedience and assent from the bishops as well as from the faithful and the clergy.[32]

This is evident also from the fact that all decisions of more than ordinary importance or of extraordinary character must be *reported* to the Pope.[33]

We now aproach the question of the *juridical value* of the decisions of the various Congregations and Tribunals.

(1) Concerning *favors,* there is little difficulty, for they touch only persons directly concerned, and therefore are of a private nature. However, if a favor curtails the right of a third person, the latter must first be asked, either directly or through the Ordinary.[34]

(2) As to *questions* that may be settled by way of

30 Sixtus V, "Immensa," June 22, 1587.

31 "Sapienti consilio" (*A. Ap. S.*, I, 8).

32 Santi-Leitner, *l. c.*, I, 31, n. 41 ff.

33 Cfr. can. 244, § 1.

34 "Sapienti consilio," Ordo servandus, III, 1 (*A. Ap. S.*, I, 62).

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discipline or *administration, i. e.,* without a judicial trial (*absque strepitu iudicii*), as, for instance, many liturgical questions or questions concerning parish priests and chaplains of institutions or confraternities,— if this mode of settlement is accepted by the parties, then these parties have to abide by the decision of the respective Congregation and are not allowed to pursue their rights by judicial action, unless the S. Congregation itself refers the case to a competent tribunal.[35] From this it is evident that particular decisions touching single cases and persons bind those for whom they are issued, but not outsiders, and hence we sometimes find the clause "*et non amplius*" added, which means: "*et amplius non proponatur,*"[36] *i. e.,* the case is definitively settled. But even this clause does not make it impossible to have the case again proposed to the Roman Court if new reasons are found. In this case the remedy, which is not unlike the "*restitutio in integrum,*" must be resorted to. This is granted by the Pontiff.

Concerning the sentences of the Rota, the benefit of restitution to the former judicial status is granted by the Signatura Apostolica.[37]

(3) The judicial sentences of the Roman tribunals, though not *irretrievable,* must be obeyed by the parties concerned, as long as no "*restitutio in integrum*" is granted. The latter suspends the effect of the sentence if its execution has not yet begun.[38]

Besides *particular decisions* and sentences there may be

35 *Ib.*, p. 65.

36 Santi-Leitner, *l. c.*, I, 31, n. 44.

37 "Sapienti consilio" (*A. Ap. S.*, I, 18); can. 1603.

38 Can. 1905–1907. That the sentences of the S. R. Rota are final, the Boni Castellaine-Gould case proves.

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general decisions, which as a rule emanate from the Congregations, because the Tribunals are more or less occupied with particular sentences. When issued as "*Decreta Urbis et Orbis*" these general decrees bind the universal Church, provided no particular custom stands in the way. But, though they must be received with due respect, they are not irretrievable, much less infallible, unless the Roman Pontiff should publish such a decree by means of a solemn Constitution.[39] Instances to prove that even the decrees of the Holy Office are not irreformable or infallible, may be found in the Gallilei case (Feb. 15, 1616), and the decision of 1897 concerning the Comma Ioanneum.[40]

As to future *general decisions* of the Roman Congregations note that any one which is not based on a strictly comprehensive interpretation of the New Code, but is either extensive or restrictive, is tantamount to a new law and lacks retroactive force.[41] Benedict XV has ordered that the Roman Congregations should for the present abstain from issuing "new general decrees," but limit their decisions to instructions and strictly declaratory explanations.[42]

There are *collections* of Roman decrees called authentic, for instance, of the S. C. of Rites and the Propaganda (1907), which contain many decisions of a strictly particular nature, whilst others bear the title "*decretum Urbis et Orbis.*" Do the particular decisions lose their nature by being inserted in such a collection? By no

39 Santi-Leitner, I, 29, n. 70 f.

40 "Utrum tuto negari aut saltem in dubium revocari possit, esse authenticum textum S. Ioannis in Ep. I, 5, 7? Negative."— Pope Leo XIII was approached on the subject, and in his Encyclical on the Holy Ghost omitted to quote that text, although occasions were not wanting. Cfr. Pohle-Preuss, *The Divine Trinity,* pp. 30 sqq.

41 Can. 17, § 2.

42 "Cum iuris canonici," Sept. 15, 1917 (*A. Ap. S.,* IX, 530).

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means. For "authenticity" in that case is entirely different from that of the three authentic collections of the Decretals, and means neither more nor less than that the decisions contained in those collections are genuine, *i. e.*, were really given by the Congregations to whom they are ascribed. An illustration of the truth of our contention is the fact that Cardinal Gasparri never refers to the "Decreta Authentica" of the S. R. Congr., but merely quotes the date of the decisions.

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CHAPTER V

LEGATES OF THE ROMAN PONTIFF

Dependent on the Curia, and on the Secretary of State in particular, are those representatives of the Sovereign Pontiff who go by the name of *legates*. The right of sending and receiving legates (*ius legationis activum et passivum*) is inherent in the spiritual sovereignty of the Pope.[1] It is evident, however, that the actual relations between the Pope and secular governments will differ according to the connection existing in each case between Church and State (*sacerdotium et imperium*). In other words, where there is a complete separation between the spiritual and temporal power, papal legates will not exercise diplomatic functions in the proper sense, nor be acknowledged by the public authorities as representatives of the Sovereign Pontiff. Their mission in such countries is limited to merely ecclesiastical matters and their position or rank is strictly ecclesiastical.

After this preliminary observation a few remarks on the *historical* development of the institution of papal legates may not be out of place. We hear of a Vicar Apostolic of Illyricum in the fourth century, whose office was entrusted to the Archbishop of Thessalonica (Saloniki). Similar rights and attributes were later be-

1 Pius VI, Responsio ad Metropolitanos Mag., Trev., Col., Salisburg., super Nuntiaturis Apostolicis, Romae 1789. The so-called "Punctuatio of Ems," 1786, denied the right of the Pope to send nuncios and to grant dispensations, in an endeavor to impose Febronian principles upon the Church.

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stowed on certain prominent sees in Gaul (Arles, 545), Spain (Seville, 520), and Germany (Treves, 909, Salzburg, 973). The incumbents of these sees were considered to be *ipso facto* papal legates, or *legati nati.* Out of these in the eleventh century grew the so-called primates, who have now dwindled into insignificance.[2]

Another species of legates, of greater and more lasting importance, are the *legati missi.* Leo I (440–461) sent Julian of Cos to the Emperor Marcian to look after ecclesiastical discipline and watch over the purity of faith, as well as to observe the proceedings at the imperial court. If anything should be doubtful, he (Leo) would be ready to issue further instructions.[3] This is presumably the office of those who were called papal *responsales* or *apocrisiarii.* In the Orient their activity lasted until Cæsaropapism brought forth the unhappy schism of the ninth century.

Legati missi were employed also in the West, not indeed permanently, but for temporary or transient missions, especially in the tenth and eleventh centuries, when the investiture fight was raging, and in the twelfth and thirteenth centuries in connection with the crusades. That the royal courts of England and France were not in favor of these papal legates is well known.[4] But Rome insisted upon its right, and when permanent nunciatures had been established upon the model of the Florentine court (Medici) by Julius II, the papal legates became regular diplomatic agents of the Pope, who in turn received the envoys of civil governments.

2 That of Hungary (Strigonensis or Gran) has preserved a few of the ancient prerogatives, but the Code does not favor any exception, can. 271, unless it can be especially proved by particular law.

3 Ep. 113: "Consulenti . . . non deerit relationibus tuis meae responsionis instructio" (Migne, *P. L.*, 54, 1025).

4 Cfr. the following note.

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A third kind of legates are the *legati a latere, viz.*, (sent) from the side of the pontiff. They are of rather recent date, used merely for transient purposes, and generally chosen from among the Cardinals. Thus Pius VII sent Cardinal Caprara to put into effect the Napoleonic concordat; thus *legati a latere* have appeared in recent years at the international Eucharistic Congresses.

CAN. 265

Romano Pontifici ius est, a civili potestate independens, in quamlibet mundi partem Legatos cum vel sine ecclesiastica iurisdictione mittendi.

Two centuries before John XXII complained of his rights being curtailed by Christian princes[5] Pascal II uttered the same complaint against the King of England, who refused to receive papal legates.[6] In the new Code the Pope claims the right to send legates anywhere he pleases. This right can indeed be denied only on the pretext that the Church is no legal, necessary society founded by God, that the Sovereign Pontiff is not the spiritual ruler of that society, and that his power is not supreme, immediate, and independent within its own sphere. But these claims, as has been set forth, cannot be sustained, and the right asserted in Can. 265 is essential to any sovereign.

5 C. un. Extrav. Comm., I, 1: "Super gentes et regna Romanus Pontifex a Domino constitutus, cum personaliter singulas regiones circuire non possit, nec circa gregem sibi creditum curam pastoralis solicitudinis exercere, necesse habet interdum ex debito impositae servitutis, suos ad diversas mundi partes destinare legatos." Cfr. Leo XIII, "*Longinqua oceani*," Jan. 6, 1895.

6 Friedberg, *Grenzen zwischen Staat und Kirche*, 1872, p. 729; 477, 542.

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The legislator is careful to specify that it is a strictly *spiritual jurisdiction* that is exercised by his legates, *viz.*, such as in no way exceeds the limits of the power exercised by the Pope himself.

It follows that if papal legates would deal with political questions, or such of a mixed nature which concern both Church and State, the "independent right" would become dependent on the State, which in its sphere is also sovereign. This latter supposition is not verified, *e. g.*, in the case of the Apostolic Delegate at Washington, whose mission is confined to purely spiritual matters.

It is evident that the Pope will not send legates to entirely pagan countries, where no Catholic subjects live, although he can and often does send missionaries for the purpose of conversion. But no government under whose régime a goodly number of Catholics live, has the right to exclude papal legates who come on a purely ecclesiastical mission.

CAN. 266

Dicitur *Legatus a latere* Cardinalis qui a Summo Pontifice tanquam *alter ego* cum hoc titulo mittitur, et tantum potest, quantum ei a Summo Pontifice demandatum est.

A *legatus a latere,* then, is a Cardinal sent by the Sovereign Pontiff, and he has precisely as much power as the Pontiff bestows on him, and no more.

As we have said before, legates were not always welcome in the countries to which they were sent. One reason for this was that they committed grievous mistakes and often exceeded their faculties.[7] In the light of history Canon 266 almost sounds like a warning.

[7] Cc. 3, 4, X, I, 30.

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The following canons remove some misgivings which may arise in the Ordinaries of dioceses.

CAN. 267

§ 1. Legati qui mittuntur cum titulo Nuntii *aut Internuntii:*

1.° Fovent, secundum normas a Sancta Sede receptas, relationes inter Sedem Apostolicam et civilia Gubernia apud quae legatione stabili funguntur;

2.° In territorio sibi assignato advigilare debent in Ecclesiarum statum et Romanum Pontificem de eodem certiorem reddere;

3.° Praeter has duas ordinarias potestates, alias plerumque facultates obtinent quae tamen sunt omnes delegatae.

§ 2. Qui vero mittuntur cum titulo *Delegati Apostolici* unam habent ordinariam potestatem de qua in § 1, n. 2, praeter alias facultates delegatas ipsis a Sancta Sede commissas.

The office of the legates sent as *Nuncios* or *Internuncios,* therefore, is to foster friendly relations between the Apostolic See and the civil governments to which they are accredited; to observe the conditions of the churches of the territory assigned to them and inform the Roman Pontiff thereof. Besides these ordinary functions, they often receive other faculties, which, however, are all delegated.

Those legates who are sent out as *Apostolic Delegates* enjoy the ordinary power mentioned under § 1, n. 2, besides other delegated faculties entrusted to them by the Holy See.

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CAN. 268

§ 1. Legatorum munus cum omnibus facultatibus eisdem commissis non exspirat vacante Sede Apostolica, nisi aliud in litteris pontificiis fuerit statutum.

§ 2. Cessat autem, expleto mandato, revocatione eisdem intimata, renuntiatione a Romano Pontifice acceptata.

This canon repeals the enactment, elsewhere made,[8] that the office of Legates with all the faculties granted them does not expire by the vacancy of the Apostolic See, unless otherwise provided in the Apostolic letters; but, that, on the other hand, it ceases if the mandate or mission is fulfilled, or by repeal duly intimated, or by resignation accepted by the Roman Pontiff. A due intimation means an official or authentic document.

CAN. 269

§ 1. Legati Ordinariis locorum liberum suae iurisdictionis exercitium relinquant.

§ 2. Licet forte charactere episcopali careant, praecedunt tamen omnibus Ordinariis qui non sint cardinalitia dignitate insigniti.

§ 3. Si charactere episcopali sint aucti, possunt sine Ordinariorum licentia in omnibus eorum ecclesiis, excepta cathedrali, populo benedicere et officia divina etiam in pontificalibus, adhibito quoque throno et baculo, peragere.

Since legates must respect the jurisdiction of the Ordinaries, any suspicion on the part of the latter would be unfounded. Leo XIII justly observed, following St.

[8] Cfr. cc. 2 f., 6°, I, 15; can. 207; can. 181.

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Gregory: "Their rights are sacred to us, their honor is that of the whole Church, and the pastor's glory is the solid strength and vigor of his brethren." [9]

The rules for *precedence* are laid down in can. 106, 1°, and can. 239, § 1, n. 21, concerning cardinals. The term "all the churches" includes the churches of exempt religious.

CAN. 270

Episcopis qui, ratione sedis, titulo Legati Apostolici decorantur, nullum exinde competit speciale ius.

Bishops who are Apostolic legates by reason of their see, enjoy no special rights on that account.[10]

* * *

To complete this more or less diplomatic tract we will add a list of papal nuncios and internuncios and Apostolic delegates. For the present Pope has divided the whole ecclesiastical corps into these three classes.[11]

1. *Apostolic Nuncios* are at Vienna and Madrid.

2. *Apostolic Internuncios* in Argentina, Bavaria, Belgium, Brazil, Chile, Colombia, Holland, Peru, Venezuela.

3. *Delegates Apostolic,* under the *S. C. Consistorialis,* are in Canada and Newfoundland, Cuba, the Philippine Islands, and the United States of America (Mexico also should have one). Delegates subject to the *S. C. Prop. Fide:* Australia, Constantinople, East Indies, Egypt and Arabia, Greece, Kurdistan and Armenia Minor, Mesopotamia, Persia, Syria.

9 "*Longinqua oceani,*" Jan. 6, 1895.

10 A certain right, or at least honorary prerogative, of an Apostolic legate is still claimed by the King of Hungary (cf. Potthast, *Regesta,* n. 10,637), and was vindicated by the King of Sicily, (*Monarchia Sicula*), but entirely suppressed by Pius IX ("Suprema," Jan. 28, 1864; cfr. Giannone, *Il tribunale della Monarchia di Sicilia,* 1892).

11 *A. Ap. S.,* 1916, p. 213 (Decree of May 8, 1916).

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The *countries* now represented at the Papal Court are:

1. By *ambassadors:* Austria-Hungary and Spain.

2. By *envoys extraordinary:* Argentina, Bavaria, Belgium, Bolivia, Brazil, Chile, Colombia, Costa Rica, England (on special mission), Holland, Monaco, Peru, Prussia, Russia.[12]

The Congress of Vienna, 1814, fixed the precedence of nuncios which they still retain. They rank in the first class, even after the loss of the temporal power of the Pope.[13]

It is noteworthy that the U. S. maintained, at least for some years, diplomatic relations with Pius IX (1848 to 1868).[14]

12 *Annuario Pontificio,* 1917, p. 579, 292, 582 ff.

13 Westlake, *International Law,* 1910, I. p. 286 f.

14 Cfr. Catholic *Fortnightly Review,* (St. Louis), Vol. XXV, No. 12; *Historical Records and Studies* of the U. S. Catholic Hist. Soc., New York, Vol. XI (1918).

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CHAPTER VI

PATRIARCHS, PRIMATES, METROPOLITANS

After what has been said about organization and papal legates, it is superfluous to add anything concerning patriarchs. As to the metropolitans, a few notes will suffice.

Metropolitans are bishops who rule over a province composed of several bishoprics. However, under the present legislation, the term "rule" must be taken in a very restricted sense. In ancient times the power of metropolitans was more extensive, especially in regard to the election and ordination of the provincial bishops, the convocation of synods, and trials of the higher and lower clergy.[1] This was but natural since the metropolis was considered the mother see and center of the whole ecclesiastical organism. However, in course of time the authority of the metropolitans was diminished and went to the general centre, Rome. Metropolitans are also called archbishops, though these terms are not fully synonymous; for every metropolitan is an archbishop, but not every archbishop is a metropolitan (*e. g.*, the Archbishop of Ferrara). The title may be merely an honorary distinction.[2] Every metropolitan has one or more suffragans, thus called since the eighth century.[3] In the Frankish

1 Cfr. Nic., cc. 4 ff.; c. 1, Dist. 64; c. 3, Dist. 12; dictum Gratiani ad c. 1, C. 9, q. 3.

2 The title archbishop for metropolitan occurs since the VIII century, cf. Benedict XIV, *De Syn. Dioec.*, II, 4, 3 ff.

3 V. Scherer, *l. c.*, I, 532. In

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Kingdom, and in Italy, especially at Ravenna, the tendency early manifested itself to diminish the number of metropolitan sees and augment the prerogatives of the remaining archbishops, in order that they might appear as primates. These primates were mostly the nominees of temporal rulers. The abuses of this system were so grievous that the papacy set to work to arrest the extension of metropolitan powers, prevent the creation of primatial sees, and generally opposed the growth of tendencies which threatened to lead to the establishment of national churches.[4]

CAN. 271

Patriarchae aut Primatis titulus, praeter praerogativam honoris et ius praecedentiae ad normam can. 280, nullam secumfert specialem iurisdictionem, nisi iure particulari de aliquibus aliud constet.

The title Patriarch or Primate is purely a title of honor and aside from the right of precedence (can. 280) carries with it no special jurisdiction, except where particular laws exist to the contrary.

Our historical remark concerning the tendencies of certain bishops of France is corroborated by the canon quoted by Cardinal Gasparri in his edition. Rudolf, Archbishop of Bourges, claimed patriarchal rights; but Pope Nicholas I told him that, except where the canons and legitimate custom permit, patriarchs and primates have no power over other bishops, unless the Apostolic See has honored a church by special privileges.[5] The

case of the transfer of an archbishop to a bishop's, see, he retains his title and hence is addressed as Archbishop-Bishop (*e. g.*, Msgr. Harty of Omaha).

4 Cfr. Joy-Maitland, *St. Nicholas*, I, 1901, p. 33 f.

5 C. 8, C. 9, q. 3.

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same answer Innocent III made to an archbishop of Tours.[6] To-day, if we mistake not, only the archbishop of Gran (Esztergom) in Hungary enjoys any noteworthy prerogatives.

CAN. 272

Provinciae ecclesiasticae praeest Metropolita seu Archiepiscopus; quae dignitas coniuncta est cum sede episcopali a Romano Pontifice determinata vel probata.

Over an ecclesiastical province presides a Metropolitan or Archbishop, and the connection of that dignity with an episcopal see must be determined or approved by the Roman Pontiff.

As the erection of dioceses, so that of provinces, is a *causa maior* reserved to the Holy See (S. C. Consist.).[7]

CAN. 273

Salvo praescripto can. 275–280, Metropolita in propria dioecesi easdem obligationes eademque iura habet quae Episcopus in sua.

Besides the obligations and rights mentioned in can. 275–280, a Metropolitan is bound in his own diocese by the same duties as a bishop in his, and enjoys the same rights.

CAN. 274

In dioecesibus vero suffraganeis Metropolita potest tantum:

1.° A patronis ad beneficia praesentatos instituere,

6 C. 9, X, I, 31.

7 Cf. c. 2, C. 9, q. 3; can. 215; can. 248, § 2.

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si Suffraganeus intra tempus iure statutum, iusto impedimento non detentus, id facere omiserit;

2.° Indulgentias centum dierum, sicuti in propria dioecesi, concedere;

3.° Deputare Vicarium Capitularem ad normam can. 432, § 2;

4.° Vigilare ut fides ac disciplina ecclesiastica accurate serventur, ac de abusibus Romanum Pontificem certiorem facere;

5.° Canonicam visitationem peragere, causa prius ab Apostolica Sede probata, si eam Suffraganeus neglexerit; tempore autem visitationis, potest praedicare, confessiones audire etiam absolvendo a casibus Episcopo reservatis, de vita et honestate clericorum inquirere, clericos infamia notatos Ordinariis ipsorum, ut eos puniant, denuntiare, notoria crimina, manifestas et notorias offensas tum sibi tum suis forte illatas, iustis poenis, censuris non exclusis, punire;

6.° In omnibus ecclesiis, etiam exemptis, Ordinario loci praemonito, si ecclesia sit cathedralis, peragere pontificalia, uti Episcopus in proprio territorio, populo benedicere, cruce ante se delata incedere, non autem alia exercere quae iurisdictionem importent;

7.° Appellationem recipere a sententiis definitivis aut interlocutoriis definitivarum vim habentibus, prolatis in Curiis suffraganeis, ad normam can. 1594, § 1;

8.° Controversias de quibus in can. 1572, § 2, in prima instantia dirimere.

As to No. 1: The right of *investing* is granted to the metropolitan if the suffragan delays investiture beyond two months, for in that case the law [8] permits the patron

8 Pius V, "In conferendis," § 4; Richter, *Trid.*, p. 576; Barbosa, *De Officio et Potestate Episcopi*, P. I, tit. 4, n. 20; cfr. can. 455, 458.

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to ask the metropolitan for investiture, supposing, of course, that the candidate is fit. It may be observed that the Code mentions only benefices of the *iuspatronatus,* which is of no importance for the metropolitans of our country.

No. 3 will be explained in its proper place, under can. 432.

No. 5. As to the *canonical visitation,* the Council of Trent [9] ordained that a metropolitan could perform it in a diocese of any of his suffragans only after he had visited his own diocese and with the approval of the provincial council. The new law modifies the old in two ways: first, in that the visitation of his own diocese is not required previously to visiting a suffragan's diocese; secondly, the reason for visiting the suffragan's diocese must now be reported to, and ratified by, the Holy See. This latter enactment is the logical consequence of the provincial councils being approved by the Holy See. As soon as the visit is ratified by competent authority, and the metropolitan enters the diocese of his suffragan, his jurisdiction becomes as it were ordinary over the subjects of his suffragan, but not over the suffragan himself. Hence, (a) he may preach the word of God even without asking the suffragan; (b) exercise acts of jurisdiction in the confessional as well as outside. To this latter faculty must be referred the investigation of the life and conduct of the clergy, and the exercise of contentious jurisdiction. Coercive power may be exercised by the metropolitan against infamous clergymen [10] for notorious crimes [11] which cannot be concealed, especially if the culprit has been tried by a civil or ecclesiastical

[9] Sess. 24, c. 3 de ref., cc. 1, 5, 6°, III, 20.

[10] Cf. can. 2320, 2328, 2343, 2314, 2359, § 2.

[11] Cf. can. 2197. Barbosa, *Tractatus Varii,* Appellativa, n. 166.

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court. Finally, the metropolitan may proceed against such as offer affronts or insults to his person or suite, or prevent the exercise of his jurisdiction during the time of canonical visitation.[12]

Nos. 7 and 8 mention appeals, which may, but need not always, be made from the sentence of the episcopal court,[13] and settlements of such controversies as regard the personal property and rights of the bishop or his episcopal revenues, or diocesan property.[14]

From this enumeration of the rights of a metropolitan with regard to his suffragans we may conclude, first, that only in case of negligence directly stated in the law has the metropolitan a right to interfere in the diocese of a suffragan. Here the old [15] and the new law agree. Secondly, a metropolitan enjoys no jurisdiction *over his suffragans* as such, for in all the cases alleged in the present canon the person of the suffragan is nowhere mentioned, but there is question merely of administrative measures or appeals, or the extraordinary case (n. 5) of canonical visitation, and in this the metropolitan really acts in the name of the Pope.

Except in the case of a canonical visit, every jurisdictional act is forbidden to the metropolitan in the dioceses of his suffragans.[16] Wherefore the statement of some older canonists [17] that the metropolitan may exercise jurisdiction over his suffragans, must now be modified, as the present law warrants no such privilege, unless when the Holy See permits a metropolitan to exercise it in connection with a canonical visitation.

12 Cc. 1, 5, 6°, III, 20; c. 1, 6°, V, 9.

13 Can. 1594, § 1; c. 11, X, I, 31; c. 1, 6°, I, 16; c. 7, 6°, V, 11.

14 Can. 1592, § 2.

15 C. 1, 6°, I, 8; c. 1, 6°, I, 6.

16 Cc. 7 f., C. 9, q. 3.

17 Reiffenstuel, I, 10, n. 11; Barbosa, *De Officio et Potestate Episcopi*, P. I, tit. 4, who enumerates 38 prerogatives of the archbishops; cfr. his *Summa Decis. Apost.*, s. v. "Archiepiscopus."

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THE PALLIUM

The origin of the pallium is involved in obscurity. It seems to be an imitation of the *ὠμοφόριον*, a band of wool worn at Mass by Oriental bishops. This ornament was in vogue also in Gaul and Africa. As a special sign of distinction the *pallium* came into general use after the sixth century. In its modern form it is a circular band, about two inches wide, worn about the neck, breast and shoulders, and having two pendants, one hanging down in front, the other behind. It is set with six black crosses of silk, one each on the breast and back, one on each shoulder, and one on each pendant. It is worn over the chasuble and signifies the plenitude of the pastoral and episcopal power which an archbishop has received from the Pope.[18] The pallia are kept in a *capula* over the tomb of St. Peter, and hence are said to be "taken from the body of St. Peter," after being blessed by the Pontiff on the eve of the feast of SS. Peter and Paul.[19]

CAN. 275

Metropolita obligatione tenetur, intra tres menses a consecratione vel, si iam consecratus fuerit, a provisione canonica in Consistorio, per se vel per procuratorem a Romano Pontifice pallium petendi, quod significat potestatem archiepiscopalem.

The metropolitan is obliged, either himself or by proxy, to ask the Pope for the pallium within three months from the date of his consecration, or, if he is already consecrated, from the time of his canonical promotion in the consistory.

18 Cfr. Duchesne, *Christian Worship*, p. 380 ff; Braun in the Cath. Encycl., Vol. XI, 427.

19 Benedict XIV, "*Rerum ecclesiasticarum*," Aug. 12, 1748.

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CAN. 276

Quare ante pallii impositionem, excluso speciali indulto apostolico, ipse illicite poneret actus sive iurisdictionis metropolitanae, sive ordinis episcopalis in quibus, ad normam legum liturgicarum, usus pallii requiritur.

Acts of metropolitan jurisdiction or of the episcopal order which require the use of the pallium according to liturgical norms, are illicit if performed before the imposition of the pallium.

CAN. 277

Metropolia uti potest pallio intra quamlibet ecclesiam etiam exemptam suae provinciae in Missarum sollemnibus, diebus in Pontificali Romano designatis aliisque forte sibi concessis; nullatenus vero extra provinciam, etsi Ordinarii loci consensus accedat.

The Metropolitan may use the pallium in every church of his province on the days determined in the *Pontificale Romanum* or on others specially granted to him; but he may not use it outside his province, even though the local Ordinary consent.

CAN. 278

Si Metropolita pallium amittat vel ad aliam sedem archiepiscopalem transferatur, novo indiget pallio.

If a Metropolitan loses his pallium, or is transferred to a different archiepiscopal see, he must obtain another pallium.

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CAN. 279

Pallium neque commodari potest neque donari nec in morte alicui relinqui, sed omnia pallia quae Metropolita obtinuit, cum eodem sunt sepelienda.

The pallium can neither be lent, nor given away, nor left to anyone after death, but all pallia received by a Metropolitan must be buried with him. Archbishops who are metropolitans, or who hold that title, must demand the pallium *instanter, instantius, instantissime*. The reason for this urgent postulation lies in the significance of the pallium as indicative of the plenitude of the archiepiscopal jurisdiction.[20]

If an archbishop is personally present in Curia, he must present himself to the senior Cardinal Deacon, who imposes the pallium in the name of the Pontiff. The same applies to the procurator who requests the pallium for an archbishop, and who is, moreover, obliged to take an oath before the same Cardinal Deacon that he will conscientiously transmit the sacred ornament to the metropolitan.[21]

Since the pallium signifies the plenitude of the pastoral office, it must be obtained before the metropolitan can exercise his archiepiscopal functions. Hence he cannot licitly invest clergymen presented by patrons, but he may licitly and validly make appointments in his own archdiocese; he cannot convoke a provincial council (can. 284), nor licitly perform any act of jurisdiction mentioned in can. 274. Besides, before the reception of the pallium, a metropolitan cannot consecrate altars, or churches, or bishops, or chrism, or ordain clergymen,

20 C. 1, Dist. 100; c. 3, X, I, 8.

21 Benedict XIV, "Inter conspicuos," Aug. 29, 1744. The formula of the oath is given in "*Rerum ecclesiasticarum*," Aug. 12, 1748; cfr. can. 239, §3.

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even though he may have been archbishop of another diocese.[22]

The pallaium may be worn by an archbishop in all the *churches* located *within the limits of his province.* Strictly speaking, its use is restricted to the celebration of the Mass, except *de requiem.*[23] The festival occasions on which the use of the pallium is permitted are indicated in the *Caeremoniale Episcoporum.*[24] Since the pallium is something attached to the person, but with definite relation to a church designated by the Roman Pontiff, it cannot be loaned to another, or taken to another see, but all the pallia of an archbishop, if he has obtained several, are to be buried with him.[25]

PRECEDENCE

CAN. 280

Patriarcha praecedit Primati, Primas Archiepiscopo, hic Episcopis, salvo praescripto can. 347.

Patriarchs enjoy precedence over primates, primates over archbishops, and archbishops over bishops, except in the cases mentioned in can. 347.

The *Annuario Pontificio* for 1917 enumerates the following *Patriarchs,* called *maiores:*

Constantinople: (Latin) residing in Rome;

Alexandria: The Latin residing in Rome; the Coptic at Hermopolis;

Antioch: The Latin in Rome; the Syrian at Beirut; the Maronite at Bikorchi on Mount Lebanon; the Greek Melchite (Arabic) at Damascus;

22 *Pontificale Rom., De Pallio; Caeremoniale Episcop.,* I, c. 16, n. 6.

23 *Caerem. Ep., ib.*

24 L. I, c. 16, n. 4.

25 C. 2, X, I, 8; c. 4, X, I, 5; *Pont. Rom., De Pallio; Caeremoniale Episcop.,* I, 16, n. 6 f.

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Jerusalem, the Latin, with residence there.

Minor Patriarchs are those of:

Babylon of the Chaldees, at Mossul, who is at the same time Administrator Apostolic of Acre;

Armenian Cilicia, at Constantinople, Administrator Apostolic of Ispaham in Armenia;

West Indies, Archbishop of Toledo in Spain (since 1540);

East Indies, at Goa, since 1886;

Lisbon, since 1716, residence there (under normal circumstances).

Venice, transferred from Aquileja-Grado since 1541.[26]

[26] Cfr. *Am. Eccl. Rev.,* 1918 (Vol. 58), p. 113 ff.

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CHAPTER VII

PLENARY AND PROVINCIAL COUNCILS

When Christianity had spread and diocesan centres were erected, the bishops assembled for deliberation and especially for the uprooting of heresies. This custom soon became an important factor in the life of the Church. Synods or councils, as they were called already in Tertullian's [1] time, were quite frequent in the third and even more so in the fourth century, and were generally held in times of a crisis, but also for disciplinary purposes. Since the middle of the third century they were known by the name of provincial (exarchal) councils. In Africa, however, plenary or universal councils, presided over by the primate of Carthage, were celebrated in the fourth and fifth centuries. Roman or Papal synods went by the same name almost to the close of the Middle Ages.[2] The Council of Trent [3] ordered provincial councils to be held every three years for the regulation of morals, the correction of excesses, and the settling of controversies. Notwithstanding this enactment, times were so unfavorable that more than a century elapsed without a provincial council being held, with the exception of one at Tarragona in Spain, until Benedict XIII held one at Benevento in 1693. Since then they became more frequent.[4]

1 *De ieiunio*, c. 13.

2 Cfr. *Kirchenlexikon*, 2 ed., s. v. "Concil."

3 Sess. 24, c. 2 de ref.

4 *Collectio Lacencis, Acta et Decreta SS. Concil. Recentiorum*, 1870, Vol. I, Prolegomena, p. 2.

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In this country the first provincial council was held at Baltimore in 1829 and followed by others in 1833, 1837, 1846, 1849. In 1852 the first National or Plenary Council was convoked by the Archbishop of Baltimore, Mt. Rev. F. P. Kendrick, in the capacity of Apostolic Delegate of Pius IX. The second followed fourteen years later, and the last one was held in 1884, under the presidency of Archbishop, now Cardinal, Gibbons of Baltimore as Apostolic Delegate.[5]

PLENARY COUNCILS

CAN. 281

Ordinarii plurium provinciarum ecclesiasticarum in Concilium plenarium convenire possunt, petita tamen venia a Romano Pontifice, qui suum Legatum designat ad Concilium convocandum eique praesidendum.

The Ordinaries of several ecclesiastical provinces may meet in a plenary council after having obtained permission from the Roman Pontiff, who will designate a Legate to convoke and preside over the council.

Leo XIII, after having received the petition of South American bishops, left it to them to choose the place of meeting, but was highly pleased with their choice of Rome, where the illustrious prelates met in 1899 and enacted a number of decrees which received the specific approval of the Holy See.[6]

CAN. 282

§ 1. Concilio plenario assistere debent cum suffragio

5 The *acta* were published in the *Coll. Lacencis*, t. III, and separately at Baltimore in 1853, 1868, 1886.

6 "Quum diuturnum," Dec. 25, 1898 (*Am. Eccl. Rev.*, Vol. 20, 409 f.).

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deliberativo, praeter Legatum Apostolicum, Metropolitae, Episcopi residentiales, qui, sui loco, mittere possunt Coadiutorem vel Auxiliarem, Apostolici dioecesium Administratores, Abbates vel Praelati *nullius*, Vicarii Apostolici, Praefecti Apostolici, Vicarii Capitulares.

§ 2. Etiam Episcopi titulares, in territorio degentes, si a Legato Pontificio, secundum receptas instructiones, ad Concilium vocentur, adesse debent habentque suffragium deliberativum, nisi in convocatione aliud expresse caveatur.

§ 3. Alii ex utroque clero viri, forte ad Concilium invitati, suffragio non gaudent nisi consultivo.

This canon, especially by § 3, excludes the superiors of religious orders or congregations from a deliberative or decisive vote; they need not even be invited if the preliminary meeting thinks it unnecessary to call them. This enactment is surprising if compared with can. 223, § 1, n. 4, which admits the superiors general of exempt religious and abbots presidents of monastic congregations to deliberative participation at a general council. The Third Plenary Council of Baltimore had accorded that same right to the abbots presidents Wimmer of St. Vincent and Mundwiler of St. Meinrad, and to the superior general of Holy Cross, Father Sorin.[7] We are at a loss to find a solid reason for the exclusion of the aforesaid superiors from the right of assisting at a plenary council, the more so since Cardinal Gasparri gives no text for this enactment. But where there is no right, there is no obligation, although an invitation might be tendered.

7 *Acta et Decreta Conc. Balt.* III., 1886, p. LXIII.

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PROVINCIAL COUNCILS

CAN. 283

In singulis provinciis ecclesiasticis celebretur provinciale Concilium vicesimo saltem quoque anno.

In each province a provincial council should be held at least once every twenty years.

CAN. 284

Metropolita, eoque legitime impedito vel sede archiepiscopali vacante, Suffraganeus antiquior promotione ad ecclesiam suffraganeam:

1.° Locum ad celebrandum Concilium intra provinciae territorium, auditis omnibus qui assistere debent cum suffragio deliberativo, eligit; cessantibus tamen iustis impedimentis, metropolitana ecclesia ne negligatur;

2.° Concilium convocat eique praeest.

The metropolitan, or in case he is lawfully prevented or the archiepiscopal see is vacant, the suffragan who by reason of promotion to the suffragan see is the senior, shall select the place for holding the council, after having received the opinion of all those who are obliged to assist thereat with a decisive vote. If there is no serious obstacle, the metropolitan church should be chosen. The metropolitan shall convoke the council and preside over it.

The term "*auditis*" signifies that the metropolitan is not bound by the opinion or quasi-vote given, but may choose a place according to his own good pleasure.[8]

CAN. 285

Episcopi qui nulli Metropolitae subiiciuntur, Ab-

[8] Cf. can. 105.

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bates vel Praelati *nullius*, et Archiepiscopi Suffraganeis carentes, aliquem viciniorem Metropolitam, nisi forte iem elegerint, semel pro semper, praevia Sedis Apostolicae approbatione, eligant, cuius Concilio provinciali cum aliis intersint, et quae ibi ordinata fuerint, observent et observanda curent.

Bishops who are not subject to a metropolitan, abbots or prelates *nullius*, and archbishops without suffragans, if they have not done so already, should once for all and with the approbation of the Holy See choose the nearest metropolitan, at whose provincial council they must assist, and the enactments of which they must observe and enforce.

As to the *vicinior*, or nearest metropolitan, several decisions [9] of the Roman Court have defined that the distance is to be measured from the cathedral or abbey church to the cathedral of the metropolitan. However, these decisions are rather old, and perhaps antiquated, because there were no railroad facilities in those days, and hence it will be advisable to submit the choice to the Holy See. After the choice has been approved, no change is permitted and the obligation of assisting at the provincial councils is strict if no legitimate impediment occurs.

CAN. 286

§ 1. Praeter Episcopos, Abbates vel Praelatos *nullius* et Archiepiscopos de quibus in can. 285, ad Concilium provinciale vocandi sunt et convenire debent cum voto deliberativo Suffraganei omnes aliique de quibus in can. 282, § 1.

9 S. C. EE. et RR., Jan. 20, 1579; 1 C. C. Aug. 2, 1596; cf. Barbosa, *Summa Decis. Apost.*, *s. v.* "Episcopus vicinior;" Santi-Leitner, I, 11, n. 36; *Trid.*, Sess. 24, c. 2 de ref.

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§ 2. Episcopi titulares qui in provincia degunt, possunt a praeside, cum consensu maioris partis illorum qui cum voto deliberativo intersunt, convocari, et si convocentur, votum habent deliberativum, nisi aliud in convocatione caveatur.

§ 3. Capitula cathedralia aut Consultores dioecesani cuiusvis dioecesis cuius Ordinarius ad normam § 1 vocari debet, invitentur ad Concilium et invitati mittant duos ex capitularibus aut Consultoribus collegialiter designatos, qui tamen obtinent votum tantum consultivum.

§ 4. Maiores quoque religionum clericalium exemptarum ac Congregationum monasticarum Superiores, qui in provincia resideant, invitandi sunt, debentque invitati adesse aut impedimentum, quo detinentur, Concilio notum facere; sed his, quemadmodum aliis ex utroque clero viris ad Concilium forte vocatis, votum fuerit, habet votum dumtaxat consultivum.

Two diocesan consultors, therefore, must attend the provincial council and the *superiores maiores* of exempt clerical orders and monastic congregations who reside in the province must also be invited, and upon being invited, must attend or give notice of the reason for their absence; but all these and other ecclesiastics, secular and regular, if invited, have only an advisory vote.

Innocent III told the archbishop of Sens, who wished to exclude the cathedral chapters from the provincial council, that their deputies were to be admitted to the conciliar discussions (*ad tractatum*), especially with regard to matters touching upon the chapters.[10] This text would seem to indicate that these delegates ought to have a deliberative vote. But the new Code grants only a

[10] C. 10, X, III, 10.

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consultive vote, apparently for the reason that only the bishops are judges and legislators in the true sense,—which reason is perfectly correct, inasfar as even these judges cannot go against the general law.

The deputies of the chapters and diocesan consultors must be appointed *collegialiter,* either by secret ballot or open vote by a legitimate *quorum* present in one place at the same time.

At provincial councils the superiors of religious orders are allowed to be present, nay, they must be invited, and this invitation, of course, creates the obligation of attending.

CONCILIARY PROCEEDINGS

CAN. 287

§ 1. Qui Concilio plenario aut provinciali interesse debent cum voto deliberativo, si iusto impedimento detineantur, mittant procuratorem et impedimentum probent.

§ 2. Procurator, si fuerit unus ex Patribus quibus est votum deliberativum, duplici voto non gaudet; si non fuerit, habet votum dumtaxat consultivum.

Those obliged to attend either a plenary or provincial council and who have a deliberative vote, shall, if detained, send a procurator and prove that they are legitimately absent. If the procurator is one of the "Fathers" of the Council, he enjoys but one vote; if he is not a "Father," he has a consultive vote only.

CAN. 288

In Concilio sive plenario sive provinciali praeses,

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habito, si de provinciali agatur, Patrum consensu, determinat ordinem servandum in quaestionibus examinandis et ipsum Concilium aperit, transfert, prorogat, absolvit.

The president of either a plenary or provincial council (if the latter, with the consent of the Fathers) shall establish the order in which questions are to be examined, shall open, transfer, prorogue, and close the meetings.

CAN. 289

Concilio plenario vel provinciali inchoato, nemini eorum qui interesse debent, licet discedere, nisi iustam ob causam a Legato Pontificio vel a Concilii provincialis Patribus probatam.

Those who are obliged to attend a plenary or provincial council are not allowed to depart, once the council has been opened, unless they have a reason approved by the Apostolic Legate or the Fathers of the Council.

Notice the difference between those who are obliged to attend, because these may enjoy only an advisory vote, and the Fathers of the council, who are entitled to a deliberative or decisive vote.

CAN. 290

Patres in Concilio plenario vel provinciali congregati studiose inquirant ac decernant quae ad fidei incrementum, ad moderandos mores, ad corrigendos abusus, ad controversias componendas, ad unam eandemque disciplinam servandam vel inducendam, opportuna fore pro suo cuiusque territorio videantur.

The Fathers of a plenary or provincial council shall

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earnestly examine and decree upon all matters touching the increase of faith, the control of morals, the correction of abuses, the settling of controversies, the preservation and introduction of uniform discipline, and whatever may be opportune for their own territory. This canon states, in rough outline, what is to be submitted to the deliberation and consultation of the Fathers, and is chiefly taken from the IVth Lateran Council and that of Trent.[11] Note that only "*increase of faith*" is mentioned, not a definition of faith, because infallibility is not the attribute of a plenary or provincial council, which may, however, denounce heresies, draw attention to wrong tendencies, and warn the faithful against them. But the final definition or qualification must be left to the supreme tribunal. By the phrase "settling controversies" is not meant a dogmatic or theological settlement, as long as Rome has not spoken, but questions of discipline, education of clergy and faithful in seminaries and schools, the administration of the Sacraments, parish boundaries, etc. The matter is made much easier by the new Code, which states the universal law, modifications of which, either restrictive or extensive, are reserved to the Holy See. Where the Code is not explicit enough, a council must apply to Rome (*S. C. Concilii*).

Finally, though the canon says nothing about it, the *mode of proceeding* at a council is by vote. The vote may be secret or open. This point is to be settled in a preliminary session. The presiding officer has no preponderating voice, even where there is a tie,[12] unless the papal legate to a plenary council has received special instructions from the Holy See.

11 C. 25, X, V, 1; Sess. 24, c. 2 de ref.

12 Smith, *Elements*, I, n. 71.

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CAN. 291

§ 1. Absoluto Concilio plenario aut provinciali, praeses acta et decreta omnia ad Sanctam Sedem transmittat, nec eadem antea promulgentur, quam a Sacra Congregatione Concilii expensa et recognita fuerint; ipsimet autem Concilii Patres designent et modum promulgationis decretorum et tempus quo decreta promulgata obligare incipiant.

§ 2. Decreta Concilii plenarii et provincialis promulgata obligant in suo cuiusque territorio universo, nec Ordinarii locorum ab iisdem dispensare possunt, nisi in casibus particularibus et iusta de causa.

After the close of a plenary or provincial council the president of the same shall send all the acts and decrees to the Holy See, and they must not be promulgated until the S. C. of the Council has examined and approved them. The mode of promulgating the decrees as well as the date of their going into effect is left to the Fathers of the council.

The decrees of a plenary or provincial council, after being duly promulgated, oblige throughout the whole territory for which they were made, and the Ordinaries of the various dioceses cannot dispense from them except in individual cases and for a just reason.

The *efficacy* of conciliar decrees is here determined, first conditionally, and then as to extent. The condition is that the decrees are approved by the highest authority, *i. e.*, the Holy See, through the S. C. of the Council. This S. Congregation first obtains the opinion of one consultor, and then that of all the consultors, or at least five of them. Then the S. C. deliberates *in pleno congressu* and instructs the agent of the province to have the decrees

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printed.[13] The approval is given either *in forma specifica* or *in forma communi.* The former is generally expressed by the verbal insertion of the acts and decrees in the document of approbation, or else the printed decrees contain the formula "*ex certa scientia, ex plenitudine potestatis approbamus,*" etc. The acts and decrees of the Latin-American Plenary Council held in Rome 1899 were approved by the Holy See with the clause, "*quibuscunque minime obstantibus,*" and it was the general assumption that they were approved *in forma specifica.*[14] The same cannot be said concerning *our* American plenary councils, for they were, as is commonly held,[15] approved *in forma communi, i. e.,* by simple recognition. It appears that the Code refers only to recognition, without determining the nature of the approbation given. But the Code also supposes that the acts and decrees of a council obtain legal force by mere recognition as soon as promulgated, *i. e.,* from the date of promulgation fixed by the Fathers of the council. In view of this fact the former distinction between approbation *in forma specifica* and approbation *in forma communi* appears to be of little practical value. This deduction is corroborated by an answer of the Secretary of State to the Archbishop of St. Louis, dated Sept. 30, 1896, which declares that the decrees of a plenary council are binding even if recognized only *in forma communi* and not inserted in the diocesan statutes.[16]

As to the *interpretation* of the decrees of plenary and provincial councils the general rules laid down in our Code[17] must be observed. These grant the right of inter-

13 "Sapienti consilio" (*A. Ap. S.*, I, 95).

14 *Analecta Ecclesiastica,* 1900 (VIII), p. 145 f.

15 Smith, *l. c.,* n. 72.

16 *Am. Eccl. Rev.* 1896 (Vol. 15), p. 545.

17 Can. 17–20.

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pretation to the legislators. However, the case here is a peculiar one, since the decrees have no obligatory force unless approved by the Roman Congregation. We think it will be safe to adopt the rule laid down by the Fathers of the Latin-American Plenary Council, *viz.:* that the bishops have power to settle doubts arising from the wording of the text, as long as their interpretation does not affect the substance and juridical value of the same. In the latter case, the doubts should be submitted to the Congregation of Extraordinary Affairs.[18] For our country the authentic interpretation of the decrees of plenary and provincial councils belongs to the S. Congregation of the Council.

With regard to *dispensations,* the Code is more explicit, permitting the Ordinaries to dispense from or relax the decrees in individual cases for a just reason. The reason why this power of dispensation is limited and why the limitation affects the metropolitans as well as their suffragans — though they are themselves the legislators — lies in the fact that their decrees have been elevated into a higher sphere by a superior, not only through papal interposition, but also by a collective act of the legislators.[19] Particular cases means not such as happen daily and ordinarily (*communiter contingentes*), but exceptions, to single persons and parishes.

CAN. 292

§ 1. Nisi aliter pro peculiaribus locis a Sede Apostolica provisum fuerit, Metropolita, eoque deficiente, antiquior e Suffraganeis ad normam can. 284, curet ut

18 *Archiv für K.-R.*, 1901 (Vol. 81), p. 54 f.

19 Suarez, *De Legibus*, l. VI, c. 15, nn. 4 ff.; Kenrick, *Theologia Moralis*, 1860, I, 118 (tract. IV, c. 6, n. 49).

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Ordinarii locorum, saltem quinto quoque anno, stato tempore apud Metropolitam aliumve Episcopum comprovincialem conveniant, ut, collatis consiliis, videant quaenam in dioecesibus agenda sint ut bonum religionis promoveatur, eaque praeparent de quibus in futuro Concilio provinciali erit agendum.

§ 2. Etiam Episcopi aliique de quibus in can. 285, una cum aliis Ordinariis convocari et convenire debent.

§ 3. Iidem Ordinarii congregati sedem proximi conventus designent.

Unless otherwise provided for by the Apostolic See, the metropolitan, or if he fails to act, the senior suffragan bishop (according to can. 284) should see to it that the Ordinaries of the dioceses meet every five years at a stated time, at the metropolitan's or a fellow-bishop's residence, in order to deliberate about the affairs of their dioceses and thus foster the good of religion, as well as to prepare the questions to be treated in a future provincial council.

The bishops and others mentioned in can. 285, together with other Ordinaries, should be called and must attend a meeting to appoint the place for the next meeting.

All these regulations are intended to secure a united and uniform proceeding as well as to foster charity.

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CHAPTER VIII

VICARS AND PREFECTS APOSTOLIC

There is a material difference between the vicars Apostolic formerly appointed for, *e. g.*, Thessalonica or Arles, and the vicars Apostolic now appointed for missionary countries. The former were quasi *legati nati*,[1] whereas the vicars of whom the present canon treats are really vicars of the Apostolic See with episcopal jurisdiction, appointed for regions where a full diocesan organization cannot as yet be established or restored. Thus a vicar Apostolic was appointed for Brunswick and Lüneburg, in 1607, under the pontificate of Alexander VII (1655–67), and one for Malabar, where Nestorian disturbances made such a measure imperative. To-day there are vicars or prefects Apostolic in all the territories subject to the Propaganda.[2] In England a vicar Apostolic (Blackwell) was appointed in 1598, and vicars Apostolic continued to govern the English Church until 1850, when the hierarchy was reëstablished. Alaska is now the sole vicariate in our country.

CAN. 293

§ 1. Territoria quae erecta non sunt in dioeceses reguntur per Vicarios aut Praefectos Apostolicos; qui omnes ab una Apostolica Sede nominantur.

§ 2. Vicarius et Praefectus Apostolicus possessionem

1 Smith, *l. c.*, I, n. 524.

2 Benedict XIV, *De Syn. Dioec.*, II, 10, 3 ff.

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sui territorii capiunt, ille litteras apostolicas, hic decretum seu patentes litteras Sacrae Congregationis de Prop. Fide per se vel per procuratorem ostendentes ei qui territorium regit ad normam can. 309.

CAN. 294

§ 1. Vicarii et Praefecti Apostolici iisdem iuribus et facultatibus in suo territorio gaudent, quae in propriis dioecesibus competunt Episcopis residentialibus, nisi quid Apostolica Sedes reservaverit.

§ 2. Etiam ii qui charactere episcopali carent, possunt, intra sui territorii fines ac perdurante munere, omnes benedictiones Episcopis reservatas, una pontificali excepta, impertiri, calices, patenas et altaria portatilia cum sacris oleis ab Episcopo benedictis consecrare, indulgentias quinquaginta dierum concedere, confirmationem, primam tonsuram et ordines minores conferre ad normam can. 782, § 3, 957, § 2.

Apostolic vicars and prefects enjoy the same rights and faculties in their respective territories as residential bishops in their dioceses, unless the Apostolic See makes reserves. Even though destitute of the episcopal character they may, within the limits of their own territory, and during the time of their office, impart the blessings reserved to bishops, except the pontifical blessing proper, may consecrate chalices, patens, and portable altars with oil blessed by a bishop, grant indulgences of fifty days, and confer the tonsure and minor orders according to can. 782, § 3, 957, § 2.

Blessings reserved to bishops are: the blessing of abbots, the dedication and consecration of churches, the blessing and laying of corner-stones, the blessing and

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reconciliation of cemeteries.[3] The consecration of fixed altars is not expressly mentioned, and therefore probably not included in these faculties.

All these faculties, with the exception of such as require the episcopal character or cannot be exercised without the use of holy oils, can be communicated to simple priests.[4]

CAN. 295

§ 1. Vicarii et Praefecti Apostolici ab omnibus missionariis, etiam religiosis, possunt ac debent exigere ut suas patentes seu alias quasvis eorum missionis, destinationis, constitutionis ac deputationis litteras exhibeant, easque exhibere recusantibus exercitium cuiusvis ministerii ecclesiastici prohibere.

§ 2. Omnes missionarii, etiam regulares, licentiam sacri ministerii exercendi petant a Vicariis et Praefectis Apostolicis, qui tamen eam ne denegent, nisi singulis et gravem ob causam.

Apostolic vicars and prefects may and must demand of all missionaries, even religious, that they show their credentials or other letters explaining their mission, destiny, appointment, and deputation, and in case of refusal must forbid them the exercise of any ministerial functions.

All missionaries, including (exempt) regulars, must ask permission of the vicars or prefects Apostolic to exercise the sacred ministry. This permission should not be denied except in single cases and for weighty reasons.

This is but a repetition of former injunctions.[5]

3 Van der Stappen, *Sacra Liturgia*, IV, p. 347.

4 Benedict XIV, "Apostolicum ministerium," May 30, 1753, § 4.

5 Clement IX, "Speculatores," Sept. 13, 1669; Benedict XIV, Const. cit.

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CAN. 296

§ 1. Etiam missionarii regulares subiiciuntur Vicarii et Praefecti Apostolici iurisdictioni, visitationi et correctioni in iis quae pertinent ad missionum regimen, curam animarum, Sacramentorum administrationem, scholarum directionem, oblationes intuitu missionis factas, implementum piarum voluntatum in favorem eiusdem missionis.

§ 2. Quamvis Vicariis et Praefectis Apostolicis nullo modo liceat, praeter casus in iure praevisos, se in disciplinam religiosam ingerere quae a Superiore religioso dependet, si tamen circa ea, de quibus in superiore paragrapho, conflictus oriatur inter mandatum Vicarii aut Praefecti Apostolici et mandatum Superioris, prius praevalere debet, salvo iure recursus in devolutivo ad Sanctam Sedem et salvis peculiaribus statutis a Sede Apostolica probatis.

All missionaries belonging to (exempt) regular orders are subject to the jurisdiction, visitation, and correction of the vicar or prefect Apostolic in matters pertaining to the government of the mission, the care of souls, the administration of the Sacraments, the direction of schools, the gifts of the faithful made for the mission, and the execution of pious legacies made in behalf of the same.

Although the vicar or prefect Apostolic has no right, except in cases provided by law, to interfere with the religious discipline, which depends on the religious superior, yet in the matters mentioned in § 1 of this canon, should a controversy arise between a command of the vicar or prefect and of the superior, the former must prevail, without prejudice to the right of recourse *in devolutivo* to the Holy See and to special statutes approved by the latter.

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That regulars in charge of souls should be subject to the jurisdiction of the Ordinary in all matters pertaining to the exercise of this office, was established by the Council of Trent.[6] Benedict XIV ordained furthermore that no appeal or injunction should delay or invalidate the execution of these decrees and their consequences as applied by the Ordinaries,[7] and logically extended the law to the regular missionaries.[8] New experiences and questions elicted the remarkable constitution of Leo XIII, "*Romanos Pontifices,*" of May 8, 1881, which endeavored to settle some disputes between Ordinaries and regulars employed in parish or mission work. The rules laid down in that Constitution have entered almost entirely into the new Code, as may be seen in the section on religious. Here we will only add a note on *schools.* Leo XIII has subjected all elementary (parish) schools conducted by religious, exempt as well as non-exempt, to the direction and visitation of the bishops, but in the same Constitution states that other schools, colleges, etc., are not subject to the Ordinary, though they require his permission for their erection.[9]

As to gifts made for the missions, the same Constitution ordains that all donations made for missionary purposes must be used for that purpose. Broadly speaking, Sunday and house collections, pew rent and stole fees are mission donations and must be employed as such and accounted for to the vicar or prefect Apostolic.

What *in devolutivo* means has already been explained. Religious orders (the Society of Jesus, for instance)

6 Sess. 25, c. 11 de regg.

7 "Ad militantis," March 30, 1742, § 8.

8 "Apostolicum ministerium," May 30, 1753, § 12.

9 Can. 1382, however, gives the Ordinary the right to inspect the schools — except house schools — of regulars as to their religious and moral training.

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which have statutes concerning their missionaries approved by the Holy See, are entitled to have these statutes respected by vicars or prefects Apostolic.

CAN. 297

Deficientibus e clero saeculari sacerdotibus, Vicarii et Praefecti Apostolici possunt, audito eorum Superiore, cogere religiosos, etiam exemptos, vicariatui vel praefecturae addictos, ad animarum curam exercendam, salvis pariter peculiaribus statutis a Sede Apostolica probatis.

Where there is an insufficient number of secular priests, the vicar or prefect may, upon having heard their superior, compel religious, even those belonging to exempt orders, who are attached to the vicariate or prefecture, to perform pastoral work, with due regard, however, to their peculiar statutes approved by the Apostolic See, as stated in "*Speculatores*" of Clement IX, Sept. 13, 1669.

CAN. 298

Si qua dissidia in iis quae ad curam animarum pertinent, sive inter singulos missionarios, sive inter diversas religiones, sive inter missionarios et alios quoslibet oriri contigerit, ea quamprimum componere curent Vicarii ac Praefecti Apostolici, qui huiusmodi quaestiones, ubi opus fuerit, dirimant, integro tamen iure recursus ad Apostolicam Sedem, qui decreti effectum non suspendit.

If any controversy should arise about matters pertaining to the care of souls between individual missionaries, or different religious orders, or between missionaries and

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others, let the vicars or prefects settle them as quickly as possible. The right of recourse *in devolutivo* to the Apostolic See, however, remains untouched.

That such controversies may arise, the incidents recorded in several constitutions of Benedict XIV amply prove. This Pontiff had to settle the somewhat heated dissensions between the Dominicans and the Jesuits about Chinese rites, and solve doubts about various customs regarding the administration of baptism and nuptial ceremonies.[10]

CAN. 299

Vicarii Apostolici obligatione tenentur Sacra Limina Beatorum Apostolorum Petri et Pauli visitandi eadem prorsus lege, qua Episcopi residentiales ad normam can. 341; cui tamen muneri, si quid graviter obstet ne per se ipsi illud expleant, satisfacere possunt per procuratorem etiam in Urbe degentem.

Vicars Apostolic are, like residential bishops, bound to make the *visitatio ad limina* (or tombs) of SS. Peter and Paul. If a serious obstacle prevents them from performing this duty, they may send a procurator, or commission some one living in the Eternal City. An explanation of this follows under can. 341.

CAN. 300

§ 1. Ad normam can. 340, Vicarii ac Praefecti Apostolici tenentur obligatione Sedi Apostolicae exhibendi plenam accuratamque relationem de suo quisque pastorali officio, deque omnibus quaecunque ad

10 "Ex quo singulari," July 11, 1744; "Omnium solicitudinum," 1742; "Redditae nobis," Dec. 19, Sept. 12, 1744.

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statum vicariatus vel praefecturae, ad missionarios, ad religiosos, ad populi disciplinam, ad scholarum frequentiam, ad fidelium denique ipsorum curae commissorum salutem quavis ratione pertineant; quae relatio scripta esse debet et subscripta tum ab ipso Vicario aut Praefecto tum ab uno saltem ex consiliariis de quibus in can. 302.

§ 2. Imo etiam sub cuiusque anni exitum ad Sanctam Sedem mittant elenchum seu numerum conversorum, baptizatorum annuaeque Sacramentorum administrationis una cum aliis notatu dignioribus.

As prescribed in can. 340, Apostolic vicars and prefects are obliged to send each year a full and accurate report of their pastoral office and everything that touches the state of their vicariate or prefecture, or the missionaries, the religious, the discipline of the people, the frequenting of schools, the welfare of the faithful committed to their care. This report must be made in writing, signed by the vicar or prefect and by at least one of his consultors (see can. 302). Each vicar and prefect shall, moreover, at the end of each year, send to the Holy See a report on the number of converts, baptisms, and the annual administration of the Sacraments, together with other noteworthy items.

CAN. 301

§ 1. In regione sibi commissa commorentur, a qua sine gravi et urgenti causa per notabile tempus iis abesse ne liceat, inconsulta Sede Apostolica.

§ 2. Regionem sibi concreditam, quandocumque sit opus, debent ipsi per se vel, si legitime impediti fuerint, per alium visitare eaque omnia in visitatione expendere,

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quae ad fidem, bonos mores, Sacramentorum administrationem, praedicationem verbi Dei, festorum observantiam, cultum divinum, iuventutis institutionem, disciplinam ecclesiasticam referuntur.

Apostolic vicars and prefects must reside in the territory assigned to them and are not allowed to be absent therefrom for any considerable length of time without a weighty and urgent reason and without having consulted the Apostolic See.

Whenever necessary, they must visit their district either themselves or, if impeded, send another, and at this visitation take due measures respecting the faith, good morals, the administration of the Sacraments, preaching, the observance of feasts, divine worship, the education of youth, and ecclesiastical discipline.

These two paragraphs enjoin *residence* and *diocesan visitation;* that a wide margin is left as to place and time is but natural in missionary countries. Due regard must necessarily be taken of distance and transportation facilities. Weighty and urgent reasons may arise at any moment and cannot always be foreseen.

CAN. 302

Constituant Consilium ex tribus saltem antiquioribus et prudentioribus missionariis, quorum sententiam, saltem per epistolam, audiant in gravioribus et difficilioribus negotiis.

They shall appoint a council consisting of at least three of their older and more experienced missionaries, whose opinion they shall hear, at least by letter, in more important and difficult matters.

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CAN. 303

Prout siverit opportunitas, missionarios saltem praecipuos tum religiosos tum saeculares proprii territorii congregent semel saltem in anno, ut possint ex singulorum experientia et consilio deducere quae sint ordinanda perfectius.

As far as circumstances permit, they shall also convoke the principal missionaries, religious as well as secular, once a year, in order to learn from their experience and advice what may be more perfectly arranged.

CAN. 304

§ 1. Legibus quae de archivo constituendo Episcopis praescribuntur, etiam Vicarii ac Praefecti Apostolici, habita locorum personarumque ratione, aeque tenentur.

§ 2. Pariter quae de Conciliis plenariis et provincialibus can. 281–291 praescribuntur, applicari debent, congrua congruis referendo, Conciliis plenariis vel regionalibus et provincialibus in regionibus Sacrae Congregationi de Prop. Fide subiectis; quae de Synodo dioecesana can. 356–362, Synodo vicariatus apostolici; sed nullum est praefinitum tempus pro Concilii provincialis et Synodi celebratione, et canones Conciliorum, antequam promulgentur, recognosci debent a Sacra Congregatione de Prop. Fide.

Vicars and prefects, like bishops, but with due consideration of persons and places, are obliged to keep archives for the documents pertaining to their districts. Similarly, but also in a manner proportionate to circumstances, the prescriptions concerning plenary and provincial councils (can. 281–291) must be applied to the provinces sub-

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ject to the Propaganda; also enactments regarding diocesan synods (can. 356–362). However, no definite time is fixed for the celebration of either provincial councils or diocesan synods, and the canons of both must, before promulgation, be recognized by the Propaganda. Here it is permissible to doubt whether the religious superiors are to be excluded from participation in a plenary council.

CAN. 305

Studiosissime curent, onerata graviter eorum conscientia, ut ex christianis indigenis seu incolis suae regionis probati clerici rite instituantur ac sacerdotio initientur.

They are under strict obligation to see to it that worthy Christian natives or inhabitants of their province are properly trained and raised to the priesthood. This most Apostolic injunction has been insisted upon in various Apostolic constitutions and inculcated again and again by the S. C. Prop. Fide. Thus, on Nov. 23, 1845, the latter enjoined that natives should be trained and employed, not only in inferior mission work, such as catechizing, but also as missionaries, who in course of time might become pastors of souls and even vicars or prefects Apostolic. The contrary practice was condemned as opposed to the intentions of the Holy See and out of keeping with the spirit of the sacred ministry.

CAN. 306

Missae sacrificium pro populis sibi commissis applicare debent, saltem in sollemnitatibus Nativitatis Domini, Epiphaniae, Paschatis, Ascensionis, Pentecostes, sanctissimi Corporis Christi, Immaculatae Con-

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ceptionis et Assumptionis Beatae Mariae Virginis, Sancti Ioseph eius sponsi, Sanctorum Apostolorum Petri et Pauli, Omnium Sanctorum, servato praescripto can. 339, §§ 2 seqq.

They must apply the holy sacrifice of the Mass for the people entrusted to them at least on the feasts of Christmas, Epiphany, Easter, Ascension, Pentecost, Corpus Christi, the Immaculate Conception, the Assumption of the B. V. Mary, St. Joseph, SS. Peter and Paul, and All Saints, with due regard to the rules laid down in can. 339, § 2 ff.

CAN. 307

§ 1. Ipsis non licet, inconsulta Sede Apostolica, concedere missionariis ab ea missis veniam in perpetuum deserendi vicariatum aut praefecturam, vel alio transeundi, nec eos quoquo modo expellere.

§ 2. In casu autem publici scandali possunt ipsi, audito suo Consilio, et si agatur de religiosis, praemonito, quantum fieri potest, Superiore, missionarium statim removere, facta tamen illico certiore Apostolica Sede.

They are not allowed, without consulting the Apostolic See, to grant to the missionaries sent out by the same (Apostolic See) perpetual leave of absence from their vicariate or prefecture, or permission to go elsewhere, or to expel them in any way.

In case a missionary has given public scandal, however, they may, after having heard their counsellors, and, if the culprit is a religious, after serving notice, when possible, upon his superior, remove him at once and then notify the Apostolic See as soon as possible.[11]

11 Clement IX, "Speculatores," Sept. 13, 1669; Leo XIII, "Ad

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CAN. 308

Vicariis et Praefectis, charactere episcopali auctis, privilegia honorifica competunt, quae ius concedit Episcopis titularibus; si autem charactere episcopali careant, habent tantum, durante munere et in proprio territorio, insignia et privilegia Protonotariorum apostolicorum de numero participantium.

Vicars and prefects, if they have the episcopal character, enjoy the same prerogatives of honor which the law grants to titular bishops; if they are not consecrated bishops, they are entitled, during their tenure of office and in their own territory only, to the insignia and privileges of prothonotaries Apostolic *de numero participantium.*

As titular bishops, vicars and prefects rank after residential bishops. Their place at councils is expressly defined in the Code.[12]

As to the *protonotarii apostolici de numero participantium,* Pius X (*"Inter multiplices,"* Feb. 25, 1905) regulated their dress, which is that of regular prelates, with the right of wearing a ring and the faculty of pontificating outside of the Eternal City, but only with the *faldistorium* (faldstool) and without the seventh candle. Nor are they allowed to bless the people when entering the church. They say not "Pax vobis," but "Dominus vobiscum." They wear the pectoral cross only when they pontificate. Their mitre is not the *pretiosa* (studded with gems), but of gold cloth or silk, and their skull-cap of black silk. They always need the consent of the Ordinary if they wish to celebrate pontifical High Mass.[13]

extremas Orientis," June 24, 1893; Instructio S. C. Prop. Fide in *Collectio Lacensis,* VI, 663 ff.

12 Can. 348 f.

13 Cf. *Am. Eccl. Rev.,* 1905 (Vol. 33), p. 612 ff; Vol. 34, p. 74 f.

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CAN. 309

§ 1. Vicarii et Praefecti, ubi primum in territorium suum advenerint, deputent ex uno vel altero clero Pro-vicarium vel Pro-praefectum idoneum, nisi Coadiutor cum futura successione a Sancta Sede datus fuerit.

§ 2. Pro-vicarius aut Pro-praefectus nullam habet, vivente Vicario aut Praefecto, potestatem, nisi quae fuerit ab eodem sibi commissa; sed deficiente Vicario aut Praefecto, vel eorum iurisdictione impedita ad normam can. 429, § 1, totum debet regimen assumere et in hoc munere permanere, donec a Sancta Sede aliter fuerit provisum.

§ 3. Pari modo Pro-vicarius aut Pro-praefectus, qui titulari successerit, statim deputet ecclesiasticum virum, qui sibi, ut supra, in munere succedat.

§ 4. Si forte contingat ut nemo sive a titulari sive a pro-titulari uti administrator fuerit designatus, tunc senior in vicariatu vel praefectura, is, nempe, qui sit praesens in territorio et suas destinationis litteras in eodem prius exhibuerit, censetur delegatus a Sancta Sede ut regimen assumat, et inter plures aeque seniores antiquior sacerdotio.

Vicars and prefects shall, immediately upon entering their territory, appoint a fit clergyman as pro-vicar or pro-prefect, unless the Holy See has already assigned a co-adjutor with the right of succession.

The pro-vicar or pro-prefect has no power during the lifetime of the vicar or prefect, except in so far as the latter has committed it to him; but in case the vicar or prefect ceases to officiate, or if his jurisdiction is impeded, according to can. 429, § 1, the pro-vicar or pro-prefect assumes the whole government and administers it until the Holy See shall provide otherwise.

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A pro-vicar or pro-prefect who has succeeded the vicar or prefect proper, shall immediately appoint an ecclesiastic to succeed him.

Should the appointment of an administrator have been omitted either by the vicar or the pro-vicar, the prefect or the pro-prefect, then the senior of the vicariate or prefecture, *i. e.*, the priest who is present in the territory and has first shown the papers of his missionary appointment, must be looked upon as delegated by the Holy See to assume the reins, or if there are several of equal seniority, the one who has been longest in the priesthood.

Benedict XIV provided that where no coadjutor with the right to succession had been appointed, the vicar Apostolic should name a pro-vicar or quasi vicar-general, who in case of the demise of the vicar should immediately succeed him.[14] In another Constitution [15] he limited the appointment of a vicar-general to territories in which there were no chapters or consultors who would be entitled to choose a vicar-capitular. But he also modified the requisites (doctor title) for the office of vicar, demanding only that he be "*habilis et idoneus.*" Our canon modifies this law in so far as not only the vicars Apostolic but also the prefects Apostolic are instructed to appoint pro-prefects, in order to obviate any uncertainty or confusion regarding the government of the territory. The canon makes no distinction between territories with chapters or concultors and such as have none of these, but merely enjoins that a pro-vicar or pro-prefect be appointed immediately upon entering his office, or rather his district. The power of these pro-vicars and pro-prefects is suspended until the vicars and prefects go out of office, just as Benedict XIV had ordered.

14 "Ex sublimi," Jan. 26, 1753. 15 "Quam ex sublimi," Aug. 8, 1755.

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CAN. 310

§ 1. Ad quos vicariatus aut praefecturae cura devenerit ad normam can. 309, ii debent quamprimum certiorem facere Apostolicam Sedem.

§ 2. Interim uti possunt omnibus facultatibus sive ordinariis ad normam can. 294, sive delegatis, quibus Vicarius vel Praefectus pollebat, nisi commissae fuerint ob industriam personae.

Those who rule a vicariate or prefecture (*ad interim*) according to can. 309, must inform the Apostolic See as soon as possible. In the meanwhile they enjoy the faculties, both ordinary (can. 294) and delegated, which were enjoyed by the vicar or prefect himself, with the exception of such as were granted with sole respect to person.

These faculties in certain formularies — the personal faculties are not contained in these formularies — are given by the S. C. of the Propaganda.

CAN. 311

Qui vacariatui vel praefecturae apostolicae ad certum tempus praepositus est, debet in regimine cum omnibus facultatibus sibi concessis permanere, licet definitum tempus fuerit praeterlapsum, donec successor canonicam sui muneris possessionem ceperit.

One who is appointed to a vicariate or prefecture for a certain time only, must continue to administer the government with all the faculties granted to him, until his successor has taken canonical possession of the office, even though this should happen after his own term has expired.

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CHAPTER IX

APOSTOLIC ADMINISTRATORS

CAN. 312

Dioecesis canonice erectae regimen, sive plena, sive vacante sede, aliquando Summus Pontifex ob graves et speciales causas Administratori Apostolico vel in perpetuum vel ad tempus committit.

The Sovereign Pontiff, for weighty and special reasons, sometimes entrusts a canonically established diocese, either during the occupancy of the Ordinary or during a vacancy, to an Apostolic administrator, either permanently or for a limited period.

Administrators, sometimes styled *visitatores*, occur in the Decretals of Boniface VIII. They were appointed either by the Roman Pontiff or by the chapter, the synod or the metropolitan, but only those appointed by the Pope had full power.[1] Besides it was customary to allow young nobles to assume the government of a diocese as administrators in temporal, especially princely, affairs.[2] Later it became the exclusive right of the Pope to assign an administrator to a diocese. This right he often exercised in times of politico-ecclesiastical troubles, such as happened, *e. g.*, at Cologne, and lately at Genoa. The expedient of appointing an Apostolic administrator is occasionally resorted to when the financial or religious con-

1 C. 42, 6°, I, 6; c. 4, 6°, I, 8. 2 Sägmüller, *K.-R.*, 1 ed., p. 363.

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ditions of a diocese are in a precarious state. The administrator is named *in pleno congressu* by the S. C. Consistorialis, and the letters of appointment are dispatched in the form of a Bull.[3]

CAN. 3

§ 1. Quilibet Administrator Apostolicus, si datus fuerit dioecesi, sede plena, canonicam administrationis possessionem init, ostendens litteras suae nominationis tum Episcopo, si sit mentis consiliique compos et in dioecesi versetur, tum etiam Capitulo, ad normam can. 334, § 3.

§ 2. Si sedes fuerit vacans, vel si Episcopus non sit mentis consiliique compos, aut in dioecesi non moretur, Administrator Apostolicus possessionem sumit ad instar Episcopi secundum cit. can. 334, § 3.

Every Apostolic administrator given to a see whilst still occupied by a bishop (*sede plena*) enters upon the canonical possession of his administration by presenting the letters of his appointment to the bishop, if the latter is in full possession of his mental faculties and dwells in the diocese, as well as to the chapter, according to can. 334, § 3.

If the see is vacant, or the bishop is not in full possession of his mental faculties, or if he does not dwell in the diocese, the administrator takes possession like a new bishop, according to can. 334, § 3.

We believe "*mentis consiliique compos*" here means the full possession of one's mental faculties, for it may be that one can think rationally, but lacks the faculty of memory, or by reason of softening of the brain has no

[3] "Sapienti consilio," June 29, 1908, P. II, c. VII, art. 2, n. 7 (*A. Ap. S.*, I, 83 f.)

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will power. The so-called *lucida intervalla* must not be taken into account here.

A bishop may dwell outside of his diocese either casually or fortuitously, or culpably, or as an exile, by deportation. Again, he may be in the diocese, but held a quasi-prisoner. In the latter case, too, it may be said that he has no power of his own (*impos consilii*).

Can. 314

Iura, officia ac privilegia Administratoris Apostolici desumantur ex litteris suae deputationis, vel, nisi in eisdem aliud caveatur expresse, ex praescripto canonum qui sequuntur.

The rights, duties, and privileges of an Apostolic administrator must be gathered from the letter of appointment, or if no special provision is therein made, from the rules laid down in the following canons.

Can. 315

§ 1. Administrator Apostolicus permanenter constitutus iisdem iuribus et honoribus fruitur, iisdemque obligationibus tenetur, ac Episcopus residentialis.

§ 2. Si ad tempus datus sit:

1.° Eadem iura ac officia habet, ac Vicarius Capitularis; sed, sede plena, potest dioecesim visitare ad tramitem iuris; nec tenetur obligatione applicandae Missae pro populo, quae Episcopum gravat;

2.° Ad honorifica privilegia quod attinet, valeat praescriptum can. 308; sed Episcopo qui, ad aliam sedem translatus, prioris retinet administrationem, in hac quoque omnia Episcoporum residentialium honorifica privilegia competunt.

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An Apostolic administrator, if appointed permanently, enjoys the same rights and honors and is bound by the same obligations as a residential bishop.

If he is appointed only for a limited time, he has the same rights and duties as a vicar-capitular, but may visit the diocese according to law; but he is not obliged to apply the Mass for the people, as a bishop is.

As to honorary prerogatives, an Apostolic administrator enjoys those of a titular bishop (see can. 308), or, if he is not a bishop, those of Apostolic prothonotaries *de numero participantium.*

A bishop transferred to another see, who retains the administration of his former diocese, enjoys also in the latter all the honorary privileges of a residential bishop.

CAN. 316

§ 1. Si Administrator Apostolicus dioecesi, sede plena, praeficiatur, iurisdictio Episcopi eiusque Vicarii Generalis suspenditur.

§ 2. Quanquam autem Administrator Apostolicus Episcopi auctoritati non subest, non debet tamen se immiscere causis Episcopum ipsum spectantibus, neque in Vicarium eius Generalem iudicium seu processum instruere aut animadvertere ob acta praeteritae administrationis.

If an administrator is appointed for a diocese while its bishop is still alive, the jurisdiction of the bishop and of his vicar-general is suspended.

Although the administrator is not subject to the authority of the bishop, yet he must not meddle in affairs which concern the bishop personally, nor try judicially or punish the vicar-general for acts of the former administration.

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CAN. 317

Si impedita fuerit iurisdictio Administratoris Apostolici aut si idem Administrator defecerit, Sedes Apostolica statim moneatur; et interim, si dioecesis vacet aut Episcopus non sit sui compos, valent praescripta can. 429 seqq.; secus Episcopus dioecesim regit, nisi Sedes Apostolica aliud praestituerit.

If the jurisdiction of an Apostolic administrator is impeded, or if he goes out of office, the Holy See must be immediately informed; meanwhile, if the see is vacant or the bishop is not in full command of his faculties, the prescription of can. 429 ff. must be followed; in all other cases the bishop rules the diocese, unless the Apostolic See has decided otherwise.[4]

CAN. 318

§ 1. Administratoris Apostolici iurisdictio Romani Pontificis aut Episcopi obitu non cessat.

§ 2. Cessat vero cum Episcopus dioecesis vacantis possessionem legitime ceperit ad normam can. 334, § 3.

The jurisdiction of an Apostolic administrator does not expire with the death of the Roman Pontiff or the bishop. But it ceases as soon as the bishop of a vacant see has taken legal possession thereof, according to can. 334, § 3.

Under § 1 of this canon the canons or consultors of a diocese cannot proceed to the election of a vicar-capitular or administrator while the bishop whose diocese is ruled by an Apostolic administrator, is alive.[4]

[4] S. C. EE. et RR., Aug. 4, 1578; Jan. 24, 1749 (Bizzarri, *l. c.* p. 31, 214, 276).

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CHAPTER X

INFERIOR PRELATES

CAN. 319

§ 1. Praelati qui praesunt territorio proprio, separato ab omni dioecesi, cum clero et populo, dicuntur Abbates vel Praelati *nullius*, nempe dioecesis, prout eorum ecclesia dignitate abbatiali vel simpliciter praelatitia gaudet.

§ 2. Abbatia vel praelatura *nullius*, tribus saltem paroeciis non constans, singulari iure regitur, nec eidem applicantur quae canones statuunt de abbatiis vel praelaturis *nullius*.

Prelates who preside over a territory of their own, belonging to no diocese, inhabited by clergy and people, are called abbots or prelates *nullius, viz.*, of no diocese, according as their church is abbatial or simply prelatial.

An abbey or prelature *nullius*, which does not consist of at least three parishes, is ruled by special law, and the following canons do not apply to it.

It is evident that here the question of exemption would, at least partly, enter canonical discussion. However, this topic belongs formally to the tract on religious, to which we must therefore refer the reader for a fuller exposition. Here we will only state, with Benedict XIV, that there are three kinds of inferior prelates:

(1) such as are superiors of religious living within a monastery or convent with passive exemption from the jurisdiction of the Ordinary;

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(2) such as enjoy active jurisdiction over the clergy and people of a certain district within the limits of a diocese; and

(3) prelates with active jurisdiction over clergy and people living in a territory which is separated and distinguished by proper boundaries from the surrounding dioceses. The last-named class of prelates are abbots or prelates *nullius* (*dioeceseos*), and their right or title is acquired by Apostolic privilege or immemorial custom which bears all the marks of a juridical proof.[1] The *Annuario Pontificio* for 1917 enumerates four prelatures, eighteen abbeys, and one priory *nullius*.[2] One of the eighteen abbeys is St. Mary's, at Belmont, North Carolina. The Abbey of Einsiedeln, Switzerland, belongs to the class defined in § 2 of our canon, for its active exemption and jurisdiction extends only over the territory circumscribed by the walls of the monastery and over the clergy and people living within that precinct; therefore this latter abbey is ruled by special laws.

CAN. 320

§ 1. Abbates vel Praelati *nullius* nominantur et instituuntur a Romano Pontifice, salvo iure electionis aut praesentationis, si cui legitime competat; quo in casu ab eodem Romano Pontifice confirmari aut institui debent.

§ 2. Assumendi ad abbatiam vel praelaturam *nullius* iisdem qualitatibus ornati esse debent, quas ius in Episcopis requirit.

Abbots and prelates *nullius* are nominated and invested

1 *De Syn. Dioec.*, II, 11, 2 ff.

2 Page 283 ff., the priory being that of Ciudad Real in Spain belonging to the United Military Orders.

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by the Roman Pontiff, with due regard to the right of election or presentation lawfully belonging to another person; in which latter case they are confirmed or invested by the Roman Pontiff.

Those chosen to govern an abbey or prelature *nullius* must have the same qualifications which the law requires for bishops.

CAN. 321

Si cui collegio est ius eligendi Abbatem vel Praelatum *nullius* ad validam electionem requiritur numerus suffragiorum absolute maior, demptis suffragiis nullis, firmo peculiari iure quod maiorem suffragiorum numerum exigat.

As abbots or prelates *nullius* are classed with bishops, it is evident that the Pope is entitled to nominate them. However, the Code does not wish to curtail the acquired rights of others, be they physical or moral persons. The physical person generally is the patron, *e. g.*, the King of Spain concerning Ciudad Real; who *presents* a fit person for the vacant office. The right of *election* belongs to an electoral college, which must proceed according to the rules laid down in can. 160–178. However, if the constitutions or statutes of a college or chapter require it, the candidate must have two-thirds of the entire number of votes. On the other hand, any statute or constitution which admits only a relative majority, would now have to be discarded. If, for instance, there are forty electors and three candidates, one of whom receives twenty, the second eleven, the third nine votes, the election is null and void. As to the qualifications of candidates, can. 331 must be observed.[3]

[3] Gregory XIV, "Onus apostolicae," May 15, 1591, § 2.

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CAN. 322

§ 1. Abbas vel Praelatus *nullius* nequit quovis titulo sive per se sive per alios in regimen abbatiae vel praelaturae se ingerere, antequam eiusdem possessionem ceperit, ad normam can. 334, § 3.

§ 2. Abbates vel Praelati *nullius* qui ex praescripto apostolico vel ex propriae religionis constitutionibus benedici debent, intra tres menses a receptis litteris apostolicis, cessante legitimo impedimento, benedictionem ab Episcopo, quem maluerint, accipiant.

§ 1 strictly prohibits any interference in the spiritual or temporal government of an abbey or prelature *nullius* by the candidate-elect before he has received the Apostolic letters confirming his election. But suppose the election fell upon the administrator or vicar-capitular, what then? In that case, as Pius IX has decided,[4] a new administrator should be chosen by the electoral college. Our Code, mitigating the Constitution of Pius IX just quoted,[5] inflicts the penalty of suspension of the right of election *ad beneplacitum,* if the electors allow the candidate elected or presented to interfere before he has received the Apostolic letters notifying him of his appointment. One who acts against this law is declared unable to obtain the prelacy.[6] But can. 334, § 3 permits an administrator who is elected bishop, to continue in the office of administrator.

As to the blessing of abbots or prelates *nullius,* the Code speaks conditionally, *viz.,* if an Apostolic mandate or statute requires the same. Up to a few years ago the Cassinese abbots, three[7] of whom are abbots *nullius,*

4 "Romanus Pontifex," Aug. 28, 1873.

5 According to the Const. just quoted, excommunication *speciali modo* reserved was inflicted.

6 Can. 2394.

7 Those of Monte Cassino, S. Paolo Roma, SS. Trinità della Cava de' Tirreni.

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were never blessed, because being chosen *ad tempus,* for special reasons, they simply took possession of their abbeys after being confirmed. An abbot must be blessed by a bishop, not by an abbot.[8]

CAN. 323

§ 1. Abbas vel Praelatus *nullius* easdem potestates ordinarias easdemque obligationes cum iisdem sanctionibus habet, quae competunt Episcopis residentialibus in propria dioecesi.

§ 2. Si charactere episcopali non sit ornatus et benedictionem, si eam recipere debet, receperit, praeter alia munera quae in can. 294, § 2 describuntur, potest quoque ecclesias et altaria immobilia consecrare.

§ 3. Quod attinet ad Vicarii Generalis constitutionem, serventur praescripta can. 366–371.

As to § 1 we may mention[9] that some abbots seem to have exempted themselves from the duty of visiting the tombs of SS. Peter and Paul at stated times. The Code, following the law laid down by Benedict XIV, enjoins on abbots and prelates *nullius* the same obligations which are incumbent on residential bishops, including the *visitatio ad limina.*

§ 2 appears somewhat misleading, because there are two conditions in one sentence: if not endowed, and if obliged to receive the blessing, as if the blessing were a necessary qualification for obtaining the rights mentioned. We believe the meaning to be that abbots who are not bishops may perform the functions allowed to vicars and prefects Apostolic — for these are mentioned in can. 294, § 2 —

8 S. Rit. C., March 8, 1617; Barbosa, *Summa Apost. Decis., s. v.* "Abbas," n. 8.

9 Cfr. Benedict XIV, "Quod sancta," Nov. 23, 1740, §§ 3, 5, 6; "Firmandis," Nov. 6, 1744, § 12.

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but that this does not apply to those abbots who are under obligation to receive the blessing and, against the Apostolic injunction or proper statutes, fail to receive it. As a penalty for their disobedience they are deprived of prerogatives which they would otherwise enjoy, and which such abbots as are not bound to receive the blessing enjoy unconditionally.

We may here draw attention to our explanation of can. 294, § 2, where we said that Apostolic vicars and prefects are not entitled to consecrate churches and immovable altars. Can. 323, § 2 adds to the privileges enjoyed by vicars that of consecrating churches and altars as granted to the abbots or prelates *nullius,* who therefore are more privileged than vicars and prefects.

Can. 324

Capitulum religiosum abbatiae vel praelaturae *nullius* regitur propriis legibus ac constitutionibus; Capitulum saeculare, iure communi.

Concerning religious chapters and their constitutions, note must be taken of can. 489, which ordains that particular constitutions conflicting with the present Code are to be looked upon as abrogated.

Can. 325

Abbas vel Praelatus *nullius,* licet charactere episcopali careat, utitur tamen in proprio territorio insignibus pontificalibus cum throno ac baldachino et iure ibidem officia divina pontificali ritu celebrandi; crucem autem pectoralem, annulum cum gemma, ac pileolum violaceum potest etiam extra territorium deferre.

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Abbots and prelates *nullius,* though not consecrated bishops, enjoy within their own territory the right of wearing the pontifical insignia with throne and canopy, and of celebrating pontifical functions; outside their territory, they may wear the pectoral cross, a ring set with a precious stone, and a violet skull-cap.

The canon limits the pontifical functions of these prelates to their own territory, outside of which they are not allowed to pontificate, unless the Ordinary of the diocese grants permission.[10]

CAN. 326

Si praelatura saecularis Capitulo careat, eligantur consultores ad normam can. 423–428.

CAN. 327

§ 1. Abbatia vel praelatura *nullius* vacante, si agatur de abbatia vel praelatura religiosa, succedit Capitulum religiosorum, nisi constitutiones aliud ferant; si de saeculari, Capitulum canonicorum; utrumque autem Capitulum intra octiduum debet Vicarium Capitularem deputare ad normam can. 432 seqq., qui abbatiam vel praelaturam regat usque ad novi Abbatis vel Praelati electionem.

§ 2. Abbatia vel praelatura impedita, servetur praescriptum can. 429.

During the vacancy of an abbey or a prelature belonging to religious, the chapter of religious succeeds in the government, unless the Constitutions provide otherwise; to a vacant secular abbey or prelature, the chapter of

10 S. Rit. C., Dec. 6, 1631; Barbosa, *Summa, Dec. Ap., s. v.* "Abbas," n. 28; cfr. can. 337.

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canons succeeds; however, both chapters are obliged within eight days from date of notice of the vacancy, according to can. 432 ff., to elect a vicar-capitular, who shall rule the abbey or prelacy until a new abbot or prelate is elected.

If an abbey or prelature is *impedita,* let canon 429 be observed.

These canons will be treated in their proper places further down.

Can. 328

Circa Romani Pontificis Familiares, sive praelati titulo gaudeant, sive non, standum privilegiis, regulis et traditionibus pontificiae Domus.

The term *familiares* (dependants) of the Roman Pontiff excludes the so-called palatinate Cardinals, who would otherwise belong to the *familia pontificia.* The latter term first included all persons belonging to the Papal Court, but towards the end of the fifteenth century it came to be a special distinction or honor granted to certain persons who stood in a special relation to the palatinate clergy.[11] Now the *palatinate* clergy really meant those clerics who served the *palatium Lateranense,* or Lateran palace. But in course of times various papal officials and tribunals (*Rota* and *Signatura*) were detached from the palatinate clergy and attached to the Papal Court.[12] According to the *Annuario Pontificio* for 1917 the following belong to the *Familia Pontificia:* two Cardinals palatinate, the Maggiordomo, the Maestro di Camera, the Vicar-Prefect of the Sacred Apostolic Palaces, the Auditor of the Pope, the Master of the Sacred

11 *Annuario Pontificio,* 1917, p. 559.

12 Phillips, *K.-R.,* 1864, Vol. VI, 333 ff.

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Palace, the secret Chamberlains *participantes,*[13] the Domestic Prelates in great number, the secret Chamberlains supernumerary, also in great number, the Chamberlains with the purple dress (*pavonazzo*) in and outside of Rome, and finally the secret chaplains in and outside the City.[14]

13 After that would follow the *camerieri di spada e cappa,* who, however, are all secular persons.

14 *Annuario Pontificio,* 1917, p. 455 ff.; Pius X, "Inter multiplices," Feb. 21, 1905.

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TITLE VIII

THE EPISCOPAL POWER AND THOSE WHO PARTAKE THEREOF

After treating of the supreme power in the Church and those who stand either in a proximate or a remote relation to the Sovereign Pontiff, the Code proceeds to deal with the episcopal power and those who partake thereof. The whole preceding title considered only prelates immediately connected with the Papal Court. This is intelligible, because all the ranks of the hierarchic order so far enumerated, with the exception of the Primacy itself, are of ecclesiastical institution, and, so to speak, ramifications of the central power.

Now a new title starts, treating of an institution which, though dependent on the supreme power, exists not by mere permission or authority of the Roman Pontiff, but by divine right and ordination.

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CHAPTER I

THE BISHOPS

CAN. 329

§ 1. Episcopi sunt Apostolorum successores atque ex divina institutione peculiaribus ecclesiis praeficiuntur quas cum potestate ordinaria regunt sub auctoritate Romani Pontificis.

§ 2. Eos libere nominat Romanus Pontifex.

§ 3. Si cui collegio concessum sit ius eligendi Episcopum, servetur praescriptum can. 321.

After what has been said under cc. 100 and 216, only a few remarks remain to be added.

The names *episcopus* and *sacerdos* occur promiscuously up to the third century, and even at the time of St. Gregory the Great, bishops were called *consacerdotes,* which is not surprising, since the bishops are priests in the fullness of the word, who have received the plenitude of the priesthood and jurisdiction over a determined territory, generally called diocese. Hence bishops were also styled *dioecesani.*

Two characteristics distinguish the bishop from the simple priest: the fullness of the priesthood and the power of jurisdiction *in foro externo.* The former, *potestas ordinis,* consists chiefly in the right of administering the Sacraments of Confirmation and Holy Orders and performing pontifical consecrations and blessings. The

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potestas iurisdictionis is *ordinary,* because *ipso facto* attached to the episcopal office, wherefore the bishop is also called *Ordinarius* (*i. e., iudex*) of his diocese. However, the episcopal jurisdiction is subject to the power of the Sovereign Pontiff, and hence is neither *plena* nor *independens,* but limited, first to the diocese (locally) and, secondly, in regard to subject-matter (materially), especially by reserved cases and limited dispensations, as also by co-called *causae maiores.*

From this we must conclude: (1) that whereas the *potestas ordinis* is equal in the bishops and the Pope, the latter is superior to the bishops as to the *potestas iurisdictionis;* (2) that bishops are superior to ordinary priests both in power, order, and jurisdiction. These conclusions are *de fide.*[1] The opinion of St. Jerome[2] concerning the equality of bishops and priests, and the false views of William a Sancto Amore are of purely historical interest.[3] The Code merely says that the bishops are by divine right placed over single dioceses. This expression appears to us not well chosen. For local organizations are not of divine institution, and therefore single dioceses cannot correctly be said to be ruled by the bishops in virtue of a divine ordinance. The truth is that, by virtue of their episcopal consecration, bishops are radically (*aptitudinaliter*) qualified to rule a diocese assigned to them by the Pope. Jurisdiction, of course, no matter how we conceive it to be conferred, whether immediately by God through consecration, or mediately through the Pope, can neither validly nor licitly be exercised without a canonical mission, which, on account of the monarchical principle of the Church,

1 *Vatic.,* Sess. IV, c. 3; *Trid.,* Sess. 23, cap. 4; can. 7 f. (Denzinger, *l. c.,* nn. 1672 ff. nn. 837, 844 f.).

2 *Comm. in Titum,* I; *Ep. ad Ocean.* 69, 1; ep. 146 *ad. Evang.* 1.

3 Bouix, *De Parocho,* 1855, p. 65 f.

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must be imparted by the supreme head. Therefore, also, episcopal consecration is, according to modern law,[4] reserved to the Pope, who has moreover the exclusive right of confirming bishops.[5]

§ 3 of our canon mentions the election of bishops, which followed, as we shall see under chapter V (Diocesan Chapters), the investiture, which the diocesan chapters, with the approval of the Holy See, vindicated to themselves. The Decretals mention this mode of providing for a vacant diocese, not as a particular concession of the Holy See, but rather as a matter-of-fact and the usual thing.

QUALITIES REQUIRED IN A BISHOP

CAN. 330

Antequam quis in Episcopum assumatur, constare debet, secundum modum a Sede Apostolica determinatum, eum esse idoneum.

Can. 331

§ 1. Ut quis idoneus habeatur, debet esse:

1.° Natus ex legitimo matrimonio, non autem legitimatus etiam per subsequens matrimonium;

2.° Annos natus saltem triginta;

3.° A quinquennio saltem in sacro presbyteratus ordine constitutus;

4.° Bonis moribus, pietate, animarum zelo, prudentia, ceterisque dotibus praeditus, quae ipsum aptum

4 Schemier, *Jurisprud. Eccl. Civilis*, l. I, tr. 3, c. 1, n. 569; *Pontificale Rom.*, tit. de consec. electi.

5 Benedict XIV, "*In postremo*," Oct. 20, 1756, § 15; but historians would put at least a sign of interrogation after the word "restituta," used in the paragraph quoted; even the Decretals speak of election as something usual and legal; cc. 46, 48, 50, 57, X, I, 6 de electione.

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efficiant ad gubernandam dioecesim de qua agitur;

5.° Laurea doctoris vel saltem licentia in sacra theologia aut iure canonico potitus in athenaeo aliquo vel in Instituto studiorum a Sancta Sede probatis, vel saltem earundem disciplinarum vere peritus; quod si ad religionem aliquam pertineat, a suis Superioribus maioribus vel similem titulum vel saltem verae peritiae testimonium habeat.

§ 2. Etiam electus, praesentatus vel quoquo modo ab illis designatus, qui privilegio a Sancta Sede concesso eligendi, praesentandi seu designandi gaudent, debet memoratis qualitatibus pollere.

§ 3. Iudicare num quis idoneus sit, ad Apostolicam Sedem unice pertinet.

CAN. 332

§ 1. Cuilibet ad episcopatum promovendo, etiam electo, praesentato vel designato a civili quoquo Gubernio, necessaria est canonica provisio seu institutio, qua Episcopus vacantis dioecesis constituitur, quaeque ab uno Romano Pontifice datur.

§ 2. Ante canonicam institutionem seu provisionem candidatus, praeter fidei professionem de qua in can. 1406–1408, iusiurandum fidelitatis erga Sanctam Sedem edat secundum formulam ab Apostolica Sede probatam.

No one, says can. 330, shall be appointed a bishop, unless his fitness is proved according to the rules prescribed by the Apostolic See. It also mentions the *processus informativus*[6] or investigation into the qualifications of candidates for the episcopal office. This is now conducted by the S. C. Consistorialis. For appointments to bishop-

[6] *Trid.*, Sess. 24, c. 1 de ref.

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rics outside of Italy, the Secretary of State gathers the necessary documents, makes up what is called the "position" of the case, and then proposes it to the full Congregation. According to a decree of July 25, 1916, of the same Congregation [7] the names and qualifications of candidates for American sees, after being passed upon by the bishops and the metropolitan of the province, must be forwarded to the Secretary of State.

Canon 331 states some of the *qualities* which are required in episcopal candidates over and above those demanded for the priesthood.

(1) The candidate must be of *legitimate birth*. Legitimation by a subsequent marriage is not sufficient. This is a stricter regulation than was usually admitted by authors.[8] It means that at the time the candidate was born, his parents must have lived in lawful wedlock.

(2) The candidate must be thirty years of age and in *sacred orders* or the priesthood. As to age, the old law [9] was not quite determined up to the Decretals,[10] and the Tridentine Council did not fix the precise age, but simply referred to the canons.[11] And as to the time during which one had to be in sacred orders, the Council required only six months. The new Code requires five years.

(3) The *moral qualifications* are more detailed in our canon than in the Tridentine decrees.[12]

(4) As to *scientific equipment*, the Code closely follows the enactments of Trent, but inserts "*vere peritus*" to determine more definitely the Tridentine decree which says that if an academic degree is wanting, "at least the

7 *A. Ap. S.*, 1916 (VIII), p. 400 ff.

8 Cfr. Barbosa, *De Officio et Potestate Ep.*, P. II, alleg. 1, nn. 33 ff.

9 C. 3, dist. 77 required 45 years; c. Dist. 51 only 30 years.

10 Cc. 7, 19, X, I, 6 de electione.

11 Sess. 22, c. 2 de ref.

12 *Ib.* and Sess. 24, c. 1 de ref.

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public testimony of an academy should declare the candidate fit to teach others." It is not probable now-a-days that, as in the time of Honorius III (1216–1227), a bishop should be unable to read the grammar or "Donatus," [13] but the standard of scholarship laid down by the Code must be insisted upon. For, as Barbosa says, a bishop without learning is like a ship without a rudder, a clock without weights, a hen without wings.[14] A bishop should be particularly "well versed" in theology and canon law because the former governs the court of conscience, while the latter is required for the *forum externum.*

The *superiores maiores* of a candidate who belongs to a religious order or congregation are the Abbot Primate, the Abbot President, the Abbot, the Superior General, or the Provincial.[15]

The same qualities are required for all candidates for episcopal sees, no matter whether they are elected, presented, or designated, for the law [16] makes no distinction. Nor is there any reason for granting an exemption when the public welfare is concerned, since these qualities are prescribed not merely for the persons, but for the office, which is one of great dignity and importance. Nothing, says Innocent III, is more offensive to the Church of God, than unworthy prelates ruling souls.[17] The Roman Pontiff alone is competent to judge whether or not the qualities described in the papers relating to the *processus informativus* are sufficient. Of course, in case of necessity or utility the Pontiff may dispense with some of the required qualifications.[18]

13 C. 15, X, I, 14.

14 *De Officio et Pot. Ep.*, P. II, alleg. 1, n. 25.

15 Can. 488, 8°; cfr. *Trid.*, Sess. 22, c. 2 de ref.

16 Cfr. cc. 1, 3, X, I, 5; cc. 7, 18, 44, 53, X, I, 6; *Trid.*, Sess. 24, c. 1 de ref.

17 C. 44, X, I, 6.

18 *Ib.* and c. 19, X, I, 6; Pius X, Allocutio "Duplicem," Nov. 14, 1904.

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Can. 332 rejects the claim of the so-called regalists that the right of presentation includes investiture, and that consequently a bishop can enter upon the government of his diocese without papal investiture and documents.[19] The contrary is true. Only by ratification on the part of the Apostolic See can one become a bishop or Ordinary of a diocese. This confirmation is preceded by two acts: the *profession* of faith and the *oath* of allegiance to the Church. The oath must be taken before an Apostolic Delegate, personally and not by proxy.[20] If the consecration is performed in virtue of Apostolic letters, the *oath of fidelity or loyalty* is taken into the hands of the consecrator.[21] This is that "fearful" (!) oath which most probably Pope Gelasius I (492–496) prescribed for the suburbicarian bishops, and which St. Boniface, the Apostle of Germany, made into the hands of Gregory II, which did not, however, prevent him from making remonstrances to Pope Zachary.[22]

CAN. 333

Nisi legitimo impedimento prohibeatur, promotus ad episcopatum, etiamsi S. R. E. sit Cardinalis, debet, intra tres menses a receptis apostolicis litteris, consecrationem suscipere, et intra quatuor ad suam dioecesim pergere, salvo praescripto can. 238, § 2.

Unless prevented by a lawful obstacle, one promoted to a bishopric, even though he be a cardinal of the Holy Roman Church, must within three months after receiving the Apostolic letters receive consecration, and within

19 Pius IX, Allocutio, "Nunquam fore," Dec. 15, 1856; Syllabus, n. 50 (Denzinger, n. 1598); "Romanus Pontifex," Aug. 28, 1873; cfr. c. 18, X, I, 6; Reg. Iuris I in 6°; c. 5, Clem. I, 3.

20 Can. 1406 f.

21 *Pontificale Rom.*, De Consecr. Electi in Episcopum: Forma juramenti.

22 Cf. Alzog, *Manual of Church History*, 1876, II, p. 114.

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four months take up residence in his diocese. The cardinal-bishops of the suburbicarian sees are the only ones exempted from this rule. The text is based upon an old law,[23] and its meaning is evident, with the possible exception of the time within which a newly consecrated bishop must go to his diocese. For it might be construed either that the four months run from the date of consecration, or that they must be counted from the date of having received the Apostolic letters of confirmation. In the first case seven months would be granted, in the latter only four. We believe that the latter interpretation is the correct one, because otherwise the clause would have no proper starting point; and hence the omission of the *terminus a quo* in the last clause must be supplied from that of the first or, "*a receptis litteris.*" This seems still more probable if we consider the omission of the word "months" in the last clause.

DUTIES AND RIGHTS OF BISHOPS

CAN. 334

§ 1. Episcopi residentiales sunt ordinarii et immediati pastores in dioecesibus sibi commissis.

§ 2. In regimen dioecesis neque per se neque per alios, nec ullo sub titulo sese ingerere possunt, nisi prius eiusdem dioecesis possessionem canonice ceperint; sed si ante suam ad episcopatum designationem vicarii capitulares, officiales, oeconomi fuerint renuntiati, haec officia etiam post designationem retinere et exercere possunt.

§ 3. Canonicam dioecesis possessionem capiunt Episcopi residentiales simul ac in ipsa dioecesi vel per se

[23] Ce. 7, 44, X, I, 6; *Trid.*, Sess. 7, c. 9, de ref; Sess. 23, c. 2 de ref.

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vel per procuratorem apostolicas litteras Capitulo ecclesiae cathedralis ostenderint, praesente secretario Capituli vel cancellario Curiae, qui rem in acta referat.

Bishops are the judges-in-ordinary of their respective districts, because their power accrues to them in virtue of the episcopal office, not by mere delegation. What the term *immediate,* taken from the decrees of the Vatican Council,[24] means is to be determined by the bishop's dependence upon the supreme authority of the Church on the one hand, and by his independence of any secular or clerical power on the other. Pius X complained against the illegal procedure of the government of Portugal, which tried to separate clergy and people from the centre and subject them to its own power.[25] The episcopal power, though it may be offered by electors or patrons, is not conferred by them, but by the Sovereign Pontiff, and is attached to the office. *Immediate* in the truest sense would mean that the episcopal power is the result of consecration. But it is hardly probable that the Code intends to settle a controversy which has been debated for a long time and with an excess of zeal by canonists.[26] Probably the term here only means that, aside from papal interposition, no other power on earth shares in the bestowal of episcopal jurisdiction.

With regard to his inferiors, the bishop of a diocese is their free and independent judge, and not responsible to them, but subject only to the supreme lawgiver and the common law of the Church.[27]

The next paragraph emphasizes that a bishop elect, even after he is confirmed, should not interfere in dio-

24 Sess. IV, c. 3 (Denzinger, *l. c.* n. 1674).

25 "Iamdudum," May 24, 1911 (*A. Ap. S.*, III, 217 ff).

26 Cf. Benedict XIV, *De Syn. Dioec.*, I, 4, 2.

27 Aichner, *l. c.*, § 115, 3, c.

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cesan matters before he has taken canonical possession of his see.[28] Stress is here laid, as the quotations of Card. Gasparri show, on the Apostolic letters of Pius IX against the regalistic tendencies which tried to subvert the organization of the Church in favor of civil governments.[29] But the old law already opposed such encroachment.[30]

Our canon permits a candidate elected and confirmed to a bishopric to continue in the office of administrator or official (can. 1573), if he held these offices before his appointment to the episcopate. As bishop elect, however, he cannot accept any such office.

The act of taking juridical (not liturgical) possession of a see is performed in the chapter (*in capitulo*). In our country this means that the consultors, who take the place of the chapter as far as this forms the senate of the bishop,[31] must meet to hear or inspect the papal document. The chancellor of the diocese, who acted as such under the preceding bishop, must be present, in order to make a record of the proceeding.

CAN. 335

§ 1. Ius ipsis et officium est gubernandi dioecesim tum in spiritualibus tum in temporalibus cum potestate legislativa, iudiciaria, coactiva ad normam sacrorum canonum exercenda.

§ 2. Leges episcopales statim a promulgatione obligare incipiunt, nisi aliud in ipsis caveatur; modus autem promulgationis ab ipsomet Episcopo determinatur.

28 See can. 322.

29 "Nunquam fore," Dec. 15, 1856; Syllabus, n. 50; "Romanus Pontifex," Aug. 28, 1873.

30 Cc. 9, 17, 23, X, I, 6; c. 5, 6°, I, 6; c. 1, Extrav. Comm. I, 3.

31 Can. 427.

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CAN. 336

§ 1. Observantiam legum ecclesiasticarum Episcopi urgeant; nec in iure communi dispensare possunt, nisi ad normam can. 81.

§ 2. Advigilent ne abusus in ecclesiasticam disciplinam irrepant, praesertim cira administrationem Sacramentorum et Sacramentalium, cultum Dei et Sanctorum, praedicationem verbi Dei, sacras indulgentias implementum piarum voluntatum; curentque ut puritas fidei ac morum in clero et populo conservetur, ut fidelibus, praecipue pueris ac rudibus, pabulum doctrinae christianae praebeatur, ut in scholis puerorum ac iuvenum institutio secundum catholicae religionis principia tradatur.

§ 3. Circa praedicationis munus, servetur praescriptum can. 1327.

About these two canons many pages might be written. The new Code has rendered a great service to the bishops as well as to canonists, as the former have in it a guide-book through the labyrinth of canon law, while the latter are allowed to refer to the respective canons. Yet some observations will not be superfluous.

(1) The bishops, in virtue of their office, enjoy *legislative power* within the limits of the common law, from which, however, they may dispense under certain conditions. These conditions are laid down in canon 81, which says that a bishop cannot dispense even in individual cases unless this power has been given to him either explicitly (by a faculty), or implicitly in virtue of a special office connected with that of Ordinary. Implicitly may also mean that the law itself grants the power of dispensation in certain cases. And, indeed, our Code

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mentions several instances in which Ordinaries may grant dispensations which would otherwise be beyond their power. Thus they may dispense from examinations those who are distinguished in theological science [82]; they may dispense from occult irregularities,[83] from the banns of marriage,[84] from impediments of ecclesiastical law in certain cases,[85] and from fasting and the observation of feasts in peculiar circumstances.[86]

But, as noticed under can. 81, there is another category of cases in which bishops may dispense, *viz.*: if the three conditions mentioned there occur. Hence if the law, on the one hand, is sufficiently explicit as to the power of dispensation, it is also strict in limiting the use of that power.[87]

Here let us state that, without solid reasons, Ordinaries cannot validly dispense in common law. Laxity in that regard would subvert ecclesiastical discipline, endanger the hierarchy, and invite schism, such as the pseudo-council of Pistoja tried to bring about.[88]

In what, then, does the legislative power of the bishops consist? Being the guardians, not the authors, of the common law of the Church, they have to watch over its enforcement.[89] They may furthermore make new decrees in matters which the common law has overlooked or left undetermined, for in that case an episcopal decree is not against, but beyond the law. Thus, for instance, the common law [40] ordains in a general way that children

82 Can. 459, § 3.
83 Can. 990.
84 Can. 1028.
85 Can. 1043, 1045.
86 Can. 1245.
87 Can. 85. The S. C. Cons. (Apr. 25, 1918) has abolished certain faculties (*Acta Ap. Sedis*, X, 190 ff.), of which we shall treat in an appendix.
88 Pius VI, "Auctorem fidei," nn. 7, 74 (Denzinger, *l. c.*, nn. 1370, 1437).
89 Benedict XIV, *De Syn. Dioec.*, XII, *passim*.
40 *Rituale Rom.*, tit. 9.

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should be brought to church for baptism as soon as possible. Here the bishop may determine the precise time. He may also determine more accurately the common law rules concerning clerical dress and conduct. He may abolish customs contrary to the common law and proper to his diocese only; although, as Benedict XIV says, he should be cautious in abrogating long standing traditions tolerated by the Church.[41] However, a bishop would exceed his power were he to demand of *ordinandi* the so-called five-year pledge under threat of refusing them Holy Orders. For such an ordinance would be tantamount to establishing an irregularity, which bishops cannot do.[42]

(2) The *judiciary power* of the Ordinary extends to all ecclesiastical matters brought before his court, which are not specially reserved to the Holy See. Reserved are all *causae maiores,* as noted above,[43] as well as the foundation of religious communities and the approbation of their constitutions.[44] Otherwise bishops are judges-in-ordinary of the first instance, and therefore every bishop must establish a diocesan court and finish cases brought before him within the time prescribed by law.[45] Besides, at canonical visitations he may issue enactments and rules for correction, from which appeal can be made only *in devolutivo.*[46] Lastly, they may reserve cases to themselves, but only a few, at most four.[47]

The *place* where a bishop can exercise his judiciary power, in cases of contentious jurisdiction, is his whole

41 Bened. XIV, *l. c.,* XII, 7, 4; XI, cc. 10 ff.; XI, cc. 1–3.

42 This is the opinion of a Roman canonist whom we consulted about the matter.

43 Can. 220.

44 Can. 492.

45 Can. 363 f.; can. 1709.

46 Benedict XIV, "Ad militantis," March 30, 1742; can. 345.

47 Can. 897.

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diocese (barring places exempted); whilst extra-judicial or voluntary jurisdiction may be exercised even outside the diocese.[48]

(3) The *coercive power* of a bishop consists in inflicting ecclesiastical penalties on such as are contumaciously delinquent and recalcitrant. Here especially the censures are to be noted. They are either established by law or directly inflicted by the Ordinary. The Code admonishes bishops to be moderate and very circumspect in wielding this power.[49] To inflict canonical penalties without weighty reasons would diminish episcopal authority and provoke contempt of the bishop.[50] Temporal punishments, especially fines, forfeiture of revenues, etc., unless permitted by law, should be sparingly used.

(4) Regarding the *administrative power* of a bishop, he is the dispenser and steward of all the church property within his jurisdiction, *i. e.*, so far as not exempt by law, and as such must watch over the diocese.[51] Here we deem it well to call attention to the late decree of the S. C. Council, which says that bishops should not hold church property in fee simple, but have it acknowledged by the State as vested in parish corporations or a corporation sole, to be administered by the bishop with the coöperation of trustees and the diocesan consultors.[52] The bishop is furthermore entitled and obliged to demand an account of priests or administrators, and to see to it that testaments are properly executed.[53]

As to *civil laws,* note that some States of our Union restrict the amount of property that a church or religious society may hold, and the use to which it is put, whereas

48 Cfr. c. 7, 6°, I, 16; can. 201.
49 Can. 2241.
50 *Trid.*, Sess. 25, c. 3 de ref.; Benedict XIV, *De Syn. Dioec.*, v, 5, 5.
51 Can. 1519.
52 July 29, 1911 (*Am. Eccl. Rev.*, Vol. 45, 586).
53 Can. 1520 ff; *Trid.*, Sess. 22, cc. 9, 11 de ref.; can. 1515.

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other States have no restrictions. Nearly all States, however, have some statutory laws, which must be observed as far as they do not conflict with ecclesiastical laws.[54] A deed of land to the bishop for a church in fee simple creates a trust, and on the death of the bishop, the title passes to his successor.[55] As to cemeteries, the civil laws generally acknowledge ecclesiastical jurisdiction.[56]

As regards the *exactions* the bishop is entitled to make, see can. 1504–1507.

(5) The bishop's *ius vigilantiae,* according to canon 336, is exercised by watching that no *abuses* creep into:

(a) The *administration of the Sacraments and Sacramentals,* which should take place according to the *Rituale Romanum.* No diocesan ritual should be used, unless it has the special approbation of the Holy See (S. Rit. C.). Bishops may approve editions of Roman liturgical books, if they are in strict concordance with the original text. Their approval is simply testifying to the correctness of the reprint. Bishops may also approve and publish a diocesan calendar with feasts prescribed for the universal church or for their diocese especially. Besides, they may set the hour of divine service more precisely. For the rest the third book contains explicit instructions.

(b) The *divine worship* and the *veneration of saints* might be endangered by tolerating devotions not approved by the Church, or by the exhibition of strange images and unusual representations, drawing an aureole around the head of one not yet beatified or canonized, etc.[57] The bishops might, at times, profitably say a word about pictures, sculptures, and architectural designs.

54 Scanlan, *The Law of Church and Grave,* 1909, n. 304; C. Zollmann, *American Civil Church Law,* 1917.

55 Scanlan, n. 287.

56 *Ibid.,* n. 454.

57 *Trid.,* Sess. 25, de invoc., venerat., etc.

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(c) As to *indulgences,* see the rules laid down in can. 911 ff.

(d) Concerning the *purity of faith and morals,* the rules on the censorship of books are of special importance.[58] Of course, bishops are not infallible judges in matters of faith and morals and cannot singly define articles of faith, and therefore they should abstain from endeavoring to settle dogmatical controversies which the Church has not yet decided.[59]

(e) About *schools,* the Code gives some important rules in can. 1375 ff., and it is not necessary to repeat the injunctions of popes and councils touching that matter. Leo XIII in the beginning of his pontificate,[60] addressed all the bishops of the Church, saying: "Your duty, Venerable Brethren, is to take every care that the seed of celestial doctrine be sown throughout the field of the Lord, in order that the minds of the faithful may be deeply imbued with the Catholic truths and firmly rooted and preserved from error." He went on to urge upon the bishops the necessity of giving a solid Catholic training to the young.

(f) As to *preaching,* the new Code merely reiterates the old precept that bishops must preach the word of God and also see to it that the pastors do their duty in this important matter.[61]

PONTIFICAL FUNCTIONS

CAN. 337

§ 1. Episcopus in tota dioecesi, ne exceptis quidem

58 Can. 1384 ff.

59 Benedict XIV, *De Syn. Dioec.,* VII, 11, 2.

60 "Inscrutabili," April 21, 1878.

61 II Tim. 4, 2; Acts 6, 2; Benedict XV, "Humani generis," June 15, 1917; cfr. can. 1327.

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locis exemptis, potest pontificalia exercere; non vero extra dioecesim sine expresso vel saltem rationabiliter praesumpto consensu Ordinarii loci, et, si agatur de ecclesia exempta, de consensu Superioris religiosi.

§ 2. Exercere pontificalia in iure est sacras functiones peragere quae ex legibus liturgicis requirunt insignia pontificalia, idest baculum et mitram.

§ 3. Episcopus, licentiam concedens pontificalia exercendi in suo territorio, potest quoque permittere usum throni cum baldachino.

That a bishop may perform pontifical functions which require the use of the pastoral staff and mitre, even in the exempt churches of his diocese, has been decided by several congregations. Thus the S. C. EE. et RR. answered on July 10, 1603, that a bishop may employ censures if regulars refuse him that right.[62] Outside his diocese, however, a bishop needs the consent of the respective Ordinary. This consent may reasonably be presumed if the Ordinary is absent and has never objected to outside bishops pontificating in his diocese. However, if the church belongs to exempt religious outside his own diocese the consent must be expressed, because in that case the Ordinary[63] has no power to give his consent, and the religious superior is not supposed to permit a stranger to exercise pontifical functions, in order not to establish a precedent.

Pontifical functions, says the Code, are such as require the use of the *pastoral staff and mitre,* hence, the conferring of Holy Orders (even minor), Confirmation,

62 Barbosa, *Summa Decis. Apost.*, *s. v.* "Baldachinum."

63 We scarcely believe that the Code intends to enjoin two consents: that of the Ordinary and that of the religious superior, although "et" (and) would not exclude that interpretation; but the consent of the religious superior too may reasonably be presumed.

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blessing abbots, consecrating virgins,[64] consecrating chrism, sacred vessels, blessing sacred vestments, etc. Mitre and staff always go together and are things related to one another in the bishop's use, except, of course, in Masses *de requiem*.[65]

RESIDENCE

CAN. 338

§ 1. Etiamsi Episcopi Coadiutorem habeant, tenentur lege personalis in dioecesi residentiae.

§ 2. Praeterquam causa visitationis Sacrorum Liminum, Conciliorum, quibus interesse debent, vel civilis officii suis ecclesiis legitime adiuncti, abesse possunt aequa de causa non ultra duos vel ad summum tres menses intra annum, sive continuos sive intermissos, dummodo cautum sit ne ex ipsorum absentia dioecesis quidquam detrimenti capiat: quod tamen tempus coniungi nequit sive cum tempore sibi concesso occasione suae promotionis, vel visitationis Sacrorum Liminum, vel assistentiae Concilio, sive cum tempore vacationum anni subsequentis.

§ 3. Ab ecclesia cathedrali ne absint tempore Adventus et Quadragesimae, diebus Nativitatis, Resurrectionis Domini, Pentecostes et Corporis Christi, nisi ex gravi et urgenti causa.

§ 4. Si ultra sex menses e dioecesi illegitime abfuerint, Episcopum Metropolita, ad normam can. 274, n. 4, Metropolitam antiquior Suffraganeus residens Sedi Apostolicae denuntiet.

64 The phrase "*La consacra*," which frequently occurs in the regesta S. C. EE. et RR. means the solemn blessing of nuns (moniales) with solemn vows.

65 Cf. Benedict XIV, "*Ad audientiam*," Feb. 15, 1753, § 8; *Caeremoniale Episcoporum*, I, c. 17, nn. 4, 8.

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This canon deals with the important duty of *residence,* by which is understood not only material presence in the place of office, but also personal discharge of the duties involved. For offices are indeed attached to places, as the Council of Chalcedon (c. 6) enacted, but they are also generally conferred with regard to personal qualities (*de industria personae*). Hence this obligation may truly be said to have its foundation in divine law, although it is modified and further determined by ecclesiastical law.

The *place* where the bishop must reside is his diocese, but not necessarily the cathedral church. His presence in the latter is required only at certain times mentioned in § 3. In this point the old law [66] agrees with the new Code.

The law of residence obliges all residential bishops, as well as Cardinals who govern a diocese, with the exception of the six cardinal bishops of the suburbicarian sees.[67]

We may add that, according to canonists, residence in the diocese means attending to business, not merely looking on.

§ 2 allows a *three months' vacation,* as granted by the Tridentine Council.[68] This period does not include the canonical visit to the tombs of SS. Peter and Paul (a mere pleasure trip, even a pilgrimage, cannot be called *a visitatio ad limina*) nor the time spent at a council at which attendance is of obligation. (A friendly visit to a provincial or plenary council at which a bishop is not obliged to be present, because not belonging to that prov-

66 C. 19 ff, c. 25 f., C. 7, q. 1; c. 9, X, III, 4; *Trid.*, Sess. 6, c. 1; Sess. 23, c. 1 de ref.; Richter, *Trid.*, pp. 33 ff.; p. 178 ff.; Benedict XIV, "*Ad universae,*" Sept. 3, 1746.

67 Can. 238.

68 *L. c.*

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ince or country, could not be reckoned off). Lastly,—and this is intended mainly for countries (*e. g.*, Austria) in which the bishops are *ex officio* deputies to parliamentary assemblies — bishops are allowed to deduct from the three months allowed them for vacation the time they are in duty bound to spend outside their dioceses to attend parliamentary sessions. Foreseeing, however, human frailty and astuteness, or perhaps also good faith wrongly applied, the Code forbids any arbitrary interpretation as to the three months' period by stating that no combination or putting together is allowed, because that would protract a bishop's absence from his diocese.

No mention is made of lawful absence because of a civil office, for in that case circumstances are not at the command of the bishop.

Note that a vacation may not be prolonged by taking the last three months (Oct.-Dec.) of one year and the first three months (Jan.-March) of the following year and staying away six months in succession. All these questions were proposed to the S. Congregation under Urban VIII and solved as stated in the Code.[69]

§ 3 describes the *feasts* on which bishops must be at their *cathedral,* for they are pastors whose voice the faithful hear more willingly. From this duty they are excused only by an urgent and solid reason, such a one, says Benedict XIV, as will stand the test before the tribunal of the great Judge.[70]

§ 4 ordains that, if a bishop is unlawfully absent from his diocese for more than six months, the metropolitan must report him to the Holy See, and if he is himself a metropolitan, this duty devolves on the senior suffragan.

69 Benedict XIV, "*Ad universae,*" § Cum vero.

70 "*Ubi primum,*" Dec. 3, 1740, § 4.

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Reasons which would excuse such absence are, according to the Council of Trent:[71]

(a) *Christian charity,* for instance, preaching to infidels and heretics, or a lecture which cannot well be postponed; spiritual or bodily help to confrères and people in time of distress or calamity, such as war, earthquakes, etc.

(b) *Urgent necessity,* relating to his own person, for instance, persecution, ill-will of the people, or personal infirmity requiring a change of climate; however, the danger of contracting disease in times of epidemics and perils common to pastors and flock does not excuse the bishop from keeping residence;[72]

(c) *Obedience* to superiors, for instance, a call to Rome or to the Metropolitan, perhaps for a special meeting, trial, canonization, etc. To this class belong the *visitatio ad limina* and assistance at councils, as expressly stated in the Code;

(d) *Evident utility* of Church or State, for instance, as peacemakers, as extraordinary envoys or counsellors, as strike settlers, etc. However, if time permits, it is advisable to inform the metropolitan or the Apostolic See.[73]

Reports concerning the non-observance of the law of residence are to be made to S. C. Consistorialis.[74]

MISSA PRO POPULO

CAN. 339

§ 1. Debent quoque, post captam sedis possessionem, omni exiguitatis redituum excusatione aut alia quavis

71 *Trid.*, Sess. 23, c. 3; Sess. 24, c. 12; Benedict XIV, "*Ad universae.*"

72 Benedict XIV, "*Ad universae.*"

73 Wernz, *l. c.*, II, p. 557; p. 564 ed. 1; cfr. can. 465; 2168, 2175.

74 Can. 248, § 3.

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exceptione remota, omnibus dominicis aliisque festis diebus de praecepto, etiam suppressis, Missam populo sibi commisso applicare.

§ 2. In festo Nativitatis Domini, et si quod festum de praecepto in diem dominicam incidat, satis est ut Missam unam pro populo applicent.

§ 3. Si festum ita transferatur ut in die *ad quem* non solum fiat officium cum Missa festi translati, sed serventur quoque obligationes audiendi Missam et abstinendi a servilibus, Missa pro populo applicanda est in die *ad quem;* secus in die *a quo.*

§ 4. Episcopus Missam pro populo diebus supra indicatis per se ipse applicare debet; si ab eius celebratione legitime impediatur, statis diebus applicet per alium; si neque id praestare possit, quamprimum vel per se ipse vel per alium applicet alia die.

§ 5. Licet Episcopus duas vel plures dioeceses aeque principaliter unitas regat aut, praeter propriam dioecesim, aliam vel alias in administrationem habeat, obligationi tamen satisfacit per celebrationem et applicationem unius Missae pro universo populo sibi commisso.

§ 6. Episcopus, qui obligationi de qua in superioribus paragraphis, non satisfecerit, quam citius pro populo tot applicet Missas, quot omisit.

The first of these paragraphs is taken almost verbally from the Apostolic letter of Leo XIII, "*In suprema,*" June 10, 1882, where the Pontiff says that one of the duties of a pastor is to pray and offer sacrifice for his flock, and that this obligation, considered in general and not as to fixed days, is based on the divine law. The Code with the S. C. Concilii, insisting upon the Tridentine

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decrees,[75] authentically explains and extends this rule to all bishops and cardinals who govern a diocese, and to abbots and prelates *nullius*.

The *days* on which a bishop has to say Mass *pro populo* are Sundays, holydays of obligation celebrated *in foro et choro,* and such suppressed feastdays as are now celebrated only *in choro*. The feastdays *in foro et choro,* or holydays of obligation, are: New Year's Day, Ascension, Assumption of the Blessed Virgin, All Saints, Immaculate Conception, and Christmas (First Mass).[76] The suppressed feasts are: Epiphany, Purification,[77] St. Matthias, St. Joseph (March 19), Annunciation B. M. V., Monday and Tuesday after Easter, Monday and Tuesday after Pentecost, SS. Philip and James, Finding of the Holy Cross, Corpus Christi, St. John Baptist, SS. Peter and Paul, St. James, Nativity of the Blessed Virgin, St. Matthew, St. Michael (Sept. 29), SS. Simon and Jude, St. Andrew, St. Thomas, St. Stephen Protomartyr, St. John Evangelist, Holy Innocents, Pope St. Sylvester (Dec. 31).[78]

The rest of the canon needs no explanation, with the exception perhaps of two phrases. "*Si ab eius celebratione legitime impediatur*" (§ 4) does not mean that a bishop is unable to say Mass at all, but that he is not able to *apply* his Mass; for instance, he may have to say a Mass for a special intention, a funeral Mass, or a *missa pro sponso et sponsa,* or perhaps he has a *pingue stipendium* for that day and no other. All these and similar reasons are considered lawful, provided a bishop complies with the rest of the canon.—"*Aeque principaliter*

75 Sess. 23, cc. 1, 4 de ref.

76 Cfr. can. 1247, § 3.

77 Not Candlemass day, because the blessing of candles always takes place on Feb. 2, whereas the feast of the Purification may be transferred.

78 The compiler of the St. Louis Ordo, 1918, has wisely inserted this list (p. 22).

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unitae" are two dioceses which have been combined, but so that both remain intact and none is subject to the other.[79]

REPORTS TO THE HOLY SEE

CAN. 340

§ 1. Omnes Episcopi tenentur singulis quinquenniis relationem Summo Pontifici facere super statu dioecesis sibi commissae secundum formulam ab Apostolica Sede datam.

§ 2. Quinquennia sunt fixa et communia, atque computantur a die Ianuarii 1911; in primo quinquennii anno relationem exhibere debent Episcopi Italiae, insularum Corsicae, Sardiniae, Siciliae, Melitae, et aliarum minorum adiacentium; in altero, Episcopi Hispaniae, Portugalliae, Galliae, Belgii, Hollandiae, Angliae, Scotiae et Hiberniae, cum insulis adiacentibus; in tertio, ceteri Europae Episcopi, cum insulis adiacentibus; in quarto, Episcopi totius Americae et insularum adiacentium; in quinto, Episcopi Africae, Asiae, Australiae et insularum his orbis partibus adiacentium.

§ 3. Si annus pro exhibenda relatione assignatus inciderit ex toto vel ex parte in primum biennium ab inito dioecesis regimine, Episcopus pro ea vice a conficienda et exhibenda relatione abstinere potest.

On the last day of December, 1909, the S. C. Consistorialis issued a decree ("*A remotissima*") regulating the *visitatio ad limina* and the reports to be made in connection therewith. Canon 340 relates only to the latter.[80] It is a new law, in so far as the report is to some extent detached from the *visitatio,* and in regard to details.

79 Can. 1419, 30.

80 *A. Ap. S.*, II, p. 13 ff.

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What the canon means by "*communia*" (general) appears from the contrary; *i. e.*, the dates fixed oblige all the bishops comprised under a certain year, so that no exception or further specification is required. The year for our American bishops commenced on the first of January, 1914, and ended the last day of December, 1914, so that the next year in which they will have to make a report is 1919; then 1924, etc.

§ 3 says if a bishop has been governing his diocese only for two years when his turn comes for making his report to the Holy See, he may omit it. The reason is evident. A new bishop is hardly able to know the state of his diocese, especially if he has not yet visited all portions of it.

The decree of S. C. Consist. prescribes that the quinquennial report be made in *Latin*. The "*Ordo servandus in Relatione de Statu Ecclesiarum*" (fifteen chapters with 150 points) specifies what the report must contain, *viz.*: a survey of the material and spiritual state of the diocese, comprising the clergy, religious and pious institutes, and the faithful at large.[81]

VISITATIO AD LIMINA

CAN. 341

§ 1. Omnes et singuli Episcopi eo anno quo relationem exhibere tenentur, ad Urbem, Beatorum Apostolorum Petri et Pauli sepulcra veneraturi, accedant et Romano Pontifici se sistant.

§ 2. Sed Episcopis qui extra Europam sunt, permittitur ut alternis quinquenniis, idest singulis decenniis, Urbem petant.

81 *A. Ap. S.*, II, 17 ff.

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CAN. 342

Episcopus debet praedictae obligationi satisfacere per se vel per Coadiutorem, si quem habeat, aut, ex iustis causis a Sancta Sede probandis, per idoneum sacerdotem qui in eiusdem Episcopi dioecesi resideat.

The tombs of the princes of the Apostles were from the earliest times visited by the faithful and their pastors as a sign of veneration for the two founders of the Roman Church. Cajus, a presbyter of Rome, told the heretic Proculus: "I can show you the trophies of the Apostles." Two epitaphs testify to the custom of sacred visitation, notably that of Abercius, bishop of Hieropolis in Phrygia, who came to Rome to venerate the tombs of the Apostles towards the end of the second century.[82] Of course, the Italian bishops, who were immediately subject to the Bishop of Rome as their metropolitan, were more numerous and regular in making these visits. But it is also true that missionary bishops were sometimes summoned to Rome, whence they had received their mission. Since Paschal II (1099–1118) the metropolitans had to promise at the reception of the pallium to visit the *sacra limina* at stated intervals.[83] Later on all the bishops who were either directly or indirectly consecrated by the Pope had to comply with this obligation.[84] A more uniform discipline was ushered in when Sixtus V, in his Constitution "*Romanus Pontifex*," Dec. 20, 1585, ruled that all patriarchs, primates, metropolitans, and bishops should present themselves at regular intervals before the Roman Pontiff, to give counsel and make suggestions conducive to the betterment of ecclesiastical

82 Armellini, *Lezioni di Archeologia Cristiana*, 1898, p. 90 f; p. 225.

83 C. 4, X, I, 6.

84 C. 13, X, I, 33; C. 4, X, II, 24.

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conditions. Benedict XIV directed also the prelates and abbots *nullius* to make the *ad limina* visit.[85] He permitted bishops who were lawfully prevented from making the visit personally, to send a representative,— either a secular or regular dignitary, or a priest in good standing. This representative must report the reason why the bishop cannot come. Titular bishops are not obliged to make the visit, because the text binds only those who have to make a report.

In Rome, the bishops, after visiting the two churches of St. Peter (Vatican) and St. Paul (Via Ostiense), must present themselves in the sacristies of the two basilicas and inscribe their names in a book kept for that purpose.

The *relatio status* must be handed in at the Apostolic Chancery (Via Vittore Emmanuele) to the S. C. Congregatio Consistoralis.

During their visit,[86] the bishops must also present themselves to the Sovereign Pontiff, in order to pay their respects to the Vicar of Christ and, as stated above, to offer their counsels if asked for.

DIOCESAN VISITATIONS

CAN. 343

§ 1. Ad sanam et orthodoxam doctrinam conservandam, bonos mores tuendos, pravos corrigendos, pacem, innocentiam, pietatem et disciplinam in populo et clero promovendam ceteraque pro ratione adiunctorum ad bonum religionis constituenda, tenentur Episcopi obligatione visitandae quotannis dioecesis vel ex toto vel

85 "*Quod sancta,*" Nov. 23, 1744.

86 The Irish bishops, by indult of the S. C. Conc., May 20, 1631, have to make the visit only every ten years; but we scarcely believe that the S. C. Consist. would now admit that privilege, although can. 60 does not declare it null and void.

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ex parte, ita ut saltem singulis quinquenniis universam vel ipsi per se vel, si fuerint legitime impediti, per Vicarium Generalem aliumve lustrent.

§ 2. Fas est Episcopo clericos duos etiam a Capitulo sive cathedrali sive collegiali sibi adsciscere visitationis comites atque adiutores; eosque, quos maluerit, eligere, reprobato quocunque contrario privilegio vel consuetudine.

§ 3. Si obligationi de qua in § 1, Episcopus graviter defuerit, servetur praescriptum can. 274, nn. 4, 5.

Can. 344

§ 1. Ordinariae episcopali visitationi obnoxiae sunt personae, res ac loca pia, quamvis exempta, quae intra dioecesis ambitum continentur, nisi probari possit specialem a visitatione exemptionem fuisse ipsis ab Apostolica Sede concessam.

§ 2. Religiosos autem exemptos Episcopus visitare potest in casibus tantum in iure expressis.

Can. 345

Visitator, in iis quae obiectum et finem visitationis respiciunt, debet paterna forma procedere, et ab eius praeceptis ac decretis datur recursus in devolutivo tantum; in aliis vero causis, etiam tempore visitationis, Episcopus ad normam iuris procedat necesse est.

Can. 346

Studeant Episcopi debita cum diligentia, sine inutilibus tamen moris, pastoralem visitationem absolvere: caveant, ne superfluis sumptibus cuiquam graves onerosive sint, neve ratione visitationis ipsi aut quisquam suorum pro se suisve dona quodvis genus petant aut

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accipiant, reprobata quavis contraria consuetudine; circa vero victualia sibi suisque ministranda vel procurationes et expensas itineris, servetur legitima locorum consuetudo.

From the *Codex Canonum Ecclesiae Africanae* we learn that at the beginning of the fifth century synods ruled that prelates should visit their privinces annually.[87] A council of Tarragona, 516, commanded the bishops on the occasion of this visit to see especially to the repairs of the churches.[88] In the Frankish Kingdom, especially under Charles the Great, the bishops were accompanied by a count (*comes*) as protector and aid, who took cognizance of and decided cases of a more or less civil nature.[89] A decretal of Innocent IV (1252) forbids avaricious exactions, allowing the necessary victuals but no gifts or donations of any kind.[90] These rules were renewed by the Council of Trent, from which our text is almost verbally taken.[91]

(1) The episcopal visitation must be made by the bishop *personally,* unless he is prevented by a legitimate obstacle, *e. g.,* sickness, or duties of an urgent nature, in which latter case the visit may be entrusted to the vicar-general or some other trustworthy priest.

(2) The *whole diocese* must be visited within the space of *five years,* which is a modification of the Tridentine law.

(3) Not more than two companions are allowed, who may be taken from the number of canons, although these might remonstrate against the exercise of this right of

87 Nn. 53, 73, 94, Mansi, *Coll.,* III, 742, 775, 799.

88 Cfr. c. 10 f., C. 10, q. 1; (Toledo synod, 633, cc. 35 f.).

89 Regino of Prüm, *De Synodalibus Causis,* l. II., c. 2 ff.

90 C. 1, § 5, 6°, III, 20.

91 Sess. 24, c. 3 de ref.

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the bishop;[92] and the Code reprobates any contrary privilege or custom.

(4) The *persons, things, and places* subject to the diocesan visitation are:

(a) The whole *secular clergy* of the diocese, also cathedral and collegiate chapters, in all matters spiritual and temporal.[93] The *laity,* too, may, if the Ordinary judges it expedient, be examined about things pertaining to faith and morals, the administration of the Sacraments and the care of the church property. The church trustees in particular are liable to be questioned.

All *religious, not exempt,* of both sexes, are amenable to the canonical visit; and also *exempt religious* who are *pastors* of souls, in all matters concerning their pastoral conduct.[94]

(b) The *places* which should and may be visited are the cathedral church, the parish churches, and public and semi-public oratories not in possession of or administered by exempt religious. Oratories which, though incorporated into an exempt religious body, are served by a secular priest, are subject to visitation.[95]

The Bishop may also visit any *parish church* held and administered by exempt religious, and inspect the baptismal font, the confessionals of the pastor and his assistants and the altar of the Blessed Sacrament.[96] He may visit the meeting places or chapels or *confraternities* or *sodalities* of lay persons, even though they are erected in churches belonging to exempt religious;[97] also hos-

92 Richter, *Trid.,* p. 155, nn. 34, 35, 37, 38.

93 *Trid.,* Sess. 6, c. 4 de ref. (Richter, *l. c.,* p. 39).

94 Can. 631, § 1.

95 *Trid.,* Sess. 7, c. 8 de ref. (Richter, *l. c.,* p. 52, n. 3).

96 S. C. Conc., April 5, 1631, Curiensi; June 23, 1725 (Richter, *l. c.,* n. 6).

97 *Trid.,* Sess. 7, c. 7 de ref.; S. C. Conc., Sept. 30, 1730 (Richter, *l. c.,* p. 53, n. 10).

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pitals and orphanages and *schools* which are maintained, even by exempt religious, as *parish* or *elementary schools*.

High schools and colleges conducted by exempt religious are liable to canonical visitation by the Ordinary only concerning their religious and moral training.[98]

Cemeteries common to the faithful and exempt religious are subject to episcopal visitation, whilst cemeteries exclusively reserved to exempt religious are not.[99]

(c) The *things* which the bishop should examine and inspect must be determined by the purpose of the canonical visit, as outlined in the first clause of canon 343, § 1, and mentioned in the *Pontificale Romanum*.[1] The second point: "That he may know how the church is administered spiritually and temporally," offers an opportunity to investigate:

(α) Whether the *Blessed Sacrament* is properly kept and in the right place; whether there is a sanctuary lamp; whether pyxis, monstrance, lunula, etc., are of the prescribed material, kept clean and free from verdigris, whether the sacred species are changed with sufficient frequency, etc.

(β) Whether the *altars* are made according to rubrics, and if images or statues are erected upon them, whether these are in conformity with the mind of the Church and in good taste, and especially whether any extraordinary images or representations disapproved by the Church are exposed for veneration.

(γ) Whether the *baptismal font* is properly and conveniently kept and the holy oils can be easily found and are preserved in a decent place.

(δ) In the *sacristy* he should observe the neatness and

98 Leo XIII, "*Romanos Pontifices*," May 8, 1881; can. 1382.

99 Leo XIII, *ibid.*

1 Pars III: *Ordo ad Visitandas Parochias.*

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color of the sacred vestments, the chalices and other sacred vessels.

(ε) The *confessionals* should be examined as to their grates, and also with regard to veils, stole and surplice, where these are prescribed, etc.[2]

We come now to what the Code says about *exempt religious.*[3]

(1) Note that exemption from canonical, or rather episcopal, visitation is now comprised under the general concession of exemption, as has been more than once decided by the S. R. Rota,[4] but is valid only if granted by a special concession of the Apostolic See, as canon 344, § 1 clearly emphasizes. Wherefore no *communicatio privilegiorum* may be invoked by exempt religious as to the canonical visitation.

(2) However, as far as the exempt religious themselves are concerned, the bishop is entitled to visit them only in *cases expressly stated in the law.* These cases, as far as the diocesan visitation is concerned, were partly mentioned above. They are:

(a) The *parish churches* administered by exempt religious, including the Blessed Sacrament, the altar, the tabernacle, the baptismal font and holy oils, the confessionals, the pulpit, the sacristy, the belfry with the bells belonging to the parish, the cemetery, etc.[5]

(b) The *oratories or chapels* of confraternities whose members are lay or secular persons, even though administered by exempt religious;[6]

2 Cf. Barbosa, *De Officio et Potestate Episcopi,* P. III, alleg. 73, nn. 63 ff.

3 Cfr. can. 615 f.

4 Barbosa, *l. c.,* n. 6; Benedict XIV, "*Ad militantis,*" March 30, 1772; "*Firmandis,*" Nov. 6, 1744; Gregory XV, "*Inscrutabili;*" Leo XIII, "*Romanos Pontifices,*" May 8, 1881.

5 "*Firmandis,*" § 7.

6 "*Inscrutabili;*" Richter, *l. c.,* p. 53, n. 10.

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(c) The *schools* conducted by exempt religious, except the secondary schools, which are subject to visitation only as far as religious and moral education is concerned;[7]

(d) *Divine worship,* that it be carried out according to the sacred canons, and no superstitious practices tolerated, even in the churches and oratories of exempt religious.[8]

Canon 345 lays down the *modes of procedure* when correction of abuses becomes necessary. There are two such modes, the paternal and the judiciary. The former consists in secretly admonishing the delinquent. This may be employed towards the clergy as well as the faithful. But it would not be paternal to threaten penalties in order to compel one to reveal crimes or transgressions,[9] or to make a public admonition serve as a preliminary to criminal procedure.[10]

Much less in keeping with the bishop's office as a father would be the infliction of ecclesiastical censures. Penances which have no judiciary character, *e. g.,* a retreat, would not exceed paternal correction. If the bishop proceeds paternally, no appeal is allowed, because no sentence has been given; but recourse is permitted *in devolutivo;* that is to say, the correction must be accepted and the injunctions carried out, until the superior judge reverses the sentence.

Metropolitans should not accept any recourse against a bishop's paternal procedure as long as the latter has remained within the limits prescribed by law.[11]

What are the *aliae causae* mentioned in canon 345? We presume them to be such as do not fall directly under

7 Can. 1382.
8 Can. 1261.
9 Barbosa, *l. c.,* P. III, alleg. 73, n. 29.
10 Can. 2309.
11 *Trid.,* Sess. 13, c. 1 de ref.; Richter, *l. c.,* p. 71, n. 1 f.; Benedict XIV, "*Ad militantis,*" March 30, 1742, §§ 6, 10, 19, 21.

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the objects of an episcopal visitation, especially those which require a *formal trial, e. g.,* the removal of a parish priest, the procedure against pastors refusing to comply with the law of residence, although a mere precept concerning that point would not exceed the paternal method;[12] lastly, all criminal cases requiring trials.

Can. 346 repeats the old and oft inculcated duty not to make the episcopal visitation disagreeable for those concerned, and more especially establishes the *remuneration* allowed by law.[13] The Code permits the *procurationes* and expenses of the journey. By *procurationes* are understood food and lodging. No prescription is admissible against this lawful claim of the visiting bishop.[14] However, those who would have to furnish the *procurationes* may pay their equivalent in money.[15] With the exception of this support, and the expenses of the journey, neither the bishop nor his companions are allowed to demand or accept any gifts or donations.

It has been decided by the S. C. Concilii that nuns (*moniales*), who have no regular ecclesiastical benefice, are not obliged to offer the *procurationes* to the visiting bishop.[16] However, as the Code says, custom may in that case admit the acceptance of a decent support. But on the other hand the canons as well as legal decisions[17] admonish the bishop not to be too exacting. Now-a-days there is not so much danger of excesses in this as there used to be.

12 Barbosa, *l. c.*, n. 37.

13 C. 16, X, I, 31; c. 23, X, III, 39; cc. 1 f, 6°, III, 20; *Trid.*, Sess. 24, c. de ref.

14 C. 16, X, II, 26 de praescript.

15 *Barbosa*, l. c., n. 56.

16 S. C. Conc. Nov. 13, 1638 (Richter, *Trid.*, p. 333, n. 9).

17 Richter, *l. c.*, p. 335, n. 17; this decision obliges the bishop to restitution.

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PRECEDENCE

CAN. 347

In suo territorio Episcopus praecedit omnibus Archiepiscopis et Episcopis, exceptis Cardinalibus, Legatis Pontificiis et proprio Metropolita; extra territorium serventur normae traditae in can. 106.

TITULAR BISHOPS

CAN. 348

§ 1. Episcopi titulares nullam possunt exercere potestatem in sua dioecesi, cuius nec possessionem capiunt.

§ 2. Decet ex caritate, citra tamen obligationem, ut aliquando Missae sacrificium pro sua dioecesi applicent.

EPISCOPAL PRIVILEGES

CAN. 349

§ 1. Ab accepta authentica notitia peractae canonicae provisionis, Episcopi sive residentiales sive titulares:

1.° Praeter alia privilegia quae suis in titulis recensentur, fruuntur privilegiis de quibus in can. 239, § -, nn. 7–12; nec non n. 2, etiam quod spectat ad casus Ordinario loci reservatos; n. 3, cum consensu saltem praesumpto Ordinarii loci; n. 4, dummodo non teneantur celebrare in cathedrali; nn. 5, 6, ritibus tamen ab Ecclesia praescriptis;

2.° Ius habent deferendi insignia episcopalia ad normam legum liturgicarum.

§ 2. A capta vero possessione Episcopi residentiales habent praeterea ius:

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1.° Percipiendi reditus mensae episcopalis;

2.° Concedendi indulgentias quinquaginta dierum in suae iurisdictionis locis;

3.° Elevandi in omnibus ecclesiis suae dioecesis thronum cum baldachino.

Can. 349 enumerates some of the *privileges and rights* of bishops. The following they hold in common with cardinals: the right of a portable altar,[18] the right to celebrate Mass on board of vessels, the right of applying the indulgences of a personally privileged altar, the right to gain indulgences in their private chapels, and the right to bless the people everywhere. As to the celebration of Mass on board a vessel the conditions are: that the sea be calm and the ship not rolling, that it be far from the coast and another priest or deacon be present to hold the chalice in case of great agitation of the ship.[19]

As to the privileges mentioned under n. 2, canon 239, § 1, the confessor chosen by the Ordinary for himself and his dependents may also absolve from cases which the same Ordinary has reserved to himself; and with regard to n. 3, concerning preaching in a strange diocese, the consent of the Ordinary must at least be presumed, *i. e.*, it must be probable from common indications that he is not unwilling to grant it, or known that he never refused his consent before when asked for it. As to n. 4, Christmas would be concerned and also Holy Thursday; but on the latter day the bishops generally bless the holy oils. On Christmas day, according to can. 338, § 3, they should not be absent from their cathedrals, but this does not exclude the use of the privilege about the masses; at least a bishop may celebrate two masses or have them

18 S. R. C., June 8, 1896.

19 Cfr. Göpfert, *Moral-Theologie*, 1898, III, 138.

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celebrated in his private chapel. About nn. 5 and 6, the bishops must follow the ritual in blessing devotional articles and erecting stations of the cross.

The *episcopal insignia* are: the mitre, the crosier or pastoral staff, the pectoral cross, the pontifical ring, dalmatics and tunicella, gloves and sandals.[20] Leo XIII added the skullcap of violet color for all.[21] The crosier is certainly the oldest and most significant episcopal ornament, in use since the fifth century, whilst the mitre (*taenia* = a priestly band) only dates to the tenth century, but is mentioned in several papal letters and in the decretals.[22] Besides, the residential bishop's name must be mentioned in the canon.

A *residential bishop,* from the day that he takes possession of his diocese, enjoys the *reditus mensae episcopalis,*[23] which means the income of the bishopric of which he is the sole administrator. This income comprises the salary proper, the cathedraticum, the *procurationes,* the *synodicum,* etc., or whatever belongs to him as chief pastor of the diocese, of whose table he is to live.[24] The bishop has the right of erecting a throne with a baldachino or canopy over it in every church of the diocese,[25] even those of exempt religious.

20 Cf. c. 15, X, III, 1; c. 7, X, 1, 8; cf. Jaffé, *Reg Pontf.*, ed. 2, 1882, where since the 10th century many privileges occur to that effect.

21 "*Praeclaro,*" Feb., 1888.

22 Cf. *Cath. Encycl.*, under the various catchwords; Smith-Cheltham, *Dictionary of Christian Antiquities, s. v.* "Mitre," "Staff."

23 *Mensa episcopalis* occurs since the 12th century; and in the sense of property or support, since the 9th century; see Du Cange, *Glossarium, s. v.* "Mensa."

24 I Cor. 10, 21; cfr. Barbosa, *l. c.*, P. III, alleg. 95, n. 67; Martin V, "Inter cunctas" (Denzinger, *Enchiridion,* n. 504).

25 Barbosa, *Summa Decis. Apost., s. v.* "Baldachinum."

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CHAPTER II

COADJUTORS AND AUXILIARY BISHOPS

1. Bishops had helpers in the discharge of their pastoral duties as early as the third and fourth centuries. Thus St. Augustine is said to have been the coadjutor of Valerius. This custom, humane as it is,[1] had consequences against which the law had to guard, especially that two bishops should rule one and the same diocese. Therefore resort was had to the expedient of constituting a *visitator* or *quasi administrator*. For various reasons, especially to prevent a troubled election and to preserve episcopal sees against the invasion of territorial usurpers, it was often found necessary to appoint a coadjutor for a bishop yet living and active, whose see the coadjutor should occupy after the death of the incumbent. This practice was acknowledged by the Popes, who reserved the right of granting such coadjutors.[2]

2. In the Orient as well as in the Occident there was a species of bishops called *chorepiscopi* (country bishops), who were consecrated and exercised episcopal functions often to the detriment of the diocese.[3] At the end of the fourth century the *chorepiscopi* were supplanted by visitators. In the Occident, especially in France, "country bishops," whose jurisdiction often appears doubtful,

1 According to the saying: "afflicto afflictio non est addenda," c. 3, c. 7, q. 1; c. 5, X, III, 6.

2 C. un. 6°, III, 5; *Trid.*, Sess. 35, c, 7 de ref.; Benedict XIV, *De Synod. Dioec.*, 13, 10, 22 ff.

3 Cf. *Conc. Encyc.*, c. 13; *Sardic.*, c. 6; *Laodic.*, c. 57.

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became more generally known in the eighth century, and in the following century incurred the censure of Pseudo-Isidor, whose influence dealt a deadly blow to the institution.

3. A last kind of quasi-bishops were those who owed their canonical position to the invasion of the Saracens, especially in Spain and the Orient, where many episcopal sees and cities were seized by the Islamic hordes and the bishops driven away. These exiled bishops sought refuge with other bishops, who often employed them in the discharge of diocesan functions. In Germany such refugees were commonly known as *episcopi titulares, annulares, nullatenses, auxiliares, suffraganei, vicarii in pontificalibus*. Their appointment was reserved[4] to the Holy See by Clement V. Furthermore it must be remembered that after the later crusades many bishops, though not resident at their sees, were ordained to bishoprics retained by schismatics or infidels; such bishops were called "*episcopi in partibus infidelium.*"[5]

The Code distinguishes two kinds of coadjutors, *viz.:* coadjutors proper and auxiliaries. A coadjutor proper may be given to the see or to the bishop personally. However, we must confess that we have not so far read in any author of a coadjutor given to a see, unless he be identified with the coadjutor *cum iure successionis*.

CAN. 350

§ 1. Unius Romani Pontificis est Episcopo Coadiutorem constituere.

§ 2. Coadiutor dari solet personae Episcopi cum iure successionis; sed nonnunquam datur quoque sedi.

[4] C. 5, Clem. I, 3.

[5] Since 1882 called simply "*in partibus*"; Aichner, *l. c.*, § 124; v. Scherer, *K.-R.*, I, p. 597.

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§ 3. Coadiutor, datus personae Episcopi sine iure successionis, speciali nomine dicitur *Auxiliaris*.

The principle laid down in § 1 was formulated by Boniface VIII and adopted by the Tridentine Council,[6] which also allowed coadjutors to abbots. Benedict XIV granted the bishops of Ireland the right to ask for a coadjutor if by reason of advanced age or infirmity they were unable to comply with the law of residence.[7] However, circumstances like those arising at Cologne[8] and elsewhere in the thirties of the last century might prompt the idea of giving a coadjutor to the see, not to the person of the bishop, especially if he is in the hands of the enemies of the Church. A coadjutor is supposed to be given to a see only in case it becomes vacant; because the contrary assumption that two bishops can hold one and the same see at the same time, would be uncanonical; one must be titular of another see, otherwise the *connubium spirituale* would be jeopardized.

RIGHTS OF COADJUTORS

CAN. 351

§ 1. Iura Coadiutoris dati personae Episcopi desumantur ex litteris apostolicis, quibus constituitur.

§ 2. Nisi aliud in his litteris caveatur, Coadiutor qui datur Episcopo prorsus inhabili, habet omnia iura ac officia episcopalia; ceteri tantum possunt quantum Episcopus eisdem commiserit.

§ 3. Quae Coadiutor potest et vult exercere, Episcopus habitualiter alii ne deleget.

[6] C. un. 6°, III, 5; *Trid.*, Sess. 25, c. 7 de ref.

[7] "*Grave*," Aug. 15, 1741, § 8.

[8] Brück, *Gesch. d. kath. Kirche in Deutschland im XIX. Jahrh.*, 1889, II, 371.

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§ 4. Coadiutor, iusto impedimento non detentus, debet, quoties fuerit a Coadiuto requisitus, pontificalia et alias functiones obire, ad quas Episcopus ipse teneretur.

CAN. 352

Coadiutor sedi datus potest in territorio ea quae sunt ordinis episcopalis exercere, excepta sacra ordinatione; aliis in rebus tantum potest, quantum eidem a Sancta Sede vel ab Episcopo fuerit commissum.

These two canons state the powers of coadjutors. These powers depend first on the Apostolic letters of appointment, and secondly on the condition of the bishop in need of assistance. If the latter is able to perform his episcopal duties, his will must be respected. On the other hand, it would be unnatural and, as it were, offensive to the Holy See, if a bishop having a coadjutor would call in another bishop to perform pontifical functions which his coadjutor is able and willing to perform.

A bishop cannot punish or repeal acts which his coadjutor has lawfully performed.[9]

A coadjutor, unless permitted to do so by virtue of the Apostolic letters or the consent of his bishop, should not use the pastoral staff, because this is the special sign of jurisdiction; but he may bless the people, like the bishop.[10]

CAN. 353

§ 1. Quilibet Coadiutor, ut canonicam sui officii possessionem capiat, necesse est litteras apostolicas ostendat Episcopo.

§ 2. Coadiutor cum futura successione et Coadiutor

9 S. C. Conc., Feb. 18, 1623; Wernz, *l. c.*, II, p. 1009 (ed. 1.).

10 Barbosa, *Summa Decis. Apost.*, *s. v.* "Coadjutor," nn. 3, 10.

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sedi datus debent praeterea easdem ostendere Capitulo ad normam can. 334, § 3.

§ 3. Si Episcopus eum in statum inciderit ut eliciendi actus humani sit impos, praetermisso praescripto § 1, solum praescriptum § 2 ab omnibus Coadiutoribus servetur.

This canon appears to confirm the general teaching of canonists [11] that a coadjutor with the right of succession, who is ordinarily elected by a chapter, is given by the Roman Pontiff only upon the previous consent of that chapter. But the Code in canon 350, § 1, is silent about that consent, and in the U. S. it is of little practical value. However, in our country, too, a bishop coadjutor with the right of succession must present his papers of appointment to the assembled consultors, who take the place of the chapter.[12] To the bishop the coadjutor must show the Apostolic letters only if the former is mentally and physically able to perform human acts,— in other words, as long as he realizes the meaning of the ceremony.

RESIDENCE

CAN. 354

Coadiutor quilibet obligatione tenetur, sicut Episcopus, residendi in dioecesi, e qua, extra tempus vacationum, ad normam can. 338, ipsi non licet, nisi ad breve tempus, Coadiuto permittente, discedere.

What is meant by "a short time" may be deduced from can. 405, § 5 f., where mention is made of a shorter

11 Benedict XIV, *De Syn. Dioec.*, XIII, c. 10, n. 24.

12 Can. 427.

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time than a week in connection with residence. Hence, in round terms, we may say, about six days.

CAN. 355

§ 1. Coadiutor cum iure successionis, vacante sede episcopali, statim evadit Ordinarius dioecesis, pro qua fuerat constitutus, dummodo possessionem legitime ceperit, ad normam can. 353, §§ 2, 3.

§ 2. Cum Episcopi munere exspirat Auxiliaris officium, nisi aliud in litteris apostolicis caveatur.

§ 3. Si Coadiutor datus fuerit sedi, eius officium etiam sede vacante perdurat.

This canon states how a *coadjutorship is ended; viz.:* (1) If the episcopal see becomes vacant the coadjutor appointed for that diocese becomes Ordinary of the same immediately after taking canonical possession thereof; (2) With the office of the bishop that of the auxiliary also expires, unless provided otherwise in the Apostolic letters; (3) If the coadjutor was given to the *see,* his office continues during the vacancy of the diocese.

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CHAPTER III

DIOCESAN SYNODS

The first diocesan synod, or gathering of the clergy of a diocese of which we have knowledge, was held by Pope Siricius about 387 in Rome.[1] The holding of synods became customary in the Eternal City, and Innocent III was wont to convoke a synod twice or three times a week. These synods were, however, rather forerunners of the consistory, to which foreign bishops were admitted. In the Frankish kingdom diocesan synods were not infrequent in the sixth century, to judge from the seventh canon of the synod of Auxerre, A. D. 578, which set up the rule that in the middle of May all the priests, and on the first of November all the abbots should meet annually in the episcopal city.[2] These synods turned out to be mixed meetings in which both ecclesiastical and civil matters were debated. The fourth Lateran Council (1215) ordered synods to be held annually to promulgate the decrees of provincial councils to the clergy.[3] The same decree, with the addition of disciplinary injunctions concerning profession of faith and the appointment of synodal judges and examiners, was adopted by the Council of Trent.[4] The pseudo-council of Pistoja, 1786,

1 Benedict XIV, *De Syn. Dioec.*, I, 1, 6. The Council of Alexandria, 320/321, mentioned by Wernz (II, 1096) was attended by nearly 100 bishops (Hefele, *Conc.-Gesch.*, I, 325), which sounds more like a provincial council than a diocesan synod.

2 Hefele, *l. c.*, III, 38 f.

3 C. 25, X, V, 1.

4 Sess. 24, c. 2; 25, c. 2; 24, c. 18 de ref.

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adopted certain false propositions concerning the importance and authority of synods and the power of parish priests, which were condemned by the Church.[5]

CAN. 356

§ 1. In singulis dioecesibus celebranda est decimo saltem quoque anno dioecesana Synodus, in qua de iis tantum agendum quae ad particulares cleri populique dioecesis necessitates vel utilitates referuntur.

§ 2. Si Episcopus plures dioeceses aeque principaliter unitas regat, aut unam habeat in titulum, alteram aliasve in perpetuam administrationem, potest unam tantum dioecesanam Synodum ex omnibus dioecesibus convocare.

CAN. 357

§ 1. Synodum dioecesanam convocat eique praeest Episcopus, non autem Vicarius Generalis sine mandato speciali nec Vicarius Capitularis.

§ 2. Celebranda est in ecclesia cathedrali, nisi aliud rationabilis causa suadeat.

The *date from which* the ten years are to be reckoned is not explicitly stated. However, since the Code went into effect in 1918, it appears reasonable to take this year as the starting-point. As it is very probable that a plenary council will be held in this country in the near future, if conditions permit, diocesan synods could be conveniently held soon thereafter and repeated every ten years. Most probably further instructions will be issued by the Holy See on this point.

The *matter or subjects* to be treated at the diocesan

[5] Pius VI, "*Auctorem fidei*," Aug. 28, 1794, nn. 9–11.

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synod are the needs and welfare of clergy and people. They are outlined in the classic work of Benedict XIV on the diocesan synod. He mentions:

(1) Public prayers, allocutions, and sermons;

(2) The decrees to be read and the profession of faith to be pronounced (according to the formula given in the Code);

(3) The election of synodal judges and examiners and the appointment of diocesan officials;

(4) The cases to be reserved (now no more than three or four) for atrocious crimes;

(5) The cathedraticum, taxes, stole fees, etc., to be determined;

(6) The alms for mass-stipends and abuses concerning them;

(7) Rendering of an account for the diocesan seminary.[6]

We might add pastoral conferences, the administration of church property, and, above all, the inculcation of the new Code.

As to § 2 of canon 356, observe that the S. C. Conc. formerly allowed two synods to be held for each of several dioceses *aeque principaliter* united (*e. g.*, Viterbo-Toscanella).[7] Benedict XIV, however, wished that only one synod be held for such dioceses (*e. g.*, Giovinozzo-Terlizzi, now Molfetta in Apulia), but alternately in the one and the other;[8] which is not excluded by the Code.

Can. 357 states the *authority* that convokes a synod is the bishop who has been confirmed by Rome and taken possession of the diocese, even though he be not yet consecrated. If he be a metropolitan he may convoke a

6 L. V, *De Syn. Dioec.*

7 Jan. 11, 1789 (Richter, *Trid.*, p. 35, n. 6).

8 "*Unigenitus*," Nov. 26, 1749, § 9; *De Syn. Dioec.* I, 5, 3 f.

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synod before the reception of the pallium.[9] We say that he must have taken possession of the diocese, on account of can. 334, § 2, which rules that before that act he is not allowed to take a hand in the government of the diocese. The name of Ordinary in this case includes Apostolic administrators, Apostolic vicars, abbots and prelates *nullius*,[10] but not vicars-general without a special commission, nor vicars-capitular, who are entirely excluded because they can have no mandate.[11]

As to the *place*, it is becoming that the cathedral church, as "the mother and head of the other churches,"[12] be chosen for the synod, although any good reason may suffice for choosing another. Such reasons would be repairs in the cathedral church or the holding of a retreat for the clergy.

CAN. 358

§ 1. Ad Synodum vocandi sunt ad eamque venire debent:

1.° Vicarius Generalis;

2.° Canonici ecclesiae cathedralis aut consultores dioecesani;

3.° Rector Seminarii dioecesani saltem maioris;

4.° Vicarii foranei;

5.° Deputatus uniuscuiusque collegialis ecclesiae a Capitulo eiusdem ecclesiae e gremio eligendus;

6.° Parochi civitatis in qua Synodus celebratur;

7.° Unus saltem parochus ex unoquoque vicariatu foraneo eligendus ab omnibus qui curam animarum

9 Benedict XIV, *De Syn. Dioec.*, II, 5; Wernz, *l. c.*, II, p. 1099, who remarks that the metropolitan is not allowed to wear the pallium at his archdiocesan synod.

10 Benedict XIV, *De Syn. Dioec.* II, cc. 10 f.

11 Benedict XIV, *l. c.*, c. 8.

12 *Ibid.*, I, 5, 6.

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actu inibi habeant; parochus autem electus debet pro tempore absentiae vicarium substitutum sibi sufficere ad normam can. 465, § 4;

8.° Abbates de regimine et unus e Superioribus cuiusque religionis clericalis qui in dioecesi commorentur, designatus a Superiore provinciali, nisi domus provincialis sit in dioecesi et Superior provincialis interesse ipse maluerit.

§ 2. Episcopus, si opportunum iudicaverit, potest ad Synodum vocare alios quoque et etiam omnes canonicos, parochos, Superiores religiosos, imo et singulos suae dioecesis saeculares sacerdotes, iis tamen exceptis qui necessarii sunt ne in paroeciis animarum cura desit; invitati autem ius suffragii in omnibus habent, perinde ac ceteri, nisi Episcopus in invitatione aliud expresse caverit.

CAN. 359

§ 1. Iis qui ad Synodum venire debent, si legitimo impedimento detineantur, non licet mittere procuratorem qui eorum nomine Synodo intersit; sed Episcopum de impedimento certiorem faciant.

§ 2. Negligentes Episcopus potest iustis poenis compellere et punire, nisi de religiosis exemptis agatur qui parochi non sunt.

The text of the two canons is explicit enough, but one point has surprised us somewhat. It is n. 8 about the *abbates regiminis.* For the Council of Trent,[13] strongly defended by Benedict XIV in his work *De Synodo Dioecesana,*[14] and again upheld by Leo XIII, "*Romanos Pontifices,*" had established that only those abbots have

[13] Sess. 24, c. 2 de ref. [14] Lib. III, c. 1.

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to attend the synod who either exercise the care of souls as pastors of a parish, or whose monasteries are not united with a congregation and subject to a general chapter. Hence, since the Benedictines form congregations and celebrate general chapters, it would follow that the bishop had no right to call their abbots to the diocesan synod. But the Code subjects all governing abbots to the episcopal call. On the other hand the new law does insist less vigorously on the attendance of exempt religious exercising the care of souls, whom the old law strictly obliged to attend. Perhaps the Code wants the abbots to take the place of their subjects.

In order to make the invitation and will of the bishop more efficacious, canon 359, § 2, gives the Ordinary the right to proceed against recalcitrants with ecclesiastical penalties. These comprise, besides the privation of active and passive suffrage, excommunication and other punishments to be inflicted at the good pleasure of the bishop.[15] This procedure affects governing abbots and exempt religious only if they are actual pastors of parishes.

CAN. 360

§ 1. Episcopus, si id ipsi expedire videatur, opportuno ante Synodum tempore, unam vel plures e clero civitatis et dioecesis *commissiones* nominet, seu coetus virorum qui res in Synodo tractandas parent.

§ 2. Ante Synodi sessiones Episcopus omnibus qui convocati sunt et convenerunt, decretorum schema tradendum curet.

CAN. 361

Propositae quaestiones omnes, praesidente vel per

15 S. C. Conc., Nov. 19, 1604; Benedict XIV, *l. c.*, III, 1, 10.

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se vel per alium Episcopo, liberae adstantium disceptationi in sessionibus praeparatoriis subiiciantur.

CAN. 362

Unicus est in Synodo legislator Episcopus, ceteris votum tantum consultivum habentibus; unus ipse subscribit synodalibus constitutionibus; quae, si in Synodo promulgentur, eo ipso obligare incipiunt, nisi aliud expresse caveatur.

Since the bishop is the sole ruler of the diocese, and alone endowed with legislative power *in foro externo,* it is evident that all synodal decrees made in conformity with the common law of the Church need no approbation or signature on the part of the diocesan consultors, or the synodal judges, or the rest of the clergy. The clergy, both secular and regular, must, however, carry out the decrees made at a synod. Any other theory would pervert the true idea of hierarchic jurisdiction.[16] At the same time it may be well to call attention to Benedict XIV's rule that nothing should be enacted in a synod which would be detrimental to the privileges of exempt religious, because these are granted by the Supreme Pontiff.[17]

16 Benedict XIV, *De Syn. Dioec.*, XIII, cc. 1 ff.

17 *Ibid.*,. IX, c. 15; Pius VI, "*Auctorem fidei*," Aug. 28, 1794, nn. 9 ff.

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CHAPTER IV

THE DIOCESAN COURT

A reproduction, on a smaller scale, of the Roman Curia is the diocesan court, whose importance grows in proportion to the extent of the territory and the number of the faithful in the diocese.

CAN. 363

§ 1. Curia dioecesana constat illis personis quae Episcopo aliive qui, loco Episcopi, dioecesim regit, opem praestant in regimine totius dioecesis.

§ 2. Quare ad eam pertinent Vicarius Generalis, officialis, cancellarius, promotor iustitiae, defensor vinculi, synodales iudices et examinatores, parochi consultores, auditores, notarii, cursores et apparitores.

The diocesan court, then, consists of those persons who assist the bishop or his representative in the government of the whole diocese. It is made up of the vicar-general, the official chancellor, the *promotor justitiae* or diocesan attorney, the defender of the marriage bond, synodal judges and examiners, parish consultors, auditors, notaries, couriers and beadles.

The *official,* who holds the first place after the vicar-general and must be chosen by the bishop (can. 1573, § 1), is a functionary distinct from the vicar-general. His importance will become manifest later. The *promotor iustitiae,* the couriers and beadles will also be

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dealt with *infra*. The latter two offices, being similar to that of ushers (cf. can. 1591), may be committed to laymen and one man may hold both.

CAN. 364

§ 1. Nominatio eorum qui praedicta officia vel munera exercent, scripto consignetur, ad normam can. 159.

§ 2. Nominati vero debent:

1.° In manibus Episcopi iusiurandum praestare de munere fideliter exercendo, quavis personarum acceptione posthabita;

2.° Negotia ad se spectantia sub auctoritate Episcopi tractare ad normam iuris;

3.° Secretum servare intra fines et secundum modum a iure vel ab Episcopo determinatum.

The appointment of all these officials must be made in writing, but before entering upon their respective offices they (1) are bound to swear in the hands of the bishop that they will discharge their duties faithfully and without human respect; (2) and when performing their duties, they must do so under the supervision of the bishop, according to the norms laid down in the following canons. Besides they are strictly bound to secrecy within the limits and to the extent set by law or by the bishop.

The secret they are obliged to keep is called official; it attaches to their office and hence might also be styled with a legal term, "privileged knowledge," *i. e.*, knowledge the manifestation of which cannot be legally exacted. The obligation arising from this secret is based upon the natural law, but its measure and extent may be determined by positive norms, which are as broad as the mat-

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ter involved and as wide as the necessity of the office, which is subject to the law and the will of the superior. Therefore, if a higher or more stringent reason, *e. g.*, the public welfare or a superior command, should demand of these officials the revealing of a secret, they would have to obey. On the other hand, they are never allowed to reveal anything to persons not legally, or not at all, involved or interested, and even to parties interested they cannot communicate anything which would be detrimental to another, unless they are legally called upon to do so by reason of their office.

CAN. 365

De officiali, promotore iustitiae, defensore vinculi, iudicibus synodalibus, auditoribus, cursoribus et apparitoribus, serventur praescripta can. 1573–1593; de Vicario Generali, cancellario aliisque notariis, examinatoribus synodalibus et parochis consultoribus, praescripta canonum qui sequuntur.

The special duties of these several officers are pointed out partly in the immediately following canons, partly in the fourth book on legal procedure (cc. 1573–1593). Here more particular attention is given to the important office of the vicar-general.

ARTICLE I

THE VICAR-GENERAL

The historical development of this office proceeded by slow degrees, until it assumed its present status. Not all countries show the same process of evolution, and hence it is dangerous to generalize. The former office of

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archdeacon, to some extent, resembles that of the vicar-general. In Rome as well as in other large cities, one of the deacons was called archdeacon, a title which is already given to St. Lawrence.[1] The office was closely connected with temporal affairs. The archdeacon grew in importance as the *chorepiscopus* decreased in power. Since the IXth century there was more than one archdeacon, especially in larger dioceses, and they gradually seem to have absorbed the powers of the archpriest, whose functions concentrated upon baptismal and other spiritual powers. The archdeacons often acted against the bishop's wishes, and consequently the bishops endeavored to restrict the archdeacons' aggrandizement of power. That their power was ordinary, without a mandate or delegation from the bishop, is nowhere stated in the Decretals of Gregory IX, although this has been asserted.[2] The decretals[3] call him vicar of the bishop, attribute to him the supervision and correction of the clergy, care of the sacred vestments, the office of master of ceremonies, and the visitation of the diocese. But without a special mandate of the bishop archdeacons cannot appoint parish priests or pronounce excommunication, although they may hear the quarrels of single individuals. This is sufficient concerning the power given by the Gregorian Decretals to the archdeacon. Soon afterwards appears an *officialis,* who may be identified with the present vicar-general. In the *Liber Sextus* Innocent IV (A. D. 1250) laid down rules for this official.[4] His power is not, at least in its full extent, ordinary, otherwise procedure and appointment to benefices would not be ex-

1 *Liber Pontificalis,* ed. Duchesne, 1886, I, 155.

2 Thus Sägmüller, *K.-R.,* 1900, p. 368.

3 Cf. tit. 23.— A Vicar is mentioned in c. 14, X, I, 31 as constituted for different rites and languages, but subject to the bishop.

4 Tit. 13 in 6° de officio vicarii.

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cepted therefrom. The bishops meanwhile continued their opposition to the archdeacons by appointing *officiales foranei,* or rural deans, who with the permission of the bishop exercised a certain jurisdiction in their districts, but were removable *ad nutum.* In England there arose a distinction between the vicar-general, to whom the administration or voluntary jurisdiction was entrusted, and the official, who had contentious or criminal jurisdiction. The Council of Trent[5] paid no attention to this distinction, but curtailed the power of the archdeacons, who became an appendage of the cathedral chapters with merely honorary rights, whilst the vicar-general became more important. Under the new Code the *officialis* of former times reappears, as will be seen in Book IV.

CAN. 366

§ 1. Quoties rectum dioecesis regimen id exigat, constituendus est ab Episcopo Vicarius Generalis, qui ipsum potestate ordinaria in toto territorio adiuvet.

§ 2. Vicarius Generalis libere ab Episcopo designatur, qui eum potest ad nutum removere.

§ 3. Unus tantum constituatur, nisi vel rituum diversitas vel amplitudo dioecesis aliud exigat; sed, Vicario Generali absente vel impedito, Episcopus alium constituere potest qui eius vices suppleat.

Whenever the right government of a diocese requires, the bishop shall appoint a vicar-general to aid him, with ordinary power, in the whole diocese.

5 *Trid.*, Sess. 24, cc. 3, 20; Sess. 25, c. 14 de ref.; concerning the history cfr. Thomassinus, *Vetus et Nova Disciplina circa Beneficia et Beneficiarios,* Magontiaci, 1787, P. I, lib. II, cc. 7 ff.; Hinschius, *System des Kath. Kirchenrechts,* II, 183.

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The vicar-general is freely designated by the bishop and may be removed by him at pleasure.

Only one vicar-general may be appointed, unless a diversity of rites, or the size of the diocese, should require more. If the vicar-general is absent or prevented, the bishop may temporarily appoint another priest in his place.

This canon enjoins the bishop to choose a vicar-general under certain circumstances, namely, when this is necessary for the right government of the diocese. Hence the bishop is not absolutely, but only relatively obliged to appoint a vicar-general. The judgment of the necessity lies with the bishop himself. If gross neglect of episcopal duties or protracted absence should cause considerable damage to a diocese, the Holy See might force the bishop to accept either a vicar-general or apostolic administrator.[6]

The *appointment* of a vicar-general is one of the free and uncontested rights of the bishop, and in exercising it he is not bound by the consent or advice of his chapter or consultors, much less by insinuations or pressure on the part of the civil government, unless the latter is accorded definite privileges by a concordat.

The bishop can exercise the right of appointing a vicar only after the papal nomination or provision has been received.[7]

The removal of a vicar-general depends entirely on the good pleasure of the bishop, who may take the office away, with or without reason, and without any formality, summary or solemn procedure.

The *number* of vicars-general is limited to *one,* except in dioceses where diversity of rites or territorial extent

[6] Cf. Wernz, *Jus Decret.*, II. p. 982.

[7] Cf. can. 334, § 3.

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make it advisable to have several. Innocent III decreed that a bishop should select several vicars for diverse rites and language..[8] Such vicars resemble auxiliary bishops, who would be able to celebrate the sacred mysteries in the respective rite, whilst our Code speaks of vicars-general only and does not mention diversity of language. The second reason for having several vicars-general is "*amplitudo dioeceseos.*" *Amplitudo* has the meaning of extension as well as greatness or number of parishes and souls. On that score the metropolitans of most of our American archdioceses may safely appoint several vicars-general, who *per concomitantiam* may divide their labors according to linguistic denominations. If a bishop has two dioceses to govern, either as two sees with equal rights (*aeque principaliter unitae*), or one as his proper see and the other as administrator, he may appoint two vicars-general, *i. e.,* one for each diocese, if this latter measure should be found more expedient or perhaps necessary for "right administration."[9]

CAN. 367

§ 1. Vicarius Generalis sit sacerdos e clero saeculari, annos natus non minus triginta, in theologia et iure canonico doctor aut licentiatus vel saltem earum disciplinarum vere peritus, sana doctrina, probitate, prudentia ac rerum gerendarum experientia commendatus.

§ 2. Si dioecesis alicui religioni commissa fuerit, Vicarius Generalis potest esse eiusdem religionis alumnus.

8 Cf. c. 14, X, I, 31, de officio judicis ord.

9 Bouix, *Tractatus de Judiciis Ecci.,* 1855, t. I, p. 411 f., says that if the other diocese would be very distant, the bishop would be obliged to appoint a vicar-general.

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§ 3. Vicarii Generalis munus ne committatur canonico poenitentiario, aut Episcopi consanguineis praesertim in primo gradu vel in secundo mixto cum primo, aut, exclusa necessitate, parocho ceterisque curam animarum habentibus; sed non prohibetur Episcopus Vicarium ex ipsa dioecesi assumere.

The Code next proceeds to determine the *qualities* of the vicar-general, which are modified somewhat in comparison with the old law:

The vicar-general must be a member of the secular clergy, at least thirty years of age, a doctor or licentiate of sacred theology and canon law, or at least well versed in said branches, of sound doctrine, righteousness, prudence, and experienced in administrative matters.

If the diocese has been entrusted to a religious order, the vicar-general may be a member of that order.

The office of vicar-general cannot be committed to the canon penitentiary, nor to one related to the bishop by blood in the first, or second touching the first, degree, nor, except in case of necessity, to a parish priest or any one occupied in the care of souls.

The first paragraph of Can. 367 appears to be taken almost verbally from the schema of the Vatican Council,[10] which, however, required the academic degree only in either theology or canon law. Our Code dispenses with the degrees, if a candidate is otherwise fit and has the required age, which is raised to thirty years.[11]

The second paragraph regards dioceses entrusted to religious orders. This may be done in such a way that the diocese becomes an *abbatia nullius,* which is possible only if the community itself is an abbey; or that religious

10 Cfr. Granderath-Kirch, *Geschichte des Vatik. Konzils,* 1903, II, 162.

11 Cfr. Bouix, *l. c.,* p. 388 ff.

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have entire charge of the diocese, whose head is a religious, though not necessarily the superior of the community. Attention must be paid to the text, which says: "if the *diocese* is entrusted." Hence, if a religious is elected bishop of a diocese, this does not mean that the diocese is committed to the care of religious or that the vicar-general should be a religious; for the first paragraph requires the vicar-general to be a member of the secular clergy.

The question whether a *regular with solemn vows* may be appointed vicar-general seems, according to our view, to be settled in the negative by the first paragraph of our canon, which demands a secular priest. The reason for this law doubtless lies in the fact that religious should reside in their convents, at least habitually, unless they are compelled for good reasons to dwell outside, *e. g.*, as pastors. Hence a bishop who would wish to have a regular for his vicar-general, would have to apply to the Holy See. But a religious with simple vows, whose institute permits its members to dwell outside the convent, especially if they have given only the promise of obedience, provided he has the permission of his superior, needs no papal indult to accept the office of vicar-general.[12]

The last paragraph excludes three kinds of otherwise qualified priests from the vicar-generalship,— the *poenitentarius canonicus* of a cathedral, the next relations of the bishop, and pastors. As to the first-named, he must reside at the cathedral and hence, since he was formerly to be taken from a strange diocese, he could hold the office of vicar-general; but the office of cathedral confessor, and the delicacy of confessional trust, require full

12 Cf. can. 606, § 2. Cf. Bouix, *l. c.*, p. 392 ff. It is true, as we read in many responses to questions given by the S. C. EE. et RR., that the Roman practice never favored appointing religious as vicars-general.

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attention. The same holds good concerning parish priests and others, chaplains or assistants, occupied with the care of souls. However, in case of necessity, *e. g.*, where there is a lack of fit persons, or *penuria sacerdotum*, even a parish priest, provided he is not *canonicus poenitentarius*, may be appointed. In no case, however, can a brother or nephew of the bishop be chosen vicar-general.[13] The old doctrine [14] that no one who was born in, or was a citizen or an inhabitant of, the diocese for which he was to be appointed, could be vicar-general thereof, is now discarded. The last clause of the last paragraph simply states that the bishop may choose a priest of the diocese, and consequently also of the episcopal city.

The *powers* of the vicar-general are described, or rather outlined, in the following canon.

CAN. 368

§ 1. Vicario Generali, vi officii, ea competit in universa dioecesi iurisdictio in spiritualibus ac temporalibus, quae ad Episcopum iure ordinario pertinet, exceptis iis quae Episcopus sibi reservaverit, vel quae ex iure requirant speciale Episcopi mandatum.

§ 2. Nisi aliud expresse cautum fuerit, Vicarius Generalis exsequi potest rescripta apostolica quae Episcopo vel praecedenti rectori dioecesis remissa sint, ac generatim ad ipsum quoque pertinent facultates habituales Ordinario loci a Sancta Sede concessae, ad normam can. 66.

The vicar-general, by virtue of his office, enjoys that

13 The first degree would also include the bishop's son and father, which cases, however, are rare.

14 Cf. Bouix, *l. c.*, p. 396 ff.

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temporal and spiritual jurisdiction in the whole diocese which the bishop as Ordinary possesses *iure ordinario,* except that which the bishop reserves to himself, or which by law requires a special mandate from him.

Unless expressly provided to the contrary, the vicar-general can be executor of Apostolic rescripts sent to the bishop or his predecessor in the administration of the diocese. He also enjoys the *habitual faculties* granted by the Holy See to the *ordinarius loci.*

Hence there is now [15] no longer any doubt as to the character of the vicar-general's power. It is an ordinary power, conferred by the very act of appointment, and, therefore, coextensive with the ordinary power of the bishop himself in matters spiritual and temporal. Wherefore, let it be said by the way, the custom of appointing two vicars-general, one *in temporalibus* and one *in spiritualibus,* is not to be admitted, although, as stated above, two vicars-general *in solidum* may be appointed.

From the ordinary powers of the vicar-general the Code exempts that which the bishop has reserved, and that for which the law requires a special mandate. As to the first clause, it should be remembered that *Regula iuris* 81, in 6°, states: "In generali concessione nequaquam illa veniunt, quae non esset quis verisimiliter in specie concessurus." Some authors give a list of such cases,[16] which, however, is of little value, since the bishop must state the reservations he wishes to make to the vicar-general, otherwise the latter acts validly and licitly if he proceeds in such cases. Of greater importance is the second clause. A special mandate is required under the

15 We say *now,* for doubts were previously entertained as to the nature of that power. Cfr. Wernz, *l. c.,* II, p. 987 f. (1 ed.).

16 Cf. Benedict XIV, *De Synod. Dioec.,* l. II, c. 8; Barbosa, *De Officio et Potestate Episcopi,* P. III, allegatio 54, nn. 83 ff. (ed. Lugd. 1665, t. II, p. 123 ff.)

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new Code for the appointment to offices (can. 152), the conferring of benefices (can. 1432, § 2), the granting of *litterae dimissoriales* (can. 950, § 2), and the convoking of a synod (can. 357, § 1). Certain other cases that formerly required a special mandate are not mentioned in our Code.[17]

Concerning rescripts and faculties enough has been said in Bk. I. We merely note here that habitual, *i. e.*, triennial or quinquennial faculties, if such are issued again after the decree of the S. C. Consist. of April 25, 1918, are understood, but not such as are granted for a special case or for extraordinary occasions.

CAN. 369

§ 1. Vicarius Generalis praecipua acta Curiae ad Episcopum referat, ipsumque certiorem faciat de iis quae gesta aut gerenda sint ad tuendam in clero et populo disciplinam.

§ 2. Caveat ne suis potestatibus utatur contra mentem et voluntatem sui Episcopi, firmo praescripto can. 44, § 2.

In order that the old principle may be maintained, that the bishop and his vicar-general form one and the same person and tribunal, the Code demands that the vicar-general report the chief affairs (*acta*) of the Curia to the bishop and inform him of what was done or is to be done to safeguard the discipline of the clergy and the people, and that he should not use his powers against the intention and will of his bishop.

This canon was evidently added to obtain uniformity

17 For instance, to dispense from irregularities arising from an occult delict, (cfr. can. 998), to visit the diocese (can. 343), etc. Of course, this latter only in case the bishop is impeded.

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and unity of government. It forbids the vicar-general, under pain of nullity, to grant a favor denied by the bishop. How far prudence and charity are to be guides, must be left to personal judgment. We only add that the canon does not mean to make the vicar-general the policeman (in an odious sense) of the diocese.

CAN. 370

§ 1. Praesente etiam Episcopo, Vicarius Generalis publice privatimque praecedentiae ius habet super omnibus dioecesis clericis, non exclusis dignitatibus et canonicis ecclesiae cathedralis, etiam in choro et actibus capitularibus nisi clericus charactere episcopali praefulgeat, et Vicarius Generalis eodem careat.

§ 2. Si Vicarius Generalis sit Episcopus, omnia honorifica privilegia Episcoporum titularium obtinet; secus durante munere habet tantum privilegia et insignia Protonotarii apostolici titularis.

The *honorary rights* of the vicar-general are the following: He takes *precedence* over the whole clergy of the diocese at public and private occasions, even if the bishop is present, and over all dignitaries and cathedral canons in choir as well as in chapter meetings, unless there is a clergyman endowed with episcopal character and the vicar-general lacks that character. If the vicar-general is a bishop he enjoys all the honorary privileges of titular bishops. If he is not a bishop, he is entitled, during the time he serves as vicar-general, to all the privileges and insignia of a titular protonotary apostolic.

The first paragraph of can. 370[18] regulates the prece-

18 Formerly a distinction was made as to whether the vicar-general was a canon or not, whether he assisted in his insignia or not, etc. Cfr. Bouix, *De Capitulis*, 1852, p. 524 ff.

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dence of the vicar-general on all ecclesiastical occasions. As he takes precedence over all prelates not endowed with the episcopal character, he ranks above protonotaries and abbots, actual and titular. Of the honorary privileges of a vicar-general who has received episcopal consecration, and hence ranks as a titular bishop, enough has been said. If the vicar-general is not a bishop, he is entitled to the privileges and insignia of a titular protonotary apostolic, the lowest class of the protonotaries' college, as remodeled by Pius X in his Motu proprio, "Inter multiplices," Feb. 21, 1905. Vicars-general enjoy the title and privileges of this class of prelates by right during the whole tenure of their office as vicars, and are, therefore, called monsignori. Their dress is a black cassock which may have a trail (but not unfolded) with a silk belt and two pendants (*flocculi*) on the left, a rochet, mantelet, and biretta, all black. They do not genuflect but only bow to the bishop or the cross; and are incensed *duplici ductu;* they say Mass as ordinary priests, but have the right to use the *bugia* or hand-light. Over their daily dress, on solemn occasions, including audiences with the Pope, they may wear a silken belt with a black fringe, a hat with a band and tassels of black color. On their coat-of-arms they may place a hat of black color with ribbons or strings and six tassels on each side, all black (not purple or red).[19]

CAN. 371

Exspirat Vicarii Generalis iurisdictio per ipsius renuntiationem ad normam can. 183–191, aut revocationem ei ab Episcopo intimatam, aut sedis episcopalis

19 Cfr. *Amer. Eccl. Review*, 1905, Vol. XXXII, p. 625 ff.

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vacationem; suspenditur vero suspensa episcopali iurisdictione.

The jurisdiction of the vicar-general *expires* by resignation, by revocation on the part of the bishop, or by vacancy of the episcopal see. When the bishop's jurisdiction is suspended, that of the vicar-general also ceases.

As to *resignation* enough has been said above. If the bishop wishes to *remove* his vicar-general, he has to make the fact formally known to him, for a tacit recall is not valid nor does it affect the validity of the acts of the vicar-general. The best way is in writing, although this mode of recall is not strictly involved in the term "intimata," which signifies to make something known to someone in a legal way. Hence the notification may be made orally by courier or any other official, but the bishop must assure himself that the notice was received by the vicar-general. No reason [20] need be given for the removal, for the vicar-general is removable "*ad nutum episcopi.*"

If the episcopal see becomes vacant the jurisdiction of the vicar-general ceases, because bishop and vicar-general are considered one tribunal. However, if a common error concerning the death of the bishop should occur, the official acts performed by the vicar-general during the supposed vacancy would be valid.[21]

The jurisdiction of the vicar-general is suspended if the bishop is suspended from jurisdiction, or excommunicated, or smitten with the personal interdict. But a mere *suspensio a divinis* of the bishop would not suspend the jurisdiction of his vicar-general.

20 Bouix, *De Judiciis*, I, p. 443, and others hold that recourse may be had to the Holy See; but now this seems out of place, as stated in the text.

21 Cf. Wernz, *Jus Decret.*, II, p. 994.

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ARTICLE II

THE CHANCELLOR AND OTHER NOTARIES — THE EPISCOPAL ARCHIVES

The following canons attest the great care which the Church wishes to be taken of all the more important documents pertaining to diocesan government. She herself has set a shining example. From the earliest time of her existence, Rome had its regional notaries, who were employed partly in collecting the acts of the martyrs, and partly in writing and preserving documents for the papal archives. The latter existed as early as the fourth century,[22] as we learn from the *Liber Pontificalis* that the popes preserved their official, legislative, and disciplinary documents *in archivio ecclesiae*.[23] The care of these archives required persons of trust and ability, who would scrupulously record the documents and watch over them. For this purpose a host of scribes (called *notarii, scriniarii, chartularii*) were employed at the papal court, who not seldom rose to dignities and held high rank in the pontifical family, to which in later centuries especially belonged the protonotaries.

All this goes to prove the importance of ecclesiastical archives and makes the following enactments more intelligible. As the episcopal court forms part of the universal machinery of the Church, those who are entrusted with the diocesan archives should bestow upon them minute and loving care.

CAN. 372

§ 1. In qualibet Curia constituatur ab Episcopo cancellarius qui sit sacerdos, cuius praecipuum munus

22 Cf. Hieronymi Opp., Migne, *P. L.*, 23, 549; Phillips, *Kirchenrecht*, 1864, t. VI, p. 362 ff.

23 *Liber Pontificalis*, ed. Duchesne, I, CXXX, CLII, 230, 238

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sit acta Curiae in archivo custodire, ordine chronologico disponere et de eisdem indicis tabulam conficere.

§ 2. Poscente necessitate, adiutor ei dari potest, cui nomen sit vice-cancellarii seu vice-tabularii.

§ 3. Cancellarius est eo ipso notarius.

Every episcopal Curia should have a chancellor, a priest appointed by the bishop, whose chief business it is to file official documents in the archives, keep them in chronological order and properly indexed. If necessary, the chancellor should be given an assistant, with the name of vice-chancellor or vice-recorder. The chancellor, by reason of his office, is also a notary.

The documents may be indexed according to the names of parishes, or topically, according to the subject-matter; for instance, appointments, assistants, charitable institutions, marriages, ordinations, parish priests, religious, sisterhoods, etc. The chronological order had best be kept according to the calendar year.

CAN. 373

§ 1. Episcopus praeter cancellarium potest alios quoque notarios constituere, quorum scriptura aut subscriptio publicam fidem facit.

§ 2. Iidem constitui possunt aut ad quaelibet acta, aut ad acta iudicialia dumtaxat, aut ad acta tantummodo certae causae vel negotii conficienda.

§ 3. Si clerici desint, possunt e laicis assumi; sed notarius in criminalibus clericorum causis debet esse sacerdos.

§ 4. Cancellarius aliique notarii debent esse integrae famae et omni suspicione maiores.

§ 5. Omnes possunt removeri aut suspendi ab eo

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qui illos constituit aut ab eius successore aut Superiore, non autem a Vicario Capitulari, nisi de consensu Capituli.

Besides the chancellor, the bishop may appoint other ecclesiastical notaries, who may act in all ecclesiastical matters without discrimination, or only in judicial affairs, or in certain cases, or for a certain kind of cases, as the bishop deems proper. Where there is a lack of clerics, laymen may be chosen for this office; but the notary in all criminal cases of the clergy must be a priest.

The chancellor and the other notaries must be men of good reputation and beyond suspicion concerning their character and trustworthiness.

All of them may be removed or suspended by the one who appointed them, or by his successor or superior, but not by the vicar-capitular, except with the consent of the chapter.

These officials may be removed by the bishop for any or no reason and without appeal to a higher authority. They may also be suspended [24] for a time, according to the good pleasure of the bishop. The right of removing and suspending the chancellor and other ecclesiastical notaries belongs to the bishop, to his successor, and to his *superior*. The superior of the bishop, in the canonical sense, is the Pope, not the metropolitan, who cannot therefore remove the aforesaid officials. Neither should the vicar-capitular or administrator remove or suspend them, for the old title in the Decretals (III, 9) that nothing should be changed during a vacancy, still holds good (can. 436). Therefore our canon demands, not only the advice, but the consent of the chapter or diocesan consultors.

24 Suspension is here to be taken as temporary cessation, not as ecclesiastical censure, because it may be inflicted on lay notaries.

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CAN. 374

§ 1. Officium notariorum est:

1.° Conscribere acta seu instrumenta circa dispositiones, obligationes, citationes et intimationes iudiciales, decreta, sententias aliave circa quae eorum opera requiritur;

2.° In scriptis fideliter redigere quae geruntur eaque cum significatione loci, diei, mensis et anni subsignare;

3.° Acta vel instrumenta legitime petenti ex regesto, servatis servandis, exhibere et eorum exemplaria cum autographo conformia declarare.

§ 2. Conscribere acta nequit notarius nisi in territorio illius Episcopi a quo est electus aut pro negotio ad quod est legitime constitutus.

This canon defines the functions of ecclesiastical notaries. They are:

(1) To put in writing all episcopal acts or documents concerning enactments (*dispositiones*), orders, and engagements (*obligationes*), all judicial summons and intimations, all decrees and sentences, and whatever else requires their cooperation;

(2) To record all important events with name of place and date,— day, month and year;

(3) To show the acts or documents contained in the diocesan archives to those who rightfully ask to see them, and to furnish authenticated copies of the originals.

A notary can make official records only in the territory of the bishop by whom he is appointed, and in matters with which he is lawfully entrusted. The office of notary is thus not only legal, but partly that of a historiographer. *Legal acts* are the orders issued by the bishop (*dispositiones*), *e. g.*, concerning appointments to offices,

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conferences and arrangements for confirmation. Likewise the *obligationes,* which imply all kinds of material and spiritual engagements, for instance, (1) title deeds, mortgages on church property, etc., (2) foundations for masses, legacies or bequests, especially last wills. Legal in the strictest sense are those acts which belong to judiciary procedure, summons, intimations, sentences, etc., all of which must be composed and recorded very carefully because their validity might otherwise be jeopardized.

As the *historiographer* of the diocese the chancellor or notary should record the erection of parishes, the labors of priests, the work done by institutions of charity and religion, etc. Historical records are very important, *inter alia,* for ascertaining prescription and custom. Wherefore the chancellor, in doing his duty conscientiously, serves History, which "teaches by example."

Here we would draw attention to the necessity of using durable and specially prepared ink. It is an unfortunate fact that many, especially typewritten papers, in course of time become almost illegible, whereas manuscripts of the ninth and tenth century can still be read with little difficulty.

The last paragraph of our canon *limits the activity* of notaries to the territory of the bishop to whom they owe their appointment. This rule is based on the nature of espiscopal jurisdiction, which is strictly limited in regard to territory, according to the principle: "Extra territorium ius dicenti impune non paretur." [25] A notary who would attempt to perform judicial functions in a strange territory would lack authority and therefore act invalidly.[26] Besides, a notary can write or compose only such documents for which he has been authorized; whence

[25] Cfr. c. 2, 6°, I, 2, de const.

[26] Cfr. Reiffenstuel, II, 22, n. 262, *de fide instrum.*

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a judicial act or document composed by a notary who was assigned to administrative affairs only, would be invalid.

CUSTODY OF ARCHIVES

CAN. 375

§ 1. Episcopi in loco tuto ac commodo archivum seu tabularium dioecesanum erigant, in quo instrumenta et scripturae, quae negotia dioecesana tum spiritualia tum temporalia spectant, apte dispositae et diligenter clausae custodiantur.

§ 2. Omni diligentia ac sollicitudine conficiatur inventarium seu catalogus documentorum quae in archivo continentur cum brevi singularum scripturarum synopsi.

CAN. 376

§ 1. Quotannis, primo bimestri, inventario seu catalogo illae scripturae adiungantur, quae anno praecedenti confectae vel alias neglectae fuerunt.

§ 2. Ordinarii sedulo inquirant chartas et scripturas forte alio distractas atque dispersas; et quaelibet necessaria remedia adhibeant ut eaedem scripturae archivo restituantur.

CAN. 377

§ 1. Archivum clausum sit oportet et nemini illud ingredi liceat sine Episcopi aut Vicarii Generalis et cancellarii licentia.

§ 2. Unus cancellarius illius clavem habeat.

CAN. 378

§ 1. Ex archivo non licet efferre scripturas sine Episcopi vel Vicarii Generalis consensu eaedemque post

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triduum in suum locum referantur. Ordinario autem reservatur facultas prorogandi hoc tempus, quae tamen prorogatio nonnisi moderate concedatur.

§ 2. Qui aliquam scripturam ex archivo effert, syngrapham sua manu signatam, hoc ipsum significantem, cancellario relinquat.

The bishop must provide a safe and convenient place for the diocesan archives, where all documents pertaining to the spiritual and temporal affairs of his diocese may be properly arranged and safely kept under lock and key. A careful inventory or list of documents kept in the archives should be made, as well as a brief summary of each. Within the first two months of every year should be added to the catalogue such new papers as have accumulated in the course of the preceding year or been found neglected elsewhere.

The Ordinaries are instructed to make a careful search for documents and papers which may have gone astray or been scattered, and to employ every feasible means to have them restored to the diocesan archives.

The archives are to be locked, and no one is allowed to enter the place where they are kept without the permission of the bishop or of both the vicar-general and the chancellor. The chancellor shall keep the key.

No one is allowed to take papers out of the archives without the consent of either the bishop or the vicar-general; and if any papers are taken out, they must be returned after three days, unless the Ordinary permits them to be kept out for a longer time. Such permission, however, should be granted but rarely. Whoever takes out a paper from the archives must leave a signed receipt in his own handwriting with the chancellor.

This canon is intended as a safeguard to prevent docu-

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ments from being scattered, and at the same time offers to students of history, or others who may be interested in episcopal records, an opportunity to use them. Of course, bishops will see to it that the documents are not put to wrong uses.

SECRET ARCHIVES

CAN. 379

§ 1. Habeant praeterea Episcopi aliud archivum secretum vel saltem in communi archivo armarium seu scrinium omnino clausum et obseratum, quod de loco amoveri nequeat. In eo scripturae secreto servandae cautissime custodiantur; sed singulis annis quamprimum comburantur documenta causarum criminalium in materia morum, quarum rei vita cesserint vel quae a decennio sententia condemnatoria absolutae sunt, retento facti brevi summario cum textu sententiae definitivae.

§ 2. Etiam huius secreti archivi vel armarii inventarium seu catalogus conficiatur ad normam can. 375, § 2.

§ 3. Hoc archivum vel armarium duabus clavibus inter se diversis aperiatur, quarum altera apud Episcopum vel Administratorem Apostolicum, altera apud Vicarium Generalem vel, eo deficiente, Curiae cancellarium asservetur.

§ 4. Episcopus vel Administrator Apostolicus, repetita altera clave, ipse solus, nemine adstante, archivum vel armarium secretum, ubi opus fuerit, aperire et inspicere potest, quod deinde utraque clavi iterum claudatur.

CAN. 380

Statim a capta possessione, Episcopus sacerdotem

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designet, qui, sede vacante aut impedita, clavem secreti tabularii seu armarii quae apud Episcopum erat, assumat.

CAN. 381

§ 1. Nisi Administrator Apostolicus dioecesi datus fuerit:

1.° Sede impedita ad normam can. 429, § 1, sacerdos ab Episcopo designatus, si quidem regimen dioecesis sit penes virum ecclesiasticum ab Episcopo delegatum, clavem eidem remittat; si penes Vicarium Generalem, eam ipse retineat;

2.° Sede vero vacante aut impedita ad normam cit. can. 429, § 3, idem sacerdos clavem remittat Vicario Capitulari statim post eius designationem; Vicarius vero Generalis vel cancellarius aliam clavem a se retentam remittere eodem tempore debet primae Capituli dignitati vel consultori dioecesano munere antiquiori.

§ 2. Antequam claves iis, quibus tradi debent ad normam § 1, remissae fuerint, Vicarius Generalis vel cancellarius et sacerdos, ut supra, ab Episcopo designatus, tabularium vel armarium sigillis Curiae obsignent.

CAN. 382

§ 1. Tabularium vel armarium nunquam aperiatur nec sigilla ab eo removeantur, nisi urgente necessitate et ab ipso Vicario Capitulari coram duobus canonicis vel dioecesanis consultoribus, qui evigilent ne qua scriptura e tabulario auferatur; solus autem Vicarius Capitularis documenta in tabulario asservata potest, iisdem canonicis vel consultoribus adstantibus, inspicere, nunquam tamen auferre. Archivum autem, post inspectionem, iterum sigillis obsignetur.

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§ 2. Advenienti novo Episcopo, si sigilla remota fuerint et tabularium aut armarium apertum, Vicarius Capitularis rationem reddat urgentis necessitatis, qua ad hoc motus fuerit.

What was said in the preceding canons concerns the common archives of the diocese. Besides this there should be a strictly secret one. At least the bishop must provide for a special safe or chest, capable of being locked and immovable (safe or safety vault), wherein all secret papers should be carefully preserved. Documents pertaining to criminal cases and moral matters which have reference to deceased defendants or to cases settled by condemnatory sentence over ten years ago, should be burnt every year, only a brief summary of each case with the text of the final sentence being retained.

Of the contents of these secret archives or chests an inventory or catalogue must be made according to can. 375, § 2.

These archives (or safe) must be locked with two different keys, one of which is kept by the bishop or Apostolic administrator, the other by the vicar-general, or, if there is no vicar-general, by the chancellor.

The bishop or Apostolic administrator, after having procured the other key from the vicar-general or chancellor, may, if necessary, open and inspect the secret archives alone and without witnesses, and should again lock it with both keys.

§ 1 of canon 379 safeguards the reputation of the dead and prevents the accumulation of useless papers.

The reason why the Apostolic administrator is specially mentioned in § 3 and § 4 is because these officials have sometimes been excluded not only from episcopal palaces, but also from the diocesan archives.

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Canon 380 provides that the bishop, immediately after taking possession of his diocese, shall appoint a priest who, during a possible vacancy of the see or enforced absence of the bishop (*sede impedita*), shall take possession of the key. How careful the Church wishes the bishop to be with these archives is apparent from this canon. The secret archives of a bishop resemble diplomatic archives, and the last nuncio of Paris, if he were still alive, might tell a strange tale. Hence the law provides that a special custodian is appointed for the secret archives,— the chapter, which is otherwise competent in such matters, being discarded for good reasons.

Canon 381 says that, when a diocese has no Apostolic administrator during the vacancy of the see or enforced absence of the bishop, the custodian of the secret archives shall hand over the key to the temporary ruler of the diocese, if he be an ecclesiastic designated by the bishop; but if the government is in the hands of the vicar-general, he shall retain the key. The key shall be handed over to the vicar-capitular as soon as one is appointed, and at the same time the vicar-general or chancellor shall give up the other key to the first dignitary of the diocesan chapter or the oldest in rank among the diocesan consultors.

Before the keys are handed over to the persons designated in § 1, the vicar-general (or chancellor) and the custodian appointed by the bishop shall seal the archives, including the secret chests, with the seal of the episcopal Curia.

Canon 382 rules that the secret archives (*tabularium, armarium*) shall never be opened or unsealed except in urgent cases, by the vicar-capitular in the presence of two canons or diocesan consultors, who shall watch that no papers are carried off. The vicar-capitular may examine the papers alone in the presence of said canons or con-

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sultors, but he is not allowed to take any of them away, and the archives must again be sealed after inspection. If the seals were removed and the archives opened, the vicar-capitular must report to the new bishop the reason which urged him to open the archives.

OTHER ARCHIVES OF THE DIOCESE

CAN. 383

§ 1. Curent Episcopi ut archivorum quoque ecclesiarum cathedralium, collegiatarum, paroecialium, necnon confraternitatum et piorum locorum inventaria seu catalogi conficiantur duobus exemplaribus, quorum alterum in proprio archivo, alterum in archivo episcopali servetur, firmo praescripto can. 470, § 3, 1522, nn. 2, 3, 1523, n. 6.

§ 2. Documenta originalia ex praedictis archivis ne efferantur, nisi ad normam can. 378.

CAN. 384

§ 1. Documenta quae in paroeciarum et Curiarum archivis sub secreto servanda non sunt, fit cuilibet cuius intersit inspiciendi potestas; itemque postulandi ut sua impensa sibi legitimum eorum exemplar exscribatur et tradatur.

§ 2. Cancellarii autem Curiarum, parochi, aliique archivorum custodes in communicandis documentis et eorum exemplaribus describendis tradendisque regulas servent a legitima auctoritate ecclesiastica datas, et in casibus dubiis loci Ordinarium consulant.

Canon 383 urges the bishop to take care that all documents concerning the cathedral, collegiate and parish churches, as well as confraternities and pious institutions,

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be made out in duplicate and that one copy be kept in the archives of the respective church or institution, whilst the other is preserved in the episcopal archives. No papers are to be taken from these archives except under the conditions stated in can. 378.

Canon 383 refers to three other canons, *viz.*, 470, 1522, and 1523, which pertain to the parish books and inventories procured by the diocesan trustees. Of these a copy must be sent to, and kept in, the episcopal archives. It is evident that parishes in charge of exempt religious must comply with this law only in so far as parish affairs are concerned.

According to canon 384, the papers which need not be kept secret in parochial and episcopal archives may be inspected by any one who is interested in them, and authentic copies may be made by any one at his own expense. The chancellors of the various Curiae, parish priests and other custodians, in communicating documents or copies from the archives entrusted to their care, shall follow the rules laid down by legitimate ecclesiastical authority, and in doubtful cases consult their ordinaries.

The laws embodied in this part of the Code may serve as a pattern for more elaborate rules, which, if properly observed, will prevent abuses and unpleasantness.

ARTICLE III

SYNODAL EXAMINERS AND CONSULTORS

CAN. 385

§ 1. In quavis dioecesi habeantur examinatores synodales et parochi consultores qui omnes in Synodo constituantur, propositi ab Episcopo, a Synodo approbati.

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§ 2. Tot eligantur quot Episcopus prudenti suo iudicio necessarios iudicaverit, non tamen infra quatuor, nec ultra duodecim.

CAN. 386

§ 1. Examinatoribus et parochis consultoribus medio tempore inter unam et aliam Synodum demortuis vel alia ratione a munere cessantibus, alios pro-synodales Episcopus substituat de consilio Capituli cathedralis.

§ 2. Quae regula servetur quoque in examinatoribus et parochis consultoribus constituendis quoties Synodus non habeatur.

The Council of Trent [27] decreed that at each diocesan synod *examiners* should be chosen for the concursus of parish priests. The same council [28] advised bishops to have regular examiners for examining candidates for the priesthood and priests asking for the faculty to hear confessions. Diocesan synods having gone into desuetude, and for other reasons, examiners are now also selected outside the synod. Hence two kinds of examiners *synodales, i. e.,* those chosen at a diocesan synod, and *prosynodales, i. e.,* those chosen outside.

The *parochi consultores,*[29] have but a short history; for, if we mistake not, they were "canonized" by the Motu proprio of Pius X, "Maxima cura," Aug. 20, 1910,

27 Cf. *Trid.*, Sess. 24 c. 18, de ref. and Bened. XIV, *De Synod. Dioec.*, l. IV, c. 7; decisions cfr. Richter, *Trid.*, p. 378 ff.

28 *Trid.*, Sess. 23, cc. 7, 15 de ref.

29 In the Catholic Directory the term "parochi consultores" is sometimes translated by "parish-consultors," which may be accepted for brevity's sake, but is not entirely correct, for these consultors are quasi assessors of the parish priests, not of the parishes, which, of course, are concerned indirectly.

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and now figure in the procedure of administrative removal of parish priests.

The Code ordains that there should be in every diocese synodal examiners and parish priest consultors, all to be appointed at and approved by a synod but proposed by the bishop; that the number of examiners and consultors is left to the prudent judgment of the bishop, but should not be less than four nor more than twelve.

These officials should be elected by those attending the synod after the bishop has proposed several names. The balloting may be secret or open; but a majority of votes is required for election. Hence, if one or the other, or even all proposed by the bishop do not receive the necessary majority, the bishop must propose other names for those rejected, until the number of appointees has been reached.[80] This number is determined by the bishop, preferably at the synod. The maximum and minimum are settled by law.

Canon 386 provides that, if any examiner or parish priest consultor should die or go out of office during the time intervening between synods, the bishop, with the advice of the cathedral chapter [or the diocesan consultors] shall appoint another in his stead and that the same rule shall be observed in the appointment of examiners and consultors, if no synod is held.

This enactment precludes the idea that the office of consultor or examiner may be attached to a parish, dignity, or office in such a way that the successor in that parish, etc., would *eo ipso* be examiner or consultor because his predecessor held that office.[81]

The second paragraph provides for extraordinary

80 Benedict XIV, *De Synod. Dioec.*, l. IV, c. 7, n. 3.

81 *Ibid.*, n. 5, where an example from the diocese of Toledo in Spain is stated covering the text.

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cases, which may arise where synods are not held at all or at irregular intervals.

CAN. 387

§ 1. Examinatores et parochi consultores, sive in Synodo sive extra Synodum constituti, post decennium ab incepto munere vel etiam prius, adveniente nova Synodo, officio cadunt; possunt tamen negotium iam coeptum ad exitum perducere et, servatis de iure servandis, denuo constitui.

§ 2. Qui loco examinatorum ac parochorum consultorum deficientium constituantur, in officio persistunt dumtaxat quousque perstitissent ii quibus substituti fuerunt.

CAN. 388

Removeri ab Episcopo nequeunt, nisi ex gravi causa et de consilio Capituli cathedralis.

CAN. 389

§ 1. Examinatores synodales operam suam diligenter navent praesertim experimentis habendis ad provisionem paroeciarum nec non processibus de quibus in can. 2147 seqq.

§ 2. Pro experimentis vero habendis ad clericorum ordinationem et approbationem sacerdotum qui petunt facultatem excipiendi sacramentales confessiones aut sacras conciones habendi, et pro examinibus de quibus in can. 130, integrum est Episcopo vel examinatorum synodalium vel aliorum opera uti.

CAN. 390

Idem potest esse examinator et parochus consultor, non autem in eadem causa.

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Under can. 387 examiners and consultors, whether synodal or prosynodal, go out of office ten years from the date of their appointment, or, if a synod is held, even sooner. However, they may finish cases already begun, and, with due observance of the prescribed regulations, may be re-elected.

Those who are appointed in the place of deceased or retiring examiners and consultors shall merely fill the unexpired terms of those whose place they take.

A synod, according to can. 356, should be held every ten years, and this period is the normal term of office for the officials in question. Hence, if a consultor or examiner is appointed extrasynodically, say five years after the last synod, he can remain in office five years only, *i. e.*, up to the time of the next synod. However, he as well as those who have served a full ten years' term, may be re-elected at the synod according to the rules established in can. 385.

If they have *commenced* to treat an ecclesiastical matter, say the removal of a parish priest, they may finish the case, even if they are not re-elected. In the example stated, the cause would have "commenced," so far as the examiner is concerned, as soon as the invitation to resign has been issued (can. 2148). For a consultor a "business" (*negotium*) has "commenced" when the parish priest thus asked to resign has taken recourse to the Ordinary (can. 2153). In other affairs, such as examinations, a sudden interruption is not likely to occur; but if an examiner has commenced to examine, he must finish the job.

Canon 388 provides that examiners and consultors *cannot be removed from office* by the bishop except for weighty reasons and with the *advice* of the cathedral

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chapter (or diocesan consultors). This canon is but a consequence of the mode of their appointment, as the express wish of the synod would be slighted if the bishop were to remove these officials arbitrarily. Hence a weighty reason is required. Such a reason would be, *e. g.,* fraud committed at an examination, or a bribe accepted. Besides, the reasons that justify the removal of a parish priest would also justify the removal of an examiner or consultor. Note that the *advice,* not the consent of the chapter or consultors is required. Hence a removal without solid reason, or without the advice of the chapter or board of consultors, would be valid, and the person removed could have recourse, but could not appeal to a higher authority.

Canon 389 makes it obligatory for the synodal (or pro-synodal) examiners *to perform their task* diligently, especially at the examinations which are held for the provision of parishes and in the course of procedures aiming at the removal of pastors. For the examination of candidates for Holy Orders and of such priests as desire the faculty of hearing confessions and preaching, and also of newly ordained priests for three years after ordination, the bishop is at liberty to employ the synodal examiners or others. These points shall be explained in connection with can. 459, where definite rules are laid down.

Can. 390 permits the same person to be examiner and consultor, but not in the same cause. Hence in the canonical process for the removal of parish priests, one who holds both offices can act in only one capacity, either as examiner or as consultor.

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CHAPTER V

CHAPTERS OF CANONS

Ancient documents testify to the fact that the bishops at an early date in the Church's history made use of their clergy in the government of the diocese, as helpers and counselors, so that the body of the clergy formed, as it were, a senate about their chief pastor. St. Jerome could say: "We, too, in the Church possess our own senate, the assembly of the clergy."[1] However, this coöperation did not imply a life in common (*vita communis*), as led by the monks. St. Augustine, indeed, endeavored to gather his priests under one roof and have them lead a community life;[2] and his example found followers, not only in Africa, but beyond the shores of the Mediterranean, at Tours (567) and Toledo (633).[3] A fresh impetus to community life was given by Chrodegang of Metz, who composed a special rule for his *canons,* as he called them.[4] This name had a double signification. Originally it meant one immatriculated or inscribed in the canon or list of names which was preserved in the churches either for liturgical or administrative purposes. In the eighth and ninth centuries, the term signified a person who lived according to a canonical rule, *i. e.,* one

1 Cf. Benedict XIV, *De Synod. Dioec.,* XIII, 1, 4.

2 *Vita S. Aug.,* by Possidius, in Migne, *P. L.,* 32, col. 37 ff.

3 Hefele, *Conciliengeschichte,* 1855, III, 75 and 21.

4 The rule of Chrodegang is published in Mansi, *Coll. Conc.,* t. XIV, 313 ff.; it is in part taken verbally from the rule of St. Benedict. Amalarius of Metz published an enlarged edition of the rule of Chrodegang.

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supposed to be taken from the canons of church councils; hence, *vita canonica* or canonical life. Various synods, as well as Charlemagne, had decreed that all clergymen should be canons[5] and live within the *claustrum* of the bishop, to which no women were admitted.[6] The superior *par excellence* was the bishop himself, his chief assistants the arch-deacon, the precentor,[7] and prelates, who went by various names, the first in rank being sometimes called provost (*praepositus*), and the second, dean or arch-priest. The younger clerics, called *domicellares,* were trained by a *scholasticus* and employed as singers. This was the institute of canons, which Louis the Pious wished to introduce into his empire. But in course of time some of the clergy grew tired of the life in common, especially since their private property remained to them, and their prebends or benefices permitted, nay often compelled them to remain outside the community house. Yet, though they lived in private houses, they long retained the rule of Chrodegang[8] that they should attend the *chapter* or capitulum, in order to hear a chapter from the rule or a homily, and to receive orders and corrections. This praiseworthy custom was about all that was left of the ancient canonical life, and despite the efforts of saintly men[9] to restore it, the chapters of canons remained independent, nay obtained many additional prerogatives in the eleventh and twelfth centuries. It certainly was more than a mere accident that the popes wished to favor the chapters in that

5 Cf. Hefele, *Conciliensgeschichte,* III, pp. 551, 561, 585, 627, 683, 693.

6 *Regula Canonica,* cc. 117, 144; Hefele, *l. c.,* IV, pp. 10, 13.

7 *Regula Chrodeg.,* cc. 9, 24; Mansi, *l. c.,* XIV, 317, 325.

8 *Regula Chrodeg.,* c. 8; Mansi, *l. c.,* XIV, 318.

9 Yvo of Chartres, and especially S. Norbert, succeeded in establishing the order of canons regular, so-called, to distinguish them from the canons secular.

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memorable struggle concerning investitures. Hence it need not surprise us that, under Alexander III (1159–81), the canons controlled the episcopal elections,[10] and that the Decretals accept this as a matter of fact.[11] Besides electing the bishop, the chapter, through its vicar-capitular, governed the diocese during the vacancy of the episcopal see.

Thus, the cathedral chapter in course of time became a powerful *corporation,* which asserted its influence throughout the diocese no less than within its bosom (*gremium*). To it belonged the right to receive new members and to determine their number, to create new prebends, etc. Thus, the *canonicus theologus* and the *canonicus poenitentiarius,* in existence since the thirteenth century, obtained a legal status at the Council of Trent[12] and were looked upon as important officials. Some canons were supranumerary or honorary, whilst others were full-fledged (*in fructibus et floribus*). Besides a distinction was sometimes made between *dignities* in the proper sense, including precedence and jurisdiction, *personatus,* which gave only precedence, and *officia,* which had neither precedence nor jurisdiction. But unfortunately these terms are often used promiscuously.[13] If *dignitas* is taken in the strict sense, to wit, as including precedence and jurisdiction *in foro externo,* it would include the bishop and the vicar-general, and perhaps other officials. However, the bishop and the vicar-general are not considered canons under the law. The new Code admits a twofold gradation: *dignitates* and *canonicatus,* the former being nothing else than the an-

10 Can. 35, Dist. 63.

11 Cf. tit. 6, *de electione,* passim.

12 Sess. 5, c. 1, de ref.; sess. 24, c. 8 de ref.; Bouix, *De Capitulis,* 1852; Aichner, *Compendium Juris. Eccl.,* § 121; Wernz, *Jus Dec.,* II, 921 ff. v. Scherer, *Kirchenrecht,* I, 565 ff.; Sägmüller, *K.-R.,* § 95.

13 Cf. Benedict XIV, *De Syn.,* III, 3. 1.

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cient *personatus,* involving mere precedence or honorary rights, while the latter connotes administration or office, with, of course, some honorary prerogatives to distinguish the holder from the rest of the clergy.[14]

Mention must finally be made of the fact that after the canonical life had completely vanished, the chapters fixed a *certain number* of canons to be admitted, and a chapter, if filled, was called "closed" (*capitulum clausum*).

In order to make their burden more bearable, the canons admitted, not indeed into the chapter or to participation in its honorary rights, other clerics, who went by various names: *beneficiarii, capellani, portionarii, mansionarii.* These received a certain portion of the revenues and were actual coadjutors of the canons,[15] though without the latters' prerogatives.

After these explanations, which were necessary to enable the reader to understand the following canons, we now proceed.

CAN. 391

§ 1. Capitulum canonicorum sive cathedrale sive collegiale seu collegiatum est clericorum collegium ideo institutum ut sollemniorem cultum Deo in ecclesia exhibeat et, si agatur de Capitulo cathedrali, ut Episcopum, ad normam sacrorum canonum, tanquam eiusdem senatus et consilium, adiuvet, ac, sede vacante, eius vices suppleat in dioecesis regimine.

§ 2. Capitulum collegiale appellatur insigne aut

14 Cf. Bouix, *De Capitulis,* p. 79 ff.; Wernz, *Jus. Decret.,* III, 934 f., who appropriately remarks that, in order to get at the true distinction of these various offices, one would have to study the several chapters. This occupation we leave to others.

15 Cf. Bouix, *l. c.,* p. 68, p. 139 ff.; *mansionarii,* they were called because of their permanent service; *portionarii,* because they received a portion of the revenues.

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perinsigne, si hoc titulo ex apostolico privilegio vel ab immemorabili gaudeat.

A chapter of canons, either cathedral or collegiate, is a corporation of clerics, instituted for the purpose of more solemnly celebrating the divine service. A cathedral chapter has the additional function of assisting the bishop as his senate and council and governing the diocese during a vacancy of the episcopal see.

A collegiate chapter is called distinguished or very distinguished (*insigne aut perinsigne*), if it has received that title from the Apostolic See or enjoys it by immemorial custom.

A *collegiate* chapter is a corporation of canons, which is established, not at the cathedral, or, as the ancient term has it, *in domo episcopi,* but in some other conspicuous place or church. Such chapters are often found in episcopal cities. In Rome, for instance, there are several of them, *e. g.,* S. Maria in Cosmedin, S. Lorenzo in Lucina, etc.

The character *insignis* (distinguished) is derived either from the will of the Supreme Pontiff or from immemorial custom. The former needs no reason, but generally follows the rule either of antiquity or excellence attached to the place or church. Custom, therefore, has distinguished certain chapters either by the significance of the place or importance of the church (sanctuary) or the fame of the canons.[16]

Can. 392

Capitulorum tum cathedralium tum collegialium institutio seu erectio, innovatio ac suppressio Sedi Apostolicae reservatur.

16 Bouix, *l. c.,* p. 55 f.

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Cathedral as well as collegiate chapters may be erected, changed, or suppressed only by the Apostolic See. This has been the practice of the popes since the eighteenth century; indeed, we might say, to some extent, since the Tridentine Council.[17]

CAN. 393

§ 1. In qualibet ecclesia capitulari sint dignitates et canonici inter quos varia officia distribuantur; possunt esse etiam alia minora beneficia in uno vel pluribus gradibus.

§ 2. Capitulum constat dignitatibus et canonicis, nisi, ad dignitates quod attinet, aliud ex capitularibus constitutionibus eruatur; non autem inferioribus beneficiariis seu mansionariis, qui canonicis auxilium praestant.

§ 3. Canonicatus sine adnexis emolumentis ne instituantur sine speciali Apostolicae Sedis concessione.

In every chapter church there should be dignitaries and canons to discharge the various offices. There may also be minor benefices of the same or several kinds (*gradibus*).

A chapter consists of dignitaries and canons, unless the constitution of the chapter provides otherwise concerning the dignities; but not of beneficiaries or *mansionarii* who are assistants to the canons.

No canonicate lacking the necessary revenues can be established without the special permission of the Apostolic See.

§ 1 declares the intention of the legislator that there should be two kinds of canons in every chapter: digni-

17 Cf. Bouix, *De Capitulis*, p. 81 ff.

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taries and simple canons; but § 2 admits the old custom that dignitaries proper are not *de capitulo*.[17] A plurality of minor benefices either in the dignitaries or canons is admitted, whereas beneficiaries or vicars of canons are excluded from the chapter.

CAN. 394

§ 1. In Capitulis numeratis tot sint praebendati, quot praebendae; in non numeratis, quot ex proventibus decenter sustentari posse, Episcopus, audito Capitulo, iudicaverit.

§ 2. Erectio dignitatum Sedi Apostolicae reservatur; sed est in Episcopi potestate, consentiente Capitulo, exstinctas forte dignitates restituere et praebendis in Capitulo iam exstantibus alias sive canonicales sive beneficiales addere.

§ 3. In ecclesiis cathedralibus et collegialibus insignibus ubi adeo tenues praebendae sunt una cum distributionibus quotidianis, ut sustinendo canonicorum decori plane sint impares, Episcopi, audito Capitulo et impetrata Sanctae Sedis licentia, vel beneficia aliquot simplicia praebendis uniant, vel, si hac ratione provideri non possit, aliquibus praebendis suppressis, cum patronorum consensu, si de iure patronatus laicorum sint, quarum fructus et proventus reliquarum praebendarum distributionibus quotidianis applicentur, eas ad minorem numerum reducant, ita tamen ut tot supersint, quot divino cultui celebrando ac dignitati ecclesiae commode respondeant.

In closed chapters there should be as many prebendaries as there are prebends;[18] in chapters which have no

17 Cf. Bouix, *De Capitulis*, p. 81 ff.

18 In the established church of England, the chapter was said to consist of canons or prebendaries. Blackstone-Cooley, *Commentary*, I, p. 381.

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fixed number of members, there may be as many as in the bishop's judgment (to be formed after hearing the chapter) can be decently supported from the revenues.

The establishing of dignities is reserved to the Holy See; but the bishop, with the consent of the chapter, may restore extinct dignities and add to the prebends already existing in the chapter others, either of canons or beneficiaries.

Should the prebends, even with the daily distributions added, become so meagre in any cathedral or distinguished collegiate church, that they prove entirely inadequate for maintaining the decorum of the canons, then the bishop may, after having heard the chapter (advice) and obtained the permission of the Holy See, add some simple benefices to the prebends, or, should this prove impracticable, suppress some of the prebends — (if these belong to a lay patron, their suppression requires the consent of the patron) — and apply the income thus saved to the daily distributions among the remaining prebendaries; provided, however, that enough prebends are left to ensure the worthy celebration of the divine service and the maintenance of the dignity of the church.

Note the difference between the first and second clause. To unite benefices requires the *beneplacitum apostolicum;* whereas to suppress insufficient prebends does not.

Since the *daily distributions* play a conspicuous part in chapters, a few words of explanation regarding them may not be amiss. Ivo of Chartres was probably not the first bishop who had trouble in making the canons live up to their duty of personally assisting at the choir service. To make the negligent more diligent and the slothful more assiduous in the performance of their canonical duties, he says, I have decided to give them half of the income of a provostry, in order to make thereof a daily

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pittance, that those whom the sweetness of the spiritual food does not move, may be stimulated by the temporal bread.[19] This custom was accepted and entered the Decretals as a law.[20] The Council of Trent[21] ordered bishops to set aside the third part of all the fruits, revenues, and income from all the prebends for daily distribution among those who personally and actively assist at the divine service. Of these we shall hear more in the following canons.

CAN. 395

§ 1. In ecclesiis tam cathedralibus quam collegialibus in quibus nullae sunt quotidianae distributiones vel ita tenues ut verisimiliter negligantur, Episcopi tertiam partem separent fructuum, proventuum, obventionum quae ex dignitatibus, canonicatibus, officiis aliisque illius ecclesiae beneficiis percipiuntur et in distributiones quotidianas convertant.

§ 2. Si distributiones quavis de causa introduci nequeant, Episcopus in dignitates, canonicos ac beneficiarios negligentes pecuniarias constituat mulctas, quae distributionibus respondeant earumque locum teneant.

§ 3. Distributiones cedunt diligentibus, quavis collusione aut remissione exclusa; si vero dignitates habeant proventus a massa seu bonis canonicorum diversos et separatos, distributiones ab eis amissae cedunt aliis dignitatibus praesentibus, si adsint, secus fabricae ecclesiae, quatenus indigeat, aut alii pio loco, Episcopi arbitrio.

19 Cf. Benedict XIV, *Institutiones Iuris Eccl.*, 207, § 7; Bouix, *De Capitulis*, p. 170 f.

20 Cf. c. 32, X, III, 5 de praeb.; c. un. 6° III, 3 de clericis non resid.

21 *Trid.*, Sess. 21, c. 3; Sess. 22, c. 3 de ref.

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§ 4. Ab unoquoque Capitulo, secundum sua cuiusque statuta, unus vel plures censores, seu *punctatores* nominentur, qui absentes a divinis officiis quotidie notent, praestito prius coram Capitulo vel eius praeside iureiurando de suo munere fideliter obeundo; quibus Episcopus alium addere potest punctatorem; quod si abfuerint punctatores, senior e canonicis qui adsunt, illorum vices suppleat.

In those cathedral as well as collegiate churches in which no daily distributions take place or where they are so meagre as to count for nothing, the bishop shall set apart the third part of all the profits, incomes, and revenues [22] received from the dignities, canonships, offices and other church benefices, and turn them into daily distributions.

If, for any reason, such distributions cannot be arranged, the bishop shall impose upon the negligent dignitaries, canons and beneficiaries, pecuniary fines in proportion to the distributions of which they shall take the place.

These distributions are for the benefit of the diligent and there must be no secret agreements or abatement of fines. If any dignitaries have an income separate from the common possession of the canons, the distributions forfeited by them must be given to the dignitaries present, or if none are present, they should be applied, according to the pleasure of the bishop, to the church building, if in need, or to any other pious institution.

22 These three terms, which often recur, signify respectively, *fructus*, the produce of the cultivated soil, thence victuals, *proventus*, income, revenue, also salary (in classical language also crop); *obventiones*, that income which is beyond expectation, what the Italians call *incerti* (*Sporteln*, fees), or, in the language of the Pandects, the revenues not including the fruits of the field. However, the three terms are often used promiscuously.

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Every chapter shall, according to its own statutes, appoint censors or *punctatores,* whose duty it is daily to make note of those absent from the divine offices. Before entering upon their office these *punctatores* must promise under oath before the chapter or its presiding officer to perform their duty faithfully. The bishop may add another *punctator* to those set up by the chapter. If the *punctatores* are absent, the senior of the canons present shall take their place.

The *punctatores* (or *obedientiales,* as they were formerly called) must write down the names of the absentees, also note those who come late (if they arrive after the Kyrie, they are taken for absentees), and who talk or do not chant, or leave the choir too often.[23] That this office is not very agreeable goes without saying. Hence the right of the bishop to appoint a censor of his own, in order to prevent secret agreements.

CAN. 396

§ 1. Collatio dignitatum tum in Capitulis cathedralibus tum in collegialibus Sedi Apostolicae reservatur.

§ 2. Prohibetur optio, reprobata contraria consuetudine, sed salva fundationis lege.

§ 3. Prima saltem dignitas in Capitulo cathedrali, quantum fieri potest et ceteris paribus, laurea doctorali in sacra theologia vel iure canonico polleat.

The conferring of dignities in cathedral as well as collegiate chapters is reserved to the Apostolic See.

Optioning is prohibited, notwithstanding any contrary custom, but with due regard to the law of foundation.

23 Cf. Benedict XIV, *De Syn.,* IV, 4, where the oath to be taken is reproduced (n. 3, according to St. Charles Borrom.) Boux, *l. c.,* pp. 135–139.

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The first dignitary of the cathedral chapter should, if possible and other things being equal, be a doctor of divinity or canon law.

Optioning means the right of choosing a vacant canonicate, whether a dignity or simple canonship, belonging to the senior canon.[24] It does not differ from the *ius optandi* of the cardinals. But canons no longer enjoy this right, unless it was expressly stipulated at the foundation of the chapter. The requisites (§ 3) for the first *dignitas,* whatever it be, according to the statutes of the respective chapter, are taken from the Council of Trent.[25] What "*ceteris paribus*" means, must be deduced, like the other qualities required, either from common law, or from particular statutes.

CAN. 397

Nisi aliud in statutis capitularibus caveatur, dignitatibus et canonicis secundum ordinem praecedentiae ius et officium est:

1.° Episcopi vicem supplere in peragendis functionibus sacris in sollemnioribus anni festivitatibus;

2.° Episcopo celebranti in pontificalibus, aspersorium in ingressu ecclesiae porrigere et presbyteri assistentis fungi officio;

3.° Eidem decumbenti ministrare Sacramenta; defuncto iusta funebria persolvere;

4.° Convocare Capitulum eique praeesse ac praescribere et ordinare quae ad chori directionem referantur, dummodo dignitas sit de gremio Capituli.

After the constitutive elements have been laid down, the *duties of canons* are now defined.

24 Cf. Bouix, *l. c.*, p. 169 f.

25 Sess. 24, c. 12 de ref., Richter, *Trid.*, p. 348 ff., where various decisions are inserted.

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Unless otherwise provided in the chapter statutes, the dignitaries and canons, according to their respective rank and order of precedence, have the following rights and duties:

(1) They take the bishop's place in the celebration of the sacred functions on the more solemn feasts of the year;

(2) When the bishop celebrates pontifically, they must offer him the sprinkler at the entrance of the church, and one of them act as assistant priest;

(3) When the bishop is ill, they must administer to him the sacraments, and after his death, hold the funeral services;

(4) They shall convoke the chapter and preside over it, they shall prescribe and regulate whatever pertains to the direction of the choir service, provided the dignity belongs to the chapter. This conditional clause supposes that dignitaries may not belong to the chapter. Hence the meaning is that a dignitary who does not belong to the chapter has no right to convoke it; and if there should be no dignitary at all in the whole chapter, a canon, who acts as *praeses capituli,* may call the meeting. Generally, however, the chapter is called by the provost or dean.[26]

THE CANONICUS THEOLOGUS AND THE POENITENTIARIUS

CAN. 398

§ 1. In nulla ecclesia cathedrali desit officium canonici theologi et, ubi id fieri poterit, canonici poenitentiarii.

§ 2. Etiam in collegialibus, praesertim insignibus,

26 Cf. Bouix, *l. c.,* p. 192 f.

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officium canonici theologi et poenitentiarii constitui potest.

CAN. 399

§ 1. Canonicus theologus et poenitentiarius eligantur qui aptiores pro loci qualitate ad propria munera adimplenda reperiantur; sed, ceteris paribus, praeferantur doctores in sacra theologia, si agatur de canonico theologo, in sacra theologia vel iure canonico, si de poenitentiario; expedit praeterea ut canonicus poenitentiarius aetatis annum tricesimum expleverit.

§ 2. Praebenda theologalis et poenitentiaria ne conferantur, nisi prius de vita, moribus, doctrina candidatorum plane constiterit, salva lege concursus, ubi sit constituta.

§ 3. Canonicus poenitentiarius prohibetur aliud simul officium in dioecesi suscipere aut exercere, cui adnexa sit iurisdictio in foro externo.

CAN. 400

§ 1. Canonici theologi est, diebus et horis ab Episcopo cum Capituli consilio designatis, publice in ecclesia explanare sacram Scripturam; sed Episcopus, si id utilius iudicet, potest eidem alia doctrinae catholicae argumenta in ecclesia explicanda committere.

§ 2. Canonicus theologus munus expleat suum ipse per se, vel, si ultra sex menses fuerit impeditus, propriis expensis per alium sacerdotem ab Episcopo deputandum.

§ 3. Episcopus gravi de causa potest canonico theologo committere ut, loco lectionum in ecclesia, sacras disciplinas in Seminario doceat.

CAN. 401

§ 1. Poenitentiarius canonicus tum ecclesiae cathe-

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dralis tum ecclesiae collegialis obtinet a iure potestatem ordinariam, quam tamen aliis delegare non potest, absolvendi etiam a peccatis et a censuris Episcopo reservatis, in dioecesi extraneos quoque, et dioecesanos extra territorium quoque dioecesis.

§ 2. Debet in sede excipiendis confessionibus sibi in capitulari ecclesia destinata residere tempore ad fidelium commoditatem, iudicio Episcopi, opportuniore et praesto esse iis qui ad confitenda sua peccata accedunt ipso quoque divinorum officiorum tempore.

CAN. 402

Si Capitulo adnexa sit cura animarum, haec exerceatur a vicario paroeciali ad normam can. 471.

In every cathedral church there should be a canon theologian, and, wherever possible, also a canon penitentiary (confessor).

Also in the collegiate churches, especially the distinguished ones, there may be both a canon theologian and a canon penitentiary.

The canon theologian and the penitentiary should be chosen from among those who are best fitted for their respective tasks; but, other things being equal, a doctor of divinity is to be preferred for canon theologian, and a doctor of divinity or canon law for penitentiary. It is also becoming that the penitentiary shall have completed the thirtieth year of age.

The prebends of a theologian and *poenitentiarius* shall never be conferred on any candidate until an investigation has been made as to his life, moral conduct and knowledge, and by observing the concursus, if this be the law.

The canon penitentiary is not allowed to hold or exercise any office in the diocese which has attached to it jurisdiction *in foro externo*.

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The office of the *canon theologian* is to expound Holy Scripture publicly in church, on days and at hours designated by the bishop with the advice of the chapter. The bishop may also entrust him with the exposition of other doctrinal matter.

The canon theologian must fulfill his office personally, and in case he is prevented for more than six months, he must employ at his own expense another priest, to be designated by the bishop.

For urgent reasons, the bishop may employ the canon theologian as professor in the theological seminary, instead of lecturer in the church.

If a comparison be allowed between the old and the new law,[27] a certain mitigation is here noticeable, whether for better or for worse is not our business to determine. The old law excluded all other employment, even in the seminary, while the new permits the theologian to be professor of a theological — not petit — seminary. Probably new conditions, especially the lack of fit men and scarcity of priests, required the mitigation.

The *canon poenitentiarius* of a cathedral or collegiate church enjoys the ordinary power (which, however, he cannot delegate to others) of absolving all, even strangers in the diocese, from sins and censures reserved to the bishop. Outside his own territory he may absolve the subjects of his diocese.

He must sit in the confessional assigned to him in the capitular church at the time which, according to the judgment of the bishop, is most convenient for the faithful, and must be ready to hear confessions even during divine service.

27 Cf. *Trid.*, Sess. 5, c. 1, de ref. and the decisions of the S.C.C. in Richter, *Trid.*, p. 16 ff.; Benedict XIV, *De Synod. Dioec.*, XIII, 9, 17.

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The faculties of this official are enlarged under the Code, especially concerning strangers and strange territory and as to cases reserved to the bishop.[28] Reserved to the bishop are those cases prescribed by law and designated as such by the bishop himself (cfr. Title IV, Book III).

If the chapter has charge of souls (*cura*) this must be entrusted to a vicar, according to canon 471.

THE APPOINTMENT TO CANONICATES

CAN. 403

Exceptis dignitatibus, ad Episcopum pertinet, audito Capitulo, conferre omnia et singula beneficia ac canonicatus in ecclesiis tum cathedralibus tum collegialibus, reprobata quavis contraria consuetudine et revocato quolibet contrario privilegio, sed firma contraria fundationis lege et praescripto can. 1435.

CAN. 404

§ 1. Canonicatus Episcopus conferat sacerdotibus doctrina vitaeque integritate praestantibus.

§ 2. In canonicatuum collatione, ceteris paribus, ratio habeatur illorum qui doctores in sacra theologia vel iure canonico renuntiati fuerint in aliquo athenaeo, vel laudabiliter ministerium ecclesiasticum aut magisterium exercuerint, firmo praescripto can. 130, § 2.

CAN. 405

§ 1. Dignitates, canonici et beneficiarii, capta legitime beneficii sui possessione ad normam can. 1443–

28 Cfr. *Trid.*, Sess. 24, c. 8, de ref. Richter, *Trid.*, p. 344 f.; Bouix, *l. c.*, p. 125 f.

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1445, statim pro gradu suo acquirunt, praeter insignia ac privilegia propria, scamnum in choro, ius percipiendi fructus ac distributiones, ac vocem in capitulo ad normam can. 411, § 3.

§ 2. De fidei professione ab ipsis ante captam possessionem emittenda servetur praescriptum can. 1406–1408.

The dignities excepted, all benefices and canonicates in cathedral and collegiate chapters are conferred by the bishop after hearing the chapter. All customs to the contrary are rejected and all privileges revoked, but the law of foundation as well as foundations made in Rome (can. 1435, § 3) remain in force.

The bishop should confer canonries on priests who are distinguished for learning and virtuous life. Other things being equal, those candidates should be preferred who are doctors of divinity or of canon law, or have distinguished themselves in the sacred ministry or as professors.

Dignitaries, canons and beneficiaries, after having duly taken possession of their office (can. 1443–1445), besides their insignia and privileges, immediately obtain a seat in the choir (stall), the right of receiving their income and sharing in the daily distributions, and a voice in the chapter, according to can. 411, § 3

As to the profession of faith to be pronounced before their taking possession, see can. 1406–1408.

HONORARY CANONS

CAN. 406

§ 1. Episcopo, non autem Vicario Generali, nec Vicario Capitulari, ius est canonicos ad honorem nomi-

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nandi sive dioecesanos sive extra-dioecesanos cum consilio Capituli cui canonicus est adscribendus, sed Episcopus raro et caute hoc iure utatur.

§ 2. Sacerdotem alienae dioecesis canonicum ad honorem nominaturus, Episcopus, praeter Capituli sui consilium, Ordinarii, cui subiectus est nominandus, assensum impetret, sub poena nominationis irritae, eundemque Ordinarium insignia edoceat ac privilegia quorum usum nominandus exinde habiturus sit.

§ 3. Canonici ad honorem extra dioecesim in qua nominati sunt degentes, numero sint tertia parte minores canonicis titularibus.

CAN. 407

§ 1. Canonici ad honorem alicuius basilicae vel ecclesiae collegialis almae Urbis, privilegiis et insignibus uti possunt tantum intra eiusdem basilicae vel collegiatae ecclesiae eiusque filialium ambitum; canonici vero ad honorem aliarum ecclesiarum extra Urbem, privilegiis et insignibus utantur in dioecesi tantum ubi nominati sunt, non autem extra dioecesim, nisi ad normam can. 409, § 2.

§ 2. Canonici ad honorem, praeter insignia et privilegia seu iura honorifica, obtinent etiam scamnum in choro.

The bishop (not the vicar-general or the vicar-capitular) has the right of nominating, with the advice of the chapter, honorary canons, either from his own or a strange diocese; but this right should be used rarely and with caution. In appointing a priest of a strange diocese honorary canon, the bishop must, besides the advice of his chapter, have the consent of the Ordinary to whom

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the priest is subject, under penalty of the nomination being null and void; besides, the bishop must inform the strange ordinary as to the insignia and privileges which the honorary canon shall enjoy.

The number of honorary canons living outside the diocese for which they are named must be one-third less than of the titular canons (such as hold a canonship *in titulum;* cfr. can. 1439).

The honorary canons of basilicas and collegiate churches of the city of Rome enjoy their privileges and insignia only within the precincts of the respective basilica or collegiate church and their dependencies. Honorary canons of churches outside of Rome may use their privileges and insignia only in the diocese for which they are named, but not in another, except when they accompany the bishop or represent the bishop at occasions mentioned in can. 409, § 2.

Honorary canons, besides their insignia and privileges (honorary rights) are also entitled to a seat (stall) in the choir.

The order of *precedence* in chapters and for single canons is established as follows:

CAN. 408

§ 1. Capitulum cathedrale praecedit collegiali, etiam insigni, in ipsa quoque collegiali ecclesia; Capitulum insigne praecedit non insigni; in eodem Capitulo, salvis peculiaribus statutis, vel legitimis consuetudinibus, dignitates, servato inter se praecedentiae ordine, praecedunt canonicis; canonici antiquiores, qui nempe prius possessionem ceperunt, posterioribus; canonici titulares, honorariis; honorarii, beneficiariis; dignitates vero aut capitulares charactere episcopali ornati omni-

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bus dignitatibus ac canonicis in presbyterali tantum ordine constitutis praecedunt.

§ 2. In Capitulis in quibus habentur distinctae praebendae presbyterales, diaconales, subdiaconales, servetur praecedentia ordinis; et in eodem ordine praecedentia receptionis in ordinem, non autem in Capitulum.

The cathedral chapter takes precedence over the collegiate chapter, even though this be a distinguished one and in its own church; a distinguished chapter over the one which does not enjoy that prerogative. In the same chapter, unless particular statutes and customs rule otherwise, the dignitaries have precedence over the canons; the senior canons over the junior, according to the time of possession; the titular canons over the honorary; the honorary canons over the beneficiaries. Dignitaries or capitularies endowed with the episcopal character take precedence over all other dignitaries and canons who are only priests.

In chapters which have distinct classes of priests, deacons, and subdeacons, precedence is regulated according to these orders, and, in the same order, according to the time of ordination, not the date of reception into the chapter.

INSIGNIA

CAN. 409

§ 1. In unaquaque ecclesia tum cathedrali tum collegiali, qui in dignitate episcopali sunt constituti, deferant in choro vestem episcopalem; ceteri omnes, dignitates, canonici et beneficiarii, vestem sibi in bulla erectionis assignatam vel apostolico indulto concessam; secus censeantur tanquam absentes.

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§ 2. Vestem choralem aut specialia insignia capitularia adhibere possunt in tota dioecesi in qua est Capitulum, sed, reprobata contraria consuetudine, non extra dioecesim, nisi vel Episcopum comitentur vel Episcopum aut Capitulum repraesentent in Conciliis aliisve sollemnitatibus.

Bishops wear the episcopal dress in choir; all others, dignitaries, canons, and beneficiaries, the dress assigned to them in the document of erection or granted by Apostolic indult. If they appear in any other garb, they are to be considered as absent.

Members of the chapter may wear their choir dress or special insignia throughout the diocese, but not outside of it, except when they accompany their bishop or represent him at a council or other solemnities. All contrary customs are abolished.

The dress of canons generally — for the Code admits prerogatives established by written law — consists of the rochet, mozzetta, cappa, and almutium.[29] The latter two appear united in the manteletta with a small hood. The new Code allows the canons to wear this choir dress in all the churches of the diocese, which is an extension of their former rights. For formerly,[30] unless they appeared in a body, the canons could wear this dress only in their own churches. Now they are entitled to wear it in the whole diocese, including the churches of exempt religious; for the text makes no distinction.

29 The word *rochet* is said to be derived from the Greek *ron chiton*, *i. e.*, soft tunic; *mozzetta* from the Italian *moza*, *i.e.*, cap, whilst *almutium* is said to be derived from *almuz* (Mütze), a late medieval German word; Bouix, *De Capitulis*, p. 504 ff.

30 Bouix, *l. c.*, p. 512 f. There are many decisions concerning our subject to be found in the *Decreta Auth. S. R. I. C.*

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STATUTES AND MEETINGS

CAN. 410

§ 1. Sua cuique Capitulo statuta ne desint, ab omnibus dignitatibus, canonicis, beneficiariis religiose servanda.

§ 2. Statuta capitularia, per legitimum actum capitularem condita, approbanda subiiciantur Episcopo, sine cuius auctoritate postea nec abrogari possunt nec mutari.

§ 3. Si, Episcopo edicente ut statuta conficiantur, Capitulum id praestare neglexerit, exacto sexto ab intimatione mense, Episcopus eadem conficiat imponatque Capitulo.

CAN. 411

§ 1. Stato tempore ac loco conveniat canonicorum coetus de suae ecclesiae et Capituli negotiis acturus; alii praeterea conventus haberi poterunt, quoties id aut Episcopo aut Capituli praesidi aut maiori canonicorum parti expedire videatur.

§ 2. Ad habendum coetum ordinarium non est necessaria specialis convocatio; quae tamen ad extraordinarium requiritur, et facienda est secundum statuta capitularia.

§ 3. In capitulis vocem habent canonici, exclusis honorariis, et dignitates, si una cum canonicis Capitulum constituant ad normam can. 393, § 2.

Every chapter must have its statutes, which are to be observed conscientiously by all, dignitaries, canons, and beneficiaries.

The statutes, after having been established by a legiti-

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mate capitular act, must be submitted for approval to the bishop, without whose authority no change can afterwards be made.

If the chapter, though admonished thereto by an episcopal edict, neglects to adopt statutes, the bishop, after six months from the date of the edict being intimated, should himself compose statutes and impose them on the chapter.

Formerly a chapter could make statutes either in writing or by way of custom, and they needed no appproval by the bishop as long as they touched the canons' own affairs.[81] But now no statutes can be enacted without episcopal approval. Besides, the chapters are obliged to write down their statutes, and may be compelled thereto by an episcopal edict, *i. e.*, a peremptory admonition issued in writing and brought to the notice of the canons in a canonical way. No abrogation or change is allowed without the knowledge and approval of the bishop.

A capitular act is one concluded and agreed upon by the majority of canons assembled in chapter.

The chapter should meet at stated times and places in order to deliberate on the affairs of the church and chapter.

Besides these regular meetings, others may be held as often as the bishop, or the president of the chapter, or the majority of the canons, deem it opportune.

For a regular meeting no special summons is necessary, but for an extraordinary assembly summons must be issued according to the statutes of the chapter.

In the chapter all canons, except the honorary, as well as the dignitaries, if the latter belong to the body of

81 Cfr. Bouix, *De Capitulis*, p. 408 ff.

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canons, enjoy the right to vote. (Cfr. can. 393, § 2.)

As the matter is of importance for our diocesan consultors, a few notes may further illustrate the text.

The *regular meetings* should be established by statutory agreement, in order that the canons do not incur the danger of being condemned *in contumaciam* if they fail to appear.

Extraordinary meetings may be called as often as important affairs require it, by the bishop, by the president of the chapter (provost, dean), or by the majority of the members.

The *majority* is taken relatively to those who do not desire a chapter meeting; for instance, if the chapter consists of eight canons, five are a majority.

For the ordinary or regular meetings, no special summons is required. Hence the absentees lose their vote and cannot demand a rehearsal of the proceedings.

Two-thirds always form a quorum, but at regular meetings two-thirds are not required if only three members are present, according to the saying, "*tres faciunt collegium.*" We presuppose, of course, that the statutes contain nothing to the contrary. To *extraordinary meetings,* all the capitulars must be called. The summons must mention the time and place of the meeting, and if necessary, also the subject-matter to be considered. Should any member be unlawfully neglected by the one who calls the meeting, he may remonstrate against any decision made at that meeting and have it nullified.[32] Hence, whenever the bishop is ordered to ask the chapter to meet for affairs designated as requiring the chapter's cooperation, he must call a meeting,— not simply ask the advice or consent of the members in writing,— because

[32] This is the doctrine commonly held by canonists. Cfr. Bouix, *l. c.*, p. 182 ff.

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the chapter signifies the meeting of the whole body, not the vote of single canons or consultors.

Whether the vote is to be taken secretly or *viva voce,* is not determined, except for elections, and therefore balloting may take place either way, unless the statutes prescribe or the consultors by previous vote have adopted a specified mode.

The *majority* of votes is calculated in proportion to those present and relative to the number of yeas and nays; for instance, if thirteen are present, seven affirmative votes carry the resolution against the six contradictory votes.

What the Code says concerning dignitaries is to be understood of such as do not by right belong to the chapter according to its constitution; for instance, the vicar-general as such is not counted to be of the chapter in many cathedral chapters. But this depends upon the statutes.

DUTIES OF CANONS

CAN. 412

§ 1. Canonici sive ecclesiae cathedralis sive collegialis Episcopo solemniter Missam celebranti aut alia pontificalia exercenti, etiam in aliis ecclesiis civitatis aut suburbii, ab eodem invitati, assistere et inservire debent, dummodo iudicio Episcopi sufficiens canonicorum et ministrorum in ecclesia numerus maneat: et eundem accedentem ad ecclesiam cathedralem et redeuntem comitari ad normam Caeremonialis Episcoporum.

§ 2. Epicopus potest duos e Capitulo sive cathedrali sive collegiali assumere ac retinere ut sibi in ecclesiastico ministerio ac dioecesis servitio assistant.

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CAN. 413

§ 1. Quodlibet Capitulum obligatione tenetur quotidie divina officia in choro rite persolvendi, salvis fundationis legibus.

§ 2. Divinum officium comprehendit psalmodiam horarum canonicarum et celebrationem cum cantu Missae conventualis, praeter alias Missas vel secundum rubricas Missalis vel ex piis fundationibus celebrandas.

§ 3. Missam conventualem sine cantu celebrare licet hebdomadario, cum in ecclesia, pontificali ritu, Episcopus vel alius loco Episcopi celebrat.

CAN. 414

Omnes et singuli qui chorale beneficium obtinent, tenentur in ipso choro divina officia persolvere singulis diebus, nisi servitium per *turnum* a Sede Apostolica aut fundationis legibus fuerit indultum.

CAN. 415

§ 1. Si ecclesia cathedralis aut collegialis simul sit paroecialis, relationes iuridicae inter Capitulum et parochum reguntur normis quae sequuntur, nisi aliud ferat aut Sedis Apostolicae indultum aut particularis conventio in erectione paroeciae inita et a loci Ordinario legitime probata.

§ 2. Ad parochum spectat:

1.° Applicare Missam pro populo et, debito tempore, praedicare ac christianam doctrinam fideles edocere;

2.° Custodire libros paroeciales et ex iis attestationes extrahere;

3.° Functiones paroeciales peragere de quibus in can.

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462. Iusta funebria, in ecclesia ad normam iuris peragenda, non exclusa Missa exsequiali, persolvere ad Capitulum pertinet tantum in casu quo de funere agatur alicuius dignitatis, vel canonici, etiam honorarii tantum, vel beneficiarii;

4.° Alias functiones non stricte paroeciales peragere quae in paroeciis fieri solent, modo non impediatur chorale servitium, nec Capitulum easdem functiones peragat;

5.° Eleemosynas in bonum paroecianorum colligere, easdem directe vel indirecte oblatas recipere, administrare et secundum offerentium voluntatem distribuere.

§ 3. Ad Capitulum spectat:

1.° Custodire sanctissimum Eucharistiae Sacramentum; sed altera sacri ciborii clavis apud parochum servari debet;

2.° Invigilare ut in functionibus a parocho in capitulari ecclesia peragendis leges liturgicae observentur;

3.° Ecclesiae curam habere eiusque bona administrare cum piis legatis.

§ 4. Nec parochus capitulares nec Capitulum paroeciales functiones et munera impediat; exorto autem conflictu, quaestionem dirimat loci Ordinarius, qui in primis curare debet ut catechetica instructio et Evangelii explicatio hora fidelibus commodiore semper habeatur.

§ 5. Non solum Capitulum impedire nequit parochum in exercenda paroeciali cura, sed insuper sciant capitulares se ex caritate teneri, maxime si designati coadiutores desint, eidem adiutricem operam navare, secundum modum ab Ordinario loci determinandum.

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CAN. 416

In statutis capitularibus iusta designetur norma, ad quam canonici et beneficiarii in servitio altaris fungantur per turnum tum officio celebrantis tum etiam ministerio diaconi ac subdiaconi, exclusis tamen ab hoc ministerio dignitatibus, canonico theologo, poenitentiario et, si praebendae distinctae habeantur, canonicis ordinis presbyteralis.

The canons of a cathedral or collegiate chapter, if invited, are obliged to assist and serve the bishop at the celebration of pontifical High Mass or other pontifical functions in other churches of the city or its suburbs, provided that a sufficient number of canons and ministers, according to the bishop's judgment, is left at the cathedral or collegiate church. Besides, they must accompany the bishop on his way to and from the cathedral according to the *Caeremoniale Episcoporum*.[33]

The bishop is entitled to assume and retain two members of either the cathedral or collegiate chapter to assist him in the ecclesiastical ministry and diocesan service.

Every chapter is bound to recite the divine office daily and properly in the choir, with due regard to the laws of foundation.

The divine service comprises the singing of the canonical hours and the celebration of a conventual high mass, besides other masses to be celebrated according to the rubrics of the Missal or the laws of foundation.

A low Mass may be celebrated as conventual mass by the hebdomadarian, if the bishop, or another bishop in his place, sings a pontifical Mass in the church.

33 Cfr. the decisions of the S. C. Conc., in Richter, *Trid.*, p. 354 f. Bouix, *De Capitulis*, p. 266 ff.

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All who hold a choir benefice are bound to perform the divine service in the choir every day, unless the Apostolic See or the law of foundation allows the service to be performed *per turnum* (by turns).

Choir service means, of course, not only personal presence, but active coöperation in the recitation and singing. This has been expressly decided by the S. C. Concilii on various occasions.[34] Hither also belongs some knowledge of the Gregorian Chant.[35]

If the cathedral or collegiate church serves as parish church, the following rules must be observed. (Exceptions are admitted only if an Apostolic indult has been obtained to that effect, or an agreement lawfully approved by the Ordinary entered upon at the time the parish was erected). The rules are:

The *parish priest* has the following obligations:

(1) To apply the Mass for the people and to preach and teach catechism at the times prescribed;

(2) To keep the parochial books and take from them the attestations required;

(3) To perform the funeral services (cfr. can. 462); the chapter may hold funeral services, Mass not excluded, only for a dignitary, a canon, an honorary canon, or a beneficiary;

(4) To perform such other functions as are usually held in parish churches, provided, however, that the choir services do not interfere, or that the chapter perform the same;

(5) To collect alms for the good of the parishioners and accept such as are either directly or indirectly of-

34 Cf. Benedict XIV, *De Syn. Dioec.*, XI, 3, 8; XIII, 9, 11; *Instit. Eccl.*, 107, § 3.

35 "*Ipsi tenentur ex vi sui muneris addiscere cantum quem vocamus Gregorianum.*" (Thus Garzia et Pignatelli) Bouix, *l. c.*, p. 323.

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fered, to administer and distribute them according to the donor's intention.

The *chapter* on its part is bound:

(1) To take care of the Blessed Sacrament, but leave one key with the parish priest;

(2) To see to it that the liturgical rules are observed by the parish priest in the performance of all functions in the chapter church;

(3) To take care of the church and administer its possessions and legacies.

The parish priest shall not interfere with the functions of the chapter, nor the chapter with the parochial functions. Should a conflict arise, the Ordinary should settle the question. He shall also take special care that catechetical instructions and gospel explanations be given at an hour most convenient for the faithful.

Not only should the chapter not interfere with the parish priest in the exercise of his parochial duties, but the capitulars should also remember that charity obliges them to lend a helping hand to the parish priest, according to the ways and means established by the Ordinary, especially if no sufficient number of assistants is available.

The chapter statutes should prescribe a just rule, according to which the canons and beneficiaries shall take turns in serving at the altar, either as celebrants, or as deacons and subdeacons; but the dignitaries, the canon theologian and the canon penitentiary, as also the canon priest, if there are distinct prebends, should not act as deacons and subdeacons.

CAN. 417

§ 1. Missa conventualis applicanda est pro benefactoribus in genere.

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§ 2. Capitularis infirmitate detentus non tenetur eleemosynam praebere sacerdoti capitulari, qui ipsius vicem supplet in Missae conventualis celebratione et applicatione, nisi statuta capitularia vel particularis consuetudo aliud ferant.

§ 3. Servari potest consuetudo praebendi stipem celebranti vel ex cumulo distributionum vel ex reditibus omnium praebendarum per contributum.

The *conventual Mass* must be applied for the benefactors in general.

A capitular prevented by illness is not obliged to offer a stipend for the Mass celebrated and applied by another capitular in his stead, unless the statutes of the chapter or a particular custom so prescribe.

The custom of offering a stipend to the celebrant either from the distributions or from the contributions accruing out of all the prebends, may be retained.

RIGHTS AND PRIVILEGES OF CANONS

CAN. 418

§ 1. Reprobata contraria consuetudine, canonici ac beneficiarii quotidiano choro adstricti, possunt singuli abesse tres tantum menses in anno, sive continuos sive intermissos, dummodo propriae ecclesiae statuta aut legitima consuetudo servitium diuturnius non requirant.

§ 2. Sine causa legitima et speciali Episcopi licentia nec feriari licet Quadragesimae et Adventus tempore, aut in praecipuis anni sollemnitatibus de quibus in can. 338, § 3; nec permittitur uno eodemque tempore capitulares ultra tertiam partem abesse.

§ 3. Tempore vacationum omne genus distributio-

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nes amittuntur, non obstante remissione ab aliis capitularibus facta; sed percipiuntur praebendae proventus aut duae tertiae distributionum partes, si omnes praebendae proventus in distributionibus consistant.

CAN. 419

§ 1. In ecclesiis in quibus non omnes simul choro intersunt, qui ad eum adstringuntur nequeunt per alium huic obligationi satisfacere, nisi in casibus particularibus, iusta ac rationabili de causa, et modo substitutus eodem tempore servitio chori non sit adstrictus, et sit in eadem ecclesia canonicus, si agatur de supplenda vice canonici, beneficiarius, si de beneficiarii; qui vero ad chorum non adstringuntur, obligatione residendi in loco beneficii non tenentur per dies quibus a choro absunt.

§ 2. Si quis eodem die urgeatur onere utriusque Missae et pro populo et conventuali, hanc ipse celebret applicetque per se, illam per alium vel per se die sequenti.

CAN. 420

§ 1. Ita excusantur a choro ut percipiant fructus praebendae ac distributiones quotidianas:

1.° Capitulares *iubilati* ad normam can. 422, § 2;

2.° Canonicus theologus singulis diebus quibus suo munere fungitur;

3.° Canonicus poenitentiarius dum tempore chori vacat confessionibus audiendis;

4.° Vicarius paroecialis aliusve e Capitulo sive parochus sive coadiutor ab Episcopo deputatus, dum paroecialibus vacat officiis;

5.° Qui infirmitate aliove physico impedimento choro prohibentur assistere;

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6.° Qui pontificia legatione alibi funguntur aut personae Romani Pontificis actu inserviunt;

7.° Qui piis exercitiis vacant ad normam can. 126; quo tamen indulto semel tantum in anno chori servitio liberantur;

8.° Accedentes una cum Episcopo aut eiusdem vice ad visitanda Limina Apostolorum;

9.° Qui ab Episcopo vel Capitulo mittuntur ad Concilium Oecumenicum, plenarium, provinciale aut ad Synodum dioecesanam;

10.° Qui de Capituli consensu, non contradicente Episcopo, absunt a choro ob Capituli seu propriae ecclesiae utilitatem;

11.° Qui Episcopo sacra peragenti assistunt ad normam can. 412, § 1;

12.° Qui Episcopum comitantur in visitatione dioecesis vel visitationem ipsam eius nomine et mandato peragunt;

13.° Qui operam navant conficiendis processibus in causis de quibus in can. 1999 seqq., vel uti testes in his causis vocati sunt, pro diebus et horis quibus hoc officium praestant;

14.° Parochi consultores, examinatores et iudices synodales, dum proprio munere funguntur.

§ 2. Distributiones vero quae *inter praesentes* dicuntur, ii tantum percipiunt, qui in § 1, nn. 7, 11, 13, enumerantur, nisi obstet fundatorum expressa voluntas.

CAN. 421

§ 1. Excusantur a choro, sed percipiunt praebendae fructus dumtaxat, non autem distributiones:

1.° Qui de licentia Ordinarii loci publice docent in scholis ab Ecclesia recognitis sacram theologiam aut

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ius canonicum;

2.° Dantes operam studio sacrae theologiae aut iuris canonici in publicis scholis ab Ecclesia probatis, de Ordinarii licentia;

3.° Vicarius Capitularis, Vicarius Generalis, officialis ac cancellarius, si de gremio sint, dum suis muneribus vacant;

4.° Canonici qui Episcopo inserviunt ad normam can. 412, § 2.

§ 2. Quod si omnes praebendae fructus consistant in distributionibus, vel adeo sint tenues ut tertiam distributionum partem non attingant, tunc memorati omnes duas tantum tertias partes distributionum lucrantur, cumulatas ex fructibus praebendae ac distributionibus.

CAN. 422

§ 1. Praebenda fruentes ab Apostolica tantum Sede impetrare possunt indultum emeriti seu, ut aiunt, *iubilationis* post continuum et laudabile quadraginta annorum in eadem vel distinctis ecclesiis eiusdem civitatis vel saltem dioecesis chori servitium.

§ 2. Iubilatus, etiamsi in loco beneficii non resideat, percipit tum fructus praebendae tum distributiones etiam inter praesentes, nisi obstent expressa fundatorum vel oblatorum voluntas, ecclesiae statuta aut consuetudo.

§ 3. Ius optandi, si ex lege fundationis competat, non est capitulari iubilato.

Canons and beneficiaries who are obliged to choir service may take a *three months' vacation* every year, either at once, or with interruptions, unless the statutes of their church or legitimate custom require a more protracted

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service, every other custom to the contrary notwithstanding.

Without a lawful reason and the special permission of the bishop, no holidays are allowed during Lent and Advent and on the principal feastdays of the year (can. 338, § 3); neither are more than one-third of the chapter members permitted to be absent at one time.

During vacation all distributions are lost, notwithstanding any remittance (condonation) made by the other capitulars; but the income from the prebends or two-thirds of the distributions, if the whole salary consists in such, is to be granted.

In churches which do not require the attendance of all the capitulars at the same time, those who would be obliged to assist are not allowed to send a substitute, except in particular cases and for a legitimate and reasonable cause. The substitute must not be one who is himself at the same time obliged to choir service; he must not be a canon of the same church if he takes the place of a canon, or a beneficiary of the same church if he supplies a beneficiary.[86]

If one is under obligation of saying two Masses on the same day, one for the people and the other as conventual Mass, he shall himself celebrate and apply the conventual Mass, and say the Mass for the people on the following day, or he may engage a substitute to apply it for him (of course, we suppose, by giving him a stipend).

Although receiving the income from their prebend and the daily distributions, the following are *excused from choir service:*

(1) The capitulars who are jubilarians (cf. can. 422, § 2);

86 Cf. *Trid.*, Sess. 24, c. 12, de ref. and the decisions in Richter, *Trid.*, p. 359; Bouix, *l. c.*, p. 326 ff.

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(2) The canon theologian on the days when he performs his special office;

(3) The canon penitentiary if he hears confessions during choir service;

(4) The parish priest, or any member of the chapter appointed by the bishop as parish priest or assistant, while occupied in parochial duties;

(5) Those who are prevented from attending choir by sickness or any other physical obstacle;

(6) Those who act as papal legates or are in the personal service of the Roman Pontiff;

(7) Those who are in retreat (can. 126), for which reason, however, they are excused only once a year;

(8) Those who visit with the bishop, or in his place, the *sacra limina* (Rome);

(9) Those who are sent by the bishop or chapter to a general, plenary, or provincial council, or to a diocesan synod;

(10) Those who are absent from choir with the consent of the chapter, without the bishop objecting to it, for the utility of their chapter or church;

(11) Those who assist the bishop when pontificating (can. 412);

(12) Those who accompany the bishop on a diocesan visitation or make such visitation in his name and by his mandate;

(13) Those who are employed in the lawsuits mentioned in can. 1999 ff., or on the witness-stand, but only while actually so employed;

(14) The parish priests who are consultors, as well as examiners and synodal judges, whilst occupied in their office.

However, the distributions, which are strictly reserved

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to *those present,* can be gained only by those mentioned under nn. 1, 7, 11, 13, unless the will of the founders contains a contrary clause.

The following are *excused from choir service,* and receive only the salary of the prebend, but no share in the distributions:

(1) Those who, with the permission of the Ordinary, teach dogmatic or moral theology (scripture, church history) or canon law in a Catholic school;

(2) Those who study any of these sciences in a school recognized by the Church, with the permission of the Ordinary;

(3) The vicar-capitular, the vicar-general, the *officialis,* and the chancellor, if they belong to the chapter, whilst occupied in their office;

(4) The canons serving the bishop.

If the whole income of a prebend consists of the distributions, or if it is so small that it would not amount to the third part of the distributions, then the aforesaid (§ I, 1–4) clergymen receive two-thirds of the distributions which are accumulated from the revenues of prebends and distributions.

Prebendaries can obtain the indult of *iubilatio* from the Apostolic See after a continuous and praiseworthy choir service of forty years either in the same church, or in different churches of the same city, or, at least, of the same diocese.

A jubilarian, although not residing at the place where his benefice requires him to reside, receives the whole income as well as the daily distributions, even those otherwise given only to attendants in choir, unless the express law of foundation, or the will of the founder, or the statutes, or a custom of the chapter, prohibit this.

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The right of *optioning,* although permissible by the law of foundation, cannot be claimed by a jubilarian.[87]

87 Cf. Richter, *Trid.*, p. 360 ff. Benedict XIV, *De Synod. Dioec.*, XIII, 9, 15. Formerly *iubilatio* was merely a custom, for no law existed about it.

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CHAPTER VI

DIOCESAN CONSULTORS

It must be gratifying to the church in the U. S. to see embodied in the new Code an institution which the Plenary Councils of Baltimore introduced. The Fathers of these councils realized, on the one hand, that — not to speak of the *penuria sacerdotum* — the ecclesiastical funds were not in a condition to permit the establishment of regular chapters, and, on the other hand, many of the bishops were overburdened with work. Hence the appeal of the II Plenary Council for helpers and counsellors on whom the bishops might unload a part of their burden.[1] In establishing diocesan boards of consultors, they followed the custom of other dioceses in similar condition, and, not improbably, the acts of the Council of Lebanon[2] offered an example. The new Code in a special chapter treats of these diocesan consultors, whose existence, of course, is the result of peculiar conditions.

CAN. 423

In quibus dioecesibus nondum constitui potuit restituive cathedrale canonicorum Capitulum, instituantur ab Episcopo, salvis peculiaribus Apostolicae Sedis praescriptis, consultores dioecesani, hoc est sacerdotes pietate, moribus, doctrina ac prudentia commendati.

1 Cfr. *Concilii Plenarii Baltimorensis II. Acta et Decreta*, Baltimore 1868, p. 53 f.

2 Printed in Rome, 1820.

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CAN. 424

Consultores nominat Episcopus, firmo praescripto can. 426.

CAN. 425

§ 1. Consultores dioecesani numero sint saltem sex; in dioecesibus ubi pauci sint sacerdotes, saltem quatuor; iidemque omnes in civitate episcopali vel in locis vicinioribus commorentur.

§ 2. Antequam munus huiusmodi suscipiant, iusiurandum interponant de officio fideliter exsequendo sine ulla acceptione personarum.

CAN. 426

§ 1. Officium consultorum est ad triennium.

§ 2. Exacto triennio, Episcopus vel alios in eorum locum substituat, vel eosdem ad aliud triennium confirmet, quod idem servetur singulis trienniis.

§ 3. Deficiente, quavis de causa, aliquo consultore intra triennium, Episcopus alium de consilio ceterorum consultorum substituat, isque in officio maneat usque ad expletum idem triennium.

§ 4. Cum vero triennium excidisse contigerit vacante sede episcopali, consultores in officio maneant usque ad accessum novi Episcopi, qui intra sex menses ab inita possessione providere debet ad normam huius canonis.

§ 5. Si, sede vacante, aliquis consultor moriatur vel renuntiet, Vicarius Capitularis, de consensu aliorum consultorum, alium nominet, qui tamen, ut munere, sede plena, fungatur, indiget novi Episcopi confirmatione.

CAN. 427

Coetus consultorum dioecesanorum vices Capituli

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cathedralis, qua Episcopi senatus, supplet; quare quae canones ad gubernationem dioecesis, sive sede plena sive ea impedita aut vacante, Capitulo cathedrali tribuunt, ea de coetu quoque consultorum dioecesanorum intelligenda sunt.

CAN. 428

Durante munere, consultores ne removeantur, nisi ob iustam causam ac de consilio ceterorum consultorum.

APPOINTMENT OF CONSULTORS

Where a cathedral chapter cannot as yet be either established or restored, the bishop shall appoint diocesan consultors. These consultors shall be priests distinguished by piety, exemplary life, learning, and prudence.

The appointment of consultors belongs to the *bishop*, who, however, must observe the special regulations of the Apostolic See (*salvis peculiaribus Apostolicae Sedis praescriptis*) and the rules laid down in can. 426.

As we said above, the institution of diocesan consultors, though now formally approved by the Holy See, is the result of peculiar circumstances. The rule was and is that a regular cathedral chapter should surround the episcopal office and dignity. In the U. S. this cannot as yet be achieved, and in Great Britain, where chapters once flourished, they have not yet, so far as we are aware, been restored to their former condition, although the hierarchy was reëstablished Sept. 29, 1850, and canons are constituted as corporated bodies.

What the "*peculiar regulations of the Apostolic See*" are, is not expressly stated. Perhaps the reference is to a conference held in Rome in 1883, for the introduction of cathedral chapters according to the English fashion. The Cardinals of the Propaganda, however, recognized

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the present system of consultors.[3] But the Holy See reserves the right of changing the present boards of consultors into, say, a corporation or quasi-chapter with corporate rights. In that case, however, it will be natural to expect also a change of episcopal election or nomination, from which the consultors are now practically excluded.

QUALITIES AND OBLIGATIONS

The *qualities* required in the consultors are almost verbally restated from the enactments of the second and third Plenary Councils of Baltimore.[4] These presupposed, the *bishop*, as long as Rome does not change the present laws, may freely *name* his consultors, and in doing so is not bound by the advice or consent of the counsellors, but need observe only what the Code demands in Can. 426.

There shall be at least six diocesan consultors, but four will suffice if the number of priests in the diocese is small. They should all live in the episcopal city, or near by.

Before they enter upon their office they must take an *oath* to discharge their duties faithfully without fear or favor. In large and populous dioceses the *number of consultors* may be more than six, for the canon says, "at least" six. But it can never be less than four, no matter how small the diocese may be. Therefore the rule of the III Council of Baltimore that there should be at least two,[5] must be corrected.

A leaning towards cathedral chapters is perceptible in

3 Cfr. Smith, *Elements*, I, p. 466.

4 *Acta et Decreta Conc. Balt. II.*, p. 53; *Conc. Balti. III.*, tit. II, c. 2, n. 18, p. 14 f.

5 *Balt. III.*, *l. c.* Besides, this council (n. 19) ruled that one-half of the number should be chosen upon the nomination of the clergy, but this clause is now void.

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the injunction that the consultors should live in or near the *episcopal city*. The reason is not far to seek. Forming as they do the senate of the bishop, who has to call them to meetings, they must be near at hand. Living at a distance would interfere with a prompt answer to his call.

Before whom the consultors appointed have to take oath is not explicitly stated in this canon. However, taking into consideration the obligation of making the profession of faith before the ordinary or his delegate, and at the same time before the other consultors,[6] it seems proper that the oath of office should be taken into the hands of the bishop or his substitute *ad hoc;* and if the profession of faith is made at the same time, the other consultors must also be present. To take the oath by proxy is neither permitted nor valid.[7]

The office of consultor lasts three years. After the expiration of that term, the bishop may replace a consultor, or leave him in office, according to his good pleasure.

If a consultor, for any reason, goes out of office during his term, the bishop, with the *advice* of the other consultors, shall appoint in his place another priest, who will remain in office until the three years have expired.

If the three years expire when the episcopal see is vacant, the consultors of the last term remain in office until the arrival of the new bishop, who must make provision for a new board of consultors within six months from the date of taking possession of his see.

Should a consultor die or resign during a vacancy in the episcopal see, the vicar-capitular or administrator, with the *consent* of the other consultors, shall name an-

6 Cfr. can. 1406, § 1, 6°.

7 Cfr. can. 1316, § 2.

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other, who must, however, have the approval of the n bishop (after being installed) in order to act as consult

The text is so plain as not to require any commer Attention may be drawn to the difference between t bishop and the vicar-capitular. The latter needs t *consent* of the consultors, while the former need on ask their *advice*. Consultors are free to resign, thoug they should not do so without a solid reason.

Can. 427 defines, in a general way, the *functions* of th diocesan consultors, for the body (*coetus*) of the dio cesan consultors, as the bishop's senate, takes the plac of the cathedral chapter, and hence whatever the canon attribute to the cathedral chapter in relation to the gov ernment of the diocese, either with the bishop or during a vacancy of the see, also applies to the diocesan consultors as a body.

Note the term "*coetus consultorum*," which we rendered by "the consultors as a body." *Coetus* is a wider term than *societas, collegium,* or *corpus*. These mean a juridical person, or at least a compact society, while *coetus* means any assembly or gathering.[8] Hence, though the consultors form a body or unit, they are not a chapter in the canonical sense. Still, since *coetus* also signifies united work and a gathering of persons into a body, it follows that the consultors must be called together whenever their advice or consent is required.[9] This conclusion is confirmed by the fact that the consultors take the place of the cathedral chapter, not of the single canons. For this reason, too, be it said in passing, consultors do not enjoy the privileges and insignia of canons. But their *functions* are not therefore unimportant. They form the senate of the bishop, who must in

8 Cfr. l. 2, *Dig.*, 47, 11: "*Coetus sub praetextu religionis*"; l. 5, *Dig.*, 48, 6.
9 Cfr. can. 105.

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certain instances ask their advice, and in other, more important affairs,[10] is bound by their consent, given in a body, as shall appear later.

Their functions during a vacancy or quasi-vacancy of the episcopal see are dealt with in the next chapter.

The consultors in the U. S. are not yet entitled to elect the administrator.[11]

Canon 428 rules that no consultor should be removed during his term of office without just reason and without the advice of the other consultors.

This law is taken almost verbally from the Third Council of Baltimore,[12] which enumerates some legitimate causes of removal, *viz.:* if a consultor, by reason of age or sickness, is unable to fulfill his duty, or if he has committed a crime that renders him unworthy of his office, or if his reputation has suffered considerably through his own fault. In such cases, therefore, the bishop may remove a consultor after having asked the advice of the other consultors. This means that no trial, not even a summary one in the strict sense of the term, is required; but the bishop is not on that account excused from the moral duty of at least making an investigation into the charges brought against a consultor.

10 Cfr., for instance, can. 1532, § 3 (alienation).

11 Cfr. can. 431, § 2; hence we cannot agree with the *Eccles. Rev.*, Vol. 57, p. 367 (Oct. 1917).

12 *Acta et Decreta*, 1886, n. 21, p. 16.

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CHAPTER VII

QUASI-VACANCY AND VACANCY OF THE EPISCOPAL SEE — THE VICAR-CAPITULAR

We use the term "*quasi-vacancy*" for "*sedes impedita.*" The Decretals provide for the case of an episcopal see becoming vacant by the captivity of its occupant by "pagans or schismatics." Boniface VIII decreed that under such circumstances not the archbishop or metropolitan but the chapter should govern the diocese in spiritual and temporal affairs, "as if the see were vacant," and as soon as possible refer the matter to the Holy See.[1] This decretal was cited by the chapter of Cologne, in 1837, to justify their somewhat irregular election of a vicar-capitular against the will of the imprisoned Archbishop Clement August and the Holy See. The Cologne affair had no analogy with the captivity of a medieval bishop by pagans or schismatics, but was an act of sheer violence, perpetrated by the Prussian government without law or legal procedure, and it was branded as it deserved by Pope Gregory XVI.[2] Twenty-four years later Pius IX protested against the unlawful elections of vicars-capitular in the Kingdom of Naples and declared them null and void. The electors were declared to have incurred ecclesiastical censure and the elected vicar-capitulars were suspended and deprived of their benefices (May 3rd, 1862). The respective decree of S. C. EE. et RR. was extended to all dioceses where

1 Can. 3, 6°, I, 8 de supplenda negligentia.

2 *Brevia Greg. XVI*, Dec. 26, 1837; May 9, 1838; *Allocutio*, Sept. 13, 1838. Cfr. Brück, *Gesch. d. Kath. Kirche in Deutschland im XIX. Jahrh.*, 1889, Vol. II, p. 329 ff.

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such disorderly elections would take place.[3] This action by the Holy See was simply a defence of the freedom of the Church and of the rights of an unlawfully imprisoned prelate, who was still able to communicate with his diocese, although with great difficulty.

For the Vatican Council[4] a sketch had been prepared to throw light on the terms "*sede vacante*" and "*sede impedita,*" which had up to that time been variously interpreted by canonists. The schema maintained that the see is vacant only if the bishop is really in captivity, but merely *impedita* in case of deportation or exile, and that in the latter case the vicar-general or any one assigned by the bishop should govern the diocese. This meant that the decretal of Boniface VIII cannot be applied to a *sedes impedita.*[5] We shall now see that the Code does not entirely reject either of the two opinions which were discussed at the Council, but tries to reconcile both.[6]

3 Bizzarri, *Coll. S. C. EE. et RR.*, 1885, p. 153 f.

4 Cfr. Granderath-Kirch, *Geschichte des Vatik. Konzils*, 1903, II, 162.

5 Cfr. the schema as to the point at issue, *ib.* p. 163, which reads: "Ab hypothesi Sedis vacantis longe differre visa est hypothesis Sedis per Episcopi captivitatem vel relegationem aut exilium impeditae. Prae oculis habita fuit celeberrima Bonifacii VIII. Decretalis 'Si Episcopus a paganis' (cap. 3, De suppl. neglig. in VI°), qua decernitur in casu Episcopi capti ab infidelibus vel schismaticis Capitulum administrare ac si Sedes per mortem vacaret. Prae oculis habitae fuerunt discrepantes DD. opiniones, aliis illud idem applicantibus cuicunque casui Sedis simili modo impeditae, aliis illud ad solum praedictum casum restringentibus; quorum praeterea non pauci sentiunt, ipsi etiam Decretali Bonifacii VIII. locum non esse, ubi existit Generalis Episcopi Vicarius. Prae oculis demum habitae fuerunt ingentes difficultates et maxima pericula, quae hac in re contigerunt recentioribus temporibus praesertim in Germania, Hispania et Regno utriusque Siciliae. Quidquid autem de iure constituto sit existimandum, de iure saltem constituendo id visum est omnino decernendum, quod in proposito Decreto continetur. Capitulorum ausibus obstaculum ita ponitur; et praxi Ecclesiae conformis ea solutio est, ut liquet ex gestis anno 1838 occasione captivitatis Archiepiscopi Coloniensis et ex Decreto S. Congr. Ep. et Reg., 3 Maii, 1862, ad nonnulla Capitula Siciliae a SS. D. N. Pio IX. approbato." C. V. 654 b.

6 Cfr. can. 285.

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CAN. 429

§ 1. Sede per Episcopi captivitatem, relegationem, exsilium, aut inhabilitatem ita impedita, ut ne per litteras quidem cum dioecesanis communicare ipse possit, dioecesis regimen, nisi Sancta Sedes aliter providerit, penes Episcopi Vicarium Generalem vel alium virum ecclesiasticum ab Episcopo delegatum esto.

§ 2. Potest in casu Epsicopus, gravi de causa, plures delegare, qui sibi invicem in munere succedant.

§ 3. His deficientibus, vel, uti supra dictum est, impeditis, Capitulum ecclesiae cathedralis suum Vicarium constituat, qui regimen assumat cum potestate Vicarii Capitularis.

§ 4. Qui dioecesim regendam, ut supra, suscepit, quamprimum Sanctam Sedem moneat de sede impedita ac de assumpto munere.

§ 5. Si Episcopus in excommunicationem, interdictum vel suspensionem inciderit, Metropolita, eoque deficiente, vel, si de eodem agatur, antiquior inter Suffraganeos ad Sedem Apostolicam illico recurrat, ut ipsa provideat; quod si de dioecesi agatur vel praelatura de quibus in can. 285, Metropolita qui fuit legitime electus, obligatione recurrendi tenetur.

This is the canon treating of the *sedes impedita* or quasi-vacancy, and it affords a splendid example of how the old has been combined with the new law. The ancient law [7] spoke only of captivity brought about by pagans and schismatics, but the new law uses four terms to comprise the state of "*sedes impedita*." They are: captivity, relegation, exile, incapacity or inability. The first three words signify substantially the same,[8] to wit: prac-

7 Cfr. c. 3, 6°, I, 8, and above. 8 In Webster's Dictionary we

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tical absence from the episcopal see, brought about either by force or by an act of the civil power, be it in war or peace. *Inhabilitas* is the physical or mental inability of the bishop, without any one's fault or coöperation. Such cases are mentioned in the Decree of Gratian; in one case the bishop suffered from severe headaches, in another, he was afflicted with an ailment not further specified. In both cases the popes, Gregory I and Nicholas I, decided that no successor should be elected but the priests and neighboring bishops should assist the infirm bishop.[9] That mental infirmity falls in the same category goes without saying.[10] Under such circumstances, therefore, the government of the diocese is put into the hands of the vicar-general, as the *Schema Concilii Vaticani* postulated, or the bishop, passing over the vicar-general, may appoint another ecclesiastic, or several to whom the government is entrusted.

This provision bridges the difference of opinion raised at the Vatican Council. For the new law, differing from the *Schema,* permits the election of a vicar-capitular, if the vicar-general and the appointment of episcopal legates is impracticable. In such a case the chapter, as will be seen, shall elect a vicar-capitular.[11] But whoever holds the government ad interim must report to Rome (to the S. C. Consist., or the Secretary of State, or the S. C. of Extraordinary Affairs).

The last paragraph treats of another case which may cause a see to be *impedita,* viz., the *censure* of the bishop (treated *infra,* Book IV). If a bishop is placed under censure, the Metropolitan is not allowed to interfere

could not perceive an adequate distinction between relegation and exile.

9 Cfr. cc. 1, 4, C. 7, q. 1.

10 Reiffenstuel I, 10, n. 35 ff.

11 The S. C. C., Aug. 7, 1683 (Richter, *Trid.,* p. 370) decided that if communication with the captured bishop was possible, his jurisdiction did not devolve on the chapter.

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either with him or his vicar-general, nor is he called upon to appoint a vicar-capitular, because the old law [12] forbade such interference, and the new law does not abolish the old. But the Metropolitan is obliged in virtue of his office to inform the Holy See. If the Metropolitan is censured, the senior suffragan must make the report. If the prelate who is censured is immediately subject to the Holy See, the Metropolitan who has been chosen by the respective Prelate "*semel pro semper*," is obliged to have immediate recourse to Rome. In the meantime the vicar-general cannot continue to exercise his jurisdiction, because his power is suspended during the suspension of the bishop (can. 371). Hence, in such a case, the regular business of the episcopal curia will cease until Rome makes provision, which now-a-days, by reason of swift communication, can, as a rule, be done promptly. If any jurisdictional act should meanwhile be performed, which would give rise to a general error, the validity of such an act could not be doubted.

VACANCY PROPER

CAN. 430

§ 1. Sedes episcopalis vacat Episcopi morte, renuntiatione a Romano Pontifice acceptata, translatione ac privatione Episcopo intimata.

§ 2. Nihilominus, excepta collatione beneficiorum aut officiorum ecclesiasticorum, omnia vim habent quae gesta sunt a Vicario Generali, usque dum hic certam de obitu Episcopi notitiam acceperit, vel ab Episcopo

12 Cfr. c. 1, 6° I, 8, de negligentia supplenda. The reason why the Metropolitan is not allowed to draw the jurisdiction to himself lies in the danger of detriment accruing to the bishop and his subjects. Reiffenstuel, I, 10, 36 also mentions the expedient of recourse.

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aut Vicario Generali, usque dum certa de memoratis actibus pontificiis notitia ad eosdem pervenerit.

§ 3. A certa translationis notitia Episcopus intra quatuor menses debet dioecesim *ad quam* petere eiusdemque canonicam possessionem assumere ad normam can. 333, 334 et a die captae possessionis dioecesis *a qua* plene vacat; interim vero in eadem Episcopus:

1.° Vicarii Capitularis potestatem obtinet eisdemque obligationibus tenetur, cessante qualibet Vicarii Generalis potestate;

2.° Honorifica Episcoporum residentialium privilegia conservat;

3.° Integros percipit fructus mensae episcopalis ad normam can. 194, § 2.

The episcopal see becomes vacant by the death of the bishop, by his resignation as soon as accepted by the Roman Pontiff, or by his transfer and privation.

Nevertheless, with the exception of conferring ecclesiastical benefices or offices, all the official acts of the vicar-general are valid until he has received sure notice of the death of his bishop. Valid are also the acts of the bishop himself or of his vicar-general so long as they have not been duly notified of the vacancy.

Four months from the date of the notice of his transfer, the bishop must repair to the diocese to which he is transferred and take possession of it. From the date of his taking possession of the new diocese, his former see is fully vacant. Meanwhile, from the date of notice to that of his taking possession, the bishop

(1) enjoys the whole power of a vicar-capitular in the old diocese, while the power of the vicar-general ceases;

(2) retains all the honorary privileges of resident bishops, and

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(3) is entitled to all the episcopal revenues.

The four modes by which an episcopal see may become vacant are evidently taken *taxative*, as none other is imaginable.

In order to safeguard the validity of official acts, the second paragraph provides that the *notice* must be *certa*. First as to the case of *death*. If the bishop dies within the diocese, there will hardly be any difficulty. The vicar-general may receive the death notice a day or two after the bishop has expired.[13] But this matters little. More important is the manner in which the notice is given. This must be certain or sure. Certainty, we know, may be either physical or moral, according as it is derived from the bodily senses or based on reasons which leave no room for reasonable doubt. Besides, there is juridical certainty, obtained by means prescribed in law; for instance, peremptory admonition, official summons, or a document. The last-named kind of certainty is not required for the death notice of a bishop, because the text demands only certain notice, and "one who is already certain need not be further informed."[14] Moreover, the case does not fall under any heading of law requiring juridical certainty. Hence if the vicar-general receives notice through trustworthy witnesses, or by letter from one who is in a position to know and willing to tell the truth, he may be said to have certainty. But he is not obliged to believe the newspapers, as they sometimes report people dead when they are still among the living. Of course, the surest way of notifying the vicar-general is through the episcopal chancery (with the diocesan, not episcopal, seal).

13 *Mors* (the physical separation of soul and body) *omnia solvit*, but there is also a civil death and canonical death (excommunication).

14 Regular juris 31 in 6°: "*Eum qui certus est, certiorari ulterius non debet.*" Cfr. Reiffenstuel, Cap. II in reg. cit.

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After he has received certain notice of the death of the bishop the vicar-general's office ceases; in fact, it has ceased *de facto* and *de iure* from the moment of the bishop's death with regard to the conferring of ecclesiastical benefices and offices. What is the reason for this difference between the conferring of benefices and other official acts? For the former, the vicar-general needs a special mandate, which the bishop cannot impart after death. It may be asked whether a vicar-general can put into effect after the bishop's death a mandate received before that event. The answer is no, because a "*mandatum ab homine*" expires with the death of the *mandans*, even if the latter should have commenced the settlement of the affair in question (*re non amplius integrâ*).[15]

The terms *transfer* and *privation* have been explained above (can. 183). *Transfers*[16] of bishops were not unusual in the Middle Ages, even against the will of the prelates. The pope clearly has the right to transfer bishops from one see to another. As the appointment is adduced by human factors which depend finally on the Supreme Pastor, so a change must be considered possible and dependent on the same cause. The spiritual marriage (*connubium spirituale*) which is supposedly contracted between the bishop and his diocese, cannot be urged against this right. Mysticism in the law is dangerous and to stretch that mystic symbol would lead to absurdities. Moreover, the assumption that there is only a *matrimonium ratum* would suffice to vindicate the right of the Pope to solve it. Now-a-days, however, transfers, properly so-called, are generally made only with the consent of the one transferred and for reasons

15 Cfr. Reiffenstuel, I, 2, n, 46.

16 Cfr. title 7 in Decretals: de translatione episcopi.

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of evident utility or necessity affecting either the person of the bishop or the diocese.[17]

The bishop who *resigns* must be duly informed of the acceptance of his resignation by the S. Cong. Consistorialis. The bishop who is *transferred* must be certain that the translation was made in public consistory, and the bishop *deprived* of his bishopric must be certain that that penalty was inflicted. Here again, therefore, the question of certainty arises. But here the certainty required must be limited to *juridical knowledge;* for the resignation must be accepted by the Pope, on whose will the acceptance depends. Transfer, too, depends on the same factor; and privation is a judiciary act which must be ascertained judicially. Hence in all these cases an official document, or at least official notice, is required. If the notice of acceptance, resignation or transfer is transmitted by telegraph or telephone, it must be done by persons acting in an official capacity, in other words, by the Secretariate of State.[18] Hence we believe our term (§ 3) "authentic notice" is a correct translation. The rest of the canon will be explained in connection with the office of vicar-general.

CAN. 431

§ 1. Sede vacante, nisi adfuerit Administrator Apostolicus vel aliter a Sancta Sede provisum fuerit, ad Capitulum ecclesiae cathedralis regimen dioecesis devolvitur.

§ 2. Sicubi ex speciali Sanctae Sedis dispositione Archiepiscopus aliusve Episcopus Administratorem dioecesis vacantis designet, hic omnes et solas facul-

17 Cfr. Aichner, § 96, 2; Smith, *Elements*, I, nn. 391 ff.

18 The Secretariate of State, in virtue of its diplomatic character, is guaranteed free communication.

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tates habet quae Vicario Capitulari competunt, eisdem obligationibus ac poenis obnoxius.

The first paragraph of this canon, with the exception of the clause concerning the administrator Apostolic,[19] is a repetition of the old law,[20] which entrusted the chapter with the diocesan government.

The second paragraph applies to the U. S. Our second Plenary Council[21] provided "that if a vacancy occurs by the death of the bishop, an administrator appointed by the bishop before his death shall govern the diocese." Nothing to this effect is found in the Code, and hence it would not be safe to follow this conciliar enactment in future. But another regulation still holds good, namely, that the archbishop (metropolitan) or another, generally the senior suffragan, should designate an administrator for the vacant see. Our contention that bishops are no longer entitled to appoint their own administrators is based on the laws of interpretation. The legislator knew of the existence of a special provision for our country — otherwise mention thereof would not be made — and as he omits a part of the former disposition, he plainly wishes to see the same corrected. The term "*aliusve episcopus*" cannot be advanced against this interpretation, for the very position of the phrase clearly shows that this "other bishop" is no one else but the "senior suffragan" mentioned in n. 97 of the Second Baltimore Council. But even aside from this interpretation, which is merely declaratory, not extensive nor corrective, the right of the bishop to appoint

19 Cfr. cc. 312 ff.

20 Cfr. c. 3, 6°, I, 8, de supplenda neglig.; *Trid.*, Sess. 24, c. 16 de ref.

21 Cfr. *Acta et Decreta II. Conc. Plen. Balt.*, n. 96 f.; p. 67 f. Smith, *Elements* I, n. 638, Brief of Pius IX, Jan. 13, 1854.

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an administrator was prejudicial to the clergy in general and the diocesan consultors in particular, a setting aside of the common law of the Church in an important disciplinary matter. Hence the Fathers of the Second Baltimore Council were naturally more anxious about the faculties than about the administrator, who enters upon the scene, as it were, only after the "*vir ecclesiasticus*" has been endowed with the faculties. Now these *faculties* [22] are granted in our Code to the administrator only in so far as the vicar-capitular possesses them, and no farther; and the administrator, like the vicar-capitular, is bound by the same obligations and subject to the same penalties.

THE VICAR-CAPITULAR

CAN. 432

§ 1. Capitulum ecclesiae cathedralis, sede vacante, intra octo dies ab accepta notitia vacationis, debet Vicarium Capitularem qui loco sui dioecesim regat et, si fructuum percipiendorum ei munus incumbat, oeconomum unum vel plures fideles ac diligentes constituere.

§ 2. Si Capitulum intra praescriptum tempus Vicarium aut oeconomum, quavis de causa, nullum deputaverit, deputatio ad Metropolitam devolvitur; si autem ecclesia ipsa metropolitana fuerit vacans vel metropolitana simul et suffraganea, ad antiquiorem ex Episcopis suffraganeis.

§ 3. Etiam vacante dioecesi aut abbatia vel praelatura de quibus in can. 285, si Capitulum intra octiduum Vicarium vel oeconomum non nominaverit, hunc Metropolita qui fuit legitime electus ad normam citati canonis, constituat, nisi in abbatia vel praelatura *nullius* religiosa aliter ad normam constitutionum provideatur.

22 Cfr. can. 60 and Vol. I, p. 1111.

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§ 4. Capitulum quantocius de morte Episcopi et deinde electus in Vicarium Capitularem de sua electione Sedem Apostolicam certiorem faciant.

In case of a vacancy in the episcopal see, the cathedral chapter, within eight days from the date of notice received, must appoint a vicar-capitular, who shall govern the diocese in the place of said chapter. If the chapter also administers the revenues, it must appoint one or more trustworthy and industrious persons as administrators thereof (*oeconomi*).

Should the chapter, for any reason, neglect to designate a vicar-capitular or *oeconomus* within the prescribed time, the right of making this appointment devolves on the metropolitan; and if the vacant see is a metropolitan see, or if the metropolitan see is vacant simultaneously with a suffragan see, the right of appointment passes to the senior suffragan.

If a diocese immediately subject to the Roman Pontiff, or an *abbatia* or *praelatura nullius* (can. 285) becomes vacant, and the chapter fails to appoint a vicar-capitular or *oeconomus* within the stated time, the metropolitan "*semel pro semper*" chosen designates the said officials, unless (in the case of an abbacy or prelature of religious) the respective constitutions provide otherwise.

The chapter should as soon as possible inform the Apostolic See of the death of the bishop, and the vicar-capitular should notify the same Apostolic See of a new election as soon as made.

The first paragraph of this canon is taken from the Council of Trent, which commands that a vicar-capitular and *oeconomi*[28] ("*qui rerum ecclesiasticarum et proventuum curam gerant*") be chosen, "*ubi fructuum per-*

[28] *Trid.*, Sess. 24, c. 16 de ref.

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cipiendorum ei munus incumbit." This latter clause is verbally inserted in our Code, while the former is omitted, but is connected with the office of administrator.

"In the United States," says Smith,[24] "no such procurators or administrators of the temporalities of vacant dioceses are appointed. Vacant sees are usually governed, both in *temporalibus* and *spiritualibus,* by one and the same administrator." This opinion may even now be held and followed, but only conditionally, *viz.,* as long as the diocesan consultors are not concerned with the "*munus percipiendorum fructuum*"; because the Tridentine as well as the new law speak conditionally ("*si*" or "*ubi*"). Hence as long as the bishop with the administrators who must henceforth be chosen,[25] takes care of the temporalities, and not the diocesan consultors as such, the election of a procurator is not required in the U. S.

"*Intra octo dies ab accepta notitia vacationis*" implies any sufficiently trustworthy notice of the vacancy (either by death or transfer),[26] because the notice is not further described. For eight days, therefore, the cathedral chapter, or the diocesan consultors, as a body, are entrusted with the government of the diocese, as it was before the Council of Trent.[27]

The second paragraph treats of the *devolution* of the right of appointment to the metropolitan or the senior suffragan. Hence, if the cathedral chapter, for any reason (*e. g.,* negligence or disagreement), fails to comply with the law laid down in our canon, the metropolitan may designate a vicar-capitular, and he is not bound to

24 *Elements,* I, n. 635, p. 393.
25 Cfr. cc. 1520 ff.
26 Barbosa, *De Canonicis et Dignitatibus,* c. ult., nn. 29 ff., ed. Lugd., 1668, p. 246.
27 Cfr. c. 14, X, I, 33; c. 2, X, III, 9; c. 3, 6°, I, 8; Benedict XIV, *De Syn. Dioec.,* II, 9, 2; Bouix, *De Capitulis,* p. 539 f.

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notify the chapter of his intention, but merely of the person elected. The new law deviates from the old practice with regard to the *senior suffragan.* Formerly, if a suffragan see became vacant whilst the metropolitan see was also vacant, the metropolitan chapter was entitled to name a vicar-capitular for the vacant suffragan see.[28] Now the senior bishop designates the vicar-capitular in the cases mentioned.

But who is the *senior suffragan?* The text says "*antiquior,*" which implies that this attribute has reference to the see rather than to the person of its incumbent, and therefore the senior bishop is the one whose diocese was erected before the others: "*prior in tempore, potior in iure.*" [29]

The right of the metropolitan extends also to such vacant sees as are immediately subject to the Roman Pontiff and to *abbatiae nullius.* Exception, however, is made concerning the latter in case the Constitutions of the religious should provide otherwise. These generally determine that an administrator be chosen and admit no interference from outside. The clause safeguards the exemption as well as the authority of the Holy See to which such Constitutions must be submitted for approval.

CAN. 433

§ 1. Unus deputetur Vicarius Capitularis, reprobata contraria consuetudine; secus electio irrita est.

§ 2. Vicarii Capitularis et oeconomi constitutio fieri debet per actum capitularem ad normam can. 160–182, salvis peculiaribus huius Capitis normis, et ad eius

28 Cf. Richter, *Trid.*, Sess. 24, c. 16, n. 24, p. 375; Benedict XIV, *De Syn.*, II, 9, 2; Bouix, *De Capitulis*, p. 583.

29 Cfr. tit. 33, Decret. de maioritate et obedientia; regula 54 iuris in 6°; Santi-Leitner, *Praelectiones Juris Canonici*, Vol. I, p. 379.

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validitatem requiritur numerus suffragiorum absolute maior demptis suffragiis nullis.

§ 3. Idem potest in Vicarium Capitularem et oeconomum deputari.

§ 1 of this canon deals a decisive blow against the opinion of those canonists [80] who (based on some decisions of S. C. C.) held that more than one vicar-capitular could be elected in dioceses where an immemorial custom existed to that effect. The Code reprobates all such customs and declares all elections performed contrary to the new law to be null and void.

§ 2 treats of the *manner* of *voting,* which must be the same as that prescribed for elections proper. An absolute majority is required for election. Hence, if the number of electors is six, four votes must be cast for the same person. Any vote which is extorted, or which is not secret, certain, absolute, and determined [81] is invalid, and must be subtracted from the total. Thus, if one vote out of six were null and void, there would remain five valid votes, and therefore the candidate would have to obtain three, in order to be elected.

QUALITIES OF THE VICAR-CAPITULAR

CAN. 434

§ 1. Ad Vicarii Capitularis munus deputari valide nequit clericus qui ad sacrum presbyteratus ordinem nondum fuerit promotus, aut tricesimum aetatis annum non expleverit, aut ad eandem vacantem sedem fuerit electus, nominatus vel praesentatus.

§ 2. Vicarius Capitularis sit praeterea in theologia

80 Cf. Bouix, *De Capitulis,* p. 545; Wernz, *Jus Decret.,* II, 1, p. 960.

81 Cfr. Can. 169; Bouix, *De Capitulis,* p. 207.

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aut iure canonico doctor vel licentiatus aut saltem earundem disciplinarum vere peritus, in eoque morum integritas, pietas, sana doctrina cum prudentiae laude conspirent.

§ 3. Si praescriptae § 1 conditiones posthabitae fuerint, Metropolita, aut si ecclesia metropolitana vacans fuerit, vel de ipso Capitulo metropolitano agatur, antiquior provinciae Episcopus, agnita rei veritate, Vicarium pro ea vice deputet; actus autem illius qui a Capitulo electus fuerat, ipso iure sunt nulli.

No cleric can be validly elected vicar-capitular unless he be a priest, thirty years of age; no one who has been elected, nominated or presented to the vacant see may be chosen for the office of vicar-capitular.

Furthermore, the vicar-capitular must be a doctor of divinity or of canon law, or a licentiate thereof, or at least well versed in these sciences; besides, he must be distinguished by probity of life, piety, sound doctrine, and prudence.

If in any case the conditions prescribed in § 1 have been set aside, the metropolitan, or if the metropolitan see be vacant or it be question of electing a vicar-capitular for the metropolitan see, the senior bishop of the diocese shall designate the vicar-capitular, after having been duly informed of the election; all the official acts of the so-called chosen vicar are *ipso iure* null and void.

The Code here corrects the Tridentine law in more than one point. The Council [32] was satisfied with the clerical state in general and with the age of twenty-five; now the priesthood and the age of thirty years (completed) are required. Besides, the canon adds that no one can be elected vicar-capitular who is elected, nom-

[32] Cfr. *Trid.*, Sess. 22, c. 4; Sess. 23, c. 23, c. 12; Sess. 24, c. 12, de ref.

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inated, or presented to the same vacant see, as decided by Pius IX, "*Romanus Pontifex*," Aug. 28, 1873.

These three conditions affect the validity of the election and, if neglected, according to § 3, give the right of appointing a vicar-capitular to the metropolitan or senior suffragan. These latter cannot, however, proceed to the appointment unless they have been informed that the election was illegal; in other words, they must have verified the fact that the chosen candidate suffers from one of the three impediments stated in § 1 of this canon.

As in the case of the eight days having elapsed, the devolution takes place only for this one time (*pro ea vice*), and the metropolitan or senior suffragan cannot claim the right of interfering with the next election of a vicar-capitular to the same see. Hence, if those who are authorized to supply the illegal election should themselves choose an unfit candidate, the right of election would revert to the chapter. For the metropolitan and senior suffragan, too, are bound by the law. The reason for this assertion is that the law which urges all is nullifying and the law depriving the chapter of the right of election is penal.[33]

Concerning the other qualities required, the Code is not as strict as the former practice. The academic degrees are no longer strictly demanded for a valid election,[34] nor is that other requisite which the canonists set forth in agreement with the practice of the Roman Curia, to wit, that, *ceteris paribus,* a member of the chapter should be preferred to an outsider.[35] Therefore, should

33 Barbosa, *De Officio et Potestate Episcopi*, P. III, Alleg. 54, n. 164, ed. Lugd., 1665, t. II, p. 132.

34 Cfr. Richter, *Trid.*, p. 373, n. 4 f.; Bouix, *De Capitulis*, p. 546 ff., where the academic doctorate is described as one conferred in a public university (of course, Catholic), and the *laurea iuris* is said to be preferred to that in theology. But this must now be corrected.

35 Richter, *l. c.*; Bouix, *l. c.*, p. 572 f.; Santi-Leitner, I, p. 248 (tit. 28, n. 51).

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the chapter (or the consultors) disregard these requisites, the metropolitan or senior suffragan could not claim the right of devolution.

RIGHTS OF THE VICAR-CAPITULAR

CAN. 435

§ 1. Sicut ad Capitulum ante deputationem Vicarii Capitularis, ita deinde ad Vicarium Capitularem transit ordinaria Episcopi iurisdictio in spiritualibus et temporalibus, exceptis iis quae in iure expresse sunt eidem prohibita.

§ 2. Quare Capitulum et postea Vicarius Capitularis omnia possunt quae enumerata sunt can. 368, § 2; item facultate pollent exercitium pontificalium in dioecesi cuilibet Episcopo permittendi, imo, si Vicarius Capitularis sit Episcopus, potest ipse eadem exercere, excluso tamen usu throni cum baldachino.

§ 3. Vicario Capitulari et Capitulo non licet agere quidpiam quod vel dioecesi vel episcopalibus iuribus praeiudicium aliquod afferre possit; nominatim vero Vicarius Capitularis aliique sive de Capitulo sive extranei, clerici aut laici, per se vel per alium prohibentur Curiae episcopalis documenta quaelibet subtrahere vel destruere vel celare vel immutare.

CAN. 436

Sede vacante nihil innovetur.

CAN. 437

In Vicario constituendo nullam sibi iurisdictionis partem Capitulum retinere potest, nec gerendo muneri tempus praefinire aliasve restrictiones praestituere.

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The ordinary jurisdiction of the bishop, in spiritual as well as temporal affairs, passes first to the chapter and then to the vicar-capitular, except in regard to matters which the law has expressly excepted.

Therefore, first the chapter, and then the vicar-capitular, enjoy all the powers enumerated in can. 368, § 2, and besides, have the faculties to grant the exercise of pontificals to any bishop; nay, if the vicar-capitular is endowed with the episcopal character himself, he may perform pontifical ceremonies, though without using the throne and canopy.

The vicar-capitular and the chapter are not allowed to do anything that might prove prejudicial to the diocese or to episcopal rights; especially are the vicar-capitular and others, either capitulars or outsiders, clergymen or laymen, forbidden, either themselves or through others, to withdraw or destroy or hide or change documents of the episcopal Curia.

Nothing is to be changed during the vacancy of a see.

The chapter, in appointing a vicar, cannot reserve to itself any part of the jurisdiction, or limit the term of his office, or make any other restrictions.

These three canons belong together and supplement one another. Benedict XIV said that the powers of the chapter and the vicar-capitular about equal those of the vicar-general;[36] and therefore, whatever the bishop can do as Ordinary of the diocese (unless he has expressly reserved some matters) can also be done by the vicar-capitular. § 2, therefore, refers to can. 368, where the powers of the vicar-general are described.

Ordinary jurisdiction is vested in the chapter from the moment when notice of the vacancy is received, and in

[36] Cfr. *De Syn. Dioec.*, II, 9, 3.

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the vicar-capitular as soon as he is lawfully appointed and has made his profession of faith.[37]

However, whilst the full ordinary power passes first to the chapter, and then to the vicar-capitular, our Code, following the old law, forbids both to enact or do anything which might be detrimental to the episcopal rights. Can. 436: "*sede vacante nihil innovetur,*" is a repetition of the Decretals (III, § 9). Under this heading various acts enumerated by canonists, who gathered them from scattered sources, are prohibited, though there are some modifications under the Code. Thus the vicar-capitular (a) *cannot convoke a diocesan synod.*[38] This is now absolutely forbidden, because the Code makes no exception. This measure seems quite reasonable, as synods must be held every ten years only.[39] (b) He *cannot confer benefices* promiscuously or appoint to office, except in so far as the law permits him to exercise that right, which is determined in can. 455, § 2. (c) He *cannot grant indulgences,* and must abstain from using the faculty of granting such, should he possess it.[40] (d) He *cannot alienate* anything of value, as this would be detrimental to the *mensa episcopalis* or the diocese.[41] With regard to this point we cannot discover any change in the new Code. Hence the old prescriptions remain in full force. No doubt, however, the vicar-capitular may conclude a favorable financial deal, for instance, getting money at a lower rate of interest or converting bonds into more profitable ones. For this is not prejudicial to the diocese, and opportunities, especially on the money mar-

37 *Ib.*, n. 4; cf. can. 438.

38 Cfr. can. 357, § 1.

39 Benedict XIV, *l. c.*, n. 5 f., says that the vicar-capitular can convoke a synod if a year has elapsed since the last one.

40 Cfr. *Trid.*, Sess. 7, c. 10 de ref.; Benedict XIV, *l. c.*, II, 9, 7; Wernz, *Jus Decret.*, II, 2, p. 969.

41 Cfr. c. 62, C. 12, q. 2; c. 1, X, III, 9; Bizzarri, *Coll.*, p. 40 f.

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ket, easily slip away. Of course, if required, formalities prescribed by Canon Law must be observed. (e) The vicar-capitular *cannot grant litterae dimissoriales indiscriminately,* but only in the cases established by can. 958, § 1, 3°. In cases which permit him to issue such documents he may also ordain those provided with *litterae,* if he himself is endowed with the episcopal character (can. 959). This is a logical consequence of can. 435, § 2, which grants the vicar-capitular, if he is a bishop, the right of exercising pontifical functions. Only the use of the throne with the baldachin is forbidden; wherefore a temporary throne, or rather faldstool (*faldistorium*), must be prepared. We conclude that the vicar-capitular, if a bishop, may also administer the sacrament of confirmation.[42]

As to letters of incardination and excardination see can. 113.

The following canon (437) rejects the opinion prevailing among some canonists,[43] and in the S. C. C., but never in S. C. EE. et RR., that the chapter can reserve to itself part of the episcopal jurisdiction. Neither is the chapter entitled to limit the term of office of the vicar-capitular, or to restrict his power, for instance, to certain acts. If the vicar-capitular should submit to such restrictions at his election, the election would be valid, but the vicar-capitular would be obliged neither *in foro externo* nor *in foro interno* to abide by these restrictions.[44]

42 Cfr. Santi-Leitner, *l. c.,* I, 28, n. 62 (Vol. I, p. 255).

43 Cfr. Benedict XIV, *De Syn.,* IV, 8, 10; Bouix, *De Capitulis,* p. 556 ff.

44 Pius IX, "*Romanus Pontifex,*" Aug. 28, 1873: "Totam ordinariam episcopi jurisdictionem, quae vacua sede episcopali in capitulum venerat, ad Vicarium ab eo rite constitutum transire, nec aliam huius jurisdictionis partem posse capitulum reservare, neque posse ad certum et definitum tempus vicarios constituere."

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The time when the ordinary jurisdiction passes to the vicar-capitular is stated in the next canon.

CAN. 438

Vicarius Capitularis, edita fidei professione de qua in can. 1406–1408, statim iurisdictionem obtinet, quin necessaria sit ullius confirmatio.

The vicar-capitular, after having pronounced the profession of faith (can. 1406 ff.), immediately obtains jurisdiction and needs no confirmation from any one. This settles a point long in dispute among canonists.[45] The profession of faith is to be made before the chapter. Whether its omission by mere accident would invalidate the jurisdiction and thus render the official acts of the vicar-capitular null and void, is not stated in our canon or in the one treating of the *professio fidei,* or in the penal Code. Hence, *salvo meliori iudicio,* we should say that the clause "*edita fidei professione*" (ablative absolute) here stands for the perfect tense, meaning "after having made the profession," but not conditionally, *if*. It follows that the mere wording of the text permits us to assume that the *professio fidei* does not affect the jurisdiction itself, but only the point of time in a non-conditional sense. However, in view of the importance attached to the profession and its being placed before "*iurisdictionem obtinet,*" we may conclude that the ***ratio legis*** lays stress on the profession, and this would seem to imply that it is a *conditio sine qua non.*

CAN. 439

Quae in can. 370 de Vicario Generali praescripta

[45] See Benedict XIV, *De Syn.*, II, 9, 4; Barbosa thought otherwise.

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sunt, eadem de Vicario quoque Capitulari dicta intelligantur.

Concerning *precedence and honorary rights*, whatever has been enacted about the vicar-general must be applied to the vicar-capitular.

CAN. 440

Vicarius Capitularis obligatione tenetur residendi in dioecesi et applicandae Missae pro populo ad normam can. 338, 339.

CAN. 441

Nisi aliter fuerit legitime provisum:

1.° Vicarius Capitularis et oeconomus ius habent ad congruam retributionem, in Concilio provinciali designatam vel recepta consuetudine concedi solitam, desumendam ex reditibus mensae episcopalis aut ex aliis emolumentis;

2.° Cetera emolumenta, quo tempore sedes episcopalis vacaverit, futuro Episcopo pro dioecesi necessitatibus reserventur, si ad Episcopum, ecclesia non vacante, pertinuissent.

The vicar-capitular is obliged to residence and to the application of the Mass according to can. 338 f.

Unless otherwise provided:

(1) the vicar-capitular and the procurator are entitled to a decent support, determined by the provincial council or by legitimate custom, and taken from the episcopal revenues or other sources.

(2) All other revenues accruing during the vacancy of the see, if they are of a kind that would belong to the bishop in case the see were not vacant, must be reserved for the future bishop.

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In the U. S. the bishops receive their salary chiefly by means of the cathedraticum,[46] and hence the solution of the pecuniary question here is simple. In the old countries this matter is more intricate. It is to be settled, from time to time, in provincial councils. The vicar-capitular or administrator, therefore, is entitled to the *cathedraticum pro rata temporis* as well as to the income received from dispensations. For the rest, a plenary or provincial council shall further determine the ways and means for the support of the vicar-capitular.

CAN. 442

Oeconomus rerum ecclesiasticarum et proventuum curam et administrationem gerat, sub auctoritate tamen Vicarii Capitularis.

The *procurator* shall administer the temporal affairs and revenues of the diocese under the supervision of the vicar-capitular.

CAN. 443

§ 1. Vicarii Capitularis et oeconomi remotio Sanctae Sedi reservatur; renuntiatio authentica forma est exhibenda Capitulo, a quo tamen eam acceptari necesse non est, ut valeat; novi autem Vicarii vel oeconomi constitutio post prioris renuntiationem, obitum vel remotionem ad ipsum Capitulum pertinet, facienda ad normam can. 432.

§ 2. Cessat praeterea eorum munus per initam a novo Episcopo possessionem ad normam can. 334, § 3.

The *removal of the vicar-capitular* and the procurator is reserved to the Holy See, the *resignation* of either must

[46] Cf. *Conc. Balt. II*, n. 100 (*Actaet Decreta*, p. 68 f.).

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be made in authentic form and presented to the chapter, whose acceptance, however, is not required for the validity of the act. After the resignation, death or removal of the vicar-capitular or procurator, a new one may be appointed by the same chapter, according to the rules laid down in can. 432.

The office of vicar-capitular or procurator ceases immediately after the new bishop has taken possession of his diocese, according to can. 334, § 3.

The removal of a vicar-capitular is logically reserved to the Holy See,[47] since the chapter has no jurisdiction over the vicar-capitular, and the whole ordinary power of the bishop passes to him at election. Neither is the metropolitan, if he has appointed a vicar-capitular, entitled to remove him, for that right is only an extraordinary means of appointment, nor does the appointment cause or create the jurisdiction, but only occasions it. Therefore the *regula juris* in the Decretals of Gregory, "*Omnis res, per quascunque causas nascitur, per easdem dissolvitur,*" cannot be applied here. From the same principle, *viz.:* that the whole ordinary jurisdiction is transferred to the vicar-capitular, and nothing remains with the chapter, it follows that the chapter has no right to indict the vicar, or to judge him, or to demand an account from him.[48]

The *resignation,* says the canon, must be drawn up in authentic form, as described in can. 186. But the acceptance of the chapter is not required for its validity, which is again quite logical, because the chapter has no jurisdiction to accept the resignation of the vicar. But it has the power, as a means to an end, to appoint a new vicar-capitular, if the first appointee resigns, dies, or is

47 Cf. Pius IX, "Romanus Pontifex," Aug. 28, 1873.

48 Cf. Bouix, *De Capitulis,* p. 609.

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removed. The election must again proceed canonically, according to time and mode, and if the chapter fails to perform its duty within eight days from the date of notice of the resignation, death or removal of the former vicar-capitular, the metropolitan or senior suffragan can again claim the right of appointment.

CAN. 444

§ 1. Novus Episcopus a Capitulo, a Vicario Capitulari, ab oeconomo et ab aliis officialibus, qui, sede vacante, fuerunt constituti, rationem exigere debet officiorum, iurisdictionis, administrationis munerisve ipsorum cuiuslibet, et in eos animadvertere, qui in suo officio seu administratione deliquerint, etiamsi, redditis rationibus, a Capitulo vel a Capituli deputatis absolutionem aut liberationem impetraverint.

§ 2. Iidem rationem reddant novo Episcopo scripturarum ad Ecclesiam pertinentium, si quae ad ipsos pervenerint.

The office of vicar-capitular having ceased *ipso iure* upon the new bishop's taking canonical possession of the diocese, the latter must demand an account of the chapter, the vicar-capitular, the procurator, and other officials appointed during the vacancy, concerning their office, jurisdiction, administration, and charges; and he must proceed against such as have been delinquent in the discharge of their duties and offices, even though they had given an account to the chapter and been absolved or acquitted by the same.

Besides, the aforesaid officials shall also render account to the new bishop of whatever church documents may have come into their hands.

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This canon is almost verbally reproduced from the decrees of Trent (Sess. 24, c. 16, de ref.). But instead of the term "*punire*," found there, the canon uses the milder expression, "*animadvertere*," which means to heed or take notice, although in law it also signifies to proceed, to punish. The punishment to be meted out is left to the prudent judgment of the bishop. Attention must be paid to the word "*debet*," which implies that the bishop is not at liberty to forego asking an account.[49] He is not, however, obliged to employ assessors or witnesses to testify to the fact that he has demanded an account.[50]

§ 2 again proves the solicitude which the Church wishes to have bestowed on official and other (for instance, historical), documents pertaining to the diocese.

49 Cfr. Bouix, *De Capitulis*, p. 656 f., who quotes Monacelli and Fagnani as saying that it would be a grievous sin to omit that account.

50 S. C. C., April 14, 1725; Richter, *Trid.*, p. 376, n. 25.

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CHAPTER VIII

RURAL DEANS

The term "rural deans" is here employed for the Latin expression "*vicarii foranei,*" because the English render it thus and the practical significance of both terms is the same. Formerly their power was more extensive, and therefore the name "*vicarius,*" approaching that of vicar-general, was quite suitable. Their origin was due partly to the arrogance of the *chorepiscopi* and partly to the extension of the parish system. The country bishops became fully extinct towards the tenth century and their place was taken by archpriests, who were assigned to the civilly or ecclesiastically more important churches of the diocese, and exercised a certain amount of jurisdiction, but only in minor cases of frequent occurrence. They also convoked the clergy of their district on the first day of each month to instruct the priests how to conduct themselves in the administration of the Sacraments, as we read in the acts of a provincial council of London, of 1237. Besides, they watched over the conduct of the clergy and the faithful and the administration of temporalities.[1] It was but natural, considering the tendency of that time towards association (guilds), that the clergy of the various districts of a diocese should form, as it were, a chapter *en miniature* and elect a set of officials, the head of whom was called *dean.* The deans had to render an

1 Cfr. Thomassin, *Vetus et Nova Disciplina,* P. I, lib. II, c. 3. (ed. Mogunt., 1787, II, p. 13 ff.); Benedict XIV, *De Syn.,* III, 3, 5 ff.)

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account each year to the bishop.[2] The Tridentine Council [3] enacted nothing special about them.

Can. 445

Vicarius foraneus est sacerdos qui vicariatui foraneo, de quo in can. 217, ab Episcopo praeficitur.

The rural dean is a priest appointed by the bishop over a limited part of the diocese (c. 217).

Can. 446

§ 1. Ad munus vicarii foranei Episcopus eligat sacerdotem quem dignum iudicaverit, praesertim inter rectores ecclesiarum paroecialium.

§ 2. Vicarius foraneus ad nutum Episcopi amoveri potest.

He should be a priest chosen from among the parish priests, and may be removed by the bishop at will.

Formerly the priestly character was not absolutely required, but now it is strictly insisted on. No special qualifications are laid down, but the choice as well as the removal is left entirely to the bishop, who is bound neither by the consent nor by the advice of his chapter or consultors.

Can. 447

§ 1. Vicario foraneo, praeter facultates quas ei tribuit Synodus provincialis vel dioecesana et secundum normas in eadem Synodo legitime statutas vel ab Episcopo statuendas, ius et officium est invigilandi potissimum:

2 v. Scherer, I, 618 f.; Sägmüller, *l. c.*, § 100. The name dean is probably taken from the Rule of St. Benedict, c. 21.

3 Sess. 24, c. 20, de ref., exempts all matrimonial and criminal causes from the power of the deans.

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1.° Num ecclesiastici viri sui ambitus seu districtus vitam ducant ad normam sacrorum canonum suisque officiis diligenter satisfaciant, praesertim circa residentiae legem, divini verbi praedicationem, impertiendam pueris atque adultis catechesim et obligationem infirmis assistendi;

2.° Num decreta lata ab Episcopo in sacra visitatione exsecutioni mandentur;

3.° Num debitae cautelae circa materiam Sacrificii Eucharistici adhibeantur;

4.° Num decor et nitor ecclesiarum et sacrae supellectilis, maxime in custodia sanctissimi Sacramenti et in Missae celebratione, accurate servetur; an sacrae functiones secundum sacrae liturgiae praescripta celebrentur; bona ecclesiastica diligenter administrentur, adnexaque illis onera, in primis Missarum, rite impleantur; rectene conscribantur et asserventur libri paroeciales.

§ 2. De iis omnibus ut reddatur certior, vicarius foraneus debet, statutis ab Episcopo temporibus, sui districtus paroecias visitare.

§ 3. Pertinet etiam ad vicarium foraneum, statim atque audierit aliquem sui districtus parochum graviter aegrotare, operam dare ne spiritualibus ac materialibus auxiliis honestoque funere, cum decesserit, careat; et curare ne, eo aegrotante vel decedente, libri, documenta, sacra supellex aliaque quae ad ecclesiam pertinent, depereant aut asportentur.

This canon describes the office or *functions* of the rural dean as follows:

Besides the faculties granted him by the provincial or diocesan synod, to be used according to the norms laid down by the same or determined by the bishop, the rural

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dean enjoys the *right and office of watching,* especially:

(1) as to whether the clergy of his district live up to the requirements of the sacred canons and diligently perform their duties, particularly concerning residence, preaching the word of God, giving catechetical instruction to children and adults, and attending to sick calls;

(2) whether the clergy execute the decrees of the bishop given at the visitation;

(3) whether they take the necessary precautions concerning the matter of the Eucharistic sacrifice;

(4) whether the rules concerning the adornment and neatness of churches and sacred furniture, especially the custody of the Blessed Sacrament and the celebration of Mass, are accurately observed; whether the sacred functions are performed according to the rubrics; whether the church property is carefully administered, and the obligations, especially those accruing from Masses, are properly discharged, and, finally, whether the parochial books are correctly written and kept.

In order to inform himself of all this the rural dean shall, at stated times established by the bishop, visit the parishes of his district. As soon as he hears of the serious sickness of a parish priest of his district, he shall take care that the patient is properly provided for, materially as well as spiritually, and see to it that, in case of death, a decent funeral service be held. Furthermore, the dean shall watch that no parish books, papers, sacred furniture, or other things belonging to the church are lost or carried away during the sickness or at the death of a priest.

The beginning of the canon mentions *faculties* which may be granted to the rural dean either by the provincial or the diocesan synod. The Third Plenary Council of

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Baltimore advised the Ordinaries to give their rural deans "more or less extensive faculties," in order that they might administer their office more efficaciously.[4] But as far as we are aware, deans receive the same faculties as other priests employed in parish work,—that is, if the term *faculties* is taken in its usual sense. But "faculties" may also mean powers in general, in which sense it would involve a kind of *participated jurisdiction.* This seems to us to have been the intention of the Third Baltimore Council. If this surmise is correct, the enlarged powers of deans would naturally have reference to the correction of abuses existing in their districts, exclusive, however, of legal procedure. In some countries it was customary for the deans to dispense from the prohibition of servile work on forbidden days. The new Code grants this power to the parish priests in certain cases.[5]

Concerning the matters to which the *vigilance* of the deans should be directed, not much need be said. Several of them, *e.g.,* residence, preaching, catechetical instruction, are explained under their respective headings. All these matters require a *knowledge of Canon Law,* which deans should possess. The III Plenary Council of Baltimore says they should be endowed, not only with piety and prudence, but also with learning.[6]

As to the "*materia sacrificii Eucharistici,*" this seems an almost superfluous admonition, yet actual occurrences prove its necessity. Altar bread must be of wheat, and for licit celebration in the Latin Rite it must be unleavened. The wine must be pressed from grapes (*vinum de vite*), and, outside of cases of necessity, it should be fermented.[7] At the present time it is necessary to

4 *Acta et Decreta,* n. 29, p. 19.
5 Cfr. can. 1245, § 1.
6 *Acta et Decreta,* n. 30.
7 Cf. Sabetti-Barrett, *Theol. Moralis,* 1917, p. 563 ff.; p. 1095.

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combat an exaggerated prohibition movement, which, as the cases of Oklahoma and Arizona show, aims not only at curtailing personal liberty but at subverting the positive divine law.

With regard to n. 4°, concerning the adornment of churches and their neatness, and the proper observance of the rubrics, we must refer to Titles XV and XVIII of Book III. Accurate book-keeping is again insisted on.

In order to assure the execution of this canon, the bishop should assign certain days, on which the rural deans *must visit the parishes* of their respective districts. The day appointed need not be made public; in fact, a surprise-visit is sometimes more effective in manifesting real conditions.

Can. 448

§ 1. Vicarius foraneus debet, diebus ab Episcopo designatis, convocare presbyteros proprii districtus ad conventus seu collationes de quibus in can. 131 eisdemque praeesse; ubi vero plures habeantur huiusmodi coetus in variis districtus locis, invigilare ut rite celebrentur.

§ 2. Si non sit parochus, debet residere in territorio vicariatus vel alio in loco non valde distanti secundum normas ab Episcopo definiendas.

On the days assigned by the bishop each rural dean must call the priests of his district to a meeting or conference (see can. 131), at which he is to preside; if several meetings are held in different places of his district, the dean must see to it that they be properly conducted.

If the rural dean is not a parish priest, he must reside

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in his district, or at least near it, as determined by the bishop.

The clerical conferences here mentioned were dealt with above (can. 131); where several conferences are held in various places of the same district, as may be necessary in large or numerous dioceses, the dean is dispensed from personally attending all of them, even though they may be held on different days, in order not to overburden him, especially if he is engaged in parish work. He may appoint a substitute, or entrust any priest with the presidency; but he must see to it that these meetings are held in an orderly way and accomplish the purpose for which they are instituted.

CAN. 449

Saltem semel in anno vicarius foraneus proprii vicariatus rationem reddere debet Ordinario loci, exponens non solum quae intra annum bene gesta sint, sed etiam quae mala obrepserint, quae scandala exorta sint, quae remedia ad ea reparanda adhibita et quidquid agendum existimet ad ea radicitus exstirpanda.

At least once a year the rural dean must submit to the Ordinary an account of the condition of his district. In this report he shall freely point out the good that was done as well as the evils that have crept in, scandals and the means employed to uproot them, and make suggestions as to what had best be done to eradicate abuses.

This canon sanctions an old custom. The report of a rural dean is not limited to any one subject. He may freely descant on the frequentation of the sacraments and their administration (not only as far as the four points of can. 447 are concerned), on the condition of sodalities and schools, on the spread of sound literature,

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and if he is a temperance apostle, he may also touch on that subject. But he should also note that the III Plenary Council of Baltimore [8] says that deans should watch discreetly, admonish paternally, report truthfully. They should not be overzealous tyrants, backbiters, or flatterers.

CAN. 450

§ 1. Vicarius foraneus sigillum habeat vicariatus proprium.

§ 2. Praecedit omnibus parochis aliisque sacerdotibus sui districtus.

The rural dean shall have a *deanery seal,* which should differ from that of other deaneries.

He enjoys *precedence* over all the priests of his district.

His precedence is limited, first to the district and then to the diocesan synod or provincial council; and finally to the diocese. Outside these cases the general rules of precedence obtain. What has been said of the deans with regard to the clergy, applies also to religious employed in parish work (not to other religious).

8 *Acta et Decreta,* n. 30.

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CHAPTER IX

PARISH PRIESTS

As said above (can. 215 f.), the whole diocese formerly went by the name of parish (*παροικία*), a term originally employed by the civil authority, and during the early centuries there was but one church in each district, which served as diocesan or parish church. The Council of Sardica (c. 6) forbade the stationing of bishops in villages and small towns, lest the episcopal dignity and authority should suffer.[1] But the *chorepiscopi* were wont to succour the faithful in places far removed from the episcopal city, where alone the Eucharistic Sacrifice was offered by the bishop.[2] Even in Rome, although we read of several titular churches, it was at the Lateran that the suburbicarian bishops, surrounded by their clergy, celebrated the sacred mysteries.

In the fifth century (Chalcedon) we hear of ministers dwelling in the country and appointed with a fixed tenure. They attended to the needs of the faithful after the pagans[3] had receded. This state of things caused the authorities and landed proprietors to erect appropriate edifices for divine worship and dwellings for the clergy, who soon gained more extensive powers in the administration of the Sacraments. One privilege especially now became

1 Cf. Funk, *Manual of Church History*, 1913, I, p. 180.

2 Thomassin, *Vetus et Nova Disciplina*, P. I, l. II, c. 21, n. 7 (II, 153).

3 Paganism (from *pagus*, i. e., a country district) lasted longest in the country.

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attached to these rural churches, *viz.:* the right of possessing a baptismal font, which gradually came to be regarded as the mark of a full-fledged parish church. The landed proprietors, or landlords, either out of devotion, or for the sake of their subjects (slaves, serfs, vassals), erected churches on their estates, where priests could perform sacred functions. These churches, or rather oratories, were not endowed with the same privileges as the rural parish churches, but for the administration of baptism as well as for the celebration of Mass on feast-days depended on the parish church, to which they also had to pay tithes or make certain gifts. In the eighth century the entire rural clergy, like the clergy of the city, formed a sort of college or *corporation* and met at stated times.

In the *cities* progress was somewhat slower. For with the exception of Alexandria [4] and Rome,[5] where there were several baptismal and penitential churches, it was not until the eleventh century that the parish system was introduced in the larger cities. The reason for this tardiness must be sought in the fact that the bishop was considered the sole hierarch of the diocese, and especially of the episcopal city. The development proceeded gradually, until it assumed the present shape. But one feature must be added, *viz.,* that of the *beneficiary title* attached to parishes. This means that the parish church, by reason of its foundation and dotation, was a moral entity, though not a corporation in the sense of Canon Law, and a stable (*perpetua*) portion of a larger organization, *i. e.,* the diocese. The civil law endowed single parishes with a corporative character. The Latin names by which such parish churches went in former times, were *ecclesia ru-*

4 Thomassin, *l. c.*, c. 22, n. 1.

5 For Rome we have the testimony of the *Liber Pontificalis.*

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sticana, parochitana, dioecesana, and a head-priest or arch-priest presided over each.

The oratories on private estates in course of time were turned into parish churches and attended by a *plebanus,* — a name sometimes also given to the *parochus.*[6]

Parishes were not seldom *united with monasteries, universities,* and *confraternities,* which were all more or less corporations or juridical persons. That monks were not considered incapable of ruling a parish is evident, not only from the fact that many settlements sprang up around their monasteries, but also from conciliary decrees. Thus we read in can. 14 of a synod held at Mayence in 847, under Rhabanus Maurus, that "no monk should presume to accept a parish without the consent of the bishop."[7] As long, however, as the monks, or at least the majority of them, were not endowed with the priestly character it was necessary for monasteries to designate and support a *vicar* who, in the name of the monastery and with the approval of the bishop, would govern the parish incorporated with the monastery. The same practice was followed by the universities, which also had incorporated parishes and appointed their vicars. Abuses, however, were not infrequent. Thus a synod of London complained that the regulars paid their vicars a miserly stipend.[8] The consequence was a frequent change of vicars to the detriment of orderly and effective government. Hence the Council of Trent wished to see permanent vicars placed over such parochial benefices as were united to corporations.[9]

6 Cfr. Nilles, *Commentaria in Conc. Plen. Balt. III.,* 1890, p. II, p. 797.

7 Thomassin, *l. c.,* P. I, l. II, c. 25, n. 8 (Vol. II, p. 182).

8 The IVth Lateran Council re-echoes this complaint, c. 30, X, III, 5, de praeb.

9 Sess. 7, c. 7; Sess. 21, c. 6; Sess. 24, c. 13, de ref.

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Finally, mention must be made of a certain kind of parish priest introduced in *France* and *Belgium*. The concordat of 1801 required a reëstablishment of parishes in each diocese. Besides the regular parish priests, the bishops were allowed, if need be, to appoint *succursalistes*, — their number to be regulated conjointly by the bishop and the civil prefect. These succursalists (*desservants*) were appointed by the bishops and could be removed at their good pleasure. Thus it seemed that one essential element of the parish priest, *viz.*, irremovability, was lacking in this kind of "*vicaires et desservants*," as the thirty-first of the organic articles called them. Yet Bouix maintains that they were true parish priests in the canonical sense of the word.[10] According to the Council of Trent,[11] not only the perpetuity of the parish title (*perpetuitas obiectiva*), but also the perpetuity of the parish priest's tenure (*perpetuitas subiectiva*) is a requisite of the canonically established *parochus*. That the term later on became broader must be looked upon as an innovation or a gradual development.

Now let us hear what the Code establishes concerning parish priests. There is first the *definition:*

Can. 451

§ 1. Parochus est sacerdos vel persona moralis cui paroecia collata est in titulum cum cura animarum sub Ordinarii loci auctoritate exercenda.

§ 2. Parochis aequiparantur cum omnibus iuribus et obligationibus paroecialibus et parochorum nomine in iure veniunt:

10 Bouix, *De Parocho*, 1855, p. 234 ff.

11 Cfr. Sess. 24, c. 13; Santi-Leitner, l. III, tit. 29, n. 6 (Vol. III, p. 269).

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1.° Quasi-parochi, qui quasi-paroecias regunt, de quibus in can. 216, § 3;

2.° Vicarii paroeciales, si plena potestate paroeciali sint praediti.

§ 3. Circa militum cappellanos sive maiores sive minores, standum peculiaribus Sanctae Sedis praescriptis.

A parish priest is a priest or moral person to whom a parish is entrusted with the care of souls, to be exercised under the authority of the Ordinary of the diocese.

The following are equal to parish priests as to parochial rights and obligations and in law are known by the name of parish priests:

(1) Priests who govern quasi-parishes, *i. e.,* congregations of the faithful existing in vicariates and prefectures Apostolic (can. 216, § 3);

(2) Vicars of parishes who are endowed with full parochial powers.

Military chaplains, major and minor, are subject to special regulations by the Holy See.

There are four points in this canon which call for an explanation.

(a) A *parochus* may be "a priest or a moral person." In the first case, of course, he is a physical person, endowed with the sacerdotal character, which is now an essential requisite for a parish priest (can. 453). *A moral person* is a community consisting originally of at least three members, such as universities (in the ancient sense), monasteries, chapters, in a word, all corporations. But the term moral person may here also be taken in the sense of an institute, whose juridical nature is determined by, and which becomes the bearer of, rights bestowed for the end or purpose for which it is instituted, *e. g.,* a hosptial,

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an orphanage. In this latter case the exercise of rights lies with the *oeconomus* or procurator, or, as he was formerly called, syndic. Both corporations and institutes, the latter, of course, represented by their procurators, may be what are called habitual parish priests (*parochi habituales*), in order to distinguish them from those (*parochi actuales*) who actually and *de iure* exercise the care of souls.

(b) Every *parish* must be entrusted to such a parish priest, as explained above (can. 216).

(c) A parish must be committed *in titulum*. A title may be defined as "the legitimate cause of possessing what otherwise does not belong to one."[12] It plays a conspicuous part in prescription and possession. To hold a parish in title, or the title to a parish, therefore, means to be the owner or possessor thereof. However, no *parochus* can be styled the owner or proprietor of a parish. We might say that the bishop is the proprietor of all the parishes in his diocese, especially if he holds them in fee simple. But here "title" must be restricted to possession by a legitimate cause. By holding a parish, then, "*animi et corporis detentione et iuris adminiculo*," a priest comes into the possession of a parish; and this suffices to say that the parish was given him "in title." For as long as the title holds good, the actual possessor cannot be deprived of it. However, it may happen that the title is not real, but only presumptive (*titulus putativus* or *coloratus*), *i. e.*, it is believed to have been conferred, but was in fact never granted. For instance, a monastery may have held possession of a parish for a number of years sufficient to claim prescription, yet cannot show any document which proves that the parish

12 Cfr. Reiffenstuel, II, 26, 127: "Titulus est iusta causa possidendi quod nostrum non est."

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was duly united with the monastery. Does such a title hold good? Yes, because if the monastic chapter was *bona fide* convinced that the title was granted, there was a legitimate cause for believing that the parish belonged to it, and therefore the monastery has the right of prescription.[13]

Neither does our Code determine anything to the contrary, for it only states "*in titulum,*" without describing the nature of the title. The only authority who can grant a title to secular, minor or parish benefices in any diocese is the bishop, and concerning the union of parishes with moral persons can. 452 must be consulted.

(d) The last but most important element of a parish priest is the *care of souls* (*cura animarum*), which comprises the whole range of the *forum internum,* apart from reserved cases. Consequently parish priests may be called *pastors,* although it is true what Bouix [14] says, that, in the strict sense, comprising the offices of teacher, sanctifier, and judge or ruler, the title of *pastor* belongs to the successors of the Apostles. But this does not detract from the honor and office of the parish priests. Their power is an *ordinary* power, given by virtue of their office, which the bishop cannot arbitrarily diminish, or take away, or limit to such an extent that it would be an empty title.[15] But it is also true, as the Code says, that their power is *dependent* upon, and subject to, that of the bishop and that therefore they must exercise the care of souls under the authority of the *Ordinarius loci* or bishop.[16] It follows that the institution of parish priests

13 Cfr. c. 6, X, II, 26; Engel, II, 26, n. 25.

14 Bouix, *De Parocho,* p. 149 ff. is somewhat extreme, but can be easily understood from his standpoint; he wrote against the Jansenists.

15 Benedict XIV, *De Syn.,* V, 4, 3.

16 *Ibid.*

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or pastors of souls, in this limited sense, is not of divine law or origin, and that it is circumscribed by, and dependent upon, the authority of the bishop.[17]

§ 2 speaks of those who are equal to parish priests in regard to rights and obligations, and mentions two classes, *viz:* the *quasi-parochi* of Apostolic vicariates and prefectures, and the vicars of parishes. About the former nothing need be added. The *vicarii paroeciales* are further determined as such who are endowed with full parochial power. Of these the Code speaks in the next chapter (cc. 471 sqq.).

§ 3 adverts to *military chaplains,* of higher as well as lower rank. In Austria, for instance, there are a military vicar Apostolic with episcopal (titular) character, military parish priests and chaplains. The vicar receives ordinary and extraordinary faculties from the Apostolic See,[18] which are more freely communicated during the time of war. Similar conditions obtain in Germany and elsewhere. But all regulations concerning military chaplains must emanate directly from the Holy See, the bishop not being competent in this matter.

Does canon 451 apply to the *parish priests of the U. S.?* In order to decide this question[19] we must recur to the factors which, taken collectively, constitute a parish priest. They are: a *priest* holding a *parish in titulum* with the *care of souls.* That our pastors have the priestly character and exercise the care of souls no one will deny. But are our congregations *parishes* in the canonical sense? Returning to the definition of a parish as given in canon 216, we see that a territorially defined precinct, with a

17 Nilles, *Comment. in Conc. Balt. III,* P. II, p. 88.

18 Cfr. Aichner, *l. c.,* § 112. There is now in the U. S. an *Ordinarius Castrensis.*

19 Putzer, *Comment. in Facultates Apost.,* 4th ed., p. 172 f., emphatically denies the existence of canonical parishes in the U. S.

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church and people, over whom presides a priest as their proper pastor, constitutes a parish. In this definition a twofold element may be distinguished, the one material, the other formal. The *material* element consists of a distinct territory and people with a church of their own. The *formal* element is the pastor proper in the person of a special rector. The material element is doubtless present in the parishes of the U. S., with the exception, perhaps, of the so-called "national" churches. But a difficulty arises when we come to the formal element, which is strictly connected with the condition of a parish priest, *viz.:* that he should hold the parish *in titulum,*— in his own name. Upon this point the whole controversy turns. The Second Plenary Council of Baltimore decreed that in all the provinces of the U. S., and especially in the larger cities, where there are several churches, certain districts with clearly defined limits should be assigned to each church, and that parochial or quasi-parochial rights should be given to the rectors.[20] The Third Plenary Council contented itself with repeating this enactment and complained that existing conditions did not yet permit the bishops to carry out the canonical laws concerning parish priests proper.[21] It also declared that canonically erected parishes do not as yet exist in this country.[22] Now, then, what is lacking to make our parish priests canonical *parochi?* The parish must be given *in titulum,* that is, the parish priest must govern and hold the parish in his own name. This was practically done in many cases,[23] especially those of churches

20 *Acta et Decreta,* n. 123 f.

21 *Acta et Decreta,* n. 32 f.

22 *Ibid.,* n. 24. These decrees are no longer to be followed blindly.

23 The bishops are no longer permitted to have church property incorporated, by an act of the State legislature in fee simple, but either as a corporation aggregate or a corporation sole. (S. C. C., July 29, 1911; cfr. *Am. Eccl. Rev.,* Vol. 45, p. 586).

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which were incorporated, not in the name of the bishop, but in the name of either the priest as corporation sole, or in the name of the parish as corporation aggregate. Besides, the bishop must give the parish priest the full parochial rights which the care of souls demands, namely, ordinary power, which, as Benedict XIV says, cannot be taken away at random or arbitrarily limited. Are our bishops required to do this by the Code? We answer yes, unless the bishops request the Holy See to modify the Code. Our hierarchy is now fully and unreservedly embodied with the general hierarchy of the Church, and therefore the canonical rules must be observed also in the U. S. These rules require the appointment of *parochi proprii*. Why should our parish priests be only vicars of the bishops? No other species of public functionaries of the inferior clergy is to be discovered in the Code. Furthermore it is a natural dictate that, where duties are equal, rights should be equal also. And lastly, to speak plainly, what hinders the bishops from declaring in written terms what has *de facto* existed for a long time?

INCORPORATION

CAN. 452

§ 1. Sine Apostolicae Sedis indulto paroecia nequit personae morali pleno iure uniri, ita nempe ut ipsamet persona moralis sit parochus, ad normam can. 1423, § 2.

§ 2. Persona moralis, cui paroecia sit pleno iure unita, habitualem tantum curam animarum retinere potest, servato, quod ad actualem spectat, praescripto can. 471.

Without an Apostolic indult no parish can *pleno iure*

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be united to a moral (juridical) person in such a way that this person would be a parish priest.

Canonists distinguish a *threefold union: plenissimo iure,* which is nothing else but an *abbatia nullius* or a territory juridically separated from the rest of the diocese; *pleno iure,* by which a corporaton (*e. g.,* a university or monastery) obtains the possession and administration of a parish in matters spiritual and temporal; *semipleno iure,* by which a corporation or community becomes the temporary administrator of a parish, either in matters temporal or in matters spiritual, but not in both at the same time, or at least not forever.

Of the first species enough has been said (cc. 319 ff.). The last kind of union (*semipleno iure*) does not apply here. The second touches chiefly parishes incorporated with monasteries or religious communities. Here some practical hints may not be amiss.

First and above all, the exact boundaries of the parish must be settled between the bishop and the religious community. Then the conditions binding both contracting parties must be laid down clearly and distinctly. Besides, the reasons for the alienation must be stated. The documents of transfer must be signed and sealed by both parties. The bishop may send his to the S. Cong. Concilii, while the religious dispatch theirs to the S. C. Relig. The bishop may include his document in the envelope in which the religious send theirs to the S. C. Rel., and both (having the same address on the inside, "Beatissime Pater") go to the latter Congregation, which forwards the papers of the Ordinary to the proper Congregation. The bishop should mention the fact that he proceeded "*auditis consultoribus et iis, quorum interest*" (can. 1428). Both parties, of course, are supposed to

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keep the documents received from Rome in their respective archives.

If the document of the Apostolic See contains an affirmative answer, then, says § 2, the moral person to whom the parish is *pleno iure* united, obtains only the habitual care of souls, whilst the actual care is exercised by a vicar.

Hence the distinction between habitual and actual pastor. The former is the chapter or prelate, if the constitutions confer that right upon him, whilst the actual care with its obligations and rights are entrusted to the vicar.

CAN. 453

§ 1. Ut quis in parochum valide assumatur, debet esse in sacro presbyteratus ordine constitutus.

§ 2. Sit insuper bonis moribus, doctrina, animarum zelo, prudentia, ceterisque virtutibus ac qualitatibus praeditus, quae ad vacantem paroeciam cum laude gubernandam iure tum communi tum particulari requiruntur.

The *qualities* of a parish priest are as follows: He must be a priest of good morals, endowed with knowledge, zeal for souls, prudence and all other virtues and qualities required by either common or particular law for the praiseworthy government of a vacant parish.

That the priestly character is required for a *parochus* is evident from the fact that he must administer the Sacrament of Penance.[24] Formerly it was not necessary that the appointee should be a priest at the time of his appointment, provided only he received the priesthood

24 Cfr. c. 12, X, III, 38, de poenit. et rem., on annual confession and communion (Lat. Counc., 1215).

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within a year from the date of his appointment.[25] Under the Code, however, the priesthood is required at the moment the appointment is made, and hence the appointment, for instance, of a deacon would be *ipso iure* invalid.

The other qualities [26] prescribed in § 2 are not required *ad validitatem,* but merely *ad liceitatem.* What the Code says *ad vacantem ecclesiam* must be understood in the light of can. 150, § 1, and therefore in the sense of a true vacancy, as explained above. In the U. S. there are no special laws concerning the qualifications of parish priests, but the general law is assumed. However, if a provincial council or diocesan synod should, *e. g.,* enact that certain conditions are necessarily required by particular circumstances, such an enactment would not be against the common law.[27] Neither would we call a *civil law* requiring citizenship for a parish priest unjust. For the law recognizing the pastor as a public functionary, for instance, at marriage, is entitled to set up conditions which do not clash with his spiritual character or with the nature of the Sacraments. Of course, such laws would not be ecclesiastical until formally "canonized," or at least approved of, by the Church.

IRREMOVABLE AND MOVABLE PASTORS

CAN. 454

§ 1. Qui paroeciae administrandae praeficiuntur qua proprii eiusdem rectores, stabiles in ea esse debent; quod tamen non impedit quominus omnes ab ea removeri queant ad normam iuris.

25 Cfr. c. 14, 6°, I, 6; *Trid.,* Sess. 7, c. 3.

26 *Trid., l. c.*

27 Thus, for instance, in a linguistically mixed diocese, a law to the effect that all parish priests should have some knowledge of the prevalent languages would certainly be reasonable.

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§ 2. At non omnes parochi eandem obtinent stabilitatem; qui maiore gaudent, inamovibiles; qui minore, amovibiles appellari solent.

§ 3. Paroeciae inamovibiles nequeunt amovibiles reddi sine beneplacito apostolico, amovibiles possunt ab Episcopo, non autem a Vicario Capitulari, de Capituli cathedralis consilio, inamovibiles declarari; novae quae erigantur, sint inamovibiles, nisi Episcopus, prudenti suo arbitrio, attentis peculiaribus locorum ac personarum adiunctis, audito Capitulo, amovibilitatem magis expedire decreverit.

§ 4. Quasi-paroeciae sunt omnes amovibiles.

§ 5. Parochi autem, ad religiosam familiam pertinentes, sunt semper, ratione personae, amovibiles ad nutum tam loci Ordinarii, monito Superiore, quam Superioris, monito Ordinario, aequo iure, non requisito alterius consensu: nec alter alteri causam iudicii sui aperire multoque minus probare tenetur, salvo recursu in devolutivo ad Apostolicam Sedem.

A priest who is set over a parish as rector should be permanent. This permanency does not, however, imply that he cannot be removed according to the law.

All parish priests are not permanent in the same degree, but the irremovable rectors in a higher, and the removable rectors in a lesser degree.

Irremovable cannot be converted into removable parishes without an Apostolic indult, whereas removable parishes may, with the advice of the cathedral chapter, be declared irremovable by the bishop, but not by the vicar-capitular. Newly erected parishes are irremovable, unless the bishop is compelled by special circumstances of place or persons to declare them movable, which he is

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empowered to do if he prudently deems it expedient, after hearing his chapter.

Quasi-parish priests are all removable.

Parish priests who belong to a religious community may, as far as their person is concerned, be removed at will and with equal right either by the *Ordinarius loci,* after having notified the religious superior, or by the religious superior, after having notified the *Ordinarius loci.* Neither is bound to state and much less to prove the reason for his proceeding to the other. Recourse *in devolutivo* to the Holy See is open to both.

This canon was doubtless dictated by regard for the circumstances prevailing in several countries. It cannot be denied that the notion of a parish priest, in the canonical sense, includes his permanency or subjective perpetuity in the parish.[28] Our canon distinguishes, as the Second and Third Plenary Councils of Baltimore[29] did, between irremovable and removable rectors. *Irremovable* and permanent are synonymous terms, and the *juridical quality* attached to both is subjective perpetuity, which involves that the priest in permanent possession of a parish cannot be removed save upon trial, which supposes a crime (*delictum*). Such a trial had to be instituted according to the instructions of the S. C. P. F., 1884, "*Magnopere.*"[30] Our canon acknowledges a certain kind of irremovability, but not an absolute one. How to proceed in removing irremovable rectors is stated in cc. 2147–2156, which are modelled upon the Motu proprio "*Maxima cura,*" of Aug. 20, 1910.

Of a lower degree is the perpetuity of *removable* rectors, to which class in this country most rectors belong,

[28] Cfr. c. 30, X, III, 5; c. un. 6°, III, 18.

[29] *Acta et Decreta Conc. Balt. II.,* n. 125; *Balt. III.,* n. 32.

[30] Cfr. *Acta et Decreta Conc. Balt. III.,* p. 287 ff.

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because only every tenth parish priest was declared irremovable.[81] Removableness, however, being different only as to the degree of perpetuity, does not imply that such a rector can be removed without reason or formality, as shall be seen in cc. 2157 ff.

Note that irremovableness or removableness do not intrinsically follow the character of a *parochus proprie dictus;* otherwise the Code could not state that all parish priests do not enjoy the same degree of irremovableness. As already remarked, the new law is at variance in this regard with the old. What § 3 of the present canon says had already been enacted by the Third Plenary Council of Baltimore (n. 34). The bishops, therefore, cannot change parishes with irremovable rectors into such with removable rectors, because such a change would mean a deterioration of the condition of the churches, which is not permitted by law, unless there are sound reasons for it, which must, furthermore, be submitted to the Holy See for the necessary indult. On the other hand, the same principle gives the bishop the right of converting removable rectorships into irremovable, for this change signifies an amelioration of the status of the diocese.[82]

We said above that all parishes should receive *parochi* properly so-called. This statement receives an additional proof from the declared intention of the Holy See to introduce the parochial system everywhere.

The last paragraph of our canon determines the relation between the Ordinary and the religious superior concerning the vicar or temporary rector of a parish in charge of religious. Benedict XIV ("*Firmandis,*" Nov. 6, 1744) settled that question, and our text is but a verbal restatement of §11 of the aforesaid Constitution.[83]

81 *Conc. Balt. III.*, n. 35.
82 Cf. Smith, *Elements,* I, p. 133 f.
83 Cf. Richter, *Trid.*, p. 590.

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Hence, if the bishop wishes to remove a religious from the post of rector, he may do so at will, and is not bound to give his reasons to the religious superior or to prove his right to make the change. The same applies to the religious superior. Should a clash ensue, the last and only remedy is an appeal to Rome (the bishop to the S. C. Conc. and the religious superior to the S. C. Rel.). Such an appeal leaves the removal in force until the Holy See has decided. For this is the meaning of an appeal "*in devolutivo*" as opposed to an appeal "*in suspensivo*," that it does not suspend or nullify an act or sentence until the higher instance has decided the case.

APPOINTMENT OF PASTORS

CAN. 455

§ 1. Ius nominandi et instituendi parochos competit Ordinario loci, exceptis paroeciis Sanctae Sedi reservatis, reprobata contraria consuetudine, sed salvo privilegio electionis aut praesentationis, si cui legitime competat.

§ 2. Sede vacante aut impedita ad normam can. 429, ad Vicarium Capitularem aliumve qui dioecesim regat, pertinet:

1.° Vicarios paroeciales constituere ad normam can. 472–476;

2.° Confirmare electionem aut acceptare praesentationem ad paroeciam vacantem, et institutionem electo aut praesentato concedere;

3.° Paroecias liberae collationis conferre, si sedes ab anno saltem vacaverit.

§ 3. Horum nihil Vicario Generali competit sine mandato speciali, salvo praescripto cit. can. 429, § 1.

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CAN. 456

Ad paroecias religiosis concreditas Superior, cui ex constitutionibus id competit, sacerdotem suae religionis praesentat Ordinario loci; qui eidem, servato praescripto can. 459, § 2, institutionem concedit.

CAN. 457

Quasi-parochos e clero saeculari proprius loci Ordinarius nominat, audito Consilio de quo in can. 302.

CAN. 458

Vacanti paroeciae curet loci Ordinarius providere ad normam can. 155, nisi peculiaria locorum ac personarum adiuncta, prudenti Ordinarii iudicio, collationem tituli paroecialis differendam suadeant.

With the exception of parishes reserved to the Holy See, the right of appointing and investing parish priests belongs to the Ordinary of the diocese. All contrary customs are hereby rejected, with due regard, however, to the privilege of election or nomination.

If the episcopal see is vacant or *impedita* (can. 429), the vicar-capitular or administrator of the diocese is entitled:

(1) to appoint a parochial vicar according to cc. 472–476;

(2) to ratify the election and accept the presentation of a vacant parish and invest the one elected or presented;

(3) to appoint pastors to parishes whose appointment belongs to the bishop if the see has been vacant at least one year.

The vicar-general is not allowed to perform any of

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these acts without a special mandate, save in the case mentioned in can. 429, § 1.

This canon provides that, as a rule, the appointment to parishes belongs to the *Ordinary of the diocese,* because he is the pastor of his district by virtue of his office. However, the Pope, being the pastor of pastors, and having plenary jurisdiction over the whole Church, also has a right to make appointments to parishes. This right was claimed and exercised by the Roman Pontiffs very extensively during the Avignon period (1304–1378). The principle of *reservation* had been emphatically asserted already in a Decretal[34] of Clement IV. This decretal mentions as reserved to the Roman Pontiff all benefices which became "vacant at the Apostolic See." This term is explained by canonists as meaning that every benefice becoming vacant where the Pope resided, or within a radius of 40 miles (40,000 paces), was subject to papal reservation. Therefore any benefice whose holder died within that territory could not be conferred by the local Ordinary, but only by the Pope. This law was adopted as a rule (*prima*) of the Apostolic Chancery. But, we may be permitted to add, neither the law laid down in the Decretals, nor the first rule of the Apostolic Chancery was ever applied to this country. Nor could it in justice be applied, for with the exception of a few parishes in the province of San Francisco and one in New Orleans, there are no benefices, strictly so-called, in the U. S.[35] Hence we are inclined to hold that papal reservations do not interfere with the bishop's free right of appointing parish priests.

34 Cf. c. 2, 6°, III, 4; concerning the historical part see v. Scherer, I, 283; Wernz, *Jus Decret.* 1 ed. II, p. 448 ff.; Sägmüller, p. 272; Bouix, *De Parocho,* p. 310 f.

35 Cfr. *Cath. Encyc.,* II, 474. Other rules, like the ninth of the Conc. Apost., concerning papal months, refer to higher benefices only.

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Two other obstacles to the free granting of parochial offices are mentioned: the *privilege of election* and the *privilege of presentation.* What election means has been explained above. But the question arises what is meant here: — whether an election in the canonical sense, as that performed by a chapter, or an election by the congregation. Thus, for instance, in Switzerland parish priests are chosen by the congregation by a majority of votes. The Code seems to regard this as a privilege. It is a privilege with regard to common law, but based upon an ancient custom.[86]

The other mode of conferring a parish is by *presentation,* which means that the pastor is designated by a patron (*patronus*), who for some reason is entitled to exercise this right, as is the case, *e. g.,* in Spain and other countries in which concordats are still in force. In the U. S. there is neither election nor presentation to hamper the free choice of the bishop. But even where these privileges are enforced, the priest elected or presented needs *episcopal institution* or investiture, *i. e.,* the expressed judgment of the Ordinary that the candidate is fit, and the formal bestowal of parochial rights.

The Code next proceeds to determine the power of the *vicar-capitular* or administrator. He is entitled to appoint temporary vicars or assistants to vacant parishes (of whom more shall be said in the following chapter) and to grant investment to such as are elected or presented, for in this case the right of *libera collatio,* belonging exclusively to the bishop, is not interfered with, but only an act of jurisdiction is performed of which the administrator is capable. Lastly, the vicar-capitular is now entitled to confer all those parochial offices, the op-

[86] Cf. Wernz, II, n. 287 (p. 393, ed. 1.)

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pointment of which would otherwise belong to the bishop. Here a departure from the old law is noticeable.[37] However, this power can be used only after a full year's vacancy of the episcopal see; but the vicar need not apply for the exercise of that power to the Holy See,[38] because the law itself confers it.

§ 3 of canon 455 defines that the *vicar-general* does not enjoy the powers ascribed to the vicar-capitular in § 2. This is no superfluous addition, for in many respects both are considered equal, and a comparison between them has been drawn by prominent canonists.[39] The vicar-general can make no appointments to parishes without a *special mandate,* which had best be given in writing. (For instance: "I hereby authorize you to appoint to the vacant parish of N. whom you think worthy," etc.) This does not mean that the bishop designates the priest, on whom the parish is to be conferred, for then the vicar-general would not be *mandatarius,* but merely *executor.* In one case only does the vicar-general not need such a special mandate, *viz.,* when the episcopal see is *impedita,* as explained above under can. 429, § 1.

Canon 456 ordains that for parishes entrusted to a religious order, the respective superior who exercises that right under the constitution shall present a priest of his community to the Ordinary of the diocese, who shall invest him in conformity with can. 459, § 2.

This canon does not distinguish between a parish incorporated with a religious community *pleno iure* or only *semipleno,* but employs the general term "*ad parochias religiosis concreditas*"; and hence both kinds are understood. Presentation by the *superior* is mentioned as a

[37] Cfr. c. 2, X, I, 9; c. un. § 1, 6°, I, 8.

[38] Cfr. Wernz, *Jus Decret.,* II, p. 969, nota 243.

[39] Benedict XIV, *De Syn. Dioec.,* II, 9, 4.

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conditio sine qua non. The competent superior is he whom the constitutions of the respective order clothe with the right of presentation. We believe that, generally speaking, only the "*superiores maiores*" mentioned in can. 488, 8.° are intended. In the case of the Benedictines, the Abbot of the monastery, not the Abbot Primate or the Abbot President; in other orders and congregations with provincial organization, the provincials, their substitutes or representatives. If the respective constitutions provide otherwise (either extending or restricting the power of the superiors), they must be followed. The candidate presented must be a *priest* endowed with all the qualities required for a *parochus.* Therefore our canon refers to can. 459, § 2, where the bishop is called upon to judge the ability of candidates presented by religious superiors — not their learning only, but also other necessary qualifications. Hence the bishop would be justified in requiring an examination as to the fitness of the candidate presented, but he is not obliged to subject him to an examination if he is morally certain as to his qualifications. If the candidate is found fit, the bishop is bound to give him the investiture.[40] The bishop is not entitled to subject a religious thus presented to a *concursus,* for this is neither prescribed by the Code nor favored by the old law.[41]

We may add that the Decretals demand that the superior (prelate, abbot) ask the consent of his chapter, unless ancient custom and prescription has derogated

40 Cfr. *Trid.,* Sess. 25, c. 11 de regg.; Pius V, "Ad exequendum," § 4 f. (*Bull. Rom.,* IV, II, 402); Piatus Mont, *Praelectiones Juris Reg.,* ed. 2, II, p. 20. Even a religious superior, though a prelate, may be subjected to an examination. (S. C. C., Jan. 7, 1755; Piatus Mont, *l. c.*)

41 Cfr. Engel., *De Privilegiis et Juribus Monasteriorum,* privil. 46, de unione pleno jure, n. 2, according to Pius V, "Ad exequendum" (*l. c.*), which is not revoked by Benedict XIV, "Cum illud."

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from, or abrogated, the right of the chapter. The Code does not abrogate that right, and hence, if the constitutions do not give the unqualified right of presentation to the superior, and no custom has abrogated the right of the chapter, the superior is obliged to ask the chapter.[42]

Under canon 457 *quasi-parish priests* of the secular clergy are appointed by the Ordinary of the diocese, vicariate, or prefecture Apostolic, after hearing his chapter, according to can. 302.

Canon 458 ordains that the Ordinary of the diocese shall provide for a vacant parish according to can. 155, unless peculiar circumstances make a *delay* advisable.

The canon referred to (155) demands that a new pastor be named within six months from the date when the vacancy becomes known to the bishop. Circumstances making a delay advisable may have reference to place or person. *Circumstances of place* may be material or moral, *e. g.,* unpaid debts, unsafe conditions by reason of a fluctuating population, the erection of a parish school, the advisability of punishing the people for their treatment of their former pastor, etc. *Circumstances of person* have reference to the person to be appointed, for instance, if there be a lack of priests qualified for the place.

EXAMINATION — CONCURSUS

CAN. 459

§ 1. Loci Ordinarius, graviter onerata eius conscientia, obligatione tenetur vacantem paroeciam illi conferendi, quem magis idoneum ad eam regendam habuerit, sine ulla personarum acceptione.

§ 2. In hoc iudicio ratio haberi debet non solum

42 Engel, *l. c.*, in parochiis, etc., 46, 2.

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doctrinae, sed etiam earum omnium qualitatum, quae ad paroeciam vacantem rite regendam requiruntur.

§ 3. Quare loci Ordinarius:

1.° Ne omittat documenta, si qua sint, ex Curiae tabulario desumere quae clericum nominandum respiciunt et notitias, secretas quoque, si opportunum iudicaverit, prudenter exquirere etiam ex locis extra dioecesim;

2.° Prae oculis habeat praescriptum can. 130, § 2;

3.° Clericum examini super doctrina coram se et examinatoribus synodalibus subiiciat; a quo, de consensu eorundem examinatorum, potest dispensare, si agatur de sacerdote doctrinae theologicae laude commendato.

§ 4. In regionibus in quibus paroeciarum provisio fit per concursum sive specialem ad normam const. Benedicti XIV *Cum illud,* 14 Dec. 1742, sive generalem, haec forma retineatur, donec Sedes Apostolica aliud decreverit.

The Ordinary of the diocese is seriously admonished of his obligation to confer a vacant parish only on the one whom he deems fittest for its government, without personal favoritism.

In forming his judgment as to fitness of a candidate, he should consider not only learning but also the other qualities that are required for successfully governing a parish.

Hence the Ordinary:

(1) shall not neglect to inspect the documents in the diocesan archives, if there are any that have reference to the clergyman to be appointed, and, if he deems it expedient, shall prudently seek to obtain secret information, even from outside the diocese;

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(2) he shall faithfully comply with can. 130, § 2 (concerning examinations);

(3) he shall subject the candidate to an examination in the presence of the synodal examiners; however, he may, with the consent of the examiners, dispense from this examination if the priest concerned has distinguished himself in theology.

Where appointments to parishes are made by means of the *concursus*,— either the special concursus described in the Constitution of Benedict XIV, "*Cum illud*," Dec. 14, 1742, or a general concursus,— this method should be followed until the Apostolic See decrees otherwise.

The Council of Trent issued various decrees concerning the examination of candidates for vacant parishes, laying special stress on the necessity of such examination and permitting no appeal. A solitary exception was made in favor of those presented by universities.[43] Pius V and Clement XI issued constitutions to the same effect, and Innocent XI condemned the opinion of those who asserted that the Tridentine decrees were intended only to exclude unworthy candidates, not to give preference to the more worthy.[44] From this we may understand why § 1 of our canon appeals most earnestly to the Ordinary ("*graviter onerata eius conscientia*"), exhorting him to appoint the fittest candidate (*magis idoneum*).

The Code insists upon fitness rather than worthiness. The term *fitness* refers to the juridical qualities mentioned in § 2.

That he may form an objective and a safe judgment of a candidate's fitness, the law enjoins the Ordinary to

43 Cfr. Sess. 7, c. 13; Sess. 24, c. 18; Sess. 25, c. 9, de ref.; Pius V, "In conferendis," April 15, 1567 (Richter, *Trid.*, p. 575; p. 55, pp. 378 ff.).

44 Benedict XIV, "Cum illud"; cfr. Bouix, *De Parocho*, p. 339.

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gather information about him, to study the records of previous examinations, especially those which the candidate had to undergo during the three years immediately following his ordination, and, finally, to subject him to another test, in the presence of the board of examiners. The matter of this final examination and its method depend on the examiners. It must be passed by every secular priest who is to be appointed to a parish, whether irremovable or movable, unless the applicant has *distinguished* himself in theology. Wherein this distinction consists is not precisely stated and hence room is left for discussion. A doctor of divinity, who has received his title from a Catholic university, no doubt enjoys that distinction. But as no academic degree is mentioned, it would not be against the spirit of the law if a professor of sacred theology in the episcopal seminary were accorded the privilege of exemption. The term "theology" is generally taken to comprise dogmatic, moral, and pastoral theology, and Holy Scripture. Concerning *canon law* a doubt might arise from the fact that it seems not to suffice for a canon theologian.[45] But as in our case the question does not turn about that office, since, moreover, canon law now forms part and parcel of theological training, and a degree in canon law can be obtained only after a postgraduate course, and it would be difficult to imagine a solid canonist without a thorough knowledge of theology proper and church history, we may safely include licentiates, doctors, and professors of that noble science in the category of the "*doctrinae theologicae laude commendati.*"

However, the bishop cannot decide this point by himself, but needs the *consent of the examiners.* This con-

[45] Benedict XIV, *De Syn.*, XIII, 9, 17.

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sent may be given by each one individually, or by vote, for no chapter-act is intended.

§ 4 treats of the *concursus,* which is twofold, either special, as described by Benedict XIV, or general, which does not accurately follow the rules laid down in the aforesaid Constitution. The Third Plenary Council of Baltimore adopted the Constitution "*Cum illud*" for all irremovable rectors;[46] and therefore for such the enactment of our Code holds good and must be followed as a universal law. The substance of that Constitution is as follows:

(1) When a parish becomes vacant, the bishop shall, by a public edict, fix a suitable day for the holding of the competitive examination, notifying at the same time all who wish to make the concursus that they must, within this time and before the day set apart for the concursus, file with the diocesan chancellor testimonials, judicial or extra-judicial, of their fitness, merits, qualifications, etc. After the expiration of this time, no testimonial or document of any kind can be received.

(2) The chancellor must make out a written summary or synopsis of all the documents or testimonials presented by the various candidates and give a copy of this synopsis to the bishop, and to each of the examiners, who in approving candidates after the examination, must take into account, not merely their learning, but also their other merits and qualifications.

(3) In case a rejected competitor appeals either *a mala relatione examinatorum* or *ab irrationabili iudicio episcopi,* he must produce before the judge of appeal all the acts or records of the examination held in the first instance, which must be given him for that purpose by the

[46] *Acta et Decreta,* n. 36, nn. 40 ff. (*l. c.,* p. 25 ff.); Smith, *Elements,* I, p. 416 ff.

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chancellor. The judge *ad quem* must pronounce his decision solely and exclusively on the strength of the records or acts of the first concursus. Hence he cannot order any new concursus, nor receive any documents or testimonials other than those contained in the acts of the first instance.

(4) Finally, when the judge *ad quem* pronounces sentence in entire conformity with the appointment of the Ordinary, that is, in every respect against the appellant and in favor of the competitor appointed by the bishop, no further appeal is allowed, and the controversy becomes *res iudicata*. But if he reverses the action or appointment of the Ordinary, the competitor appointed by the bishop can appeal to the higher judge, whose sentence shall be final and unappealable.

(5) The concursus itself must be held in the following manner:

(a) The *same questions* must be proposed to all competitors, as also the same case (moral, liturgical, canonical, pastoral) and the same gospel-text upon which they must compose a short sermon; all these must be dictated at one and the same time, and the same length of time allowed for the answer.

(b) All must sit in the *same room*, and are not allowed to leave before they have completed the composition.

(c) They must *write the answers* in Latin, except the sermon, in their own hand and sign them.

(d) All answers, as well as the sermon, as soon as offered, must be *signed* by the presiding chancellor, the examiners and the bishop or his vicar, if the latter was present at the examination.

(e) The *judgment* upon the sufficiency of the answers must be passed by the examiners *at the place of exam-*

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ination, and must include a verdict on each candidate's conduct, virtues, and prudence. But the examiners must give only an objective statement as to the ability of the candidate, and leave the judgment as to the greater or lesser degree of fitness to the bishop.[47]

A *general concursus* was proposed at the Vatican Council by the German bishops, especially for larger dioceses.[48] This examination, it was suggested, should be held once a year and turn chiefly upon the learning of the candidates. The other qualities were to be considered at the time a parish became vacant. Those who had passed the examination once, were considered fit for any charge, so far as doctrine was concerned. In the *U. S.*, according to the Third Baltimore Council (n. 36, n. 43), only those priests can be admitted to the concursus who have been laudably engaged in the sacred ministry for at least ten years in the diocese, and have within that time given proof of their ability to govern a parish spiritually and temporally, either in the capacity of simple rectors, or in some other way. After the lapse of six years they must undergo another examination if they wish to be appointed to an irremovable rectorship. This general concursus was embodied by the Council in its decrees,[49] and since the Code mentions it also, it is not to be looked upon as abolished. But it is intended only for dioceses whose size does not permit calling a special concursus. Also other "peculiar circumstances" are mentioned which render a general concursus advisable.

47 Cfr. *Conc. Balt. III,* nn. 36, 52 (*l. c.*, p. 23, p. 28).

48 At the Vatican Council, cfr. Smith, *Elements,* I, 421; Granderath-Kirch, *Gesch. d. Vatik. Konzils,* 1903, III, 439 ff.

49 *Acta et Decreta,* n. 59 (*l. c.*, p. 30).

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UNITY AND POSSESSION

CAN. 460

§ 1. Parochus ad normam can. 156 unam tantum titulo paroeciam habeat, nisi de paroeciis agatur aeque principaliter unitis.

§ 2. In eadem paroecia unus tantum debet esse parochus qui actualem animarum curam gerat, reprobata contraria consuetudine et revocato quolibet contrario privilegio.

CAN. 461

Curam animarum parochus obtinet a momento captae possessionis ad normam can. 1443–1445; et ante possessionem aut in ipso possessionis capiendae actu fidei professionem edere debet, de qua in can. 1406, § 1, n. 7.

A parish priest, according to can. 156, can hold only one parish *in titulum,* unless two parishes are united *aeque principaliter.*

In each parish only one is the parish priest, who has the actual care of souls; all contrary customs are reprobated and contrary privileges repealed.

Canon 460 first speaks of the *incompatibility of two parochial charges* in one and the same person, and refers to can. 156, which forbids the holding of two offices that cannot be discharged at the same time by the same person. This law is taken over from the Decretals [50] and the Tridentine Council [51] and is based partly upon the requirement of personal residence, and partly upon the prohibition of avarice. Hence no one is allowed to possess two parishes *in titulum* as quasi-proprietor or rather pos-

50 Cc. 15, 28, X, III, 5 de praeb.; Engel, III, 5, n. 68.

51 Sess. 7, c. 4; Sess. 24, c. 17.

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sessor. An exception, however, is made in favor of two parishes united in such a way that both retain their own titles and rights and neither is subject to the other.[52] Note, however, that such a union must be objective, not subjective, that is to say, the two parishes are not allowed to be united in favor of the pastor or holder, but purely with regard to themselves. For a subjective union would be nothing but a veiled plurality of benefices, forbidden in the case of two curacies or rather parishes (*cura aminarum*).

§ 2 safeguards unity of government.[53] It is directed against interference on the part of any juridical person (chapter, monastery) with the rights of the pastor in the care of souls and against encroachments on the part of assistant priests. Needless to say, under the new law, as under the old, several priests may be employed in a parish.[54]

Canon 461 says that the pastor has the care of souls from the moment of his taking possession of the parish (can. 1443–1445). Either before or in the act of taking possession he must pronounce the profession of faith (can. 1406, § 1, n. 7). Pastors should be installed either by the bishop himself or by his delegate. If a pastor does not wish to be present himself at this function he may be represented by a procurator endowed with a special mandate. But he cannot pronounce the profession of faith by proxy.

52 Cfr. can. 1419.

53 Cfr. c. 41, C. 7, q. 1; c. 4, C. 21, q. 2, where the allegory of husband and wife (parish) is alleged; c. 15, X, III, 4. Barbosa, *De Parocho*, I, 1, n. 43, Engel, III, 29, n. 12, and others won the case against Bouix, (*De Parocho*, p. 190 ff.), who maintained that the law does not strictly forbid several pastors; our text is from c. 15, X, III, 5.

54 Cfr. c. 3, X, I, 3; and the chapter of our Code on Vicars.

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RIGHTS OF PARISH PRIESTS

CAN. 462

Functiones parocho reservatae sunt, nisi aliud iure caveatur:

1.° Baptismum conferre sollemniter;

2.° Sanctissimam Eucharistiam publice ad infirmos in propria paroecia deferre;

3.° Sanctissimam Eucharistiam publice aut privatim tanquam Viaticum ad infirmos deferre atque in periculo mortis constitutos extrema unctione roborare, salvo praescripto can. 397, n. 3, 514, 848, § 2, 938, § 2;

4.° Sacras ordinationes et ineundas nuptias denuntiare; matrimoniis assistere; nuptialem benedictionem impertiri;

5.° Iusta funebria persolvere ad normam can. 1216;

6.° Domibus ad normam librorum liturgicorum benedicere Sabbato Sancto vel alia die pro locorum consuetudine;

7.° Fontem baptismalem in Sabbato Sancto benedicere, publicam processionem extra ecclesiam ducere, benedictiones extra ecclesiam cum pompa ac sollemnitate impertiri, nisi agatur de ecclesia capitulari et Capitulum has functiones peragat.

CAN. 463

§ 1. Ius est parocho ad praestationes quas ei tribuit vel probata consuetudo vel legitima taxatio ad normam can. 1507, § 1.

§ 2. Potiores exigens, ad restitutionem tenetur.

§ 3. Licet paroeciale aliquod officium ab alio fuerit expletum, praestationes tamen parocho cedunt, nisi de contraria offerentium voluntate certo constet circa summam quae taxam excedit.

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§ 4. Gratuitum ministerium ne deneget parochus iis qui solvendo pares non sunt.

Unless otherwise provided by law, the following functions are reserved to the pastor:

(1) To administer solemn Baptism;

(2) To carry the Holy Eucharist publicly to the sick in his own parish;

(3) To bring the Holy Eucharist as viaticum either publicly or privately to the sick, and to anoint them when in danger of death (with due regard to can. 397, n. 3; 514, 848, § 2; 938, § 2);

(4) To announce sacred ordinations and the banns of matrimony; to assist at marriages and impart the nuptial blessing;

(5) To hold funeral services according to can. 1216;

(6) To bless the houses on holy Saturday or other customary days, according to the liturgical books;

(7) To bless the baptismal font on Holy Saturday, to hold processions outside the church, to give the solemn blessing outside the church, unless, in a capitular church, the chapter performs these functions.

Most appropriately the administration of Baptism holds first place among parochial rights, it being not only the initiation into the fold of Christ, but also a sign of a true parish, according to the ancient view. *Solemn Baptism* includes all the ceremonies contained in the *Rituale Romanum,* whilst *private Baptism,* when administered by a priest, comprises only the pouring of water accompanied by the formula, the anointing with chrism, the handing over of the white cloth and candle.[55]

Concerning the public or private administration of

[55] Cfr. *Conc. Balt. II,* n. 238 (*l. c.,* p. 731); Wapelhorst, *Compendium S. Liturgiae,* 1915, p. 431.

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Holy Communion to the sick, the rules of the second Council of Baltimore [56] may safely be followed, for the custom of publicly bringing them the Holy Eucharist does not generally prevail in our country. The pastor's right concerning the Holy Eucharist and Extreme Unction does not extend to the bishop (can. 397, n. 3), nor to religious clerics and nuns, if the latter have a confessor or chaplain (can. 514), and ceases in cases of urgent necessity (can. 848, § 2; 938, § 2). What is understood by the funeral service is further determined in can. 1216. The custom of blessing houses on Holy Saturday is, as far as we are aware, not widespread in our country, except perhaps in Italian congregations. In Rome, as I know from experience, it is greatly favored and sometimes accompanied by much ceremony.

§ 7 mentions the right of blessing the *baptismal font* on Holy Saturday. No mention is made of the blessing on Pentecost Saturday; wherefore the latter is not to be reckoned among the reserved rights of the pastor. Besides *processions* [57] the Code also enumerates *blessings* [58] imparted "with pomp and solemnity outside the church." Blessings by which the Divine Name is invoked upon persons and things are various. The rights of the pastor do not include papal blessings,[59] nor such as are reserved to the bishop, notably the blessing of abbots and abbesses, the consecration of virgins, the blessing of the holy oils and chrism, of sacred vessels and furniture (unless, of course, a special privilege or faculty is obtained), the blessing of churches, public oratories, and cemeteries. Some authors [60] reserve to the bishop also the solemn

56 *Acta et Decreta*, n. 264 (*l. c.*, p. 142 f.).

57 Cfr. cc. 1290–1295.

58 Cf. Wapelhorst, *l. c.*, p. 516 ff.

59 The blessings proper to the Pope are: that of the pallium, Agnus Dei, Golden Rose, and Princes' Sword; Van der Stappen, *Sacra Liturgia*, 1900, IV, p. 342 f.

60 Van der Stappen, *l. c.*, p. 347.

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blessing of images of our Lord, the B. V. Mary, and the Saints. However, our canon seems rather to favor the assumption that the parish-priest can now perform such solemn blessings, else why should it have added, "with pomp and solemnity"? Besides these, the solemn blessing of edifices, bridges, ships, railroads, banners or flags can also be performed by parish priests,— unless, the Code adds, these last named blessings (n. 7) are given by the *chapter*. Hence cathedral, collegiate or religious chapters — the Code uses the general terms *chapter* and *chapter church* — are allowed to bless the baptismal font on Holy Saturday, lead processions, and give the blessings mentioned. We know that the venerable chapter of St. Peter's in Rome has repeatedly crowned images of the Blessed Virgin. The underlying idea no doubt is that if a ceremony is performed by a whole chapter, it is more impressive and imposing than when performed by an individual pastor.

Under can. 463 every parish priest is entitled to the *income* established by approved custom and legitimate taxation (can. 1507). If he takes more, he is obliged to restitution. When parochial functions are performed by another than the parish priest, the latter is entitled to the fees, unless there is a surplus and it is evident that the donor intended that surplus for the priest who performed the function.

Parish priests should never refuse to serve the poor who cannot pay, free of charge.

This canon regulates the *material rights* of the parish priest. According to Holy Writ[61] the ministers of the altar have the right to live by the altar. The early Christians fulfilled this duty to their pastors by presenting offerings (*oblationes*) at the services. The *Didache*

[61] Matt. 10, 10; I Cor. 9, 13.

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(c. 13) directs the faithful to offer to God their first fruits, while the *Didascalia,*[62] by applying to the Christians the injunction of the Book of Numbers (c. 18) seems to enjoin the paying of tithes.[63] Lest the clergy should lean towards commercialism[64] and thus be distracted from their more important occupation, the Church, especially after the establishment of benefices so-called, demanded that the clergy should receive decent support from the faithful at large and from the flock entrusted to them in particular.[65] Whether the pastor is entitled to this support by divine or ecclesiastical right or law, is controverted. However, even those[66] who deny that divine or natural law dictates the support of pastors, must accept the view of St. Thomas,[67] who says: If a stipulation is made between the parish and its pastor to pay him a pension or interests, this agreement obliges the faithful in conscience; besides, if the minister has no other sources of income and stands in need of decent support, the parishioners, unless they themselves be destitute of means, are bound in conscience, by natural and divine law, to assist him. This was the view taken by the Third Plenary Council of Baltimore,[68] which says that justice and the sacerdotal dignity demand that the ministers of the Church should receive a decent support and decreed that the bishops should determine the salary of priests at the synods and that pastors should be content with a less sum if their people are unable to pay the stipulated salary. It is evident that the salary of a parish priest is not intended

62 *Const. Apost.* (ed. Funk, 1906), II, 25.

63 Funk, *Manual of Church History,* 1913, I, p. 56 f.

64 *Ibid.,* p. 175.

65 Cfr. c. 27, C. 12, q. 2; tit. 5, X, de praeb.; tit. 25, X, de peculio cleric. *Trid.,* Sess. 22, c. 1 de ref.

66 Barbosa, *De Parocho,* c. 24, n. 9 f. (ed. Lugd., 1665, p. 208); Bouix, *De Parocho,* p. 480.

67 *Summa Theol.,* II, II, q. 86, a. 1.

68 *Acta et Decreta,* n. 273 (*l. c.,* p. 156.)

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to enable him to live in luxury.[69] The present salaries of most of our priests, we need hardly add, preclude "high living." Here it may not be amiss to call attention to the "burning question," recently discussed even in lay magazines,[70] of a living wage for the parochial clergy. The high cost of living alone is reason enough for increasing the salaries of our parish priests, let alone their exalted position in society. Most professional men receive at least double the amount of a priest's salary, although the latter has to study and prepare himself for a much longer time than, *e. g.*, the lawyer or the physician. To increase the priests' salaries would incidentally heighten popular esteem for classical studies. *Intelligenti pauca.*

What the canon means by "*praestationes*" is palpable, though not precisely stated. According to the Digest *praestatio* signifies a payment of what is due.[71] In ecclesiastical language it is often employed synonymously with *precaria,* a kind of prebend or benefice; sometimes with pension and interest;[72] sometimes with contributions, *e. g.,* cathedraticum. Our Code mentions *praestationes* in connection with *benefices,* which, it says, may consist of contributions to be paid by families or moral persons.[73] Hence we believe that by the term "*praestationes*" the law intends to comprise the whole range of income, salary and stole-fees, with the sole exception of manual mass stipends.[74] All these sources of income should be determined by a provincial council or meeting of the bishops of the province (can. 1507).[75] Hence a

69 *Trid.,* Sess. 24, c. 1, de ref.

70 Cfr. the Catholic *Fortnightly Review,* (by Arthur Preuss), St. Louis, Mo., Vol. XXIV, No. 18, pp. 274 f.; No. 21, p. 321.

71 Cfr. Dig. 43, 26.

72 Cfr. Du Cange, *Glossarium, s. v.* "Praestatio."

73 Cfr. can. 1410.

74 Cfr. the *Catholic Register,* Kansas City, Mo., n. 27, 1918, where a judge's decision is quoted which favors our point.

75 Manual mass stipends are such as are received irregularly and uncertainly, as it were, *de manu ad*

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tax fixed by diocesan synod can no longer be looked upon as the juridical norm, either of law or conscience, unless a legitimate custom prevails in the diocese, either for better or worse.

The above considerations are of importance for understanding the next paragraph (§ 2), which mentions the *obligation of restitution* if a parish priest has obtained more than custom and fixed rates permit him to charge. Whatever he has acquired by overcharging, must be distributed for the benefit of pious causes. These, however, must not be understood to be the pastors themselves, but other persons or things, *e. g.*, the poor of the parish, the parish church, if it is needy, or other poor churches, hospitals, and all kinds of charitable institutions approved by the Church, poor students aspiring to the priesthood or the religious state, etc.[76]

§ 3 governs the disposal of the *stole fees* received by a priest who has performed a function reserved to the pastor, either with or without the latter's permission. Such a one is not allowed to retain the sum which is fixed either by taxation or custom; but he may keep any surplus if it is evident that the donor intended it for the one who performed the ceremony. The Third Plenary Council[77] merely decreed that the bishops should determine the stole fees, hence it is a diocesan matter, often regulated by custom. It must always be understood that the tax holds good which is in vogue in the diocese of the parish priest whose rights the other has assumed. Sometimes the fees for marriage and funeral services, which appear more stable than the fees for baptism, differ in different

manum; to base a salary or income upon such an uncertain source is contrary to common sense and common parlance, which styles them *alms*. The statement in *Eccl. Rev.*, Vol. 58, p. 74, is unacceptable.

[76] Cfr. Engel, III, 25, n. 11; cfr. can. 1473.

[77] *Acta et Decreta*, n. 296 (*l. c.*, p. 168).

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dioceses. It is ordinarily understood that a "*stipendium pingue,*" given to one who is not the pastor, was intended for personal service and may, therefore, be kept after the customary fee has been handed over to the parish priest. Contrary diocesan statutes may now be disregarded, since the Code is the general law.

Concerning § 4 the Third Council of Baltimore established that priests should remember that ecclesiastical services should be given gratis to the poor and that this law should be re-inforced at diocesan synods.[78]

DUTIES OF PASTORS

CAN. 464

§ 1. Parochus ex officio tenetur curam animarum exercere in omnes suos paroecianos, qui non sint legitime exempti.

§ 2. Potest Episcopus iusta et gravi de causa religiosas familias et pias domos, quae in paroeciae territorio sint et a iure non exemptae, a parochi cura subducere.

The pastor is, by virtue of his office, obliged to exercise the care of souls towards all his parishioners who are not legitimately exempt. The bishop may, for just and weighty reasons, withdraw from the care of the pastor religious communities and pious houses located within the territory of the parish, even though they are not "exempt."

The "care of souls" comprises the spiritual direction of the faithful to the end for which the Church is established, *i. e.*, the salvation of souls. The particular duties

[78] *Acta et Decreta*, n. 296 (*l. c.*). Incidentally we may mention that the fee or donation for churching women or for sick calls, which are no parochial rights, does not belong to the pastor exclusively.

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of pastors are pointed out in the following canons. From this care some are exempt *ipso iure,* others may be withdrawn by the positive will of the bishop. The former are the so-called *exempt religious,* of whom more will be said later. The bishop may grant quasi-exemption from parochial rights and care to religious families and pious houses, if there are just and weighty reasons for so doing. This power is a reminder of past times, when the bishop was considered the parish priest of the whole diocese. The ruling of the Code is not entirely new, for the semi-public oratories of brotherhoods and sisterhoods have long enjoyed certain privileges which curtailed the pastor's rights. However, in these general terms the principle laid down in § 2 of our canon is of rather recent date. After the division of dioceses into parishes, the bishop was no longer considered the *parochus* of the whole diocese, but only of the cathedral.[79] Hence the Code binds the bishop to "*just and weighty reasons*" for withdrawing anyone from the care of the pastor. Such a reason would be the merits of a religious community and their distinguished work for the common welfare, peace and tranquillity from vexations coming from the parish priest, suspicion or undue interference by the pastor with the internal and domestic affairs of the community, etc. The parish priest may appeal to the Holy See, but he has no right to demand reasons from the bishop, who is not responsible to the pastor. Finally, we may add that the fact that the canon names the *bishop,* not the *Ordinary,* appears to exclude vicars-general or vicars-capitular from granting this exemption.

79 Barbosa, *De Parocho,* c. 1, n. 21 f. (p. 5).

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OBLIGATION OF RESIDENCE

CAN. 465

§ 1. Parochus obligatione tenetur residendi in domo paroeciali prope suam ecclesiam; loci tamen Ordinarius potest iusta de causa permittere ut alibi commoretur, dummodo domus ab ecclesia paroeciali non ita distet ut paroecialium perfunctio munerum aliquid inde detrimenti capiat.

§ 2. Eidem abesse permittitur per duos ad summum intra annum menses sive continuos sive intermissos, nisi gravis causa, iudicio ipsius Ordinarii, vel diuturniorem absentiam requirat vel breviorem tantum permittat.

§ 3. Dies quibus parochus piis exercitiis vacat ad normam can. 126, non computantur, semel in anno, in duobus vacationum mensibus, de quibus in § 2.

§ 4. Sive continuum sive intermissum sit vacationum tempus, cum absentia ultra hebdomadam est duratura, parochus, praeter legitimam causam, habere debet Ordinarii scriptam licentiam et vicarium substitutum sui loco relinquere ab eodem Ordinario probandum; quod si parochus sit religiosus, indiget praeterea consensu Superioris et substitutus tum ab Ordinario tum a Superiore probari debet.

§ 5. Si parochus repentina et gravi de causa discedere atque ultra hebdomadam cogatur abesse, quamprimum per litteras Ordinarium commonefaciat, ei indicans causam discessus et sacerdotem supplentem, eiusque stet mandatis.

§ 6. Etiam pro tempore brevioris absentiae parochus debet fidelium necessitatibus providere, maxime si id peculiaria rerum adiuncta postulent.

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The pastor is obliged to reside in a parish house near his church. However, the Ordinary of the diocese may, for a just reason, allow him to live elsewhere, provided only his home is not so far away from the parish church that the performance of his parochial obligations would suffer thereby.

The pastor may take a two months' vacation, either continuous or interrupted, every year, provided there be no grave cause which, in the judgment of the Ordinary would require either a prolongation or shortening of this term.

The days of the yearly retreat (can. 126) are not included in the two months' vacation.

A pastor on vacation or absent from home for more than one full week, must have a legitimate excuse and the Ordinary's permission in writing, and, besides, provide a substitute to be approved by the Ordinary; if the parish priest is a religious, he needs also the permission of his superior, and his substitute must be accepted by both the Ordinary and the superior.

Should a parish priest, for a grave reason, be suddenly called away and compelled to be absent from home for more than a week, he must inform his Ordinary as soon as possible in writing, stating the reason for his leave and the name of his substitute, and abide by the Ordinary's commands.

Even during a shorter absence the pastor must provide for the wants of the faithful, especially if peculiar circumstances require it.

Little need be added to what has been said above concerning the residence of bishops. The present canon is nothing else but the embodiment of the Tridentine decrees [80] and of current practice, with some mitigation.

80 Sess. 6, c. 2, de ref.; cfr. Sess. 23, c. 1 de ref.; cfr. tit. 4, X de clericis non resid.

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The personal character of a pastor's duties requires his *personal presence* in his parish. Hence the presbytery should be near the parish church, and the pastor should reside therein during the day as well as by night. If a priest has a parish, say, two, three or four miles from the town where his parents live, he would, *e. g.*, not be allowed to stay in the city, either at night or during the day, much less all the time, although he might have an assistant or substitute.[81] One who has a parish situated in a swampy place, where he is exposed to gout and rheumatism, is nevertheless bound to reside there, but he may ask the bishop for a longer vacation.[82] Smallpox, or the yellow fever, or any other epidemic may be raging in his parish, yet the parish priest must remain at his post, although he may employ another priest to administer the Sacraments to the stricken.[83] Neither age, nor ill health, nor the small number of families excuses the pastor from residence.[84] The decisions of the S. Congregation are firm and uniform in this regard. A pastor (shepherd) should prove himself worthy of his name, and not be a mercenary.[85]

§ 4 provides that a pastor needs the *permission* of his Ordinary (to be given in *writing and gratis*)[86] if he absents himself from his parish for over a week, even for the time of the vacation granted by law. In this there is a difference between bishops (or canons) and parish priests. Besides, pastors must have a "*legitimate reason*" for being away from their parish on Sundays or holydays of obligation. A legitimate reason would certainly be attending the sickbed or funeral of a relative,

81 S. C.C., May 10th, 1687 (Richter, *Trid.*, p. 38, n. 11).
82 Richter, *l. c.*, n. 12; n. 14.
83 *Ibid.*, n. 13.
84 *Ibid.*, n. 15, n. 17.
85 *Trid.*, Sess. 23, c. 1 de ref.
86 *Trid.*, Sess. 23, c. 1 de ref.

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friend, or colleague, some installation or festivity, Forty Hours' devotion, or a call from the superior or the civil authorities, and any act of charity. As the bishop is to judge of the legitimacy of the reason,[87] it must be revealed to him.[88] Concerning the substitute, note that it is not sufficient simply to state that a substitute has been provided, but information must be furnished regarding his identity. It is evident that the parish priest must choose a substitute who has the necessary "faculties," or else obtain them for him from the bishop. As a rule it is safest to engage a priest or religious of the same diocese as a substitute. Should the bishop for some reason *withhold the faculties* from the substitute, the pastor must provide another, because the bishop is not obliged to grant faculties to a stranger. But neither is the substitute, especially if he be an exempt religious, obliged to undergo an examination before receiving temporary faculties. Hence prudence would dictate that the bishop should not demand too much in this regard.

The Code, as we said, mitigates the law of residence to some extent, especially concerning absence for less than a week, for which it requires neither a formal permission nor excuse. Formerly, according to some authors and a Roman synod held in 1725, an absence lasting more than two days required the Ordinary's permission.[89] The Code is silent concerning such a brief absence, and hence we may infer that it is not the lawgiver's intention to permit Ordinaries to set up a stricter rule, unless, of course, in particular cases, where grievous neglect of

87 Engel, III, 4, n. 14, de clericis non residentibus.

88 Therefore an oath of the pastor that the reason is sufficient would not have to be accepted by the bishop. Cfr. Bouix, *De Parocho*, p. 534 f.

89 Cfr. Bouix, *l. c.*, p. 553.

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pastoral duties might result.[90] Therefore § 5 obliges the pastor to provide for the spiritual needs of his flock during his absence. By the way, and in order to complete the matter, it may be added that under the Council of Trent and our Code the bishop may not give leave of absence lasting longer than the time allowed for vacation to a parish priest except for the sake of study.[91]

The residence of a pastor is sometimes styled "*laboriosa,*" which means that it is no *dolce far niente,* but a life of constant labor, which demands that the pastor perform the parochial functions and duties himself and not by means of assistants. Of course what he is not able, physically or morally, to do himself, he may commit to his assistants, unless the law expressly forbids such commission or delegation.[92]

APPLICATION OF THE MASS PRO POPULO

CAN. 466

§ 1. Applicandae Missae pro populo obligatione tenetur parochus ad normam can. 339, quasi-parochus ad normam can. 306.

§ 2. Parochus qui plures forte paroecias aeque principaliter unitas regat aut, praeter propriam paroeciam, aliam vel alias in administrationem habeat, unam tantum debet Missam pro populis sibi commissis diebus praescriptis applicare.

§ 3. Ordinarius loci iusta de causa permittere potest ut parochus Missam pro populo alia die applicet ab ea qua iure adstringitur.

§ 4. Parochus Missam pro populo applicandam ce-

90 Concerning the penalties against non-resident clergymen, cfr. cc. 2168–2175, 2381.

91 Engel, III, 4, n. 11.

92 S. C. C., Oct. 7, 1604 (Richter, *Trid.*, p. 39, n. 19 f. Bouix, *l. c.*, p. 558 f.).

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lebret in ecclesia paroeciali, nisi rerum adiuncta Missam alibi celebrandam exigant aut suadeant.

§ 5. Legitime absens parochus potest Missam pro populo applicare vel ipse per se in loco in quo degit, vel per sacerdotem qui eius vices gerat in paroecia.

A parish priest is obliged to apply the Holy Mass for his people, the same as a bishop (can. 339); a quasi-pastor, according to the rules laid down in can. 306.

A pastor who governs two parishes united *aeque principaliter,* or one as his own and the other as administrator, is obliged to apply but one Mass for the people.

The Ordinary of the diocese may for a just reason grant permission to a parish priest to apply the Mass for the people on another than the prescribed day.

A pastor should say the Mass for the people in the parish church, unless circumstances require him to say it elsewhere.

A pastor who is legitimately absent from home may either himself apply the Mass for the people at his actual abode, or have it said by his substitute.

The obligation of offering the Holy Sacrifice of the Mass for the people is based upon a divine law,[93] but the number of Masses to be applied has been established by ecclesiastical regulation. This obligation is incumbent on the pastor himself, if no legitimate reason excuses him, or, in other words, it is a personal obligation.[94] Of course, any legitimate cause (*e. g.,* sickness, some other personal duty, application of the Mass for his parents *in die depositionis* or *anniversarii,* or for a public cause)

93 *Trid.,* Sess. 22, de obser. etc.; S. C. C., Aug. 30, 1698. (Richter, *Trid.,* p. 134, n. 32.); cf. what was said under can. 339.

94 Cfr. the decisions of the S. C. C. in Richter, *l. c.,* n. 36; Bouix, *l. c.,* p. 588 f.; but the S. C. admitted a legitimate *in una,* Ruremond, Feb. 27, 1848, Bouix, *l. c.* The mass may be either low or *cantata;* Bouix, *l. c.,* p. 590.

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would justify him in having the Mass for the people said by another.

§ 2 of this enactment is based on the practice followed by the S. C. Concilii.[95]

As to § 4 and § 5 it may be said that canonists were somewhat more rigorous because of some decisions[96] which seemed to demand the celebration of the Mass for the people in the *parish church.* However, our Code does not insist upon this but leaves a wider margin. By employing the general term *adiuncta,* the lawgiver leaves it to the prudent judgment of the pastor whether these circumstances are or are not verified. Such circumstances would be the use of a winter chapel or school house, the repairing of a parish church, personal infirmity of the pastor, the convenience of the people, etc.

Note must be taken of the decree of the *S. C. Consistorialis* April 25, 1918, that the *faculties granted to bishops are abrogated with regard to the present canon.* Hence Ordinaries are not allowed to make any change as to this enactment. But we submit our humble judgment with regard to parish priests on account of what has been said under canon 451. If our parish priests are not pastors (*parochi*) in the strict sense, who is obliged to offer Mass for the people? The bishops themselves would have to apply for as many parishes as there are in each diocese.[96a]

Attention must also be drawn to decisions of the *S. Rit. C.,* July 8, 1910, and May 27, 1911. The *Missa pro populo,* also on the feasts suppressed, must be that of the current day, and no *missa de requie pro die obitus* may be said nor that of a feast transferred on a

95 Cfr. Richter, *l. c.,* p. 135, nn. 37–39.

96 Bouix, *De Parocho,* p. 591.

96a Untenable, because unjuridical, are the views proposed in the *Record,* of Louisville, Ky., June 20 and July 25, 1918.

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Sunday, if there is but one mass said in the parochial church.

Finally, can. 824, § 2 defines that a priest binating is not allowed to accept a stipend for either mass if he is obliged *ex iustitia* to apply one mass *pro populo* (except Christmas); but for the second mass he may accept some compensation *ex titulo extrinseco.* Thus we believe that a priest may say, *e. g.,* a mass for the purgatorial society of the diocesan clergy (if the statutes do not bind him *ex iustitia*), or for the Holy Name Society, or the Holy Rosary Confraternity, if he does not receive a stipend properly so called for such a mass. A donation for the trouble would be a compensation *ex titulo extrinseco, i. e.,* not intrinsically connected with the mass or the obligation arising *ex iustitia.*

PARTICULAR DUTIES

CAN. 467

§ 1. Debet parochus officia divina celebrare, administrare Sacramenta fidelibus, quoties legitime petant, suas oves cognoscere et errantes prudenter corrigere, pauperes ac miseros paterna caritate complecti, maximam curam adhibere in catholica puerorum institutione.

§ 2. Monendi sunt fideles ut frequenter, ubi commode id fieri possit, ad suas paroeciales ecclesias accedant ibique divinis officiis intersint et verbum Dei audiant.

The pastor is obliged to celebrate the divine services, to administer the Sacraments to the faithful as often as they legitimately demand them, to know his sheep and prudently to correct the erring, to bestow his paternal

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care upon the poor and wretched, and to employ the greatest diligence in instructing the children in the Catholic religion.

The faithful should be admonished that, whenever convenient, they should attend divine worship and hear the word of God in their parish church.

By "*divina officia*" the Code no doubt means primarily the celebration of Holy Mass, and secondarily those other devotions which are, as it were, ramifications of the central act of worship. *How often* the pastor is obliged *to say Mass on week-days* is not stated in the Code. Unless there is a law of foundation, a custom, a diocesan rule, legacy or stipend, no juridical obligation of saying Mass daily can be imposed.[97] However, on account of frequent communion, it will be difficult now-a-days for a pastor who has no assistant to limit the celebration of the Mass to certain days.

Of the obligation of *administering the Sacraments* and the rules to be observed in this connection more will be said in the Third Book.[98]

That the pastor should know his sheep is Gospel teaching re-echoed by the Council of Trent.[99]

§ 2 of our canon imposes on the *faithful* the moral obligation of attending their *parish churches*. It cannot be denied that the parish organism has been somewhat weakened in the last century. Thus among the parochial functions we do not even read of the paschal communion, although the people are admonished to receive it in their own church.[1] This is certainly a change from ancient views if we remember that the proposition "that the

97 Cfr. Benedict XIV, *Inst. Eccl. Just.*, 56, n. 6 (ed. Prati, 1844, p. 249).

98 Cfr. cc. 853 ff.; 901 ff.; 940 ff.

99 Cfr. John, 10, 14; 21, 15 ff.; 10, 12 f.; *Trid.*, Sess. 23, c. 1, de ref.; on preaching and catechism, see cc. 1327 ff.

1 Can. 859, § 3: *Suadendum*, etc.

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faithful were not bound to receive Holy Communion on Easter in their proper churches" was at one time branded as "*falsa, scandalosa et temeraria.*" [2]

CARE OF THE SICK AND CHARITABLE WORKS

CAN. 468

§ 1. Sedula cura et effusa caritate debet parochus aegrotos in sua paroecia, maxime vero morti proximos, adiuvare, eos sollicite Sacramentis reficiendo eorumque animas Deo commendando.

§ 2. Parocho aliive sacerdoti qui infirmis assistat, facultas est eis concedendi benedictionem apostolicam cum indulgentia plenaria in articulo mortis, secundum formam a probatis liturgicis libris traditam, quam benedictionem impertiri ne omittat.

CAN. 469

Parochus diligenter advigilet ne quid contra fidem ac mores in sua paroecia, praesertim in scholis publicis et privatis, tradatur, et opera caritatis, fidei ac pietatis foveat aut instituat.

The parish priest should assist the sick of his parish, especially the dying, with diligent care and great charity, by administering the Sacraments and commending them to God.

The pastor or any other priest assisting the sick has the faculty to grant, and should not omit to impart, the

2 Benedict XIV, *De Syn.*, IX, 16, 5. On account of can. 464, § 2, there is danger that exempt communities at times draw lay people to their chapels; but these communities as well as the bishop should see to it that no abuses are tolerated; can. 467, § 2, is evidence enough that the lawgiver wishes to see all the faithful in the parish churches.

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Apostolic blessing with the plenary indulgence in *articulo mortis,* according to the formula contained in the approved liturgical books.

The current manuals of pastoral theology may be consulted concerning this point. We merely note that the faculty mentioned is given by the very fact that the patient is in a dangerous state which will probably result in death; hence no special communication of this faculty is needed.

Can. 469 directs the pastor to watch that nothing against faith or morals is taught in his parish, especially in the schools, and admonishes him to foster or establish works of charity, faith, and piety.

Note that when the pastor is called upon to watch, it is as watchman, *not as iudex in causis fidei,* which office is reserved to the bishops wherever the Holy Office cannot immediately exercise supervision.[3] Hence the pastors must report to the bishop. Concerning our so-called *public schools,* no direct interference by the pastor is possible or intended. Yet he may draw the attention of the school board to facts which he has learned from pupils or their parents. In America pastors are entitled to act as free citizens, and no doubt in many localities uniformity of action on the part of the clergy would result in the prevention of much harm on the part of biassed public-school teachers.

As to *works of charity, faith,* and *piety* the pastor shall use prudence and energy in fostering the same. What is suitable in one parish is not always suitable in another. Charity would dictate the fostering of St. Vincent de Paul conferences or similar institutions, and aid to hospitals and orphanages. The faith is promoted

[3] H. Office, May 15, 1901 (*Annal. Eccl.,* 1902, p. 9).

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by apologetic lectures and a staunch and wholesome Catholic press. Piety is aided by devotions approved by the Church. *Sed ne quid nimis,* not too many new-fangled practices!

PARISH BOOKS AND ARCHIVES

CAN. 470

§ 1. Habeat parochus libros paroeciales, idest librum baptizatorum, confirmatorum, matrimoniorum, defunctorum; etiam librum de statu animarum accurate conficere pro viribus curet; et omnes hos libros, secundum usum ab Ecclesia probatum vel a proprio Ordinario praescriptum, conscribat ac diligenter asservet.

§ 2. In libro baptizatorum adnotetur quoque si baptizatus confirmationem receperit, matrimonium contraxerit, salvo praescripto can. 1107, aut sacrum subdiaconatus ordinem susceperit, vel professionem sollemnem emiserit, eaeque adnotationes in documenta accepti baptismatis semper referantur.

§ 3. In fine cuiuslibet anni parochus authenticum exemplar librorum paroecialium ad Curiam episcopalem transmittat, excepto libro de statu animarum.

§ 4. Paroeciali utatur sigillo habeatque tabularium, seu archivum, in quo memorati libri custodiantur una cum Episcoporum epistolis, aliisque documentis, necessitatis vel utilitatis causa servandis; quae omnia, ab Ordinario vel eius delegato visitationis vel alio opportuno tempore inspicienda, religiose caveat ne ad extraneorum manus perveniant.

Every pastor shall keep parish books, especially a record of baptisms, confirmations, marriages, and deaths,

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and take an accurate census of his parishioners. All these records must be kept according to the customary ecclesiastical rules, or as prescribed by the Ordinary, and carefully preserved.

The baptismal book should also contain notice as to whether and when the person baptized has received confirmation, was married, received subdeaconship, or made solemn vows. All these details should be embodied in the baptismal certificate, if asked for.

At the end of each year the pastor shall send a copy of all the parish books, except the *status animarum,* to the episcopal court.

The pastor should have a parish seal and archives in which said books, together with episcopal letters and other necessary or useful documents may be safely kept. Seal and archives are to be inspected by the Ordinary or his delegate at the diocesan visitation or at some other convenient time. The pastor shall take conscientious care that these documents do not get into strange hands.

The new law is certainly careful that the official documents be properly written and kept, and any one who has had to deal with documents in an official capacity (for instance, as *defensor vinculi*), will hail the solicitude of the lawgiver in this matter. It may perhaps be tedious, until good habits are contracted, but the fruits will prove priceless.

The most complicated parochial book is the *baptismal record,* which should contain four extra rubrics or separate columns,— one for confirmation, one for matrimony, one for subdeaconship, and one for solemn profession. Why the latter two are mentioned is evident from the fact that they are *impedimenta dirimentia* and have other juridical consequences. That these documents should, as

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§ 4 prescribes, be conscientiously kept from profane eyes is very necessary. For official documents of a private character are not intended for those not entitled to know their contents. This secrecy should also be observed towards domestics and other persons wont to frequent the parish house.

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CHAPTER X

ASSISTANT PRIESTS (VICARS)

The English term "assistant priests" for the Latin *vicarii paroeciales* is perhaps too narrow, inasmuch it includes only one species, *viz.*, those who help disabled or occupied pastors; whilst one whole class of vicars would be excluded, namely, those who are actual parish priests in time of vacancy or who take the place of a habitual pastor. In some countries, *e. g.*, Bavaria and Austria, pastors have *cooperatores* and *coadiutores*, or chaplains, as they are sometimes called. We may retain the term assistant priests because of its common use. The different classes may easily be distinguished by circumlocution.

VICARS PROPER

CAN. 471

§ 1. Si paroecia pleno iure fuerit unita domui religiosae, ecclesiae capitulari vel alii personae morali, debet constitui vicarius, qui actualem curam gerat animarum, assignata eidem congrua fructuum portione, arbitrio Episcopi.

§ 2. Excepto casu tum legitimi privilegii aut consuetudinis, tum dotationis vicariae ab Episcopo factae, reservata sibi libera nominatione, vicarium praesentat Superior religiosus, Capitulum aliave persona moralis; loci autem Ordinarius eundem, si idoneum, servato praescripto can. 459, repererit, instituat.

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§ 3. Vicarius si sit religiosus, est amovibilis sicut parochus religiosus de quo in can. 454, § 5; ceteri omnes vicarii ex parte praesentantis sunt perpetui, sed ab Ordinario possunt, ad instar parochorum, removeri, monito eo qui praesentavit.

§ 4. Ad vicarium exclusive pertinet tota animarum cura cum omnibus parochorum iuribus et obligationibus ad normam iuris communis et secundum probata statuta dioecesana vel laudabiles consuetudines.

A parish which is *pleno iure* united to a religious community, a chapter church, or another moral person, must have a vicar, who has the actual care of souls, and a decent support should be assigned to him according to the judgment of the bishop.

Save in the case of a legitimate privilege or custom, or an endowment made by the bishop, who may have reserved the designation of a vicar, the right of designating the vicar belongs to the religious superior or chapter or moral person; but if found fit according to Can. 457, the Ordinary of the diocese shall grant him the investiture.

The assistant, if he be a religious, is removable like the pastor (can. 454, § 5); while all other vicars are perpetual as far as the presenting party is concerned, but may be removed like parish priests by the bishop, after having informed the one who presented the vicar.

To the vicar exclusively belongs the care of souls with all the parochial rights and obligations according to the common law of the Church and approved diocesan statutes or praiseworthy custom.

This whole canon treats of vicars in the proper sense, *viz.*, such who enjoy the full rights of pastors. They are *actual parish priests,* whilst the habitual pastorship resides with a juridical person, whose rights consist chiefly

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in presenting a vicar and receiving the revenues which remain after subtracting the expenses necessary for the decent support of the vicar.

§ 1 speaks of parishes *incorporated* in a juridic person *pleno iure, i. e.,* as to temporal and spiritual matters, which union, as stated above, can be enacted only by the Apostolic See. If a monastery has a parish not fully united, it cannot appoint a vicar from among its own members, if the nature of the order or religious institute does not permit that its members be vicars *in perpetuum.*[1] A chapter *can* appoint one of its own members (canons) as pastor, but he needs the approval of the bishop, or his investiture. After his investiture the vicar has the full care of souls, and, as § 4 states, all the rights and duties of a pastor. Besides, he is entitled to *decent support.* The salary must be determined by the bishop. It is useless to say that the Constitution of Pius V, "*Ad exequendam*" (May 1, 1567) cannot be followed verbally. (This Constitution demanded at least 50 scudi, and not more than 100 scudi, or $100.) The underlying principle still holds good, *viz.,* that those who bear the burden should enjoy the benefits, and that the support of a pastor should be certain, not an uncertain amount from stole fees or similar sources, but a determined sum.[2] Benedict XIV by his Constitution "*Cum semper oblatas,*" Aug. 19, 1744, which was immediately intended for Italy but contains guiding principles for the whole world, gave the bishops full power to determine the "*congrua.*"[3] This is followed by the new Code. Hence the bishop shall establish what we call the *salary* of vicars, or assistant priests, not including in it uncertain revenues

1 Cf. *Trid.*, Sess. 7, c. 7 de ref. Richter, *Trid.*, p. 53, n. 12.

2 Cf. Richter, *Trid.*, p. 54; Santi-Leitner, I, 28 n. 14 (Vol. 1, 228).

3 *Bull. Bened. XIV*, ed. Prati, 1845, t. I, p. 595.

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(stole fees, collections, etc.). It is, of course, immaterial whence the salary is taken, whether from pew rent, collections, or other resources, provided only it is stable and sufficient for decent support.

§ 2 establishes the right of *presentation* and investiture or *institutio*. The former is inherent in the juridical person to whom the parish is *pleno iure* united. However, there may be other persons competent to present the vicar; thus by reason of a legitimate privilege, or custom, or donation made by the bishop, the latter may reserve to himself the right of presentation. For endowment, properly made, creates the *iuspatronatus,* of which the Code treats in the Third Book. With these exceptions the right of presentation remains in the moral person.

Presentation does not confer the *titulus* or actual right of administering the parish. This is given by *investiture,* and must be done upon examination or concursus, if the latter is customary in the province, according to canon 459. Should the examination prove the candidate presented to be unfit, those who have the right of presentation must offer another. But if the one presented is found fit, the bishop is obliged to invest him, otherwise he would infringe upon the rights of a third person. This investiture is no mere installation, but confers the *ius in re,* or actual possession, in our language, the conferring of faculties. As soon as the vicar is invested, the whole care of souls (§ 4) devolves upon him; neither have the members of the chapter or monastery the right of meddling with his administration.[4]

§ 3 describes the *manner of removing a vicar.* If the vicar is a religious, he may be removed as stated in can. 454, § 5, *i. e.,* by the bishop or his superior. Religious, as

[4] S. C. C. June 2, 1731, "Nullius Montis Cassini" (Richter, *Trid.,* p. 53, n. 14).

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we shall see in the treatise on religious, are capable of administering parishes, but only as temporary, not as perpetual vicars.[5] If the vicar is taken from the secular clergy, he is *perpetual, i. e.,* neither the chapter or moral person nor the bishop can remove him at will; but the bishop must proceed in the manner required for the removal of parish priests. The bishop is also obliged to inform the juridical person of the removal. Wherefore the trial prescribed in the Fourth Book must be instituted in cases of removal.[6]

VICARS AD INTERIM

CAN. 472.

Vacante paroecia:

1.° Ordinarius loci in ea quamprimum constituat idoneum vicarium oeconomum, de consensu Superioris, si de religioso agatur, qui eam tempore vacationis regat, assignata eidem parte fructuum pro congrua sustentatione;

2.° Ante oeconomi constitutionem, paroeciae regimen, nisi aliter provisum fuerit, assumat interim vicarius cooperator; si plures vicarii sint, primus; si omnes aequales, munere antiquior; si vicarii desint, parochus vicinior; si tandem agatur de paroecia religiosis concredita, domus Superior; loci autem Ordinarius in Synodo vel extra Synodum tempestive determinet quaenam paroecia cuique paroeciae vicinior habenda sit;

3.° Qui paroeciae regimen ad normam n. 2 assumpsit, debet loci Ordinarium de paroeciae vacatione statim certiorem facere.

[5] Cfr. Richter, *Trid.*, n. 15, p. 53. [6] Cfr. c. 3, X, I, 28; c. un. 6°, III, 18; *Acta S. S.*, XII, 284 f.; Wernz, *Jus. Dec.*, II, p. 1058 (ed. 1); cf. cc. 2147 ff.

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If a parish becomes vacant, (1) the Ordinary of the diocese shall, as soon as possible, appoint a fit *oeconomus* or *administrator,* (with the consent of the religious superior if the administrator is to be a religious), who shall govern the parish during the vacancy and receive part of the income for his support. (2) Before the administrator is appointed, unless otherwise provided, the assistant shall rule the parish, and if there are several assistant priests, the first in rank, or if all are equal in rank, the senior assistant shall assume the office of pastor *ad interim.* If there are no assistant priests, the nearest parish priest shall assume the same office; in parishes entrusted to religious the superior of the house shall act in the same capacity. The Ordinary of the diocese shall in due time, either at or outside the synod, determine which is to be considered the nearest parish. (3) Whoever has assumed the *ad interim* administration of a parish, must inform the Ordinary of the diocese of the vacancy.

The Council of Trent ordained that a *vicarius* be appointed by the bishop as soon as the latter receives notice of the vacancy of a parish.[7] The term *oeconomus* also[8] occurs in connection with the vacancy of episcopal sees. *Oeconomus* here means a vicar or administrator, who shall take charge of the parish until a new pastor is legitimately appointed and has taken possession. Until this *oeconomus* is appointed, the assistant priest shall "run" the parish. Then the Code sets forth various eventualities which may occur in larger parishes. Where there is no assistant, the neighboring priest should take care of the widowed parish *ad interim.* The text speaks of the *parochus vicinior* and says he should be determined by the bishop. The *parochus vicinior* is the one

7 Sess. 24, c. 18, de ref.

8 Sess. 24, c. 16, de ref.

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whose parish church is in a direct line the next from the vacant parish church.[9] However, although the direct line may be shorter between parish church A (vacant) and parish church B, yet it may be that the pastor of parish C has better communications with A, on account of superior railroad or automobile or road facilities. Therefore it is left to the judgment of the bishop to decide who is the *nearer* pastor.

The *time* during which the *ad interim* assistant or neighboring priest shall have charge of the vacant parish is not stated. The Council of Trent urged speedy provision (*statim*) by means of a vicar and then, after ten days, public announcement[10] of the examination. But since the Code does not determine the time, the Ordinary should proceed at once to the appointment of a temporary vicar, and hold the examination (or, if prescribed, the concursus), so that the vacancy may not last too long, to the detriment of the vacant church.

CAN. 473

§ 1. Vicarius oeconomus iisdem iuribus gaudet iisdemque officiis adstringitur, ac parochus, in iis quae animarum curam spectant; nihil tamen ipsi agere in paroecia licet, quod praeiudicium afferre possit iuribus parochi aut beneficii paroecialis.

§ 2. Oeconomus novo parocho vel oeconomo successori coram vicario foraneo vel alio sacerdote ab Ordinario designato tradat clavem archivi et inventarium librorum ac documentorum aliarumque rerum quae ad paroeciam pertinent, et rationem reddat accepti et expensi tempore administrationis.

9 Cf. Benedict XIV, *De Syn. Dioec.*, II, 12, 16; Santi-Leitner, I, n. 1, 11, n. 36 (Vol. I, p. 135.)

10 Sess. 24, c. 18 de ref.

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The temporary administrator enjoys the same rights and is subject to the same obligations as the parish priest in whatever pertains to the care of souls; but he is not allowed to do anything that might prove prejudicial to the rights of the pastor or parish.

The administrator shall hand over the key of the archives to the new pastor, or a new administrator, in presence of the rural dean or a priest appointed by the Ordinary, as also the inventory of the books and documents and other things pertaining to the parish, and render an account of the receipts and expenses during his administration.

The *juridical position* of the administrator is here defined in general: He is pastor with all the rights and obligations [11] attendant upon the care of souls, but he does not hold the parish in his own name (*in titulum*), and must therefore abstain from asserting rights proper to the parish priest. For instance, if a religious institute or a charitable institution or school is under the care of the pastor, the administrator should not surrender any right to the chaplain of that institute, unless otherwise stipulated. Neither should he assume obligations which may prove burdensome to the new parish priest, for instance in hearing confessions or preaching beyond what the law and previous observance require. *Prejudicial to the parish* would be contracting debts or alienating property or changing boundary lines. The administrator may improve the material condition of the parish, *e. g.*, by getting a cheaper rate of interest on money borrowed, by repairing the buildings if it should prove necessary or an unforeseen accident calls for repairs, etc.

11 Hence he is bound to the application of the *missa pro populo*, to residence, etc.

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TEMPORARY SUBSTITUTES

CAN. 474

Vicarius substitutus qui constituitur ad normam can. 465, §§ 4, 5 et can. 1923, § 2, locum parochi tenet in omnibus quae ad curam animarum spectant, nisi Ordinarius loci vel parochus aliquid exceperint.

The substitute who takes the place of an absent pastor or of one who has been deprived of his parish and appealed to Rome (can. 1923, § 2) has charge of whatever pertains to the care of souls, unless the Ordinary of the diocese or the parish priest have made exceptions.

Absence has been considered *supra,* can. 465. The substitute who is assigned for the spiritual welfare of the flock, should not interfere with the material administration unless absolute necessity requires. Besides, he must follow the *reasonable instructions* of the absent pastor. We emphasize *reasonable,* because it sometimes happens that an absent priest lays down regulations (for instance, with regard to visiting families or institutes, services, etc.) which can hardly be styled reasonable. The parish priest may except assistance at marriages, unless his absence should last too long, in which case the substitute would have to apply to the Ordinary. The latter, too, may make exceptions when approving the substitute. But unless formally stated and clearly set forth in writing, the Ordinary is not supposed to have made exceptions. If these touch the hearing of confessions, assistance at marriages, etc., they must be strictly complied with by the substitute. Preaching, too, might be excepted, for reasons which the bishop is not bound to prove or state.[12]

12 The "*Congrua*" or decent support of the substitute may be settled between the absent pastor and the substitute. C. C., March 15, 1738, (Richter, *Trid.*, p. 38, n. 18).

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Canons 475 sq. treat of what are properly called assistant priests. The first mentions such as are given to priests who for some reason are unable to perform their duties and are styled *coadiutores;* the other speaks of *cooperatores, i. e.,* helpers given to overburdened pastors.

ASSISTANTS PROPER

CAN. 475

§ 1. Si parochus ob senectutem, mentis vitium, imperitiam, caecitatem aliamve permanentem causam suis muniis rite obeundis impar evaserit, Ordinarius loci det vicarium adiutorem, praesentatum a Superiore, si de paroecia agatur religiosis concredita, qui suppleat eius vicem, assignata eidem congrua fructuum portione, nisi aliter provisum sit.

§ 2. Adiutori, si in omnibus suppleat parochi vicem, iura omnia et officia competunt parochorum propria, excepta Missae applicatione pro populo quae parochum gravat; si vero suppleat ex parte dumtaxat, eius iura et obligationes desumantur ex litteris deputationis.

§ 3. Si parochus sit sui compos, adiutor operam suam praestare debet sub eiusdem auctoritate secundum Ordinarii litteras.

§ 4. Quod si per vicarium adiutorem bono animarum provideri nequeat, locus est parochi amotioni ad normam can. 2147–2161.

If a pastor, by reason of age, mental debility, inexperience, blindness, or any other permanent cause, becomes incapable of discharging his duties properly, the Ordinary of the diocese should give him a coadjutor (presented by the religious superior if the parish belongs to religious) to take his place and to receive the necessary

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support from the revenues, unless provided otherwise.

To this coadjutor, if he takes the pastor's place to the full extent, belong all the rights and obligations incumbent on parish priests, with the exception of the application of the Mass *pro populo;* but if he takes the pastor's place only in part, his rights and obligations must be determined by his letter of appointment.

If the pastor is of sound mind, the coadjutor must discharge his office under authority of the pastor, according to the faculties given by the Ordinary.

If the welfare of souls cannot be properly taken care of by a coadjutor, the pastor may be removed, according to cc. 2147–2161.

According to the very humane adage, several times repeated in the old law,[13] "*Afflicto afflictio non est addenda,*" the Code provides a coadjutor for a priest who is in any way incapable of properly performing his pastoral duties.

The first reason is *old age,* which with some comes sooner, with others later, but nearly always entails unpleasant consequences, weakened eyesight, hard hearing, etc. A definite age-limit is difficult to draw. The Decretals, when speaking of old age as a reason for resignation, define it as debility proceeding from age and entailing some weakness which renders a priest incapable of discharging the pastoral office.[14] Seventy is considered in law as the age of *senes* or old men.[15] Practically, age must be measured by physical frailty rather than by a certain number of years.

The *mental debility* next mentioned in our canon is a

13 Cfr. c. 2, C. 7, q. 21 (Greg. M.); c. 5, X, III, 6, de clerico aegrotante.

14 c. 10, X, I, 9.

15 Reiffenstuel, II, 6, n. 8 ff.

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habitual *vitium mentis*. Insanity, therefore, even in its milder forms, certainly falls under this category.

Imperitia is inexperience. The Latin word refers to practical rather than speculative science; wherefore it does not, primarily, imply ignorance, such as was mentioned side by side with inexperience in the decree "*Maxima cura*," Aug. 20, 1910, from which our text is apparently taken. Inexperience here means rudeness, imprudence, etc., in the confessional, or on the pulpit, or in dealing with the people[16]

Blindness (*caecitas*) differs from weak eyesight or half blindness (*caecutiens*), which do not entirely destroy the faculty of sight. All these bodily ailments are supposed to be incurable or permanent.

These four and similar reasons (*e. g.*, deafness or some other permanent disability, especially when of an incurable nature) justify the bishop in giving an assistant to the afflicted pastor. In case the parish is in charge of religious, the assistant must be *presented* by the religious superior. Here we draw attention to the fact that even a religious is entitled to the benefits of the law, though not, of course, to the detriment of the parish.

The powers or *faculties* of the assistant are described in §§ 2 and 3. Their extent must be gauged partly by the condition of the pastor, partly by the letters of appointment or credentials. No general rule can be established. The assistant is entitled to the *congrua*, as per § 1. This may, especially in poor parishes, cause some trouble. The assistant would have to be paid from the salary of the pastor; this would perhaps mean privation for the sufferer, who, in case of sickness, would need more than his salary. On the other hand, a poor parish

16 *Trid.*, Sess. 21, c. 6, speaks of "*illiterati et imperiti*," but illiterate priests are no longer found.

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can ill afford to pay two priests. Hence an *infirm priests' fund* should be established in every diocese. Some kind of an insurance or pension fund would also help in this direction. If money can be raised by non-Catholic sects for pensioning their ministers, we do not see why this should be impossible among Catholics.

The last paragraph mentions *removal*. If the welfare of souls cannot be procured by an assistant, the bishop must proceed to remove the pastor, according to cc. 2147 ff. For the welfare of souls is the supreme law.

COADJUTORS

CAN. 476

§ 1. Si parochus propter populi multitudinem aliasve causas nequeat, iudicio Ordinarii, solus convenientem curam gerere paroeciae, eidem detur unus vel plures vicarii cooperatores, quibus congrua remuneratio assignetur.

§ 2. Vicarii cooperatores constitui possunt sive pro universa paroecia, sive pro determinata paroeciae parte.

§ 3. Non ad parochum, sed ad loci Ordinarium, audito parocho, competit ius nominandi vicarios cooperatores e clero saeculari.

§ 4. Vicarios cooperatores religiosos Superior cui id ex constitutionibus competit, audito parocho, praesentat Ordinario, cuius est eosdem approbare.

§ 5. Vicarius cooperator obligatione tenetur in paroecia residendi secundum statuta dioecesana vel laudabiles consuetudines aut Episcopi praescriptum; imo prudenter curet Ordinarius, ad normam can. 134, ut in eadem paroeciali domo commoretur.

§ 6. Eius iura et obligationes ex statutis dioecesanis, ex litteris Ordinarii et ex ipsius parochi commis-

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sione desumantur; sed, nisi aliud expresse caveatur, ipse debet ratione officii parochi vicem supplere eumque adiuvare in universo paroeciali ministerio, excepta applicatione Missae pro populo.

§ 7. Subest parocho, qui eum paterne instruat ac dirigat in cura animarum, ei invigilet et saltem quotannis ad Ordinarium de eodem referat.

§ 8. Si nec per vicarios cooperatores spirituali fidelium bono consuli rite queat, Episcopus provideat ad normam can. 1427.

If, on account of the large number of people in a parish, or for other reasons, the pastor, in the judgment of the Ordinary, is unable to take proper care of the parish, he should be given one or more *cooperatores* or assistants, to whom a sufficient salary should be assigned.

Such assistants may be appointed either for the whole parish at large or for a particular part thereof.

Not to the pastor, but to the Ordinary of the diocese, upon having heard the pastor, belongs the right to nominate assistants from among the secular clergy.

Assistants belonging to a religious order must be presented by the competent superior, upon having heard the pastor, to the Ordinary for his approval.

The assistant is obliged to reside in the parish, according to the diocesan statutes, or praiseworthy custom, or the episcopal injunction. The Ordinary should see to it, according to can. 130, that the assistants dwell in the parish house.

Their rights and obligations must be determined from the diocesan statutes, the letters of the Ordinary, and the instructions of the pastor; however, unless the contrary is expressly stated, they take the place of the pastor in virtue of their office and must assist him in the entire

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ministry of the parish, except only in the application of the Mass for the people.

The assistant is subject to the pastor, who should paternally instruct and advise him in the care of souls, watch over him, and at least once a year report to the Ordinary about him.

If the spiritual welfare of the faithful cannot be procured by means of assistants, the Ordinary should proceed according to can. 1427.

The Council of Trent enjoined the bishops to compel pastors whose parishes were so large that one priest alone could not administer the Sacraments or perform the divine service, to take unto themselves co-laborers.[17] Our canon mentions the same reason, but adds, "*aliasve causas.*" Some "other reasons" might be distance or increased pastoral work, for instance, in the parish schools or hospitals, increased frequentation of the Sacraments, such as is very perceptible now-a-days in many parishes of this country. The assistant may then be appointed either for the parish at large, or for some portion thereof, which latter would be the case if there were a chapel or oratory for the convenience of the more distant parishioners. Even where there is no chapel or oratory, it might be that the assistant would have to attend a group of parishioners speaking a different language (German, Italian, Polish, etc.).

§ 3 and § 4 speak of the *appointment.* According to the Council of Trent[18] the designation of an assistant was left in the hands of the pastor, who, however, could be compelled to take an assistant. Various provincial councils gave to the bishops the power to appoint assistants.[19] Therefore it may be said that our canon em-

17 Sess. 21, c. 4 de ref.
18 *Ib*
19 Conc. Quebec., de vicariis; Conc. Hib. Thurl. de coadjutoribus; cf. *Coll. Lac.*, III, 657, 790.

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bodies the common law arising from a practice otherwise established. Something of the old rights of parish priests remains, for the bishop is obliged to ask the opinion of the pastor concerning the necessity of appointing an assistant. But if the Ordinary is convinced of the necessity, he may appoint an assistant even against the will of the pastor.[20]

If the parish belongs to a religious community, the assistant to be appointed must be presented by the competent superior. This competency, as said above, is determined by the constitutions of the respective community. But in the case of religious, too, the pastor should be heard as to the necessity, not the person, of the assistant. The bishop in giving his approval also imparts the necessary powers.

These powers are determined (§ 6) by the diocesan statutes, the credentials of the Ordinary, and the commission of the pastor. Note the descending scale. First and above all the *diocesan statutes*[21] should regulate the juridical position of the assistants. After that the *letters of deputation* sent by the bishop must be inspected, because it may be that these either extend or restrict the rights given by the diocesan statutes, which the bishop can do at random, he being the sole legislator of the diocesan laws. Besides, it may be that the bishop has in the meantime received more ample faculties, which he is willing to communicate. As to the *commission of the pastor,* it must be noticed that he is not allowed to limit or curtail the rights of his assistants, as granted by the diocesan statutes or the letters of the bishop, unless these letters contain a restriction in favor of the pastor. The

20 Cf. can. 105.

21 It would not be out of place if, in order to give authority and produce uniformity, a plenary council would establish some rules to that effect.

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parish priest is allowed to set up his own regulations, but they must not clash with the common law, the episcopal credentials, or the diocesan statutes.

§ 5 enjoins residence and dwelling in the same parish house, which is generally observed in the U. S. Some holidays are to be granted to assistants.

A very remarkable passage is that which says that the assistant, *by virtue of his office,* takes the place of the pastor. This means that no subdelegation in the proper sense is needed, for "by virtue of his office" signifies that by his very appointment the assistant can do what the pastor is empowered to do, unless the latter excepts something especially.

§ 7 speaks of the *relation between pastor and assistant.* It may not be amiss here to add what the Second Provincial Council of Quebec (A. D. 1854) enacted concerning this point: "The assistants shall diligently endeavor to act in uniformity with the pastor, for too great discrepancy in the practice of the sacred ministry might turn to destruction rather than edification. Besides, they shall most carefully avoid whatever in words or deeds might belittle the pastor, but in all things conduct themselves modestly, and diligently further the welfare of the people." [22]

We may sum up the relation between pastor and assistant as follows:

(a) Appointment is made by the Ordinary upon having heard the pastor;

(b) The assistant is bound to residence, because he must aid the pastor;

(c) According to can. 460, the pastor is the one admin-

[22] *Coll. Lac.*, III, 657.

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istrator of the parish, because of the unity desired by the Church in the government of the parish;

(d) If the pastor, or the letters of appointment, or the diocesan statutes except nothing, the assistant is *ratione officii* supposed to possess all the powers of the pastor, assistance at marriages not excluded (can. 1096, § 1), especially during the absence of the pastor;

(e) The application of the *missa pro populo* is incumbent on the pastor only.

The last paragraph provides for the division or dismemberment of a parish, if effective parish work cannot be secured even by means of assistants (can. 1427).

REMOVAL

CAN. 477

§ 1. Vicarii paroeciales de quibus in can. 472–476, si religiosi sint, amoveri possunt ad normam can. 454, § 5; secus ad nutum Episcopi vel Vicarii Capitularis, non autem Vicarii Generalis sine mandato speciali.

§ 2. Quod si vicaria sit beneficialis, vicarius cooperator removeri potest processu ad normam iuris, non solum ob causas propter quas alii parochi removeri possunt, sed etiam si graviter subiectioni defecerit parocho debitae in exercitio suarum functionum.

The vicars spoken of in can. 472–476, if they are religious, may be removed according to can. 454, § 5; if secular priests, they may be removed by the bishop or the vicar-capitular, but not by the vicar-general, unless he has a special mandate.

If a benefice is attached to the vicar's office, the cooperator may be removed, upon trial conducted according to law, for reasons which admit the removal of a

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parish priest, but also for any grievous insubordination shown to the parish priest in the exercise of the ministry.

Removal was spoken of in can. 454, concerning religious. A secular assistant may be removed at the good pleasure of the bishop or the vicar-capitular (administrator) during a vacancy. But the vicar-general needs a special mandate for that purpose. Of course, by removal is not meant dismissal from the diocese; for such a penalty cannot be inflicted without due process, as will be seen in the penal Code. Even assistants must be treated according to the law.

§ 2 considers the case of an ecclesiastical *benefice* being attached to the office of an assistant. This is the case in many dioceses of Europe, especially in countries where Church and State are closely connected. To such benefices is often attached the *iuspatronatus,* either *laicalis* or *ecclesiasticus,* and a removal is not so easily carried out. Besides, the objective perpetuity of the benefice seems to constitute a title to permanency. Note, however, that the term *cooperator* is here expressly used, not *coadiutor;* wherefore a cooperator is of a more stable character. To remove a cooperator, then, requires a trial, but the reasons need be less weighty than those for the removal of a pastor.

PRECEDENCE OF ASSISTANTS

CAN. 478

§ 1. Sicut parochus ecclesiae cathedralis, ita vicarius paroecialis Capituli cathedralis praecedit omnibus aliis dioecesis parochis aut vicariis; oeconomi vero ius praecedentiae regitur normis in can. 106 statutis.

§ 2. Vicarii substituti et adiutores praecedunt, dum

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in munere manent, vicariis cooperatoribus; hi aliis sacerdotibus ecclesiae paroeciali addictis.

As the cathedral pastor, so the assistant of the cathedral parish enjoys *precedence* over all other pastors and assistants of the diocese; the precedence of the *oeconomus* is governed by the general rules laid down in can. 106.

Substitutes and assistants (*adiutores*) take precedence over *cooperatores,* and these in turn over all other priests attached to the parish church.

The first paragraph may surprise the one or other master of ceremonies in the U. S. For, if we mistake not, the assistants of cathedral churches had to give way to pastors. The Code seems to reverse the order. Yet we believe that the reversal is only apparent. For it must be remembered that the Code speaks of *cathedral* chapters made up of canons, one of whom is parish priest, and another, perhaps, assistant, if the assistant is not taken from the beneficiaries belonging to the chapter. This state of affairs is quite different from that obtaining in our country, and hence we believe, until a final decision is made by the Apostolic See or a Plenary Council, the old practice must be followed; *i. e.,* the parish priests take precedence over all assistants, even those of the cathedral.

The *oeconomus* mentioned in § 1 is the one spoken of in can. 432, who has temporal care of the diocese during its vacancy. However, we would not exclude the *oeconomus* of a vacant parish. To this class must be applied the general rules of precedence (can. 106).

That the substitutes and coadjutors of pastors should take precedence over the assistants proper may be deduced from the law of representation; they represent pastors,

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who are in possession of precedence, whilst the assistants, as such, do not represent pastors. This law of representation must also be applied to religious who are substitutes of pastors, because the canon makes no distinction. But the general rules laid down in can. 106 must be followed here.

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CHAPTER XI

RECTORS OF CHURCHES

We said above that, besides the baptismal churches, other oratories were sometimes erected, especially by landlords for their families and dependents, which, however, were not distinguished by a baptismal font. Chapter XI treats of a class of churches which seem to be a relic of such public oratories without parochial rights.

CAN. 479

§ 1. Nomine rectorum ecclesiarum hic veniunt sacerdotes, quibus cura demandatur alicuius ecclesiae, quae nec paroecialis sit nec capitularis, nec adnexa domui communitatis religiosae, quae in eadem officia celebret.

§ 2. De cappellano religiosarum, sodalium virorum religionis laicalis, confraternitatis vel alius legitimae associationis, serventur particularium canonum praescripta.

CAN. 480

§ 1. Ecclesiarum rectores libere nominantur ab Ordinario loci, salvo iure eligendi aut praesentandi, si cui legitime competat; quo in casu Ordinarii est rectorem approbare.

§ 2. Licet ecclesia pertineat ad aliquam religionem exemptam, rector tamen a Superiore nominatus debet ab Ordinario loci approbari.

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§ 3. Si ecclesia coniuncta sit cum Seminario aliove collegio quod a clericis regitur, Superior Seminarii vel collegii est simul ecclesiae rector, nisi aliter loci Ordinarius constituerit.

Rectors of churches are priests who take care of a church which is neither a parish nor a capitular church, nor entrusted to a religious community.

As to chaplains of nuns and lay religious, confraternities or sodalities, the special rules concerning them must be observed.

To our knowledge there are not many such *chapels of ease,* as they might be styled, in our country. For the church whose holder is here called *rector,* is not one of the usual parochial places of worship and sacred ministry (see can. 481), but usually a beneficiary church, such as there are in the old country, with the character of public oratories.

The rectors of such churches, according to can. 480, are freely named by the Ordinary of the diocese or approved by him, if the right of election or presentation can be lawfully claimed by some one else.

If such churches belong to an exempt order, the rector named by the religious superior must be approved by the Ordinary of the diocese.

If such a church is united with a seminary, or college ruled by the clergy, the superior of this seminary or college is at the same time rector of the church, unless the Ordinary of the diocese has determined otherwise.

Approbation here means nothing else than the ratification of the rectors presented. The bishop is not entitled to subject them to an examination, because the care of souls, properly so-called, is not attached to such churches. However, if faculties for hearing confession are de-

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manded or granted, the bishop may have the rector examined. That the hearing of confessions is not forbidden in such churches appears, at least negatively, from the following canons.

CAN. 481

In ecclesia sibi commissa rector functiones paroeciales peragere nequit.

CAN. 482

Ecclesiae rector potest divina officia etiam sollemnia ibidem celebrare, salvis legitimis fundationis legibus et dummodo non noceant ministerio paroeciali; in dubio autem utrum huiusmodi detrimentum contingat, necne, Ordinarii loci est rem dirimere et opportunas normas praescribere ad illud evitandum.

In such churches the rector is not allowed to exercise parochial functions; but he may hold solemn divine services, unless the laws of foundation, or detriment to the parochial ministry, should prevent; however, where there is doubt of such a damage befalling a parish, the Ordinary of the diocese should settle the question and make provisions to avoid it.

CAN. 483

Si ecclesia, Ordinarii loci iudicio, ita a paroeciali distet ut paroeciani non sine gravi incommodo possint paroecialem ecclesiam adire ibique divinis officiis interesse:

1.° Loci Ordinarius, gravibus quoque statutis poenis, potest rectori praecipere ut horis populo commodioribus officia celebret, fidelibus dies festos ac ieiunia

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denuntiet et catecheticam instructionem et Evangelii explicationem tradat;

2.° Parochus potest ex eadem sanctissimum Sacramentum, inibi ad normam can. 1265 forte asservatum, pro infirmis desumere.

If, in the Ordinary's judgment, the church is so far distant from the parish church that the parishioners can frequent the parish church only with great inconvenience, then (1) the Ordinary can, under threat of heavy penalties, command the rector to hold services at hours more convenient for the people, to announce holydays and fast days, give catechetical instructions and explain the gospel; (2) the pastor can take the Blessed Sacrament, if preserved there according to can. 1265, and administer it to the sick.

§ 1 gives the bishop a power which was formerly looked upon as exclusively reserved to the Apostolic See.[1] Of course we suppose that the rector's church is held as a benefice. The bishop is now entitled to compel such rectors to assume *nova onera spiritualia,* which by virtue of their office they are not obliged to perform. However, this is for the benefit of the faithful. But a material reward would not be out of place and ought to be mentioned in the text. We repeat what we stated above, that if he has the necessary faculties, a rector is allowed to hear confessions in his church. For, on the one hand, hearing confessions is not a strictly parochial right or rather duty, and, on the other, a rector is entitled to distribute holy, even paschal, communion.

CAN. 484

§ 1. Sine rectoris vel alius legitimi Superioris li-

1 Cfr. t. 1, 12, lib. III Decret.; *Trid.*, Sess. 25, c. 5, de ref., III, 12, n. 6; Aichner, § 79, 4, c.

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centia saltem praesumpta, nemini licet in ecclesia Missam celebrare, Sacramenta ministrare aliasve functiones sacras peragere; haec vero licentia dari vel negari debet ad normam iuris.

§ 2. Quod attinet ad conciones in ecclesia habendas, serventur praescripta can. 1337–1342.

Without the at least presumptive permission of the rector or other legitimate superior, no one is allowed to say Mass in such a church, or administer the Sacraments, or perform other sacred functions. The permission must be granted or denied according to the law.

Concerning the preaching in such churches, the rules laid down in cc. 1337–1342 are to be observed.

As presumption is a reasonable conjecture from facts likely to happen, a presumed license is based upon a natural conjecture that it would not be withheld if asked for. For saying Mass, a "celebret" should always be demanded, unless the priest is known; concerning other functions, the laws laid down for the administration of the Sacraments must be followed.

Can. 485

Rector ecclesiae, sub auctoritate Ordinarii loci servatisque legitimis statutis ac quaesitis iuribus, debet curare seu advigilare ut divina officia ad sacrorum canonum praescripta ordinate in ecclesia celebrentur, onera fideliter adimpleantur, bona rite administrentur, sacrae supellectilis atque aedium sacrarum conservationi et decori prospiciatur, et ne quidpiam fiat quod sanctitati loci ac reverentiae domo Dei debitae quoquo modo repugnet.

The rector of the church must, under the authority of

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the Ordinary of the diocese, and with due regard to the lawful statutes and the acquired rights of others, see to it that the divine services are properly carried out, according to the prescriptions of the sacred canons, that all obligations are faithfully complied with, that the property is duly administered, that the sacred furniture and the buildings are properly and neatly kept, and that nothing is done which might be repugnant to the sanctity of the place or to the reverence due to the house of God.

The *statutes* here mentioned are such rules as the founder of the church may have laid down. Now-a-days all such rules need the approval of the Ordinary. The *iura quaesita* are rights acquired by the family of the founder or other persons benefitted by the church. These must always be respected and are to be considered first if a conflict (see can. 482) should arise.

CAN. 486

Rectorem ecclesiae, etsi ab aliis electum aut praesentatum, Ordinarius loci removere ad nutum potest ex qualibet iusta causa; quod si rector fuerit religiosus, servetur, circa eius remotionem, praescriptum can. 454, § 5.

The Ordinary of the diocese may, at will and for any just cause, remove a rector, although elected or presented by others; if he is a religious, can. 454, § 5 must be observed in his removal.

After reading this last chapter of the first part of the Code, our so-called rectors will want to change their title into that of *pastors*. That they are pastors in the canonical sense of the word can no longer be doubted. How else should we classify them? They are neither "vi-

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cars" of the bishop nor "rectors," but *pastores animarum*, pastors of souls, who hold their parishes in their own name.

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APPENDIX

EPISCOPAL FACULTIES

This volume was already in type when the *S. C. Consistorialis* issued an important decree, which we reprint here *in extenso,* adding a few observations.

" Proxima sacra Pentecostes die, novo ecclesiasticarum legum Codice vim obtinente, omnes locorum Ordinarii facultatibus quam pluribus ipso iure instruentur, quas antea ab Apostolica Sede postulare solebant et communibus indultis assequebantur. Sufficit enim consulere canonem 349 collatum cum 239 circa plura privilegia personalia, quibus Episcopi augentur, canonem 386 circa electionem examinatorum et iudicum synodalium, 468 et 914 circa benedictionem papalem *in articulo mortis* et in maioribus anni solemnitatibus, 534 et 1532 circa alienationes, 806 circa sacri iterationem, 822 circa Missae celebrationem extra ecclesiam et oratorium, 1006 circa ordinationes extra tempora, 1043 et 1045 circa dispensationes ab impedimentis matrimonialibus, 1245 circa dispensationes ab abstinentia et ieiunio, 1304 circa benedictionem sacrorum utensilium, quin de multis aliis hic mentio fiat, ut illico appareat Episcopos, vi Codicis, tanta munitos esse potestate ut, quoties Ecclesiae utilitas et animarum salus id requirat, communis legis rigorem temperare et iustas dispensationes largiri aeque opportuneque valeant.

Quapropter indulta quae hucusque, postulantibus Ordinariis, ad hunc finem concedebantur, quaeque vel in Brevi dicto 25 annorum, vel in formulis typis impressis ad decennium, ad quinquennium aut etiam ad triennium valituris continentur, supervacanea evadere videntur; quin imo confusionem haud levem ingerere, eo quod a novis Canonici Iuris ordinationibus in pluribus discrepant.

Hisce itaque de causis, necnon ad discrimina in canonica disciplina tollenda maioremque unitatem in Ecclesia inducendam, Ssmus D. N. Benedictus Pp. XV, de consulto peculiaris coetus Emorum Patrum Cardinalium, hoc S. C. Consistorialis decreto ea quae sequuntur statuit et sanxit:

1) exceptis locis S. Congregationi de Propaganda Fide subiec-

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tis, pro quibus suo tempore quae opportuna erunt decernentur, alibi, in universis scilicet dioecesibus iuri communi obnoxiis, facultates omnes pro foro externo Ordinariis concessae, quaeque in Formulis et Brevi superius recensitis continentur, a die 18 maii huius anni cessabunt, neque amplius in usu esse poterunt;

2) in locis tamen remotioribus aliisque ad quae, sive praesentis belli causa, sive alia qualibet ratione, praesentis decreti notitia utili tempore non pervenerit, dispensationes et ordinationes vi veterum facultatum ab Ordinariis forte concessas Ssmus Dominus ratas habet, firmo tamen ut ipsi ab acceptae notitiae die, si res adhuc sit integra, huic decreto se conforment;

3) facultates pro foro interno a S. Poenitentiaria datae, aliaeque ratione praesentis belli concessae, aut peculiaribus de causis ab Ordinariis obtentae, sub huius decreti dispositione non comprehenduntur, et ideo abolitae non sunt;

4) circa dispensationes matrimoniales, quamvis vi canonum 1043–1045 Ordinarii opportunas dispensationes largiri queant "*urgente mortis periculo*" et "*quoties impedimentum detegatur cum iam omnia sint parata ad nuptias, nec matrimonium sine probabili gravis mali periculo differri possit,*" nihilominus Ssmus Dominus, attentis temporum et locorum adiunctis, haec ulterius indulgenda decrevit:

a) ut locorum Ordinarii in America, in Insulis Philippinis, in Indiis Orientalibus, in Africa extra Mediterranei maris oras, et in Russia, per quinquennium a die 18 maii huius anni, dispensare valeant ab impedimentis minoris gradus quae recensentur in can. 1042, servatis regulis in eo Codicis capite statutis: itemque ut matrimonia nulliter contracta, ob aliquod eiusdem minoris gradus impedimentum, in radice sanare queant, iuxta regulas in capite XI, tit. VII, lib. III Codicis *de convalidatione matrimonii* positas, monita parte impedimenti conscia de sanationis effectu;

b) ut iidem locorum Ordinarii dispensare pariter per quinquennium valeant ab impedimentis maioris gradus, sive publicis sive occultis, etiam multiplicibus, iuris tamen ecclesiastici (exceptis impedimentis provenientibus ex sacro presbyteratus ordine et ex affinitate in linea recta consummato matrimonio), nec non ab impedimento impediente mixtae religionis, si petitio dispensationis ad S. Sedem missa sit et urgens necessitas dispensandi supervenerit, pendente recursu. Concedendo tamen hisce in casibus dispensationes, Ordinarius prae oculis semper habeat regulas statutas in Codice, lib. III, tit. VII, cap. 2, 3 et 4, circa

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impedimenta in genere et in specie, itemque clausulas apponi solitas in matrimoniis cum hebraeis et mahumetanis; nec dispensationem concedat nisi caverit de plena earum omnium observantia iuxta sacrorum canonum praescriptiones, et iuribus S. Congregationis de disciplina Sacramentorum circa taxarum solutionem consulat;

c) ut Ordinarii Galliae, trium regnorum Magnae Britanniae, Germaniae, Austriae et Poloniae, durante bello, quoties aditus ad S. Sedem difficilis aut impossibilis saltem per mensem praevideatur, iisdem facultatibus uti possint, quae supra sub litteris *a* et *b* recensentur.

Praesentibus valituris de mandato Ssmi contrariis quibuslibet minime obstantibus.

Datum Romae, ex Secretaria S. C. Consistorialis, die 25 aprilis 1918.

✠ C. Cardinalis De Lai, Ep. Sabinen., *Secretarius.*

L. ✠ S.

† V. Sardi, Archiep. Caesarien., *Adsessor.*

This decree establishes that

(1) *All the faculties pro foro externo* granted to the Ordinaries of all dioceses subject to the general hierarchy of the Church shall *cease* May 18, 1918, whereas the faculties granted to the Ordinaries of the territories subject to the S. C. Prop. Fide shall remain in force;

(2) In those countries which, by reason of the war or for another cause, do not receive timely notice of this decree, all the dispensations and ordinances issued in virtue of former faculties shall be valid and licit until notice is duly received;

(3) The special faculties granted by the S. Penitentiary are not touched by the present decree;

(4) Concerning *matrimonial dispensations,* some of which have reference to can. 1043–1045, the following rules are to be observed:

(a) The Ordinaries of America, of the Philippine Islands, of the East Indies, of Africa, with the exception of the Mediterranean coast, and of Russia, from May 18, 1918, enjoy the faculty of dispensing from *all minor impediments,* as enumerated in can. 1042: consanguinity in the third degree of the collateral line, affinity in the second degree of the collateral line, public honesty in the second degree, spiritual relationship, crime arising from adultery with a promise of marriage or an attempt at

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marriage before a civil magistrate. The Ordinaries may also heal (*sanatio in radice*) marriages contracted invalidly on account of the said five minor impediments. This faculty lasts for five years from May 19, 1918.

(b) The Ordinaries of the countries mentioned, for five years, from May 18, 1918, enjoy the faculty of dispensing from *all impediments,* either public or secret, also multiplied, provided they are *iuris ecclesiastici* and do not concern the priesthood or affinity in the direct line, *consummato matrimonio,* of dispensing from the impediment of mixed religion, provided a petition has been sent to Rome and an urgent necessity of dispensing exists. But the provisions of the new Code in Book III, tit. VII, chapt. 2, 3 and 4 must be strictly complied with. For further explanation we must refer to the Code and our comments on Book III, which, *Deo volente,* we shall soon have ready.

A rapid glance at the faculties [1] thus granted to the Ordinaries of our country results in the following comparison.

Form I

1. *Extra tempora* et *interstitia* is useless because granted by Can. 1006 and Can. 978, § 2.

2. Concerning irregularities the Ordinaries may no longer dispense, except in such as are secret and not brought before the episcopal court at least by summons, can. 990.

3. From the age required for ordination no dispensation is allowed, according to can. 975.

4. The only reserved vows are those of perfect and perpetual chastity and that of entering religion (can. 1309), from which the Ordinary may not dispense; all others are not reserved (can. 1313).

5. Simony in ecclesiastical offices, benefices, and dignities (can. 2392) is *simpliciter reservata* to the Holy See, and the Ordinary can no longer absolve therefrom, unless he has received a general faculty (can. 2253, § 3); but the faculties *pro foro interno* given by the S. Penitentiary remain.

6–10. About matrimonial dispensations see the decrees above, 3, a and b.

11. Touches the *Privilegium Paulinum* (can. 1120–1127), concerning which, for reasons that may prompt another answer

1 We follow the text as printed in Sabetti's *Theol. Moral.*, 1917, p. 1082 ff.

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from the Apostolic See, we do not wish to prejudice opinions, though we think the faculties have ceased.

12. Holy oils are to be blessed only on Holy Thursday (can. 734, § 1), but the first part of the faculty, concerning the number of priests, probably remains.

13. Concerning the blessing of sacred vestments and the reconciliation of churches, see can. 1304, 1177, and 1207.

14–15. See can. 2253 concerning the power of absolution.

17–19. Concerning indulgences see can. 912; as to cardinals, can. 239; § 1, n. 24; metropolitans, 274, 2; bishops, can. 349, § 2, n. 2. Can. 468, 914, 20, we believe, still hold good, because not given to the Ordinaries as such, but to dioceses.

21. Forbidden books, see can. 1401–1403.

22. Concerning regulars receiving the government of parishes no faculty is required; cfr. can. 454 and 630; but an incorporation may be made only with papal permission; can. 452.

23. No faculty needed by reason of can. 806.

24. Can. 847 allows our custom concerning Holy Communion brought to the sick.

25. About the wearing of clerical dress no faculty is needed; cfr. can. 136.

26. In regard to the recitation of the Breviary (can. 135) no faculty (properly so called) is needed, and only the general rules of morality need be observed; but can. 135 does not oblige one to substitute three rosaries for the Breviary.

27. No faculty now needed; cfr. can. 1245.

28 and 29. Must be regulated according to what has been said above, can. 196–210.

Facultates Extraordinariae T.

1. Cannot be applied (cfr. above, n. 3).

2. The *titulus servitii ecclesiae* is now common law (see can. 981), and therefore no faculty is needed.

3–6. Dispensations from these impediments may be granted in virtue of the decree of April 25, 1918, with the exception of affinity *in linea recta* (cfr. can. 97).

7. Remains, because the faculties of the S. Poenit. remain in force in virtue of the decree quoted.

8–12. Remain in virtue of the same decree and as far as this decree permits. But perhaps the reader will find a difficulty in said decree concerning *mixed religion: "nec non ab*

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impedimentio impediente mixtae religionis, si petitio dispensationis ad S. Sedem missa sit et urgens necessitas dispensandi supervenerit, pendente recursu." This seems to mean that for each case a petition has to be sent to Rome (Holy Office), and the case would be urgent pending recourse. We confess that this seems a very rigid application of the law and might cause great trouble, not only now, in time of war, but even in normal times. Probably a mitigation can be obtained.

13. See above, Form I, 11.

14. Is superfluous, according to can. 47.

15. Must be judged according to can. 1056.

16. Must be brought in accordance with can. 1429.

17–20. See above, Form I, n. 17–20.

21–22. These, we believe, remain, because the department of indulgences is attached to the S. Penitentiary, whose faculties are not revoked. Besides the Cardinals enjoy them (can. 239, n. 5 f.), as well as the bishops (can. 349, § 1, 10). It would be about time to stop the privileged state of certain orders and congregations, if these things are meant for the faithful at large, and we really expected a canon to that effect.

23–26. Are strictly missionary faculties, not applicable to our country, for instance, blessing of bells (can. 1169, 1155).

27. Concerning privileged altars, can. 916 f. must be observed.

28. The recitation of the Breviary must be performed according to rubrics and sound moral principles.

29. As to forbidden books, see can. 1401–1403.

30. The serving of flesh-meat on forbidden days to non-Catholics is to be judged according to moral principles.

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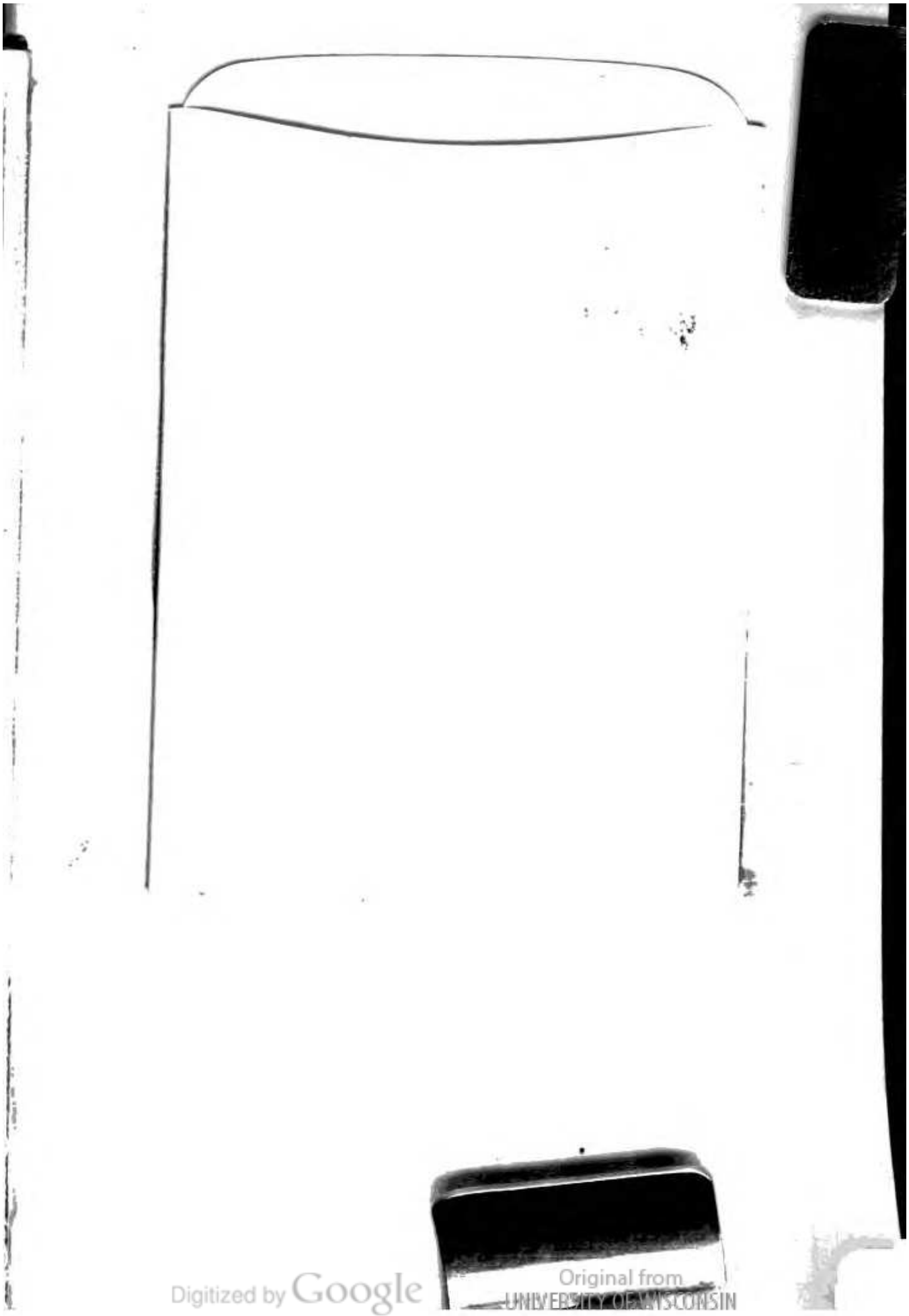
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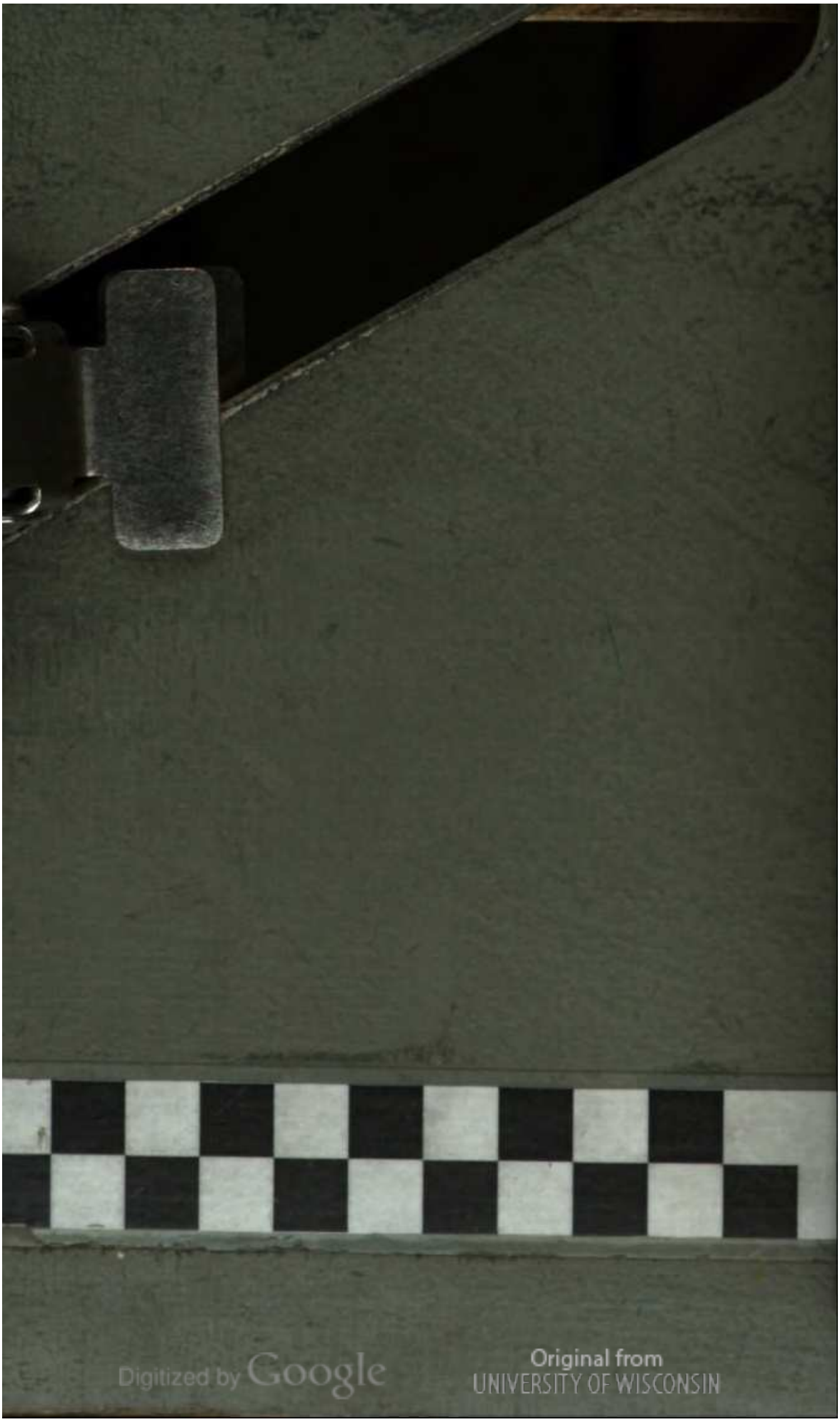
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A COMMENTARY ON THE NEW CODE OF CANON LAW

By THE REV. CHAS. AUGUSTINE, O.S.B., D.D.
Professor of Canon Law

WITH AN INTRODUCTION BY
HIS EMINENCE CARDINAL GASQUET

VOLUME III

De Personis, or Ecclesiastical Persons

Religious and Laymen

(Can. 487-725)

SECOND EDITION

B. HERDER BOOK CO.
17 SOUTH BROADWAY, ST. LOUIS, MO.
AND
68 GREAT RUSSELL ST. LONDON, W. C.
1919

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INTRODUCTION BY HIS EMINENCE CARDINAL GASQUET

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I have been asked to write a brief Introduction to this third volume of the *Commentary on the New Code of Canon Law*. The subject matter is so important and affects so many people that an Introduction would almost appear to be out of place; but I cannot refuse the request of an old friend like Father Augustine to write a few words to preface his Commentary.

The sections of the Code treated in this volume deal with two classes of persons, namely religious and lay people. The laws relating to the first naturally follow upon those which deal with clerics, and they are set forth in this Codex in 195 Canons, in which is given with clearness and precision the whole jurisprudence of the Church regarding the religious life. In some ways this portion of the new Codex may be regarded as perhaps the most useful and necessary part of the Codification of ecclesiastical law. Hitherto legislation in regard to religious has been in what may be called "a fluid state." It was mostly based upon special Pontifical Constitutions and deductions from the same, and had not hitherto been gathered together and coördinated officially. The marvellous growth of religious bodies and the variety, especially in modern times, of their scope and purpose, had rendered it difficult, to say the least, to set out the ecclesiastical law applicable to them.

After the Council of Trent, the advent of Congregations of Clerks Regular made necessary great changes

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in the old monastic legislation, and these again opened the way for other Congregations of simple vows, perpetual or temporary, which have proved useful and even necessary to meet the needs of the Church in modern times.

The codification of the laws relating to religious life has consequently not been the easiest portion of this great work, which has been accomplished in the present Codex. The most important change which has been introduced in this section — at least so far as the older Orders are concerned — is the law which imposes a period of three years of temporary simple vows after the noviciate, before perpetual vows, simple or solemn, can be taken. Hitherto the very ancient monastic principle of stability was safeguarded by the subjects taking simple vows for three years, which on their part are perpetual, before taking their solemn vows.

Another point in the present legislation to be noticed is the greater stress which is laid upon the element of "common life," as an essential condition for the religious life. Canon 487 makes this clear. One who leads an eremitical life, for example, cannot be called a religious, because the condition of "common life" is wanting. In the same way Canon 673 defines as improperly called "religious" those who, though living together in common life, are not bound by vows.

The second portion of this volume deals in two sections with matters regarding the laity and their associations. In the first the enrollment of the laity in pious associations is strongly recommended. Since these are recognized by the Church, they should be approved and established by competent ecclesiastical authority. The Ordinary always is to exercise his jurisdiction over such associations. In view of the great multiplication of these confraternities in modern times, it is obviously of the

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greatest importance that the principles which regulate them should be set forth and understood.

The second section of this part deals with particular pious associations, such as "Third Orders," Archconfraternities, Confraternities, Pious Associations, etc.

It will be seen from this bare statement that the Volume here given to the public contains much of great practical importance, and I have little doubt that the Commentary furnished by so competent a canonist as Father Augustine, O. S. B., will be found of great assistance to those who wish to understand the New Codex.

A. CARD. GASQUET

Rome, Nov. 10, 1918.

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THE NEW CODE OF CANON LAW

BOOK II—PART II

RELIGIOUS

HISTORICAL INTRODUCTION

Before starting this part of our commentary, we shall give a brief historical sketch of the origin of the religious state and its development into various branches, orders, and congregations. To this shall be added a paragraph treating of exemption.

§ I. ORIGIN AND EARLY PROPAGATION OF THE RELIGIOUS STATE

The primitive form in which the religious state appears is *monasticism*. "Dwelling alone," in its concrete Christian [1] aspect, is a creation of the closing third century and owes its origin to *SS. Antony* and *Pachomius*. The former is the father of the Anchorites proper, whilst Pachomius gave to the monks the cenobitic rule. Undoubtedly the persecutions from Decius to Diocletian, violent and universal as they were, made more than one Christian tremble for his faith and life and caused many

1 As to the Essenes, cf. *Cath. Encyclopedia*, V, 546; Montalembert, *The Monks of the West*, (Engl. ed.), 1896, I, 217.

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to seek shelter in the desert.[2] Yet this extrinsic motive alone would scarcely account either for the multitude of solitaries or for the perseverance of their ascetic institutes after peace had been restored to the Church. Hence another element must necessarily be assigned in explanation of so singular a phenomenon: it is the desire of fervent Christians to follow more closely in the footprints of the Savior and His Disciples, and to imitate the great forerunners of monastic life, the prophet Elias and St. John the Baptist.[3] However, it was not only the voice of Christ bidding His loved ones to forsake everything and follow Him; it was not merely the promise of a full measure of bliss that attracted the multitudes, but we may truly say that this abandonment of a sin-steeped world was due to a deeply felt desire of appeasing the longing of a "naturally Christian" soul. Montalembert describes it thus: "In the depths of human nature there exists without doubt a tendency, instinctive though confused and evanescent, towards retirement and solitude. Its manifestations are found in all the epochs of history, in all religions, in all societies, except perhaps among savage tribes, or in the bosom of that corrupt civilization, which by its excess and over-refinement too often leads humanity back to a savage condition."[4] The novelty, too, and a certain chivalric tendency may have drawn not a few into the wilderness. But withal the Christian sentiment deeply impressed, and especially that bewildering echo of the second advent of Christ — the *parousia* of St. Paul's teaching — prompted many of those whose souls had been purified in the

[2] Thus St. Paul, the first hermit; cf. *Vita S. Pauli*, in *Acta SS.* (Boll.), X, Jan. I, 603; Bulteau, O.S.B., *Abrégé de l'Histoire de l'Ordre de S. Benoit*, Paris, 1684, I, 4.

[3] Cf. St. Jerome, *Proleg. Vitae S. Pauli*, Migne, *P. L.*, 23, 17.

[4] *The Monks of the West*, I, 15.

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waters of penance to shake off worldly fetters in order to contemplate more freely the "light divine." Thus, then, we see St. Antony the Great[5] bury himself in the mountains of the Thebaid at Pispir, and S. Pachomius lead his cenobitic army to the cloistral realms of Tabennisi in the upper Thebaid on the Nile.[6]

But if we speak of the life in common organized by Pachomius, we must not compare it to St. Benedict's Rule. It looked indeed somewhat like a congregation of modern times, with its superior general, visitations and chapters; but the essential feature of Benedictine life, the family ideal, could not be attained by reason of the great number of monks, 50,000 being mentioned in the preface of St. Pachomius' rule.[7] The brethren were divided according to their arts or trades, each group having its own provost or prior. In the month of August there was a general chapter at which all officials were appointed. A great deal of freedom was left to the individuals; thus, for instance, they could take their meals in common or privately in their cells. Two fast-days per week were prescribed except during Easter and Whitsuntide.[8]

Community life was more strictly defined by *St. Basil* the Great. The "father" of cenobitic life would have his monks work and pray seven times a day in common, besides placing all ascetic exercises under the control of a superior.

The East, therefore, presented two kinds of monks: the solitaires following Antony, and the cenobites following the rule of Pachomius and the great Cappadocian Bishop.

5 Cf. *Vita S. Antonii* in *Acta SS.* (Boll.), Jan. 17, II, 471 ff.

6 See C. Butler, O.S.B., *The Lausiac History of Palladius* in "Cambridge Texts and Studies," P. I, 1898, P. II, 1904.

7 Migne, *P. L.*, 23, 64, n. 6; n. 8; Butler, *l. c.*, I, 236.

8 Migne, *l. c.*, n. 5.

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The wave of monasticism from the East soon invaded the Western Church, not like a great inundation, but gradually, gently, and steadily. This was due in part at least to the whirlwind of Arianism. The persecution set on foot by these fanatics caused Athanasius and other Alexandrian clergymen to seek the protection of the Apostolic See.[9] This happened between the years 339 and 341 A. D. On the other hand Italian bishops like Eusebius of Vercelli were banished from their native soil into Eastern regions. The same Eusebius, confessor of the Catholic faith (d. 371), on returning from his exile — which had lasted from 355 to 362, during which time he had been the guest of the Thebaid monasteries — transplanted the monastic institute to Italy.

But it may be safely said that the first impulse to Western monasticism came from Rome, primarily through the service of St. Athanasius and through the influence exercised by the noble *Marcella*. Her palace stood on the Aventine hill, consecrated by the presence of the Prince of the Apostles. She is praised by St. Jerome as the "*prima monacha Romae.*" The life of St. Antony, written about 365, was known to her, and when St. Jerome came to Rome (382) to renew those instructions and narratives by adding to them the example of his own life, Marcella, with her mother Albinia, and her sister Asella placed themselves at the head of that select number of illustrious matrons who took him for their guide and oracle. She died shortly after the sack of Rome by Alaric (410).[10] *Pammachius*, a man of consular birth, is celebrated by the hermit of Bethlehem as the "first and leader of the monks" in Rome, whose example drew

9 *Acta SS.* (Boll.), II, 1108; St. Jerome, *Ad Principiam* (Migne, *P. L.*, 22, 1087 f.).

10 Cfr. *Studien u. Mitteilungen O.S.B.*, 1898, 303 ff.

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many noble, learned, and powerful men to the monastic life.[11] It is to be noted that among the great houses of Roman nobility the Anician family distinguished itself in a conspicuous manner. A grand-daughter of Proba, of the gens Anicia, devoted her life to Christ in *Africa* and is celebrated by St. Augustine.[12] From Africa we cross the Mediterranean Sea to Spain, but particularly to France, that fertile soil of monasticism.

The historical genesis of monasticism has now been briefly outlined. We have seen that in its beginnings it was of human origin, and we naturally ask ourselves if it had also a *divine sanction,* or whether it was completely a human invention. To answer this question properly we must make a distinction. Christ invited His Apostles to His fellowship. He tendered this call to the wealthy youth and urged that he sell whatsoever he had and follow Him. The precepts contained in the Decalogue and in the Sermon on the Mount were addressed to all alike; but it was not so with the counsels leading to a more perfect life. *"Qui potest capere, capiat."* Yet, it must be evident that, as Christ gave these counsels, He intended them not for mere contemplation, but for practice. He aimed at gathering a "little flock" which would more closely follow the footprints He left on earth, and unswervingly walk that narrow path which He himself had traveled. This close imitation of the Saviour is more surely achieved by living according to the

11 St. Jerome *Ep. ad Pammach.,* says: *"Primus in primis, archistrategos monachorum" . . . "quis enim crederet ut consulum pronepos et Furiani germinis decus, inter purpuras senatorum, furva tunica pullatus incederet?"* (Migne, 22, 641 f.) which words indicate that the dress of the monks was black and of coarse material.

12 Montalembert, *l. c.,* I, 293. Besides these names, others might be mentioned, such as Melania the elder and younger, Paula, Eustochium, etc., as well as St. Paulinus of Nola, not to speak of St. Augustine and his monk-like clergy.

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three counsels: poverty, chastity, and obedience, which embody the perfection proposed by Christ. Hence, wherever these three are put into practice, the religious state exists, and that by divine right. Monasticism, however, is not *the* religious state; it is but a form or part thereof, as a branch is part of a tree. It would not, therefore, be quite correct to assert that monasticism exists by divine right, unless it be identified with the religious state in general. In this latter sense we might, though improperly, say that its foundation is divine,—that it is "the philosophy introduced by Christ." [13]

If this is true of monasticism, which is not the concrete form of the religious state, it is even more applicable to single monasteries or congregations, which, as history teaches, may appear and disappear. On the other hand, the law of prescription must be quoted in favor of monasticism; despite all dislikes, derision and persecution from adversaries within and without the Church, it has always proved a solid rock amidst the storms of the sea, and a fertile spring of true civilization and learning, rendering untold services to the whole of humanity.[14]

§ 2. THE RELIGIOUS STATE UP TO THE FOURTH LATERAN COUNCIL [15]

Our Code (can. 488) distinguishes the following categories of religious:

The *Religious State* consists of	1. *Orders of Regulars* with solemn vows and	a) Monastic Congregations		
		b) Clerical or lay orders.		
	2. *Congregations* with simple vows.	a) Exempt — not exempt.	}	either clerical or lay
		b) Pontificial institutes.		
		c) Diocesan institutes.		

13 St. John Chrys., *Hom. ad Popul. Antioch.* 17; Montalembert, *l. c.*, I, 218.

14 Montalembert, *l. c.*, I, 9.

15 Cf. Montalembert, *The Monks of the West*, Engl. ed., 1896; Heimbucher, *Ordensgeschichte*, 1896, 2 vols.

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Monasticism, as we have seen, was the common form of the religious state in the early Middle Ages, up to the time of the IVth Lateran Council (1215). That this year marks an epoch in religious life is evident from the far-reaching decrees of the Council mentioned, as well as from the fact that soon afterwards orders of a somewhat different type made their appearance. We need not recall the *different rules* which were introduced by saintly men. Individualism was the keynote of the first centuries up to the time of Charlemagne, when the *Rule of St. Benedict* was made the monastic code, not by extrinsic forces merely, but chiefly by its intrinsic merit. Its organization is cenobitic, prescribing a life in common under the government of an abbot, elected by the brethren for lifetime. Its end is the *conversio morum,* or truly moral conduct based upon the Evangelical truths. To achieve this principal aim St. Benedict clothed it in the form of a vow or promise, which was supported by two more — obedience and stability. These three formed the contents of the formula of profession which every son of St. Benedict had to pronounce after a year's novitiate. There were no special spiritual works demanded beyond what the Gospel taught; — no flagellations, no special fasts except those prescribed by the rule and the regulations of the Church, no newfangled devotions. The liturgical prayer was to be *the* prayer of the monks, in it they should live, from it they should draw inspiration and example. But *work,* too, was prescribed, no kind, either intellectual or manual, being excluded, though the latter was the principal form, until a distinction between *fratres barbati* (*conversi* or lay brothers) and monks proper was made, towards the end of the Xth century.[16] These are the two main fea-

16 *Conversi* or *barbati* occur in the "Customs" of Einsideln, com-

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tures of the Benedictines: *"Ora et labora,"* by which they cultivated the soil, trained the young, and brought truth and culture to tribes and races not yet in touch with the Church or civilized society.

The Rule of St. Benedict was the foundation of many other orders. Thus the founder of the *Camaldolese* (St. Romuald, 1027) and the founder of the *Vallombrosians* (St. John Gualbert, 1073) adopted the Code of the "Patriarch of Western Monasticism."[17] The most illustrious branch is that founded by St. Robert at Citeaux, Burgundy, in 1098. The name of one great abbot of Clairvaux, *St. Bernard,* has given to the *Cistercians* a lustre which shall never fade. St. Bernard is said to have received 200 novices, and in the middle of the 14th century his order counted no less than 700 abbeys. Their rule was that of St. Benedict, whilst the more detailed organization is contained in the *Charta charitatis.* The chief superior is the abbot of Citeaux, who is assisted by four "Father Abbots" and a general chapter held every year. The powers of the chapter were extensive. It could even depose the abbot of Citeaux, though the latter was elected by the monks of Citeaux and the abbots of the other monasteries. Besides, the general chapter elected twenty-five *Definitores,* who were entrusted with the affairs of the Order outside the time of the chapter-meeting. This is, if not a deviation from, at least a change of, the Benedictine rule, and, we be-

posed by Abbot Gregory, an Englishman, towards the end of the 10th century. They were distinguished from monks, probably by a different kind of profession, wearing the beard, and their chiefly outward occupation; they were not admitted to choir service.

17 The order of *Grandmont,* and that of *Fontevrault,* founded by Robert of Arbrissels, in 1100, might also be mentioned, especially the latter, because placed under the jurisdiction of an abbess, whom monks and nuns obeyed.

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lieve, a wholesome democratic one, which the orders of the following period adopted.

Closely allied to the Benedictine rule, although with traits of hermitical life, somewhat similar to the Camaldolese, are the *Carthusians,* founded by St. Bruno (1084) at Chartreuse, near Grenoble.

More clerical than monastic were the orders which followed the so-called *Rule of St. Augustine,*— a compilation from the writings of the great Bishop of Hippo.[18] To this class belong all the branches of the *Canons Regular* who adopted the common life and pronounced the three religious vows and were spread in different congregations. The *Praemonstratensians* or Norbertines, founded by St. Norbert (1120), and the *Trinitarians,* by John of Mortha and Felix of Valois (1198), may also be counted among the followers of the Augustinian rule.

§ 3. FROM THE FOURTH LATERAN TO THE TRIDENTINE COUNCIL

Whereas the first period bore an almost exclusively or at least overwhelmingly monastic[19] character, the following epoch may, according to the saying "*a potiori fit denominatio,*" be styled clerical, or at least *monastico-clerical.* On one side we see the Benedictine and Cistercian orders flourish, or revived through the medium of newly formed congregations, like those of St. Justina of Padua (1412), of Melk in Lower Austria (1418),

18 The Rule in its present form did not originate with St. Augustine. It is a compilation from his two sermons "On the Morals of the Clergy," and a "Letter (109) to the Nuns of Hippo." Particular statutes were added to this compilation later on; cfr. Alzog, *Manual of Church History,* Engl. Transl., 1876, Vol. II, p. 693.

19 Even the Canons Regular followed a rule that was, in the main, taken from the Rule of St. Benedict; such was that of Chrodegang of Metz; cfr. Hefele, *Conc.-Gesch.,* IV, 17 ff.

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and of Bursfeld (1440); on the other hand the phenomenal rise and development of the *Mendicants,* who devoted themselves chiefly to the sacred ministry, marks a new epoch full of life and energy.

St. Francis, the humble poor man (*poverello*) of Assisi in Umbria, founded his "confederation," as he called it, in 1209. On Nov. 29th, 1223, his rule was approved by Honorius III, whose predecessor, *Innocent III,* had enacted at the Lateran Council that, to prevent too great a confusion of religious, no one should found a new order, but all who felt called to the religious state should enter one of the established institutes,[20] and those who wished to found a new religious house should accept a rule and institute already approved. Though this canon was enacted *after* Francis had laid the foundations of his marvelous society, the great Pope and canonist seemed to be slow, especially on account of the extreme poverty proposed by the Saint, in giving his permission. At length an oral leave was granted through the intervention of the Cardinal of St. Prisca, Colonna. Honorius III gave his formal approval to the rule after the order counted thousands of members.

The *Code of St. Francis* is simple. It comprises twelve brief chapters. The first treats of the three vows, of which the strictest is that of poverty. It also contains a clause of "obedience and reverence to the Pope." Noticeable and new is the insertion of a special addition to the twelfth chapter, which enjoins the minister general to ask the pope for a *cardinal protector* and superintendent, in order that the brethren may always be subject to the Holy Roman Church and remain unswerving in the Catholic faith. The *organization* has some similarity with that of the Cistercians, in as far,

20 Cfr. c. 9, X, III, 36.

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namely, as the *minister general* is elected by the general chapter, which may also, upon unanimous vote, depose him. Under the minister general are the provincials, and under these the custodes (cap. 8). Chapters 9 and 12 treat of preaching, which the brethren are to omit if the Ordinary forbids them. Preaching among the Saracens and infidels may, by special grace, be undertaken with the permission of the provincial. As to the *vow* of *poverty* (cap. 6) the Saint commands his brethren "to possess nothing for themselves, neither house, nor estates, nor anything," but to live entirely on alms. This latter point is specifically Franciscan and, like many other human institutions, has caused some disturbance because of divergent interpretations.[21] But not on that account may any slur be cast upon the holy Founder's intention, nor should the subsequent splits among the Friars Minor form a reason or pretext for casting aspersions on the institute as such, which has wrought miracles of spiritual reformation among the faithful and produced a great number of Saints.

The *division* of the Franciscan Order, which practically began towards the end of the 14th century, was completed and sanctioned by Leo X, "*Ite et vos,*" May 28, 1517. Henceforth two great branches were recognized: that of the *Observants* with the brown habit, and that of the *Conventuals* with the black habit, who were entitled to possess movable and immovable property, whilst the Observants claimed no right to own property nor any special indults.

A third, very popular and deserving branch of the great Franciscan Order is that of the *Capuchins,* founded by Matteo di Bassi and approved by Clement VII, May

21 Cf. Nicholas III, "*Exiit qui seminat,*" in c. 3, 6°, V, 12, de verb. signif.; Clem., "*Exivit,*" c. 1, Clem. V, II.

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18, 1528. After severe trials, lasting for many years and threatening its very existence, this order was formally recognized by Paul V, in 1619, as autonomous with its proper Minister Generalis. Since they proceeded from the *Observants,* the Capuchins cling to the original rule of St. Francis and observe absolute poverty. Similar to their rule is the one composed by St. Francis of Paula for his order, called "*Minimi,*" approved A. D. 1474.

In 1217, Innocent III approved an order which has gained universal admiration for its scientific pursuits and high achievements, especially in speculative theology. It is the Order founded by *St. Dominic,* known as that of the Friars Preachers or Dominicans. The Pope enjoined the holy Founder to assume, according to the decree of the Lateran Council, a rule already approved. He adopted that of St. Augustine, as it was then called. The *organization* proper of the new Order was established at a chapter held at Bologna in 1220. The constitutions adopted there enacted that the general chapter, to be held every three years (now held every twelfth year) should enjoy legislative powers and elect the *Magister Generalis,*[22] who himself chooses his associates (*socii*) in the government of the Order. The *provincials* are elected by the provincial chapter for four years and are assisted by *definitores* chosen by the same chapter. A *prior* is set over every house for the period of four years and is assisted by a subprior. Special attention was given to studies, which should last at least eight years, two of which are devoted to propaedeutics.

A *characteristic* of the Order of the Friars Preachers is poverty. Together with the Franciscans they are called *mendicants.* At first they depended entirely on

22 Now elected for twelve years.

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alms, but later papal constitutions (like that of Martin V, 1425) allowed the Dominicans to hold landed property and have a secure income. Another feature peculiar to this order is the office of preaching, for which they were chiefly founded (against the Albigenses), and which they performed with great zeal and success especially at the time of the Reformation. Most remarkable is the great number of accomplished scholars whom they produced and who held the Catholic world spellbound for centuries. The names of Albertus Magnus, Thomas Aquinas, and Cajetan suffice to show their merit and greatness.

The rule of St. Augustine was followed also by the *Mercedarians,* "the royal, military, and religious order of the Blessed Virgin for the ransom of slaves," founded in 1223 by Peter Nolascus; by the *Servites,* or "Servants of Mary," established by seven Florentine nobles in 1233; and by the "*Alexian Brothers,*" founded in the 14th century and allowed to make solemn profession by Pius II (1459). These latter are a lay order engaged in charitable work, and since 1870 the members take only simple vows. The so-called *Hieronymites* and *Bethlehemites* likewise followed the so-called rule of St. Augustine.

During that same period the Benedictine Order experienced not only a reformatory impetus, but also an increase of branches: *St. Sylvester,* of the Gozzolini family, in 1231 founded at Fano near Fabriano a monastery which became the mother-house of the Benedictines of the same name. Their constitutions, based on the rule of St. Benedict, were finally approved by Alexander VIII (1681). They now devote themselves to mission work in various countries, including the U. S. (Diocese of Wichita, Kansas). Another Italian foundation was

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that of *Celestine V,* who as Peter Murone established a congregation based on the Benedictine rule and known as *Celestinians.* This order at one time counted about 150 monasteries, but is now nearly extinct. The last Benedictine congregation founded in that period is that of *Bl. Bernard Tolomeo,* who called it the order of the Blessed Virgin Mary of Mount Olivet, wherefore its members are named *Olivetans.* They still have some monasteries.

A rule with Oriental traits, but modified by Eugene IV in 1431, is that of the *Carmelites,* written by Patriarch Albert of Jerusalem in 1208 and then transplanted to the West. Particularly in Spain this order gained a solid footing and received a fresh impetus through the reformatory zeal of the great *St. Teresa* and *St. John of the Cross,* in the middle of the sixteenth century.

§ 4. FROM THE TRIDENTINE COUNCIL TO OUR TIME

This period might be called *congregational* because, although a few orders were started, yet the signature of the whole epoch is that of religious congregations without solemn vows, or of merely pious societies without vows proper.

First and deserving of particular mention is the *Society of Jesus,*[23] founded by St. Ignatius Loyola in 1534 in the crypt of St. Denis of Montmartre at Paris and approved as an order by Paul III (*"Regimini militantis ecclesiae,"* Sept. 27, 1540) fifteen years before the holy founder's death. The code of this order is remarkable for its detailed and elaborate regulations. It is contained

23 Nothing can be said against that title (cfr. *Cath. Encycl.,* XIV, 81); however, if a member of S. J. (Cuvilhier, *Meditationes Brevissimae*) contrasts the humility of St. Ignatius with that of the founders of other orders in favor of the former, as if these latter had given their own names to their foundations, it sounds somewhat puerile.

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in the "*Institutum Societatis Jesu*,"[24] often printed, and therefore no secret. For our purpose the most important part of the Institute is the "Constitutions," from which we learn the internal and external organization of that illustrious corporation. The head of the Society is called *praepositus generalis*, or simply General of the Jesuits, although the chief authority is vested in the "General Congregation," which is similar to the General Chapter of other centralized orders. To that General Congregation belongs the supreme legislative power, whilst the fullness of administrative power and spiritual authority is vested in the General. He appoints the provincials (at present twenty-seven, four in the U. S.), and the local superiors: rectors of colleges, provosts of professed houses, and masters of novices. The General is aided by five assistants, who, however, enjoy only a consultive vote, and by an "admonitor." This organization is to some extent democratic, inasfar, namely, as the General Congregation is the legislative organ. We fail to see where the aristocratic element[25] enters. It is rather a constitutional monarchy, because the General of the Society has unlimited power within the Constitutions.

The *members* are: (1) *novices*, whose "probation" lasts two years; (2) *formed scholastics*, aspirants to the priesthood with simple but perpetual vows; (3) *formed coadjutors*, lay brothers or priests with simple but perpetual vows; (4) *professed members*, who besides the three usual solemn vows of religion, make a fourth to obey the Pope in the matter of missions and to go wherever they are sent. They also make certain additional, but non-essential, simple vows in the matter of poverty

24 Cfr. *Cath. Encycl.*, *l. c.*, which we chiefly follow concerning this Society.

25 Cfr. Heimbucher, *l. c.*, II, 55.

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and external honors, also regarding ecclesiastical dignities, if we mistake not.

The *object*[26] of the order is not limited to practising any one class of good works, but to study, in the manner of the Spiritual Exercises, what Christ would do if He were living in our day, and to carry out that ideal.[27] Hence elevation and largeness of aim. Hence also the motto of the Society: "*Ad Maiorem Dei Gloriam.*" Obedience is the characteristic of the order,—to be ready for any call and to preserve unity in every variety of work. Hence, by easy consequence,[28] the omission of office in choir, of a specially distinctive habit, of unusual penances. The *ministry* of the Society consists in preaching, the administration of the Sacraments, and teaching.

History has shown that the members of the Society have carried out their noble purpose for the welfare of the Church at large; their literary and missionary work lives after them, and one of the greatest titles of honor peculiar to the Society is perhaps that of being the most calumniated order in the Catholic Church.

Of a charitable character, purposing to help orphans and the poor, is the order founded by St. Hieronymus Aemilianus, approved by Paul III in 1540, and declared a religious order by Pius V in 1608. It is called the order of *Somasco,* because this place (near Bergamo in Italy) was its first settlement. The rule is that of St. Augustine.

The same rule was adopted by the order of St. John

26 *Cath. Encycl.,* XIV, 84 f.

27 This is not specifically Jesuitic, except in as far as the method is "according to the Spiritual Exercises of St. Ignatius," provided, of course, these are the exclusive literary product of the holy founder.

28 However, it is known that St. Ignatius omitted choir service from his Code only after long deliberations.

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of God (*"Brothers Hospitallers"*), founded in 1540 at Granada in Spain and raised to the dignity of an order in 1570 by Pius V. It has a lay character, because only a few of its members, generally one in each house or hospital, are priests. These Brothers enjoy the privileges of mendicants, granted by Urban VIII in 1624. Their chief task is nursing the sick.

Very similar is the order founded by St. Camillus of Lellis in 1504, and approved as an order with the privileges of mendicants by Gregory XIV, in 1591. The members are named *"Fathers of a Good Death."*

For the sacred ministry and the embellishment of the church service St. Cajetan and Caraffa, later pope Paul IV, founded the *Theatines,* in 1524.

The *Barnabites* were established by Antonius Maria Zaccaria in 1530 at Milan.

For school purposes chiefly was instituted the "Order of the Pious Schools," or *Scolopii,* by St. Joseph of Calasanza at Rome, in 1597.

Now we come to the *congregations* of men. Hither belong the *Christian Brothers,* founded in 1679 by St. John Baptist de la Salle, and approved by Benedict XIII, in 1724. They are a lay institute engaged mainly in the primary and middle-class education of youth. Their number is as great as the merits they have gained in the field of pedagogy in almost every country of the globe. Two priestly congregations of a clerical character, which are spread over the whole Church are those of the *Passionists,* founded by St. Paul of the Cross, in 1725, for mission work and the constant remembrance of the Passion of our Lord, and that of the *Redemptorists,* founded in 1735 by St. Alphonsus of Liguori, especially for the exercise of the sacred ministry among the poor and forsaken, which scope it carries out with astonishing success.

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The congregation of *St. Sulpice,* founded in 1642 by Jean Jacques Olier, and that of the *Eudists,* founded in 1643 by P. Eudes, are devoted to the training of the clergy.

Among the many *pious societies* whose members take no special vows, are to be mentioned the *Oratorians,* established by the "Apostle of Rome," St. Philip Neri, in 1575; the *Lazarists,* founded by St. Vincent de Paul, in 1624, and approved by Urban VIII, in 1632; the *Oblates of the Immaculate Conception,* established in 1816 by Bishop Mazenod; the Marists, or *Fathers of the Society of Mary,* founded in 1816 by Abbé Colin; the *Fathers of the Precious Blood,* founded by Bl. Gaspar del Bufalo, in 1823; the *Pallottini,* founded by the Ven. Vincent Pallotti, in 1835; the *Fathers of the Holy Ghost,* founded in 1848; the *Salesians* of Don Bosco, founded in 1855; the *White Fathers,* founded by Cardinal Lavigerie, in 1868; the *Society of the Divine Word* (Steyl), founded by Arnold Janssen, in 1875; the *Society of the Divine Saviour,* founded by J. B. Jordan, in 1881; the *Fathers of the Holy Cross,* founded in 1841 at Notre Dame, Ind.; the *Paulists,* founded in 1859 as an offshoot of the Redemptorists; the brethren of *St. Viator;* the priests of the *Most Bl. Sacrament,* founded by Julien Eymard, in 1856, and others, among them many Tertiaries from older orders. The *Assumptionists,* founded in 1520, with the rule of St. Augustine, conduct schools and missions in various countries, especially in France, where they flourished before the iniquitous laws of 1905.

§ 5. FEMALE ORDERS AND CONGREGATIONS

The rules for nuns, or sacred virgins, as they were called, were sometimes nothing else but practical instructions given by renowned bishops. Thus St. Ambrose

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composed his "Exhortation to the Virgins" (about 397). That the rite of veiling those who vowed virginity dates to remote antiquity, perhaps to the beginning of the fourth century, is unquestionable. The existence of sacred virgins is testified to by Tertullian.[29] Monasteries of nuns were early and numerous in Egypt, Cappadocia, and Palestine. Later the *monachae* were also introduced into the West. Rules were then written especially for nuns. Thus St. Caesarius of Arles (542) wrote a rule for virgins and monks,[30] St. Leander of Seville (603) one for his sister Florentia.[31] But the *Rule of St. Benedict,* under which St. Scholastica lived, soon governed most convents of nuns. In 742 a German national council enacted that "monks and nuns should introduce and observe the Rule of St. Benedict."[32] Besides the Benedictines there were also *Cononesses,* as we learn from a council of Mayence in 813.[33] However, it is safe to say that to the beginning of the thirteenth century the majority of nuns followed St. Benedict's rule, either as "black" Benedictines, or as Camaldolese or Vallombrosian Sisters. This condition prevailed up to our time. The branch of the Olivetans was instrumental in the foundation of the noble society of the *Oblates of Tor de Specchi,* whose holy foundress was St. Frances of Rome (+ 1440). A congregation founded by the Ven. Mechtildis in 1654, and approved by Innocent XI in 1676, was devoted to the perpetual adoration of the Bl. Sacrament.

In our country the Benedictine nuns, established within the last 70 years, have grown in number and do meritorious work in parish schools and academies. But their

29 Cfr. Wilpert, *Die gottgeweihten Jungfrauen,* 1892.

30 Migne, *P. L.,* 67, 1099 ff.; 1107 ff.

31 *Ibid.,* 72, 873 f.

32 Mansi, *Coll. Conc.,* XII, 366.

33 *Ibid.,* XIV, 64 (can. 73).

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vows are, now at least, simple, though perpetual, and because of the nature of their work papal enclosure is not imposed on them. Outside of special Apostolic indults they are not under the jurisdiction of Benedictine abbots, but under that of the Ordinaries of the dioceses. Neither do they elect an abbess, but a mother superior.[84]

The great *Mendicant Orders* of St. Francis and St. Dominic also had sisterhoods following their respective rules. St. Clare was vested by the seraphic Saint himself with the tunic of the order, March 18, 1212. This was the beginning of the *second order* of the "Poverello" of Assisi, but the code proper of the Clarisses was that which combined the second (1247) and third rule (1253) and remained the fundamental constitution for all Franciscan nuns who take solemn vows and are subject to the Friars Minor. Besides these St. Francis established a rule for persons remaining in the world, who were called *Tertiaries*. Towards the close of the thirteenth century some of these Tertiaries commenced to live in common and were therefore called *Tertiaries Regular*. These were united with the first order of the Friars Minor by Leo X, in 1512, and are therefore an order of *moniales* with solemn vows. The same Pope allowed *Tertiaries* to exist *with simple vows* and in community. These follow the rule of St. Francis, as approved by Nicholas IV. Lastly there was a class of Tertiaries who did not live in common but with the permission of the bishop took one or three vows and wore the religious habit.

Pius V, by his Constitution "*Circa pastoralis,*" of May

84 The Catalogue O. S. B. of 1910, p. 710 f., gives the total number of "Black" Benedictine Sisters as 8360, of whom only 411 are exempt. Most of those not exempt (2214) live in the U. S. Most probably the number has, since 1910, increased to 3000.

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29, 1566, compelled all nuns with solemn vows to live in enclosure, and furthermore decided that all Tertiaries, or "those who are called of the penance"— thereby striking a blow chiefly at the aforesaid Tertiaries of St. Francis — should make solemn vows and be obliged to observe the enclosure.[35] But conditions were stronger than the Pope. Despite all the penalties threatened, new congregations sprang up. For a long time the S. C. EE. et RR. was wont to approve the rules of such congregations with the clause: "without however approving the institute itself."[36] This custom was tenaciously followed up to the beginning of the 19th century, when so many deserving communities sprang up that Rome could no longer withhold formal approbation.

But to return to the Franciscan Sisters. It is astonishing to see how many branches sprang from that productive tree. One of them was that of the sisters of *St. Elizabeth,* which existed in great numbers in the 16th century. They wear sometimes a brown, sometimes a grey habit (*soeurs grises*). It is impossible to name them all, but we must mention at least the institute of Sisters founded by P. Theodosius Florentini under the name of "Holy Cross" or "*Mercy-Sisters of the Holy Cross,*" whose seat is at Ingenbohl,[37] and the "School Sisters of the Holy Cross," at Menzingen, both in Switzerland.

Similar to the orders mentioned, that of *St. Dominic* also had a *second* and *third* order for women. The former was probably founded in 1217 in Rome, whilst the latter was established by Munio di Zamora and ap-

35 Cfr. Pius V, "*Lubricum vitae genus,*" Nov. 17, 1568, which compelled male congregations to take solemn vows.

36 Bened. XIV, "*Quamvis iusto,*" April 30, 1749, § 5.

37 These Sisters enjoy some exemptions, for instance, in the choice of their confessors, etc.

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proved by Innocent VII (1405) and Eugene IV (1439). Prominent among the Tertiaries of St. Dominic are the "*Mantellatae*" or Poor School Sisters of the Third Order of St. Dominic.

The rule of *St. Augustine* was followed by the order of nuns established by St. Birgitta of Sweden in 1344, the constitutions of which were approved by Urban V (1379). The *Ursulines* were founded by St. Angela Merici in 1535, and appear as an order with solemn vows under the rule of St. Augustine in 1612. The same rule is the foundation of the order founded by St. Francis de Sales and St. Francis de Chantal, in 1610, and known as *Visitation Nuns*. In our country they are the only nuns with solemn vows.

The congregation founded in 1635 by St. Vincent de Paul as *Filles de la Charité*, or *Sisters of Charity*, spread widely over the world and gained universal approbation by their works of charity. Of a very charitable character is also the order of the *Sisters of the Good Shepherd*, an offspring of an older sisterhood, the *Bon Secours*, founded in 1644.

Chiefly for educational purposes were intended the institute of the "*Sorores Anglicae*" or English Ladies, who had a peculiar fate, as may be seen from Benedict XIV's Constitution "*Quamvis iusto*," of April 30, 1749. Related to them are the *Loreto Sisters* (1822) and the "*Congregation of Irish Sisters of Charity*" (1836). To these may be added the *Notre Dame Sisters*, the *Sisters of St. Joseph* (1805), the *Sisters of the Precious Blood*, etc., etc.

Last, but by no means least, may be mentioned the "*Ladies of the Sacred Heart of Jesus*," founded by Bl. Magdalen Sophie Barat, in 1800, and approved by Leo XII, 1826. These "Ladies with the hearts of dragoons"

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have flourished in the U. S. in consequence of the zeal of Madame Duchesne.

If we omitted to mention the *military orders,*[38] it was for the obvious reason that they are no longer of importance.

After this brief summary notice may be taken of the differences between the various organizations. Up to the foundation of the Society of Jesus the *religious state* was considered to be founded on solemn vows or profession, and until the middle of the last century there was generally but one profession in the religious orders (except the Jesuits), and this a solemn one.[39] The religious state even now requires the *three vows* embodied in the formula of profession which binds the members to their community. Hence congregations in which only one vow, for instance, that of obedience, is taken, are not religious congregations, nor do they partake of the religious state.[40] On the other hand it is now immaterial whether they are congregations in which solemn or simple vows are made, either pontifical or diocesan institutes, as long as profession of the three essential vows is made in a community approved by ecclesiastical authority, either supreme or inferior (bishop). But it is not without reason that orders, *i. e.*, religious organizations with solemn vows, are of higher rank and more esteemed by the Church. For they are of a more stable nature and have a long-standing tradition in their favor. This we say, not to disparage the congregations, but as canonical truth. The very fact that the Church has granted to the regular

38 The *Order of St. John*, or Maltese Knights, was founded in 1048, that of the *Knights Templars* in 1119, that of the *Teutonic Knights* in 1190; others were established in different countries; cf. Funk, *Manual of Church History*, Engl. Trans., 1913, I, 375 f.

39 "*Neminem latet*," March 19, 1857; "*Perpensis*," May 3, 1902.

40 Can. 673, § 1.

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orders exemption, which she has withheld from the congregations (except by special indult), shows her intention. A special indult was given to several important congregations, *v. g.*, the Redemptorists and the Passionists.[41]

§ 6. EXEMPTION

The Code tells us that "regulars are exempt from the jurisdiction of the Ordinary of the diocese," and that by the name of regulars must be understood religious of an order or religious organization in which solemn vows are taken.[42] In these words is contained the institute of exemption, which has a history of more than twelve centuries and an eventful development in a secular as well as in an ecclesiastical respect, which finally led to the legal recognition of singly granted privileges as a juridical entity. A brief historical review[43] may not be amiss and seems necessary to understand exemption.

1. Up to the beginning of the seventh century the general law of the Church may be said to be embodied in the words of the Council of Chalcedon: "No one is allowed to build or erect a monastery or oratory without the consent of the bishop of the city; all the monks living in that city or country should be subject to the bishops."[44] Whether this injunction was always carried out, we do not know; but it is certain that *Gregory the Great* (590–604) insisted upon the right of the diocesan bishop over monasteries and monks. For he emphatically states that the bishop is the competent judge in all causes of

41 Also to the Missionary Fathers of the Sacred Heart; cfr. Vermeersh in the *Cath. Encycl.*, XII, 758.

42 Cfr. can. 615; can. 488, 2, 7.

43 Cfr. Fabre, *Etude sur le Liber Censuum de l'Eglise Romaine*, 1892; *Archiv. für Kath. Kirchenrecht* (Hueffner), 1906–1907; Schreiber, *Kurie und Kloster im XII. Jahrh.*, 1910 (in Stutz, *Kirchenrechtl. Abhandl.*, 65–68.

44 Can. 4, cf. c. 10, C. 18, q. 2.

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monks and nuns, and that he has to watch over their conduct, punish and correct abuses, because he will have to give an account to God for that part of his flock as well as for the others.[45]

On the other hand he defends the rights of the monasteries and their superiors in a letter to Maximianus of Ravenna,[46] where he says that the brethren have the right to elect an abbot from among themselves, except in case no one worthy of that office can be found in the monastery; that the bishop has no right to meddle in the temporal administration, revenues, property, documents, of the monastery, and should not charge the monastery with taxes nor invade it by any fraudulent action. The privilege of exemption we cannot find in Gregory's letters, though some think it is there.[47] Gregory's rules on the monastic life do not differ essentially from those laid down in St. Benedict's Code.[48]

2. But we are approaching a period, and it is only twenty-four years remote from the death of Gregory, which foreshadows the beginning of real exemption. *Bobbio,* a monastery founded by St. Columbanus on the Trebbia, was apparently troubled and molested by the Bishop Probus. Abbot *Bertulfus,* the second successor of the holy founder, seeking protection against the vexatious bishop, betook himself to Rome, where Honorius I, on June 11, 628, granted him a charter of freedom in these plain terms, "No bishop shall rule, by whatever right, in the aforesaid monastery."[49] This sounds like real exemption and may justly be called the first privilege

45 Gregory I, *Registrum Epp.* (Ewald-Hartmann), 1891, IX, 203; V, 4; VIII, 8; IX, 114; X, 3, 9; XII, 6; XIV, 16.

46 *Ibid.,* VIII, 17; cfr. V, 49; III, 3; VII, 10.

47 *Arch. f. K.-R.,* 1906, p. 314; but Reg. IX, 16 is not to the point.

48 *Reg.,* c. 64.

49 Cfr. *Vita Bertulfi,* n. 6 (Migne, 87, 1063); Jaffé, *Regesta Pontiff.,* ed. 2, n. 2017.

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of its kind. The number of such privileges from the beginning of the seventh to the middle of the ninth century is small, though some English and Frankish monasteries were given extensive exemptions. Weremouth and Melmesburg[50] received such from Sergius I (687–701) and Fulda[51] from Zachary I (741–752). The latter exempts the foundation of Sturmi from every foreign jurisdiction and subjects it to that of the Apostolic See.

3. The ninth century, and especially the pontificate of Nicholas I (858–867), witnessed an increase in the number of privileges granting exemption to monasteries. Forty-nine such privileges were given from 855 to 900 to different Frankish monasteries. As has justly been pointed out, there were good reasons for seeking and granting such papal exemptions.[52] For during that period of internal strife and feudal struggles the secular powers could offer but scanty security and protection, and the *advocati* or protectors whom Charlemagne set over the monasteries as lay-lawyers and guardians, often betrayed their protegés and ransacked the monastic property. Furthermore, there was a feature peculiar perhaps to Frankish, or let us say, Germanic soil, viz.: the idea of *absolute landownership,* which claimed full and independent control over a church or altar built on the ground of the owner. Hence more than one monastery was in the hands of the king or of a bishop or vassal upon whose land the monastic church with the monastery had been built. Although this right claimed by the owner was directed chiefly to the temporal administration, yet it gradually led to interference in spiritual rights, especially the election of superiors, and thus jeopardized the free

50 Jaffé, *l. c.*, nn. 2106, 2140.

51 This privilege, formerly doubted, is now generally admitted as genuine; it is contained in Migne, 89, 954.

52 *Arch. f. K.-R.*, 1906, p. 635.

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election of abbots.[53] We said this feature was *perhaps* peculiar to Germanic soil. The Celtic race of *Ireland* shows a similar development,— namely, a dual system of tribal claims. For we find, says Bury,[54] "that in some cases the proprietor did not make over all his rights to the ecclesiastical community which was founded on his estate, but retained, and transmitted to his descendants a certain control over it, side by side with the control which the abbot exercised." Besides, there were monasteries in which a direct family right of inheritance to the abbey was established, so that the abbot could be chosen only from the founder's kin. Such a system was ill-fated and especially ill adapted to Benedictine government. Lastly, more than one bishop, either princely landlord or mere Ordinary of a diocese, who, being protected by the *brachium saeculare,* wielded almost absolute power, did not scruple to attack the property and quiet life of the monks,[55] who were esteemed by nobles and peasants alike. The history of Cluny bears out this statement.

4. Having mentioned these historical facts, we are ready to grasp the tendency of monastic bodies seeking the *protection of St. Peter* (*i. e.,* the Apostolic See),[56]— a formula occurring in papal privileges ever since the beginning of the tenth century. The regesta sometimes exhibit entries like this: "*monasterium tuendum suscipit, bona et privilegia confirmat, iura defendit.*" In most of these briefs a penal sanction is added against the violators of the papal injunction. Furthermore a *census* or tribute, five or two *soldi,*[57] or a *byzantinum,* or some other

53 Loening, *Geschichte des deutschen Kirchenrechts,* 1878, II, 374 f.

54 *Life of St. Patrick,* 1905, p. 174 f.

55 Ancient monastic lectionaries contain Mass-formularies such as: "*Contra episcopos male agentes,*" or simply: "*Contra malos episcopos.*"

56 Jaffé, *l. c.,* n. 3466 and *passim.*

57 The value of a *solidus,* if of

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kind of money, was sometimes (not regularly) imposed on the monasteries which were placed under papal protection. The *ratification* of the monastic property was given both in general terms and by an enumeration of single possessions. Sometimes the briefs contain a description of the site and the name of the original donor.

As to the *privileges* granted by these papal constitutions, there is no uniform and constant tenor or formula, at least up to the time of Alexander III (1159–81). But it is safe to say that most of the privileges contained the *right of freely electing the abbot,* which was of paramount importance at a time when investiture became dangerous. Occasionally *exemption from the coercive power of the bishop* was explicitly stated in terms like these: "*ut nullus in ipsum monasterium audeat et praesumat sententiam excommunicationis inferre,*" or, "*a nullo possint interdici vel excommunicari nisi a Romano Pontifice.*" [58] Such a formula as this: "*ut monasterium in nullo alicui nisi tantum apostolicae ecclesiae respondere teneatur et ab omni alia jurisdictione et subjectione liberum sit et exemptum,*" must be taken to mean full exemption. In some privileges, *e. g.,* one granted by Pope Marinus (942–946), we also read of exemption from the duty of attending the diocesan synod.[59]

5. Fully to understand the sometimes heated controversies between bishops and abbeys we must consider two more features which bear more or less directly on the question of exemption: tithes and pontificals. Ever since the sixth century *tithes* were enforced and formed part

gold, would have been about $5.30, but others (Hodgkin, *Italy and Her Invaders,* I, 778) give it only as $3.00 or twelve shillings; cfr. also Du Cange, *Glossarium,* s. v. "*Solidus*"; the *byzantinum* introduced by Justinian, is nothing else but a gold solidus.

58 Jaffé, *l. c.,* nn. 3800, 4420; Migne, 137, 334; 143, 1327.

59 Jaffé, *l. c.,* nn. 3624, 3025; Gattula, *Hist. Cass.,* I, 94.

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of the episcopal or ecclesiastical revenues which the faithful were obliged to pay to the church.[60] It is a very interesting canonical question whether they were paid to the church or to the altar. This was an issue at the time of Abbo of Fleury (+ 1004), as we learn from his writings. If these "*dimes*" were given to the churches, the monks, as proprietors of the same, could legally claim them, and were sometimes even authorized to do so in the papal briefs.[61] But if the donor's intention could be proved to be directed exclusively to the altar, the tithes were supposed to belong to the bishop, as its consecrator. This latter view was defended by Arnulf, bishop of Orleans, and some of his followers, but justly rejected by Abbo of Fleury, who calls the claim of the bishops a "modern heresy" and an "egregious pretext" for giving the offerings of the church to the horses and dogs of lay people, instead of to the monks. He also remarks, most reasonably, that a church without an altar is no church, but a common house.[62] Abbo gained his point with the Capets, and also with Pope Gregory V, a zealous promoter of Clunian reform. As noted above, the right to the tithes was often expressly defined in the bull of exemption.

The other bone of contention was the *pontificals*. The reader should remember that the abbots were at first, in fact for centuries, not endowed with the priestly character, and hence to speak of pontificals for the first three centuries, up to the beginning of the ninth, would be an anachronism. However, Pope Eugene I, in a synod held at Rome in 826, ordered that the abbots

60 The synod of Macon, 585, can. 5, ordered their payment under threat of censures, and later synods and royal capitularies enforced them.

61 For Cluny, cfr. Migne, 151, 291, 485 f.

62 *Ep. ad G.*, in Migne, 139, 440 ff.

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should be priests in order that they might be able to "heal the sins of their brethren."[63] Here jurisdiction *in foro interno* is plainly meant. But Fleury received a more extensive power from Pope Benedict VII (974–983), *viz.*, that of absolving men and women of the order.[64] About the same time we hear of papal privileges directly touching the right of pontificals. First, indeed, negatively rather than positively. Thus concessions were made that the diocesan bishop could perform pontifical functions only at the direct invitation of the abbot,[65] or that the abbot might invite any bishop to perform them, provided he was no heretic or schismatic, or that he might be blessed by any bishop.[66]

As to the right of *pontifical dress* we first read of *dalmatics* and *sandals* being granted by John XIII (965–972) to the abbot of St. Vincent of Metz.[67] The gloves or *chiroticae* were added in a privilege of Cielo d'Oro (Pavia) for "the honor of St. Peter" and "the most holy Augustine whose relics were there preserved." The Abbot of Brevnow (Bohemia) in 993 received the privilege of using mitre, gloves, sandals, maniple, and belt.[68] The same right was granted to the abbot of Reichenau, together with the prerogative of being consecrated *more episcopali* by the Pope.[69]

Thus pontificals began to be given to abbots in the last decades of the tenth century. The privilege became more frequent in the tenth and common in the twelfth century. That the bishops were not too highly pleased with this development we know from the chroniclers, one of whom,

63 Can. 27, Mansi, *Coll. Conc.*, XIV, 1000.

64 Jaffé, n. 3803; Sackur, *Die Cluniazenser*, 1892, II, 272 f.

65 Jaffé, n. 3907 (Fulda, A. D. 999).

66 Jaffé, n. 3826 (Cielo d'Oro, Pavia, A. D. 986); 3764 (S. Salvatore, Pavia, A. D. 906).

67 Jaffé, ed. 1, n. 2869, n. 2900.

68 Jaffé, n. 3826, n. 2946 (1 ed.).

69 Hermannus Contractus, *Chronica ad an.* 1032, Migne, 143, 253.

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Herman the Lame of Reichenau, tells us [70] that the bishop of Constance, Warmannus, protested to the Emperor Conrad II so long and vigorously that the abbot was compelled to deliver the papal bull together with the pontifical insignia to be burnt on Holy Thursday, 1033. Cluny had a fight with the bishop of Macon for many years, and some bishops went so far as to deny the validity of such papal privileges.

6. However, all this resistance proved useless. In the XIIth century papal protection was granted not only to single monasteries, as had been the case in former centuries — Cluny being the sole "order" which was exempt as such — but also to entire congregations, for instance, those of Vallombrosa,[71] and Camaldoli.[72] This same century is perhaps the most important for the historico-canonical investigation into the meaning of exemption, which now enters the decretals. The subject is not free from controversy. It cannot be denied that the regulars sometimes stretched the papal protection further than the grantor had intended, wherefore the Roman Court was more than once asked what the papal protection included. Many monasteries which "delivered" [73] themselves to papal protection, generally, though not always, paid a certain tax or tribute (*census*), which was regarded as an indication (*indicium*) that they were under papal protection, but not that they were papal property, in the sense of private property. The relation between such monasteries and the papal Court was similar to that between a private proprietor and the State (eminent domain). In many briefs recurs the formula: "*ad indicium per-*

70 *Chronica* (Migne, 143, 235).

71 Migne, 200, 569, 1067; Jaffé, *l. c.*, nn. 4053, 8428.

72 Mittarelli, *Annal: Camaldul.*, II, App. 236.

73 This was called *traditio*, and the monasteries thus delivered were called *monasteria tradita* or *commendata*.

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ceptae a Romana ecclesia libertatis (or *protectionis,* or *iuris* or *proprietatis*), *bisancium unum quotannis Lateranensi palatio persolvetis.*" What does that "*indicium libertatis*" mean? was asked of Alexander III. He answered the question in a well-known decretal,[74] in which he says that, as not all monasteries placed under the special jurisdiction (*iuris*) of Blessed Peter pay an annual tribute, so neither are all the monasteries which pay that tribute free from episcopal jurisdiction, and therefore the wording of every privilege must be weighed, so that every church which pays tribute and is under the special jurisdiction of Bl. Peter and pays the annual tribute as a token of the liberty received, may be looked upon as exempt; whereas, on the other hand, a church which simply pays the annual tribute as a token of the protection it receives is not *eo ipso* to be considered free from the jurisdiction of the Ordinary." In order to understand this decision we must remember that in the XIIth century a distinction was made at the Roman Court between *specialis tutela* and simple tutelage. The former was connected with the clausula added in the privileges: "*salva sedis apostolicae auctoritate,*" whilst the privileges for simple tutelage had the clause: "*salva sedis apost. auctoritate et dioecesani episcopi canonica iustitia.*" From this it follows that there were three kinds of religious bodies: (a) such as had no papal tutelage or brief at all, and these were very few; (b) such as enjoyed the papal protection, but were nevertheless more or less subject to the Ordinary's jurisdiction, and finally (c) such as were under the special tutelage of the Apostolic See and therefore exempt from the coercive power, especially of the diocesan bishop. The answer given by Alexander was authentic, but not novel, as some have

[74] C. 8, f, V, 33; cf. c. 14, 1 b; c. 10, 6°, V, 7.

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claimed.[75] For its obvious meaning is simply to warn the religious not to read more into the text of the papal brief than the legislator would naturally grant, and to give the legates a key to the interpretation of papal documents. A similar decision is that of Boniface VIII, who, instead of using the term *specialis,* says that the document must treat "*principaliter*" of exemption.[76] This again means that the whole tenor of the papal privilege must be examined, not only the terms *tutela, protectio, libertas,* etc.

7. Such is the theoretical aspect of exemption as we find it in the Decretals, which, however, barely touch its *extent.* The *First Lateran Council* (1123) laid down general rules governing the relation between diocesan bishops and regulars living in their territory. Three canons especially regulate that matter. Abbots and monks are not allowed to administer the Sacraments of Penance and Extreme Unction, nor to visit the sick, nor to say Mass publicly; the consecration of chrism, holy oils and altars, and the ordination of clerics belong to the diocesan bishop; religious priests in charge of souls must be appointed by the Ordinary, to whom they must give an account of their work and of what belongs to the bishop; whatever services or tributes the monasteries were wont to render to the Ordinary since the time of Gregory VII, they must render also in future; nor does the prescription of thirty years hold good for abbots or monks.[77] In another canon (not found in all editions) subjection and obedience to the bishops as their teachers and pastors is inculcated for the monks as a paternal tra-

75 Schreiber, *l. c.,* I, 141 ff.; cfr. *Studien O. S. B.,* 1911 (Vol. 32), p. 693 ff., where a correct interpretation is given.

76 C. 10, 60, I, 7.

77 Mansi, *Coll. Conc.,* cc. 17–19, Vol. XXI, 285 f.

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dition.[78] This canon embodies the idea of St. Bernard, who was not inclined to favor exemption. Yet it was his order that some years after his death received most extensive privileges. Urban III granted the Cistercians of Clairvaux absolute freedom from the coercive power of the bishop, and other popes granted them the prerogatives of calling in any Catholic bishop for pontifical functions.[79] Similar privileges were granted to other monasteries.

It was but natural that the *military orders* (the Knights of St. John, the Maltese Knights, the Knights Templars, etc.), should, especially during the time of the Crusades, be greatly favored by the popes, who granted them extensive exemptions, in which even their oblates shared.[80]

8. Exemption became more widespread and hotly contradicted when the great *Mendicant Orders* arose. It lay in their very nature that their activity should extend to people and clergy alike, and that they should come into contact with the diocesan bishops. Their labors in the pulpit and in the confessional required approbation either by the Ordinary or by the Holy See. The latter decidedly favored the Orders because they were true reformers, and first granted them the old privilege of exemption from the coercive power of the Ordinary by deciding that no episcopal interdict was to touch the churches of the Mendicants,[81] that the excommunication of a religious by his superior was to be acknowledged by the bishop,[82] and that absolution from censures imparted by religious superiors to their subjects was valid without any further interposition.[83] These privileges, and especially that

78 *Ibid.*, col. 300.
79 Jaffé, nn. 9728, 9756.
80 *Archiv. für K.-R.*, 1907 (87), p. 270 ff.
81 Potthast, *Regesta Pont. Rom.*, 1874, I, n. 6808.
82 *Ibid.*, n. 7123.
83 *Ibid.*, n. 7901.

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granted by Martin IV ("*Ad fructus uberes,*" Dec. 13, 1281) provoked opposition on the part of the higher and lower clergy. This document[84] granted to the general and the provincials of the Franciscans and Dominicans the right to examine and approve by Apostolic authority their priests for preaching and hearing confessions, without interference from any bishop or parish priest. This general privilege was limited by Boniface VIII and Clement V to the provinces and cities where the Mendicants had settled, and required them to obtain the permission of the local prelate or pastor.[85] But the validity of confessions was nowhere affected.[86] The same decretal enacts the freedom of burial, not only for the Mendicants themselves, but also for those who wished to be buried from or in their churches or cemeteries, provided, however, that the *quarta funeris* was paid to the parish priest.

9. Thus, up to the *Council of Trent,* the chief aim of exemption may be described as *withdrawal of religious from the punitive or coercive power of the diocesan Ordinary.*[87] For the monasteries or congregations of the Benedictine Order another point was of paramount importance, namely, that the *freedom of election,* as enjoined by the Rule, should be guaranteed by the papal power, and we find this point insisted upon in nearly all the privileges. The exercise of *pontifical functions* and the *right of tithing* were also mentioned among the privileges granted by the Holy See, as well as the prerogative to call in *any* Catholic bishop to perform the pontifical functions of consecration and ordination.

However, these briefs of exemption were not always

84 *Ibid.,* Vol. II, n. 21821: "*generali et provincialibus.*"

85 Cfr. c. 12, X, V, 38.

86 C. 2, Clem. III, 7, de sepulturis.

87 Schreiber, *l. c.*

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of the same extent; some were wider, some narrower, and hence the bearing of each had to be judged from the wording of the text. At first, as we have noted, such privileges were, as a rule, granted only to single monasteries. But the centralized organizations of Cluny, Camaldoli, Vallombrosa, and Citeaux paved the way for the still more centralized Orders of the Mendicants, who thus found the soil prepared for a fuller and more extensive exemption. But a "cut and dried" notion of exemption cannot be inferred from the papal documents of that period, as is evident from the quarrels between the secular clergy on the one hand and the regular clergy, especially the Mendicants, on the other, which arose everywhere in connection with the Constitution of Boniface VIII, *"Super cathedram"* (1300).[88] Bishops, parish priests and university professors tried to curtail the privilege of exemption, whilst the regulars vigorously fought for their rights. Both sides were guilty of excesses. The Council of Constance and Basle drew up a series of propositions aiming at a restriction of exemption, but without success. The same (fifteenth) century witnessed the rise of new monastic congregations devoted to reform of the religious life, and these were fully exempted by the popes. Thus Eugene IV granted to the brotherhood founded at St. Justina of Padua (1412) complete exemption from the jurisdiction of the Ordinaries, and from all charitable subsidies and other like obligations.[89] Sixtus IV, a former General of the Franciscans, showed great favor to the Mendicants,[90] especially the Friars Minor to whom, in the so-called *"Mare Magnum Minorum"*

88 C. 2, *Extrav. Comm.*, III, 6, de sepulturis.

89 June 30, 1436.

90 *Arch. f. K.-R.*, 1907 (87), p. 626; Pastor, *Geschichte der Päpste*, II, 536.

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(Aug. 31, 1474) he renewed and ratified all the privileges granted them by his predecessors.

10. The *Council of Trent* strove to cut off some exaggerated prerogatives, without, however, touching the substance of exemption. A distinction was, moreover, drawn between cases in which the regulars were subject to the Ordinary as such, and cases in which they were bound to obey him "as delegate of the Apostolic See." The former class comprises chiefly matters of ordination, hearing the confessions of seculars, the publication of censures and the observation of feast-days, the punishment of regulars who were scandalously delinquent outside their monasteries, preaching and the promulgation of indulgences.[91] There were but few cases in which the regulars were subjected to the Ordinary as delegate of the Apostolic See.[92] It is noteworthy that the Council refused to decide that all regulars, *i. e.*, religious with solemn vows,— only such existed at that time, with the exception of part of the Society of Jesus — were *ipso iure* exempt, or to define what exemption really implied. The Council seems to have taken for granted that most of the regulars were actually exempt and left the *quaestio iuris* untouched. As a consequence, the ancient controversies between bishops and monasteries about exemption continued after the Council. The Austrian bishops discouraged exemption, and the Bishop of Constance refused to acknowledge the written documents of Swiss monasteries which claimed exemption. Besides there are many small convents (*parvi conventus*) in which the regular discipline

91 Sess. 23, c. 2, de ref.; sess. 23, c. 15, de ref.; sess. 25, c. 12, de reg.; sess. 25, c. 14, de reg.; sess. 6, c. 3, de ref.; sess. 5, c. 2, de ref.; sess. 21, c. 9, de ref.; Bened. XIV, *De Syn. Dioec.*, IX, 15, 4 ff.

92 Sess. 5, c. 1, de ref.; sess. 25, cc. 5, 9, de reg.; sess. 6, c. 3, de ref.; cfr. Bachofen, *Compendium Iuris Reg.*, p. 327 f.

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had declined and which, therefore, seemed to invite interference by the bishop. Urban VIII and Innocent X decreed that convents in which at least twelve religious could not be maintained were subject to episcopal visitation, correction, and jurisdiction, the bishop in such cases acting as delegate of the Apostolic See.[93] However, these papal decrees affected mostly houses existing in Italy and the adjoining islands; elsewhere the houses of regulars continued to enjoy exemption, as far as the Tridentine laws permitted and the bishops did not interfere. Leo XIII (*"Romanos Pontifices,"* May 8, 1881) allowed the regulars living in England and the U. S., although there be but two or three in a missionary residence, to be exempt in all matters not pertaining to the care of souls.

This, then, is briefly the history of exemption, which has now received at last a formal acknowledgment for all regulars, *i. e.*, members of religious orders who take solemn vows and are, in the majority at least, of clerical rank.

11. Before concluding this chapter it may be useful to discuss the view of the glossators of Gratian's Decree concerning *exemptio a lege dioecesana* and *exemptio a lege iurisdictionis.* The former was vindicated to the monasteries, but not the latter. Exemption *a lege dioecesana,* according to the glossators, comprises immunity from taxation, cathedraticum or the third or fourth part of the tithes, and freedom from being called to the diocesan synod, whereas the *lex iurisdictionis* comprises the right of ordaining the clergy and consecrating altars, churches, and virgins, the power of correction and of

[93] Urban VIII, June 21, 1625; Innocent X, *"Instaurandae,"* Oct. 15, 1652; *"Ut in parvis,"* Feb. 10, 1654; Benedict XIV, *De Syn.*, III, 2, 1 ff.

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suspending and judging criminal and civil cases.[94] The reader may judge for himself whether this distinction has any foundation in the privileges granted by the Apostolic See. These glossators (Huguccio, Ioannes Teutonicus, etc.) must have read very few papal briefs on that subject. Abbo of Fleury, for instance, never denied that the monasteries were obliged to pay the tithes established by law or custom for their churches, but his monastery was exempt in many other respects, especially from the obligation of having its clerics ordained by the diocesan Ordinary. Besides, the main element of all exemption privileges was freedom from the coercive power of the bishops. Nevertheless, the distinction explained above has been retained by later canonists,— a remarkable example of the power of imitation.

94 Cfr. the Gloss on c. 1, C. 10, q. 1; on c. 34, C. 16, q. 1; c. 6, C. 18, q. 2; Benedict XIV, *De Syn. Dioec.*, I, 4, 3.

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COMMENTARY

After these preliminary notes we now continue our commentary. The first five canons of Part II treat of the definition of the religious state, of the different terms occurring in the Code, and of the effect the Code has upon the rules and constitutions of religious and precedence among them.

DEFINITION OF THE RELIGIOUS STATE

CAN. 487

Status religiosus seu stabilis in communi vivendi modus, quo fideles, praeter communia praecepta, evangelica quoque consilia servanda per vota obedientiae, castitatis et paupertatis suscipiunt, ab omnibus in honore habendus est.

Here we have both a *definition* and an *encomium* of the religious state. The religious state is a permanent mode of living in common, by which the faithful, besides obeying the commandments, also observe the evangelical counsels embodied in the vows of obedience, chastity, and poverty. The *encomium* or praise of that state is expressed in the words: *it is to be honored by all.*

To begin with the latter, it is but truth to say that it has been the *constant* and *universal teaching of the Church* ever since the religious state commenced to exist, that it is deserving of honor. St. Jerome calls the monks

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and virgins "the flowers and ornaments of the Church."[1] His controversy with Jovinian is well known.[2] St. Augustine extols the monastic life as the best known in the universe.[3] Cassiodorius, the once powerful statesman under Theodoric the Great, says of it:[4] "A heavenly life upon earth, an imitation of the faithful angels, to live spiritually in the flesh, and not to love the vices of the world, a truly pleasant paradise, in which grow so many fruits of virtues." Alcuin (804) exclaims: "O happy life of the monks, pleasing and appeasing to God, and loved by the angels."[5] St. Bernard of Clairvaux compares the monastic orders to the angelic choirs and calls the religious life the shortest route to heaven.[6]

But there were also *dissentient voices.* One was that already noticed, of the heretic Jovinian. In the thirteenth century violent attacks were made on the religious state by a powerful and influential party, of which *William of St. Amour* was the recognized leader.[7] These new opponents, however, were, at least theoretically, silenced by *St. Thomas of Aquin,*[8] who wrote several smaller treatises against them and set forth the theological viewpoint with great force in his immortal "Summa" (Qa Qae). *St. Bonaventure* employed his truly seraphic pen against the adversaries of the Friars Minor.[9] *William's* errors were condemned by Alexander IV in more

1 Cf. Migne, *P. L.*, 22, 489.

2 *Ibid.*, 23, 211 ff.; however, exaggerations occur in St. Jerome's writings; cfr. Bardenhewer-Shahan, *Patrology*, 1908, p. 465.

3 Migne, *P. L.*, 37, 372, 1277.

4 *Ibid.*, 70, 734.

5 Migne, 100, 298.

6 *Ibid.*, 182, 912; 183, 595.

7 Procter, O. P., *The Religious State by St. Thomas Aquinas*, London, 1902, p. III.

8 *S. Thomas, Contra Retrahentes a Religionis Ingressu; Contra Impugnantes Dei Cultum* (Paris ed., t. XX; English by Sands & Co., London, 1903).

9 *Liber Apol. in eos qui Ordini Min. Adversantur; Expositio in Reg. Fratrum Min.; De Paupertate Christi contra Guil.* (*opp.*, Lugd., 1668, t. VII).

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than one Constitution.[10] The diabolical errors of Wiclif were reprobated by Martin V and the Council of Constance.[11]

The *Pseudo-Council of Pistoja* (1786) could not refrain from attacking the monastic or religious state, against which it issued several decrees, which were proscribed by Pius VI in his "*Auctorem fidei,*" Aug. 28, 1794. The framers of these condemned decrees kindly permitted one order, *viz.,* that of St. Benedict, to exist, but pruned it to suit their Febronian-Josephinistic taste, allowing a certain amount of psalmody and a certain restricted capacity for the sacred ministry, abrogating the distinction between choir monks and others, rejecting the perpetual vow of stability, etc.[12]

We cannot help touching the attitude of certain followers of "*Americanism*" which was rejected by Leo XIII in his letter to Cardinal Gibbons, "*Testem benevolentiae,*" Dec. 25, 1898. As this papal document clearly shows, the depreciation of the so-called *passive virtues,* such as obedience and humility, led the champions of that unecclesiastical tendency to belittle those congregations which are devoted to the contemplative life, and to underestimate the religious state as such, which, they maintained, is not in harmony with the spirit of our times, inasmuch as the vows restrict human liberty too much and are adapted more to weak than to strong minds. All this, says Leo XIII, is opposed to the very nature of liberty, which is fostered by the religious vows and raised into a higher sphere; and contrary to the teaching of history. He calls attention to the fact that the first missionaries to the United States were religious, and that a statue has been publicly erected to one of them, Père Marquette.[13]

10 Denzinger, *Enchirid.*, n. 380.
11 *Ibid.*, 490–511; 520 f., 574, 665.
12 Denzinger, *l. c.*, nn. 1443 ff.
13 Cf. *Eccl. Review*, 1899, Vol.

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The Code's *definition of the religious state* comprises three elements: stability, vows, and the common life. Before entering upon a discussion of these points we note that the Code says: "*quo fideles.*" "Monks," solitaries or ascetics, were and are found in more than one pagan race, as among the Buddhists.[14] The essential difference between non-Christian and Christian asceticism lies, not so much in their extrinsic form,— for both tend to self-perfection by some kind of penance — but in the difference of their specific aims. Non-Christian asceticism aims at self-annihilation, Christian asceticism at love, as St. Thomas[15] so admirably states. "The Christian ideal is frankly an ascetic one, and monachism is simply the endeavor to effect a material realization of that ideal, or organization in accordance with it, when taken literally as regards its counsels as well as its 'Precepts.'"[16] Between counsels and precepts there is a difference of degree only, not of essence. For the end and aim of all Christians and, in fact, we may say, of every human being, is *perfection,* as Yahwe bade Abraham "walk before me and be perfect." This perfection consists in the love of God and men, which brings man to his eternal goal. However, aside from the love attained by the Blessed in heaven, there are diverse degrees of charity which we earthly pilgrims may arrive at; one is necessary for salvation, and therefore a matter of strict precept, whereas the other is merely a matter of counsel for those who desire to approach the ideal of perfection possessed by the Blessed. "Now it is in this effort that perfection

30, p. 406 f.; Card. Gasparri also refers to that document.

14 Cfr. Aiken, *The Dhamma of Gotama the Buddha and the Gospel of Jesus Christ,* 1900; *Idem* in the *Cath. Encycl.,* III, 32 f. Ascetics were found also among the Aztecs and Incas.

15 Procter, *l. c.,* Ch. II, p. 9.

16 *Cath. Encycl.,* X, 459 (Huddelston, O. S. B.).

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in this life consists, to which we are invited by the counsels."[17] This effort is a *striving* after perfection; but where and how is it to be made?

1. In a stable condition or *state,* for state implies a certain position which is not easily changed or moved, but quiet and favorably disposed. This can be brought about in movable and changeable man only by assuming a voluntary obligation to remain in the state once chosen.[18] Therefore it is absurd to say that religious have abdicated their freedom and natural liberty. The very act by which they enter the religious state is a voluntary one, performed with full deliberation. But it is also unreasonable to deny, with Bouix,[19] the necessity of the obligation insisted upon by St. Thomas. For no other tie is imaginable — except physical coaction, which has entirely ceased — that would bind a man to a state of life not prescribed by the Lord of life and death.

This state is called the *religious* state. Religion signifies, not any kind of worship, but the worship of God. It is that virtue by which man offers service and homage to his Creator. Therefore those are strictly called religious who give themselves entirely to the divine service, as a burnt offering so to speak,— a *holocaustum.*[20]

2. This offering is made by taking the *three vows* of poverty, chastity, and obedience. A vow is a promise made to God of a thing or action which we are not obliged to offer at all, or at least not to the extent or in the form promised. It has the character of a stable promise, and therefore is apt to produce or ratify the state chosen. The object of a vow is something not

17 Procter, *l. c.*, Ch. 6, p. 17; St. Thomas, *Summa Theol.*, 2a 2ae, q. 184.

18 *Summa Theol.*, 2a, 2ae, q. 183, a 1.

19 *De Iure Regularium*, 1857, I, p. 7.

20 *Summa Theol.*, 2a 2ae, q. 186, a. 1.

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merely good and lawful [21] in itself, but better or more noble. Lastly, a vow is something sacred because it partakes of the virtue of religion and has God himself for its direct aim and object. From these qualities follows the binding or obligatory character of a vow. It is a promise made to God with the special intention to do Him homage, and the man who makes this promise has the firm will to keep it unless prevented by unforeseen obstacles. That the three vows mentioned really and peculiarly belong to the religious state may be seen from what St. Thomas [22] says about them. They remove the obstacles that impede the road to perfection or love of God and men: (1) *poverty,* the disorderly inclination to gain and hold earthly possessions, (2) *chastity,* the impetuous aspirations of the flesh and human ties, and (3) *obedience,* the powerful love of oneself. Of the three, that of obedience belongs most peculiarly to the religious life, since by it man sacrifices his own will, and therefore everything, because obedience includes both poverty and chastity, for it is by his own free will that a man makes use either of his body or his goods.[23] From this we may understand why St. Benedict did not explicitly mention poverty and continence as special vows in his rule, for they are, partly at least, included in obedience.

3. But though a religious state which enjoins the three vows may and did exist among the ancient hermits, yet now-a-days the Church limits this state to a *life in common,* because a solitary life, unless assumed after due preparation or by a special divine grace, is full of dangers and illusions. Life in common, then, (cenobitic

21 The vow of Jephta (Jud. 11, 30) was lawful in itself but too indiscriminately made, its fulfillment — the killing of his daughter — was simply unlawful.

22 *Summa Theol.,* 2a 2ae, q. 186 (Procter, *l. c.,* Chs. 7–11, p. 18 ff.).

23 *Ibid.,* q. 188, a. 8.

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life), means a stable mode of living under the same rule and roof, although all the members may not be dwelling in the same convent or monastery or provincial house.

Canon 488

In canonibus qu. sequuntur, veniunt nomine:

1.° *Religionis,* societas, a legitima ecclesiastica auctoritate approbata, in qua sodales, secundum proprias ipsius societatis leges, vota publica, perpetua vel temporaria, elapso tamen tempore renovanda, nuncupant, atque ita ad evangelicam perfectionem tendunt;

2.° *Ordinis,* religio in qua vota sollemnia nuncupantur; *Congregationis monasticae,* plurium monasteriorum sui iuris inter se coniunctio sub eodem Superiore; *religionis exemptae,* religio sive votorum sollemnium sive simplicium, a iurisdictione Ordinarii loci subducta; *Congregationis religiosae* vel *Congregationis* simpliciter, religio in qua vota dumtaxat simplicia sive perpetua sive temporaria emittuntur;

3.° *Religionis iuris pontificii,* religio quae vel approbationem vel saltem laudis decretum ab Apostolica Sede est consecuta; *iuris dioecesani,* religio quae ab Ordinariis erecta, hoc laudis decretum nondum obtinuit;

4.° *Religionis clericalis,* religio cuius plerique sodales sacerdotio augentur; secus est *laicalis;*

5.° *Domus religiosae,* domus alicuius religionis in genere; *domus regularis,* domus Ordinis; *domus formatae* domus religiosa in qua sex saltem religiosi professi degunt, quorum, si agatur de religione clericali, quatuor saltem sint sacerdotes;

6.° *Provinciae,* plurium religiosarum domorum in-

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ter se coniunctio sub eodem Superiore, partem eiusdem religionis constituens;

7.° *Religiosorum,* qui vota nuncuparunt in aliqua religione; *religiosorum votorum simplicium,* qui in Congregatione religiosa; *regularium,* qui in Ordine; *sororum,* religiosae votorum simplicium; *monialium,* religiosae votorum sollemnium aut, nisi ex rei natura vel ex contextu sermonis aliud constet, religiosae quarum vota ex instituto sunt sollemnia, sed pro aliquibus locis ex Apostolicae Sedis praescripto sunt simplicia;

8.° *Superiorum maiorum,* Abbas Primas, Abbas Superior Congregationis monasticae, Abbas monasterii sui iuris, licet ad monasticam Congregationem pertinentis, supremus religionis Moderator, Superior provincialis, eorundem vicarii aliique ad instar provincialium potestatem habentes.

This canon explains the *terms* which are used in the Code in connection with the religious life.[24] They are the following:

1. *Religio* (institute) indicates a society, approved by legitimate ecclesiastical authority, whose members strive after evangelical perfection by observing the special laws of that society and by making public vows, either perpetual or temporary, the latter to be renewed when the time expires.

2. *Ordo* (order) denotes a religious organization in which solemn vows are taken. *Congregatio monastica* is a union of several independent monasteries under one superior. *Religio exempta* means a religious organization of either solemn or simple vows that has been with-

24 The translation of this canon is, on the whole, taken from the *Eccl. Rev.*, 1918 (Vol. 58), p. 141 f., by Very Rev. Fr. Stanislaus Woywod, O. F. M.

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drawn from the jurisdiction of the Ordinary of the diocese. *Congregatio religiosa,* or simply *Congregatio,* signifies a religious body in which only simple vows are taken; these simple vows may either be perpetual or temporary.

3. *Religio iuris pontificii,* or a religious pontifical institute, is a religious organization which has received from the Holy See either approval or at least a *decretum laudis. Religio iuris dioecesani,* or a religious diocesan institute, is a religious organization which has been instituted by the Ordinary and has not yet obtained a *decretum laudis* from the Holy See.

4. *Religio clericalis,* or clerical institute, means a religious organization most of whose members are priests; if they are laymen, it is called *religio laicalis.*

5. *Domus religiosa,* or a religious house, signifies the residence of a religious organization. *Domus regularis,* or house of regulars, is the house of an Order. *Domus formata* means a religious house in which reside at least six professed members, of whom, if there is question of a clerical organization, at least four must be priests.

6. *Provincia,* or province, is a combination of several houses of religious under one superior, constituting part of a religious Order or Congregation.

7. *Religiosi,* or religious, are those who have taken vows in any religious community; *religiosi votorum simplicium,* or religious with simple vows, are those who have taken vows in a religious Congregation; *regulares,* or regulars, are the professed members of an Order; *sorores,* or Sisters, are women who have taken simple vows; *moniales,* or nuns, are religious women with solemn vows, unless either by the nature or the context of the canons the term is to be interpreted otherwise. There are also nuns whose vows are by their rule solemn, but

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have for certain countries been declared simple by the Holy See.

8. *Superiores maiores* are the Abbot Primate, Abbots who are superiors of monastic Congregations, Abbots of Monasteries that are independent though belonging to some monastic Congregation, the Superior General of any religious organization, the Provincial Superiors and their Vicars, and all others who have the same jurisdiction as Provincials.

Some notes seem required. *Religio* is here taken as part and parcel of the *Christian religion,* or religious state, as in a sense signifying preëminently what religion broadly implies, *viz.,* worship or service of God. The etymological derivation of *religio* is given by Cicero [25] and adopted by theologians is from diligently treating and, as it were, carefully rereading (*re-legere*) the things that pertain to the worship of God. Religion in the sense of religious state, therefore, is nothing else but a concrete and emphatic, nay, we may say, exclusive occupation with divine things or at least things that have reference to God, inasfar as man's perfection is thereby most securely achieved.

But, since it belongs to the whole Church, a *religio* is not to be thought of without the *approbation* of the *legitimate ecclesiastical authority.* True, we do not read of any formal approbation of the rules of St. Basil or St. Benedict,[26] but if they had not been in conformity with the spirit of the Church, their existence would have been not only precarious but short. In the eleventh and twelfth centuries the founders of religious institutes

25 *De Natura Deorum,* l. II, c. 28: *"Qui autem omnia, quae ad cultum deorum pertinerent, diligenter retractarent et tanquam relegerent, sunt dicti religiosi ex relegendo."*

26 St. Gregory the Great (*Dial.,* II, 36) praises the rule of St. Benedict, but only as an ecclesiastical writer; the bull alleged by some is spurious.

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thought it necessary to seek the formal approbation of the Holy See, and the fourth Lateran Council [27] and subsequent laws made this step imperative,— which does not, however, mean that ecclesiastical approbation is required by divine law.[28]

Approbation involves two elements: an authentic judgment and power conferred on the religious superior to accept vows and receive members. The *authentic judgment,* which is generally held to be infallible, at least concerning religious orders and in its final stage, implies nothing else but a declaration that the institute is becoming, licit, and useful; or, as Suarez [29] says, it is a kind of canonization, by which the institute is declared holy. The *faculty* is required, because the superior must act as a public person or in the name of the Church, wherefore the vows accepted by him are called *public* vows.

There are, however, *different degrees* of approbation. Before stating the mode by which the Roman Court is now wont to proceed, it is necessary to distinguish between orders and congregations. *Orders,* or organizations with solemn vows, are not easily approved now unless they accept the rule of one of the ancient orders as their fundamental code, to which they may add their own constitutions.

Rule means the sum-total of the regulations which the first founder gave to his community, whilst *constitutions* are additions or by-laws which modify or explain the original code. Thus the various (fourteen) Benedictine Congregations all obey the Benedictine Rule and, besides, each has its own constitutions. Later orders, *e. g.,*

27 C. 9, X, III, 36; c. un. 6°, III, 17; c. 1, Extrav. Comm., III, 11.

28 Suarez, *De Statu Religioso,* I. II, c. 15, n. 2 (ed. Paris, 1859, t. XV, 192).

29 *Ibid.,* n. 13 ff.

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the Jesuits and Barnabites, call their original rule by the name of Constitutions.

Those modern *Congregations* which do not follow any of the ancient rules have Constitutions, not rules. But even if they follow a "rule," *e. g.*, that of St. Francis, they must have constitutions approved by the bishop or Holy See. As long as their constitutions are not approved by the Apostolic See, or have at least received the decree of recognition (*decretum laudis*) from the same authority, the institute is simply *diocesan,* subject to the jurisdiction of the Ordinary. And it matters nothing whether or not the members follow a rule already approved.

The Constitutions of a *monastic congregation* or of a branch of a clerical order require the papal *approbation,* but the procedure is not the same as for the approbation of religious congregations. For the former send their "Constitutions" to the S. C. Relig., which, after hearing one or more consultors, returns them with its remarks to the head of the monastic or clerical body concerned with the clause: *"ad triennium or quinquennium ad experimenti instar."* When the time thus set has elapsed, application for a further trial or for final approbation must be made, whereupon the S. Congregation gives its decision.

In the case of *religious Congregations with simple vows* the procedure [30] is as follows:

1. If the institute has only one or two houses, and no constitutions properly so called, the sacred Congregation sometimes issues a *letter* praising the institution of the founder or the scope of the institute. This document is nothing else but a recommendation and does not make

[30] *Normae secundum quas S. C. EE. et RR. procedere solet in approbandis Novis Institutis votorum simplicium,* Rome, 1901.

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the institute a papal one. However, we would not deny it the nature of a *religious* institute, provided episcopal approbation has been obtained.

2. The *decree of recognition* or praise, *decretum laudis,* is the first step by which the Holy See raises the institute to papal rank. This decree is granted after the institute has spread sufficiently and given proof of its spiritual and material vitality. To obtain the *decretum laudis,*

a) A *petition* [31] must be sent to the Sovereign Pontiff, signed by the superior and his assistants, begging for approbation. This petition must be accompanied by

b) *Letters of recommendation* from the Ordinary or Ordinaries in whose dioceses the congregation has houses. These letters should contain the opinion of the Ordinary concerning the nature, utility, and work of the congregation as well as a request for its approbation and suggestions as to desirable changes in the constitutions. Each letter must be signed and sealed by the bishop and addressed to the S. Cong. of Religious.[32]

c) An *accurate report* must be made to Rome on the foundation of the institute and its present condition,—personal, spiritual, and material. The *personal report* must state the number of professed members, novices and candidates, and if there is a distinction between members (*e. g.,* choir and lay members), how many there are of each class; also the number of houses in the diocese or dioceses. The *spiritual* or disciplinary report concerns the manner of, and progress in following the Constitutions,[33] the novitiate, and any serious difficulties that may have arisen with regard to the Constitution. The *mate-*

31 This must be written in Latin, French or Italian.

32 See Bastien, *Directoire Canonique,* translated by Lanslots, *Handbook of Canon Law,* 3rd ed., 1903.

33 A detailed statement of the government is not required, because this is supposed to be contained in the constitutions.

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rial or financial report must state the resources of the institute, whether a dowry (*dos*) be required and how much, whether there are any debts, etc. This report (under c) must be signed by the superior general, the treasurer, and the secretary general, and the Ordinary in whose diocese the mother house (*domus princeps*) is located must add his testimony as to the truthfulness and authenticity of the document.

d) Lastly, the *Constitutions* [34] as approved by the Ordinary must be included in either Latin, Italian, or French. At least twelve printed copies must be forwarded, because the various consultors are each entitled to a copy.

After the S. C. of Religious has issued the decree of recognition or praise, the Constitutions are not yet regarded as approved, but the institute is now under the jurisdiction of the S. C. Rel., and no change is allowed in the Constitutions. Before the Constitutions are approved, either on trial or definitively, the institute itself is *approved* and generally also the Constitutions receive an experimental approval; but this is granted only after a certain lapse of time, during which the Constitutions should be tried, and a faithful report made as to the practicability and efficiency of the same. During that time the changes and modifications inserted by the S. C. Rel. must be conscientiously followed and no changes should be made. Finally, after several experiments and a revision of the Constitutions according to the suggestions of the S. C. Rel., they are *approved,* whereupon neither the superiors of the institute nor the Ordinary of the diocese are allowed to change them. Note that any liturgical book, or directory, or calendar, or book of customs referred to in the Constitutions does not by vir-

[34] If the text is not printed, it should be typewritten. French is permitted because it is the diplomatic language of the Roman Court.

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tue of that approbation become "canonized" or formally approved. For instance, a so-called "*Caeremoniale Monasticum*" is not sanctioned by the approval of the Constitutions. Books referring to the liturgy of the Latin Church require a special approbation by the S. C. of Rites.

It may be well to mention here what the "Normae" [85] wish to see *excluded* from Constitutions submitted for approval.

1. No preface or introduction is allowed, nor any historical notes or letters of endorsement or recommendation except such received from the Holy See.

2. No quotations must be made from the Bible, the Church councils, or from the works of the Holy Fathers or theologians, much less may dogmatical or moral questions be brought in or doctrinal decisions cited, especially in matters of vows. Ascetic instructions and exhortations, spiritual and mystical considerations, questions from manuals or ceremonials, are also to be eschewed.

3. No reference is to be made to the office of bishops and confessors, because the Constitutions are not written for these; neither is mention to be made of the order of study and life of the students, or of the detailed order of daily exercises.

4. No mention is to be made of civil laws or magistrates, nor of the approbation by the government.

5. Minute regulations about the lower offices, such as pertain to the kitchen, infirmary, or vestry, are to be omitted.

6. Every term or expression which applies to institutes with solemn vows must be avoided for congregations with simple vows, such as *regula, monasterium,*

[85] N. 26–33.

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moniales, instead of which must be used: *constitutiones, institutum* or *domus, sorores,* etc.

These three stages: simple acknowledgment or recommendation of the intention of the founder and his scope, the decree of praise, and formal approbation, are not always insisted on by the S. C. Rel., but sometimes the first is omitted, because not asked for.[36] But the decree of praise and formal approbation of the institute or Constitutions — the two may be combined — are always required, as the Code plainly states.

c) Lastly, note the phrase: *vota publica, perpetua vel temporanea:* public vows, either perpetual or temporary. Here a *distinction between vows* is asserted, to which we may add the one between solemn and simple vows, as this occurs in n. 2 of the same canon.

1. A *vow* or promise made to God is *public* if accepted in the name of the Church by legitimate authority.[37] Such an authority may be any ecclesiastic who is empowered by the Church to accept vows, either bishops or religious superiors, acting with proper or delegated power. Hence "public" here means not precisely notorious (though this is generally implied, especially since tacit profession is no longer admitted), but public in the proper sense, as we speak of public authority. A *private* vow, for instance, to make a pilgrimage, or not to marry, is one made without the intervention of the Church. The vows of poverty, chastity, and obedience, taken in a religious congregation, are considered public.

2. Public vows may be either *perpetual* or *temporary.* They are perpetual if made without any time-limit and accepted as such by the legitimate superior. Note that the simple profession of members who pronounce their

[36] *Normae,* n. 7.
[37] Wernz, *Ius Decretalium,* III, n. 572 (ed. 1, p. 586).

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vows in a religious order involves only temporary (triennial)[38] vows. Temporary vows are such as are made for a certain limited term, for instance, three years. They must be promptly renewed, for a congregation with expired temporary vows would not constitute members in the religious state.

3. In number two of our canon, an *order* is called an organization in which *solemn* vows are taken, whereas a *congregation* is defined as a religious body whose members make only *simple* vows. Here we have the famous and controverted distinction between simple and solemn vows. Whence is it derived?

The distinction between solemn and simple vows was known to Gratian[39] and the canonists that followed him. Difficulties arose at an early date with regard to the bearing of vows upon the validity of marriage. The question was settled by Boniface VIII, who declared that the solemnity of the vow was introduced by ecclesiastical law, and what is called an invalidating impediment is produced only by the reception of sacred orders or by profession in a religious congregation approved by the Apostolic See.[40] This seems to mean that the authority of the Church determines which vows are simple and which are solemn. However, the Church would act blindly, as it were, if there were no *intrinsic distinction* between the two. Hence canonists[41] have endeavored to establish the precise difference between solemn and simple vows, with due regard always to the decision of Boniface VIII. St.

38 Can. 574, § 1.

39 Cfr. *dictum ad* c. 8, Dist. 27: those who simply take vows and those whose vows are endowed with the blessing of consecration, or who make religious vows; from which it may be inferred that all religious vows were considered solemn; cfr. c. 20, X, III, 32.

40 C. un. 6°, III, 15.

41 Cfr. *Cath. Encycl., s. v.* "Vow" (Vol. XV, 512, by Vermeersch).

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Thomas [42] places the solemnity of the vow in a certain spiritual blessing or consecration, in as far as this has special reference to the service of God. Hence we may say that the Angelic Doctor finds the difference between the two kinds of vows not in the ceremonies or the ritual as applied respectively in the administration of solemn and simple vows, but in the interior, more perfect and complete consecration to God, or, as a commentator [43] puts it, he does not speak of an accidental blessing or consecration, but of an internal consecration, which implies a more perfect and irretrievable surrender of oneself to God. If this is not a sufficient explanation, we doubt whether there is one. As regards the simple vows of the Jesuits, it required special papal constitutions [44] to render them productive of the truly religious state, to which, as the text says, their members belong because they devote themselves to the service of God,— but not irrevocably. Their's is a peculiar condition on account of the effects attached to their simple vows, and hence it must not be drawn into the question here at issue.

The general assumption of the Church up to the sixteenth and even nineteenth century was that a religious offers himself as a holocaust to God and thereby surrenders himself entirely to the Church, who has the power to declare whether, considering the circumstances,[45] it is opportune to accept and declare the surrender to be irrevocable to the whole extent or for all members and institutes alike. The intention of the Church is identical

42 *Summa Theol.*, 2a 2ae, q. 88, a. 7.

43 Joh. a S. Thoma, *Cursus Theol.*, in II-II, ed. Lugd., 1653, p. 438.

44 Greg. XIII, "*Quanto*," Feb. 1, 1583; "*Ascendente*," May 26, 1584.

45 Pius IX, "*Neminem latet*," March 19, 1857 (Bizzarri, *Collectanea*, 1885, p. 853 f.). The explanation given by Vermeersch (*Cath. Encycl., l. c.*) is less intelligible than that of St. Thomas, and we prefer the opinion of Wernz, *l. c.*, III, n. 572.

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with that of the person who takes the vows, which is extensively and intensively just what the Church declares it to be.

A *monastic congregation* is a union of several autonomous or independent monasteries under the same superior. Such congregations sprang up after the IVth Council of the Lateran (1215), for instance, the congregation of St. Vannes, that of the Cassinese, and again after the Council of Trent, which renewed the decretal of Innocent III and insisted upon the formation of congregations.[46] At present there are fourteen Benedictine Congregations, two of them in this country; and if both were amalgamated, it would hurt neither Church nor State, nor their own efficiency.

An *exempt religious* order is one withdrawn from the jurisdiction of the Ordinary. Whilst all *regulars* who make solemn vows are *ipso iure* exempt, it needs a special Apostolic indult or privilege to exempt religious congregations, for instance, the Redemptorists, Passionists, etc.[47] A *religious congregation* is one whose members take simple vows only. They are either *papal institutes* or *diocesan institutes,* the difference between them lying in the manner of approbation or decree of praise. This distinction was canonized by the Constitution of Leo XIII, "*Conditae,*" Dec. 8, 1900.

A *clerical religion* is one the majority of whose members are priests. Note that "clerical" and "monastic" are no longer[48] adequate distinctions, as the Code plainly shows, for the clerical character may be possessed by monastic congregations as well. Historically speaking,

46 Sess. 25, c. 8, de reg.; c. 7, X, III, 35.

47 Both were declared exempt by Pius VI.

48 Formerly this distinction was employed by canonists.

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monastic congregations or orders belong to the contemplative orders, which were of a lay character. Since the tenth century [49] so-called *barbati* (bearded) or *conversi, i. e.,* lay brothers, were introduced and flourished especially among the Vallombrosians. Besides, after the eleventh century, many monasteries allowed their members to serve as pastors or curates at their chapels and churches, which thus became incorporated with the monastic bodies. This led to an increased number of monks with clerical character, and thus most of the monastic orders became clerical orders.

The division into *provinces* is due to the Mendicant Orders. St. Francis in 1217 divided his order into twelve provinces. The term *domus formata* is new and difficult to translate. It means a "canonically established house." Though the term is new, the object which it designates dates back to the decrees of Urban VIII and Innocent X, who subjected houses with less than twelve (or at least six) members to the jurisdiction of the diocesan Ordinary, which regulation has partly entered into the new Code.[50]

The *Abbot Primate* is mentioned first among the higher superiors or *superiores maiores.* This dignity was created by Leo XIII (*"Summum semper,"* July 12, 1893) to foster and maintain the "fraternal confederation" established in the same year [51] among the "black" Benedictines. The Abbot Primate is not to be compared to the General of the Franciscans or the Jesuits, as our Code itself states.[52] We might call him a diplomatic representative of the Benedictines with limited power,

49 The abbey of Einsiedeln in Switzerland had such *barbati* already under Abbot Gregory in the last decades of the Xth century.

50 Cfr. can. 617, § 2.

51 *Studien O. S. B.,* 1893 (Vol. 14), p. 279 ff.; p. 454 ff.

52 Can. 501, § 3.

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accredited to the Holy See according to the Apostolic Brief of Leo XIII. His residence is at the College of St. Anselm [53] on the Aventine Hill, of which he is also abbot with ordinary jurisdiction. He is elected for a period of twelve years, but may be reëlected for twelve years more by the abbots presidents or by all the actual (not titular) abbots called to Rome. The election, in order to be valid, must be effected by a two-thirds' majority. This, in brief, is the history of a new creation which was wisely intended to produce a closer union among the Benedictines. Without a certain unity, now-a-days, in times of universal organization, any society appears to be doomed to failure.

CAN. 489

Regulae et particulares constitutiones singularum religionum, canonibus huius Codicis non contrariae, vim suam servant; quae vero eisdem opponuntur, abrogatae sunt.

CAN. 490

Quae de religiosis statuuntur, etsi masculino vocabulo expressa, valent etiam pari iure de mulieribus, nisi ex contextu sermonis vel ex rei natura aliud constet.

The rules and constitutions of all religious orders or institutes or congregations, provided they do not clash with any canon of this Code, remain in force; but any regulation or law or statute which is contraray to a canon of the Code, no longer binds either superiors or

[53] Innocent XI by his Constitution "*Inscrutabili*" (1687) erected a Benedictine college at St. Callisto in Trastevere, which was temporarily suppressed by reason of the revolutionary tendencies of 1834 and the following years, but reopened in 1888 and transferred in 1896 to the Aventine.

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subjects. Thus elections must henceforth be held according to the Code,[54] and all special rules regarding the confession and communion of religious,[55] or the *causae fidei* belonging to the Holy Office,[56] or studies and ordinations [57] and profession are revoked.[58] As to privileges, see canon 613. The Code forbids what is *contrary* to the canons therein established. Hence whatever merely goes beyond the canons, or is a more explicit explanation thereof, may be lawfully retained. General and particular decrees are abrogated when they are opposed to the prescriptions of the Code. If no opposition exists, particular decrees given to an individual Congregation or Congregations, still continue to bind. On the other hand, in this same hypothesis general decrees, which are not explicitly or implicitly contained in the Code, have no longer any force. (See the *Irish Ecclesiastical Record*, 1918.)

Canon 490 lays down the general rule that whatever is enacted about religious, also binds religious women, even though the text may employ the masculine gender, except, of course, in matters not applicable to the female sex, or where the wording itself excludes them. A similar example is that of privileges, which, if granted to a male order, also apply to the nuns (second order), all other things being equal. It is evident that the regulations concerning studies or ordination or preaching or hearing confessions do not touch women. On the other hand, the expression "*si quis*," though expressed in the masculine, obliges women.

54 Can. 507.
55 Can. 519 ff.; can. 595, § 2.
56 Can. 501, § 2.
57 Can. 587, § 2; can. 964–967; can. 2410.
58 Can. 572.

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PRECEDENCE

CAN. 491

§ 1. Religiosi praecedunt laicis; religiones clericales, laicalibus; canonici regulares, monachis; monachi, ceteris regularibus; regulares, Congregationibus religiosis; Congregationes iuris pontificii, Congregationibus iuris dioecesani; in eadem specie servetur praescriptum can. 106, n. 5.

§ 2. At clerus saecularis praecedit tum laicis tum religiosis extra eorum ecclesias atque etiam in eorum ecclesiis, si agatur de religione laicali; Capitulum vero cathedrale vel collegiale eisdem praecedit ubique locorum.

Religious precede laymen; clerical religious precede lay religious; canons regular precede monks; monks precede the rest of the regulars; regulars precede religious congregations; papal religious congregations precede diocesan congregations. Concerning precedence among religious of the same kind, the rule laid down in can. 106, n. 5 must be observed.

With regard to the precedence between the *secular clergy* and the regular clergy, the rule is that the secular clergy precede laymen as well as religious,[59] but the latter only in churches which do not belong to the religious, unless a church belongs to a lay religious community; in which latter case the secular clergy precede the religious even in their own church. A cathedral or collegiate *chapter* everywhere enjoys precedence over the religious.

Noticeable in this regulation is the fact that no distinction is made between monks and clerics regular, such as the Barnabites, Theatines, Jesuites, etc. Only the canons

[59] The secular clergy, however, are supposed to wear surplice and biretta, if they claim precedence; S. C. EE. et RR., Dec. 3, 1847 (Bizzarri, *Collectanea*, p. 558).

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regular,[60] such as those of the Lateran and the Premonstratensians (Norbertines), precede the monks, *e. g.*, Benedictines, Cistercians, Trappists (if these are priests), who in turn take precedence over all other regulars, if they are clerical orders. But among the other regulars — the Code makes no distinction between mendicants and non-mendicants — the rule laid down in can. 106, n. 5 must be observed.

This canon is taken from the Constitution of Gregory XIII, "*Exposcit,*" of July 15, 1583. It establishes that among regulars those precede who can prove quasi-possession of precedence in the place or city where a controversy has arisen; and if no quasi-possession can be proved, those who have first established a monastery or house in the controverted place precede those who came later. These are the rules the bishop should follow in settling controversies concerning precedence. The Friars Preachers (Dominicans) had precedence over the other Mendicants according to a decision of Pius V,[61] but since the Code takes the decision of Gregory XIII as the general norm for all regulars except monks, it is safe to say that the Dominicans must now follow the general rule.

Concerning the three families of the Friars Minor: the brown *Franciscans* (*Fratres Minores ab Unione Leonina*), the black Franciscans or Conventuals, and the Capuchins, the rule of precedence has been established as follows:

That family precedes which has been in a city or town for a longer time than another of the same order (O.

60 Pius IV, Sept. 23, 1563, settled the controversy between the Black Benedictines and Canons Regular in favor of the latter. Barbosa, *De Off. et Pot. Episc.*, P. III, alleg. 78, n. 29 (Vol. II, 322).

61 Barbosa, *l. c.*, n. 30; *Summa Apost. Dec., s. v.*, "Praecedentia," n. 17.

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F. M.), unless quasi-possession of precedence can be proved by the latter. However, since quasi-possession is often subject to controversies, the term of ten years, from Jan. 1, 1900, to Aug. 15, 1910, during which a family of Friars Minor has had actual possession of precedence before another family supplies proof of actual possession, unless there was no occasion to assert that precedence; in which latter case longer existence in city or town determines precedence. If a convent has been suppressed and ceased to exist in a city or town for fifty years, the date of return must be taken as the date from which existence is to be measured. If no convent of their own exists in a district outside the city or town, the general rule is that the Friars Minor of the Leonine Union (brown Franciscans) precede the Conventuals, and these in turn the Capuchins.[62]

We finally draw attention to the term *chapter*. A cathedral or collegiate chapter presenting itself in a body precedes all religious, even prelates and abbots, *e. g.*, in processions or on other ecclesiastical occasions. The text says *everywhere,* hence in the churches of religious[63] as well as on their own premises. The *vicar-general,* although appearing alone and not as a canon, precedes all the regular clergy, nay even abbots and prelates regular, because he represents the bishop.[64]

62 Pius X, "*Seraphici Patriarchae,*" Aug. 15, 1910 (*A. Ap. S.*, II, 713 ff.).

63 But the abbot's choir stall must not be ceded to the first dignitary of the chapter, because that seat signifies, not only dignity, but jurisdiction.

64 Can. 370; can. 106.

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TITLE IX

ERECTION AND SUPPRESSION OF RELIGIOUS CONGREGATIONS, PROVINCES, AND HOUSES

CAN. 492

§ 1. Episcopi, non autem Vicarius Capitularis vel Vicarius Generalis, condere possunt Congregationes religiosas; sed eas ne condant neve condi sinant, inconsulta Sede Apostolica; quod si agatur de tertiariis in communi viventibus, requiritur praeterea ut a supremo Moderatore primi Ordinis suae religioni aggregentur.

§ 2. Congregatio iuris dioecesani, quamvis decursu temporis in plures dioeceses diffusa, usque tamen dum pontificiae approbationis aut laudis testimonio caruerit, remanet dioecesana, Ordinariorum iurisdictioni ad normam iuris plane subiecta.

§ 3. Nec nomen nec habitus religionis iam constitutae assumi potest ab iis qui ad illam legitime non pertinent aut a nova religione.

The text is silent about the foundation of new religious orders, and only mentions (can. 497) the establishment of religious exempt houses, supposing, perhaps, that there is no need of a new religious order, or that a congregation may arise which may later develop into an order. In § 1 the law permits *bishops,* and these only, to found new religious congregations. Vicars-capitular and vicars-general, even if endowed with a special mandate, have no authority to make such foundations. As the

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text says *bishops,* not Ordinaries, it seems logical to exclude also religious superiors, even though they enjoy quasi-episcopal jurisdiction. Abbots *nullius* or prelates *nullius,* on the other hand, would be allowed to found new congregations, because they have the same power as residential bishops.[1]

There is, however, a twofold *condition* attached to the leave of founding such communities:

1. The bishops must consult the *Holy See* and may not permit a foundation to be made without taking advice with the S. C. of Religious.

2. A congregation of tertiaries who live in common must be affiliated by the superior general of the first order to his own religion.

The first condition calls for special emphasis, since the Holy See has more than once insisted on it. Thus Leo XIII, by his Constitution "*Conditae,*" Dec. 8, 1900, and Pius X by his Motu proprio, "*Dei providentis,*" July 16, 1906, have regulated the foundation and juridical character of religious congregations. The substance of their precepts is as follows:

a) Before applying to Rome, in fact before admitting any religious sodality into his diocese, the Bishop must examine its constitutions as to their orthodoxy and moral character, and satisfy himself that they conform to the sacred canons, the decrees of the Roman Pontiffs, and the scope intended. This examination must also extend to the founders,— whether or not they are inspired by prudent zeal for the glory of God and for their own spiritual welfare and that of others. Sometimes it happens that personal spite and rancor, or the itch for honors, or a desire to wear a different habit causes separation. *Probate spiritus.*

[1] Can. 323, § 1.

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(b) If possible, rather than permit the foundation of a new congregation, the bishop should call in members of a *congregation already approved,* if its purpose is the same.

(c) The *purpose* or aim of the new congregation *must be well defined* and not too *diversified,* which would be the case if the congregation should propose to devote itself to all kinds of charitable works.[2]

The "*Conditae*" as well as the "*Normae*" give some examples of occupations which are less suitable to Sisters.

(α) Sisterhoods who make it their special purpose to *nurse the sick in their homes by day and by night* are not entirely forbidden, but liable to be rejected by Rome, unless very solid reasons are given and certain precautions provided. The same is true concerning sisterhoods who take daily care, as quasi-domestic servants, of the families of poor laborers.

(β) Sisterhoods who conduct *hospitals open to both sexes* indiscriminately, or houses destined exclusively for infirm priests, must also provide conditions and means apt to prevent danger and avert scandal. The Roman Congregation is even stricter with sisterhoods who have for their (secondary) purpose the *management* of *clerical seminaries* or colleges of male students, or schools wherein co-education is practiced.[3]

(γ) Much less, say the *Normae,* should sisterhoods be approved whose scope is to *take direct care of babies* or of *maternity homes* (confinement cases) or similar occupations not befitting "virgins consecrated to God." The Constitution "*Conditae*" does not mention such congre-

2 "*Conditae,*" I, 3; an exception is made in favor of missionary countries; cfr. *Normae,* n. 8.

3 "*Conditae,*" I, 3; *Normae,* n. 13 f.

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gations, and the *Normae* say "*direct* care." Hence, if hospital sisters keep a special department for such purposes and leave the immediate care of babies and women, especially assisting at operations or delivery, to physicians and trained nurses, the law would not be against them.[4] Circumstances of time and persons, especially in industrial centers, would seem to require a moderation of the former strictness.

Concerning "*mixed schools,*" many parish schools would have to be closed in our country if the *Normae* would be put into effect. Here, too, circumstances must be considered. Finally, it must be added that, not only in America, but the world over it is charitable works of every kind that enkindle the flame of faith, attract non-Catholics, and confound bigots.

(d) Before approving any new congregation the bishops must also inquire into the *material and financial support* of these communities. The "*Conditae*" as well as the *Normae* justly insist upon the old law[5] that no approbation should be given to institutes which lack the resources necessary for a decent livelihood. Congregations which *live on alms* or go begging from door to door are scarcely to be approved,[6]—a point which will be more accurately determined later.

These, then, are a few points which the bishops should ponder before giving their approbation to any institute, or applying to Rome for that of the Holy See. The other condition touches *tertiaries, i. e.,* congregations which purpose to follow the rule of an ancient order, but with modified constitutions and simple vows. Note that

4 Bastien-Lanslots, *l. c.*, p. 46.

5 Cfr. c. 1, X, III, 1; c. 1, X, III, 7; c. un., 6°, III, 16; *Trid.*, sess. 25, c. 3 de reg.

6 "*Conditae,*" I, 3; "*Singulari quidem,*" March 27, 1896; cfr. can. 621–624.

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in new congregations no distinction between rules and constitutions is admitted, but all are comprised by the name Constitutions.[7] Yet, if Franciscan Tertiaries frame their Constitutions, they must be, at least substantially, based on the Rule of St. Francis, and we believe that this Rule, together with the Constitutions, may be called the Code of their common life. Of course, approbation is given only to the Constitutions, which remain the chief, and, in fact, the only obligatory norm for such Tertiaries. These must then be *affiliated,* as the Code says, or aggregated by the superior general to the first order, whose name and habit they assume. Hence of the three Franciscan families the three respective superiors general are competent to affiliate Tertiaries. Thus also the Dominican, the Augustinian, the Carmelite and the Servite Generals. But what of the *Benedictine Sisters?* There is a difficulty here, arising from the peculiar position of the Benedictine Order. The Abbot Primate has not the same power as one of the Generals of the Orders above named. Besides, history records that monasteries of nuns were affiliated to single monasteries, not to Congregations, except perhaps that of Cluny. The case was different with the Cistercians, because of the jurisdiction of the Abbot of Citeaux. Until an authentic solution of the difficulty is given, we are at a loss to state who is empowered to affiliate the Benedictine Tertiaries. Since Benedictine Oblates are incorporated in the individual abbeys, we believe that the neighboring abbot should see to it that the Tertiaries are incorporated. There is no difficulty in incorporating them because the *aim of affiliation,* even with the Tertiaries of centralized orders, is only to make them capable of *partaking* of the *indulgences* and spiritual favors granted to the first

7 S. C. EE. et RR., March 2, 1861 (Bizzarri, *l. c.,* p. 791).

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order.[8] There is, then, no question of juridical incorporation, as if the jurisdiction of the Diocesan Ordinary would thereby be curtailed. For, unless a special Apostolic indult grants them exemption, all Tertiaries are under episcopal jurisdiction.[9]

Therefore § 2 rules that *any diocesan congregation,* although spread over several dioceses, remains a diocesan institute subject to the jurisdiction of the Ordinaries according to canon law, until it has received pontifical approbation or the decree of recognition. The *episcopal approval,* which is absolutely required in order to make the institute lawful and ecclesiastical, has another effect, *viz.,* to subject the members to the jurisdiction of the Ordinary or Ordinaries[10] with regard to the internal and external administration, the election of superiors, though these be chosen by the members, canonical visitation, spiritual direction and discipline.[11] In fact such an institute is no more than a parish consisting of members who partake of the religious state and are considered by canon law as ecclesiastical persons endowed with clerical privileges. But they are not to be called corporations, in the ecclesiastical sense, as they lack autonomy or independence. Of course, civil law may give them corporative character and class them among privileged societies.

The text says, furthermore, that if these diocesan institutions are spread over more than one diocese, the respective *Ordinaries* enjoy equal jurisdiction over them. Hence no Ordinary may claim jurisdiction or direction over houses in another diocese, because this would be tantamount to reaching into the sphere of another bishop;

8 "*Normae,*" n. 16.

9 Some exemption was given to the Sisters of the Holy Cross at Ingenbohl in Switzerland.

10 Cfr. can. 495.

11 "*Conditae,*" I, 9–11.

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nor is the bishop of the diocese in which the mother-house is situated, to be considered the quasi-spiritual director of the houses located in other dioceses.[12]

The last paragraph of our canon ordains that the *name and habit of a religious order* already established may not be assumed by persons who do not lawfully belong to said order, or by any religious order to be newly founded. A distinctive religious *habit* was certainly worn by the earliest religious, as historical documents prove. For the terms *velamen* and *velare* (*veil, to veil*) occur as early as the third century and were used for the act of consecrating virgins.[13] That the veil was given in church may be surmised from the fourth Council of Toledo (633). The tenth council of the same city (656) mentions, besides the dress given by the bishop or clergyman, also a red or black cloth (*pallium*) worn on the head as a mark of distinction.[14] The religious habit was given by St. Francis to St. Clare. As to *monks,* it is known that St. Benedict in his rule speaks of the religious habit.[15] But even before that time a distinct religious habit was worn by Pammachius.[16] The synod of Gangrae (334) complains of the Eustathians (an Arian sect), for despising the common dress and wearing instead the *periboleion,* or mantle of the monks, in order to deceive the unwary.[17] Thus the religious habit appears of venerable antiquity. In the eighth and ninth centuries abuses crept into the monastic bodies,— a fact deplored and rebuked by St. Odo of Cluny.[18] St. Bede[19]

12 S. C. EE. et RR., March 23, 1860 (Bizzarri, *l. c.*, p. 778, and *passim*).

13 Cfr. Migne, 13, 1183; Bachofen, *Compendium Iuris Reg.*, p. 47.

14 Mansi, *Coll. Conc.*, X, 625 (can. 56); XI, 31 (can. 4).

15 *Reg.*, c. 58.

16 Cfr. above, p. 4 sq.

17 Can. 12; c. 15, Dist. 30.

18 *Vita Odonis,* III, 1; *Collatio,* II (Migne, 133, 75; 213).

19 *Hist. Eccl.*, IV, 25 (Migne, 95, 215 f.).

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complains of fancy habits worn by English nuns. It seems that fashion played its part also in the later Middle Ages, for a well-known decretal of Clement V at the Council of Vienne determines the color (black, brown, and white) as well as the kind and measure of the religious habit, and admonishes the religious to be modest in their dress and to avoid costly vestments. A hood (*caputium*) and scapular are also mentioned, over which, the decretal says, the religious may wear an *almutium* or large cap of black cloth or fur. Monks as well as abbots and priors are allowed a cowl. Boots and shoes are also permitted.[20] A hat is not mentioned in the decretal, but we know that Benedict of Aniane (821) and later the Clunians allowed the monks to wear hats of felt or wool. The Clunians also insisted upon neatness and cleanliness.

The text then says that neither individuals nor new congregations may assume the habit of an established religious order to which they have no juridical relation. To permit this would be like letting a ship sail under a flag not its own, and would bring confusion into the Church. This danger is quite real.[21]

Here may also be inserted a few wise rules stated in the *Normae*.[22] Material, form, cut, and color of the habit should be in harmony with religious modesty and poverty. Gold or silver ornaments, except a cross or medal of silver, are not allowed, and the image on these crosses or medals, as well as their inscriptions, must be approved or at least tolerated by the Church. Silk dresses or other showy apparel which would cause talk

20 C. 1, § 1, Clem. III, 10 de statu monachorum.

21 When in Rome the author tried to count the different habits, but soon gave up the attempt as superhuman.

22 Nn. 66–70.

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and ridicule must be entirely avoided. A distinction between the habit worn by the superior and the teaching or choir sisters, and between that of the latter and the habit worn by the lay sisters may be admitted, but the difference should not be so great that the habits make them appear as members of different congregations. This would be the case if the color were entirely different. A distinctive sign may be used in the habit of the professed sisters and that of the novices. The Constitutions which are sent to Rome should contain an accurate description of the habit. After the religious congregation has been approved or recognized, the habit may not be changed without the express permission of the S. C. Relig.

As to the *name* or title of new religious congregations, the "*Normae*" contain, besides the prohibition mentioned in the Code, some hints which may also find a place here. The title of an institute may be taken either from the attributes of God, or from the mysteries of our Holy Religion, or from the feasts of our Lord or His Blessed Mother or the Saints, or from the particular scope of the institute itself. For instance, Sisters of Divine Providence, Sisters of the Incarnation, Ladies of the Sacred Heart, Sisters of St. Joseph, School Sisters, etc. If the title or name of an existing congregation is taken, a characteristic addition must be made, for instance, Sisters of St. Francis of the Poor, or of St. Vincent de Paul of the Servants of the Poor. All titles should be simple, free from levity or sensationalism, and eschew reference to devotions not approved by the Holy See.

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SUPPRESSION OF RELIGIOUS INSTITUTES

CAN. 493

Quaelibet religio etiam iuris dioecesani tantum, semel legitime condita, etiamsi unica domo constet, supprimi nequit nisi a Sancta Sede, cui etiam reservatur de bonis in casu statuere, semper tamen salva offerentium voluntate.

The first of the next three canons — all of which treat of the same subject, wherefore we connect canon 498 with the rest — has reference to the suppression of a religious congregation, or rather of a *religio* in general. Such a *religio,* lawfully established, though it may be only a diocesan institute and consist of but one house, may be *suppressed by the Holy See alone.* To the latter is also reserved the right of disposing of the property belonging to the suppressed *religio,* with due respect to the will of the donors.

The Code is undoubtedly somewhat stricter here than Leo XIII's "*Conditae,*" which permitted the bishops to suppress diocesan institutes. It is not difficult to see the reason for this stricter legislation. Joseph II, carrying out the teaching of Febronius, endeavored to "purify" the religious state, and his example has misled many others, so that Pius IX had to condemn the error that the civil government may suppress religious families at will,[23] and Leo XIII was compelled to raise his voice against the encroachments of France and Portugal. "The Church sighs, for besides being wounded in her vital rights, she also feels the drawback in her activity, which is developed by the concordant work of the secular and regular clergy; who touches these, touches the apple

23 "*Probe memineritis,*" Jan. 22, 1855; "*Cum saepe,*" July 26, 1855; *Syllabus,* n. 53.

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of her eye." [24] These reasons no doubt prompted Benedict XV to make the suppression of religious dependent on the Holy See, which ever protected and fostered them. If the *Apostolic See suppresses a religious institute,* it generally provides that the members who are in sacred orders be subject to the Ordinary, or permits them, if they so prefer, to choose another order or *religio.* But those who have no sacred orders, like the lay brothers, appear to be free from the obligations of the simple vows.[25] As to the property of suppressed religious it is church and corporative property, and hence subject to the Holy See as the supreme administrator of all church property. However, if the donors are still alive, their wishes must be respected. The same is true if the donors are dead but have left special clauses in the legacy regarding the disposal of the property in such a case. The Holy See will also take care that the members of the suppressed *religio* shall receive back their dowries, or an equivalent thereof. But they can lay no claim to an equal share, as if they had been members of a stock company. Neither may the Ordinary of the diocese demand a share, for the disposal of the whole rests with the Holy See.

On the *suppression of a religious house* the Code rules as follows:

CAN. 498

Domus religiosa sive formata sive non formata, si ad religionem exemptam pertineat, supprimi nequit sine beneplacito apostolico; si ad Congregationem iuris pontificii non exemptam, supprimi potest a su-

24 *Le Religiose Famiglie,* June 29, 1901 (*Analecta Eccl.,* 1901, IX), p. 281 f. (French text, *ibid.,* p. 283).

25 We believe that this is the intention of the Holy See, who will mention that in the decree of suppression.

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premo Moderatore, consentiente Ordinario loci; si ad Congregationem iuris dioecesani, sola Ordinarii loci auctoritate, audito Congregationis Moderatore, salvo praescripto can. 493, si de unica domo agatur, salvoque iure recursus in suspensivo ad Sedem Apostolicam.

This canon makes a distinction between a *religio* and a religious house. A religious house, be it one with at least six religious members (*formata*) or one with less than that number (*non formata*), if it belongs to an *exempt religio,* may not be suppressed without a papal indult.

This is the logical consequence of can. 497, § 1, which requires a papal indultt for the foundation.

If the house belongs to a *non-exempt papal institute,* it may be suppressed by the superior general of that congregation with the consent of the Ordinary. The latter has jurisdiction over both house and congregation, and is therefore interested in its suppression.

If a house belongs to a *diocesan institute,* and is not the only one of the congregation, the Ordinary himself may suppress it, after having heard the opinion of the superior of the congregation. Against this decision recourse may be had to the Apostolic See, but not *in suspensivo,* although Rome may reverse the decision of the Ordinary. The Holy See may suppress any house, even of exempt religious, without any reason, although we do not know of a case in which Rome proceeded arbitrarily. But the general rule holds good, because the Pope is the sovereign judge of his own actions in matters subject to him, and may suppress whole orders, as happened in the case of the Beguins and the Knights Templars.[26]

[26] Cfr. c. un., 6°, III, 17; c. 1, *Clem.*, III, 11.

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The Superior General needs the express consent (written or oral) of the Ordinary of the diocese, because, as was said, the latter is directly interested in the suppression, not only on account of his jurisdiction, but also by reason of the diminished service of God and the sacred ministry.

The Ordinary may suppress a house of a diocesan congregation, unless it be the sole house of that institute. In the latter case the matter belongs exclusively to the Holy See. The Ordinary in suppressing a house is not bound to the consent [27] of the Superior General of the congregation, but may proceed freely. Neither is the Ordinary of one diocese dependent on the consent of another in whose diocese the mother house is situated, for all Ordinaries have equal rights over diocesan congregations. However, an Ordinary should not suppress a religious congregation except for weighty reasons, suppression being an extreme measure. Such reasons would be, for instance, serious relaxation of religious discipline, abandonment or change of the purpose of the institute, financial troubles which could not otherwise be remedied, refusal to obey the common law as well as the injunctions of the Ordinary, etc.

It may be asked: What about the *inmates* of suppressed houses? The decisions of the Roman Court on this point may be summed up as follows:

(a) *Solemnly professed members* must, unless the papal Constitution of suppression has dispensed them, continue to observe their vows as well as they are able; if they can obtain admission into other houses of the same or some other *religio,* they are obliged to do so, if no dispensation from the vows has been granted either in

27 "*Audito consilio*" means advice, not consent; cfr. can. 105, 1; "*Conditae,*" I, 6.

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general or in particular to those who asked for it.

(b) Members with *solemn vows,* who are in *sacred orders* and wish to remain in the diocese, may with the permission of the Ordinary take up their residence there and obtain incardination within six months from the date of suppression. They are subject to the Ordinary in virtue of obedience, and must, besides, observe their solemn vows, as far as their condition allows. This permission to stay in the diocese outside of a religious community is, of course, granted only by special indult, especially if the members of the suppressed institute cannot be gathered into other houses or if they do not wish to leave their native country.[28]

(c) Members of religious congregations with *simple vows,* we believe, are free from any obligation if the suppression was decreed by Rome. But if the suppression of one house was decreed either by the superior general with the consent of the Ordinary, or by the Ordinary of the diocese, where there is question of a diocesan institute, the members remain bound by their vows, especially that of chastity, from which they can be dispensed only by the S. C. of Rel., and therefore should seek other houses of the same institute, which must receive them.

If religious in sacred orders, *i. e.,* priests, after the suppression of their institute, remain in the diocese, the Ordinary may *compel* them to help in the sacred ministry, especially the care of souls.[29]

As to the vow of *poverty,* this remains in case of religious with solemn vows, and therefore their property

28 Pius VI, Brief of April 13, 1782; S. Poenit., *Instructio* of June 28, 1866; *Declaratio* of April 18, 1867 and Sept. 12, 1872; S. C. EE. et RR., Aug. 15, 1861; S. C. super Statu Regul., Aug. 5, 1872; cfr. Piatus M., *l. c.,* I, 210 f.; Nervegna, *De Iure Practico Regul.,* 1900, p. 163; Bachofen, *Compendium Iuris Reg.,* p. 163.

29 S. C. EE. et RR., July 30, 1881.

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and whatever they may acquire after suppression, belongs to the order or congregation, unless the members have been secularized, or have obtained a dispensation from the Holy See to use their belongings for other purposes.[30] The vow of *obedience* also continues to bind the solemnly professed members of a suppressed institute, so far as their actual state permits them to observe it; but it may be transferred from the local to the immediate superior, provincial or general, to whose jurisdiction they are subject.[31] Therefore they also remain under the obligation of reciting the Breviary according to their own calendar and must follow the rite of their order if they say Mass in their own churches; elsewhere, of course, they have to follow the general rubrics.[32]

CHANGE OF PAPAL INSTITUTES

CAN. 494

§ 1. Religionem pontificii iuris in provincias dividere, constitutas iam provincias coniungere vel aliter circumscribere, novas condere conditasve supprimere, monasteria sui iuris a monastica Congregatione separare et alii unire, ad unam pertinet Sedem Apostolicam.

§ 2. Exstincta provincia, de eius bonis statuere, salvis iustitiae legibus et fundatorum voluntate, spectat, nisi constitutiones aliud caveant, ad Capitulum generale vel, extra tempus Capituli, ad Moderatorem generalem cum suo Consilio.

By change of a religious institute is meant any alteration of the original or former condition of an order or

30 S. C. EE. et RR., Dec. 20, 1839; March 6, 1840; Piatus M., *l. c.*, I, 212.

31 S. C. EE. et RR., Aug. 5, 1872.

32 S. Poenit., April 18, 1867; Nervegna, *l. c.*

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congregation. Our canon treats of such as have received the papal approbation or a decree of recognition. § 1 reserves to the Apostolic See the right of dividing such a *religio* into provinces, of amalgamating provinces, of changing their boundaries, of founding new provinces, of suppressing existing ones, and of severing one monastic congregation from, or uniting it to, another. Canonists, applying the Decretal [33] which prohibited the transfer and division of episcopal sees to Apostolic legates, deemed a papal indult necessary to effect a change in the existing order of a religious institute. Now this opinion is made law, and therefore any change of the kind set forth in the text is taken out of the hands of the general chapter and reserved to the Holy See.

However, § 2 allows the *general chapter* (unless the Constitutions should forbid the exercise of such power) to settle the property affairs of an extinguished province, with due regard to the rules of equity and the laws of foundation. If no general chapter is in session at the time of the change and settlement, the superior general with his council may take the necessary steps. *Equity* requires that the remaining property should be employed for purposes similar to that for which the province was founded, that the buildings should not be entirely alienate from their original object, and that the people should be recompensed for the loss they suffer by the departure of the religious. Equity also would seem to require that, if there remains a congregation or province of the same order or congregation in the country, this latter should first be benefited. This would no doubt coincide largely with the *will of the founders.* But, as has been said, the general chapter, or the superior gen-

[33] C. 4, X, I, 30, *de officio legati;* but the enactment of our canon is certainly new.

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eral with his counsellors, is competent to decide that point. We believe the superior is dependent on the consent of his consultors, unless the Constitutions provide otherwise.

SPREAD OF DIOCESAN INSTITUTES

CAN. 495

§ 1. Congregatio religiosa iuris dioecesani in alia dioecesi domos constituere non potest, nisi consentiente utroque Ordinario, tum loci ubi est domus princeps, tum loci quo velit commigrare; Ordinarius autem loci unde excedit, consensum sine gravi causa ne deneget.

§ 2. Si ad dioeceses alias eam propagari accidat, nihil de ipsius legibus mutari liceat, nisi de consensu singulorum Ordinariorum quorum in dioecesibus aedes habeat, salvis iis quae, ad normam can. 492, § 1, Sedi Apostolicae fuere subiecta.

In order lawfully to found a house of a diocesan congregation the consent of both Ordinaries, *viz.*, that of the bishop in whose diocese the mother house is located, and that of the bishop in whose diocese the new house is to be founded, is required. However, the Ordinary of the diocese whence the foundation is made should not refuse his consent without a solid reason. Such a reason would be, *e. g.*, if in his prudent judgment either the members of the mother house were not sufficiently numerous to do justice to the work they wish to undertake in his diocese, *e. g.*, in schools or hospitals, or if the financial condition would not allow a division.

If new foundations are actually made in several dioceses, the respective Ordinaries in whose dioceses the houses are located are not allowed to change the consti-

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tutions of the congregation except by unanimous consent, and if the change involved is substantial, the Holy See must be consulted, for such a change is tantamount to founding a new congregation,— which right, according to can. 492, § 1, is reserved exclusively to the Holy See. This, at least, is our interpretation, and we believe, it is the only correct one. For it seems unnecessary to consult the Holy See, to which reference is made in § 2 of can. 495, regarding the foundation of a new house which is merely a branch of a diocesan congregation about whose foundation the Apostolic See has already been consulted, can. 492, § 2 mentioning congregations, not houses. Besides, there would be no distinction between congregations and houses if the foundation of both required papal consent, and this can. 495 would be entirely superfluous. However, if, as stated, *substantial changes,* especially such as affect the scope or government of an institute, are contemplated by the Ordinaries in whose respective dioceses houses of a diocesan congregation are to be erected, the Holy See must be consulted.

SUPPORT OF RELIGIOUS HOUSES

CAN. 496

Nulla religiosa domus erigatur, nisi iudicari prudenter possit vel ex reditibus propriis vel ex consuetis eleemosynis vel alio modo congruae sodalium habitationi et sustentationi provisum iri.

An early synod of Arles (813) enacted that no monastery or canonry should receive more members than could be decently supported from its revenues.[34] This law was renewed by the Decretals of Gregory IX, ex-

[34] Can. 8 (c. 1, X, III, 7).

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tended to nuns by Bonitace VIII,[35] and adopted by the Council of Trent,[36] which ruled that no more religious should be admitted than could easily be maintained either from the revenues of property owned by the monastery or from the usual alms. This ruling was constantly upheld by the S. C. of Bishops and Regulars,[37] which always insisted that especially dowries should be invested in secure, stable, and remunerative goods, landed property, or securities.

Our canon provides that no religious house shall henceforth be founded unless there are good prospects and a sufficient guarantee that its members shall be decently lodged and supported either from some steady source of income, or from the usual alms, or from some other source. No exception is made and no distinction between exempt and non-exempt congregations, between mendicant and non-mendicant orders, between congregations of either sex. The canon simply says: "*nulla religiosa domus.*"

To the two traditional modes of income (revenues and alms) the Code adds a third by saying: *vel alio modo.* The income or revenues proper to a house are such as it owns in its own name (*reditus proprii*), and are stable and regular, whereas *alms* cannot be said to be property, especially since almsgiving is not prescribed by the virtue of justice.

Under the name revenues are comprised all kinds of regular income, such as movable and immovable property which renders fruits; shares and title deeds; civil or ecclesiastical pensions, capital as well as interest; legacies for perpetual masses; income from parochial and missionary work; dowries of nuns; tuition fees from

35 C. un., § 1, 6°, III, 16.
36 Sess. 25, c. 3, de reg.
37 Bizzarri, *Collectanea*, p. 637, p. 644 f.

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boarding and day scholars; royalties on books, patents, and copyrights. Manual stipends are not considered revenues, but alms, because they are neither regular nor dependable. Neither are the daily distributions among canons of a chapter regarded as revenues or *reditus*.[38]

What is the *other source* mentioned in the Code? Perhaps donations of a somewhat irregular and uncertain character, but still due for work done or by reason of a promise. Hospitals generally depend on such resources unless they are amply endowed; also orphanages, although these are more often maintained by alms, and sometimes by begging, if not beggary (chain letters, etc.), concerning which, as will be seen, the Code has laid down special rules. As to the *mendicant religious* who are acknowledged as such by the Church, their respective Constitutions will tell how far they are capable of possessing property, and to what extent they have to depend on alms.[39]

The Code further says that there should be good prospects and a reasonable guarantee that the religious will be decently supported. This judgment or verdict (*"prudenter iudicari possit"*) must be given by the *bishop* in whose diocese the new house is to be founded. Hence he must investigate the material condition and prospects of the institute, and in order to obtain this information, study the character and scope of the institute. If the Congregation devotes itself to charitable works (schools, hospitals, etc.), or to the sacred ministry, its revenues may be regarded as assured. But if the members lead a contemplative life, to the exclusion of teaching and works of charity, its existence, especially in our

38 Barbosa, *Tractatus Varii*, Appell. "reditus."

39 Concerning the Friars Minor, see c. 3, 6°, V, 12; c. 1, Clem. V, 11; Richter, *Trid.*, p. 395 ff.; Reiffenstuel, III, 26, nn. 403, 435 ff.

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country, is apt to be precarious, unless substantial donations are secured, or a sufficient fund is established, or sufficient dowries are demanded to guarantee support.

The bishop has also to consider the religious houses already existing in the city or town where a new house is to be erected. Concerning this point several constitutions have emanated from the Holy See which are still of practical value. The first point to be considered is whether the religious houses already existing are likely to be injured by the establishment of a new one. This is more likely in the case of such as live on alms, yet even in school and parish work and in charitable pursuits competition and rivalry may easily cripple an older institution. Therefore Clement VIII obliged Ordinaries to consult with the superiors of existing convents before giving permission for a new foundation.[40] Gregory XV commanded that the superiors and all others interested within a radius of 4000 paces of the new foundation should be consulted.[41] No exception was made in favor of any order, for while it is true that the houses of Mendicants are chiefly named in said Constitution, others are also mentioned. Neither are houses of female congregations exempt from these laws, especially now, after the Code is promulgated, as it simply says, "no religious house." The reasons are the same for both male and female institutes, as far as external works are concerned. Too many institutes within a limited space are, even now-a-days, not only a detriment to the material support one of the other, but a menace to the existence of religious institutes in general.

The Code lastly says that the law concerning sufficient

40 "*Quoniam*," July 23, 1603; Ferraris, *Prompta Bibliotheca, s. v.* "*Conventus*," art. I.

41 "*Cum alias*," Aug. 17, 1622 (Ferraris, *l. c.*).

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provision has reference to both *habitation or dwelling place and support.* Hence the bishop, who is the first judge in the matter, must satisfy himself as to decent lodging. A decent lodging is one with which a man of modest aspirations, let us say of the middle class, would be content. The same may be said of material support. For not luxuries and dainties are to be sought in religious houses, but a moderate living, gauged by the amount and kind of work performed by the inmates, and the ordinary comforts to which a self-respecting human being is entitled. From this we may infer that if the new house to be established could live decently where older houses were suffering restrictions as to comfort, etc., this fact would be no reason for denying consent to the foundation. However, this consideration touches only the material aspect of the situation: peace and merit are factors that must also be reckoned with.

PERMISSION FOR FOUNDING A NEW RELIGIOUS HOUSE

CAN. 497

§ 1. Ad erigendam domum religiosam exemptam, sive formatam sive non formatam, aut monasterium monialium, aut in locis Sacrae Congregationi de Prop. Fide subiectis quamlibet religiosam domum, requiritur beneplacitum Sedis Apostolicae et Ordinarii loci consensus scriptis datus; secus, satis est Ordinarii venia.

§ 2. Constituendae novae domus permissio facultatem secumfert pro religionibus clericalibus habendi ecclesiam vel publicum oratorium domui adnexum, salvo praescripto can. 1162, § 4, et sacra ministeria peragendi, servatis de iure servandis: pro omnibus religionibus, pia opera exercendi religionis propria, salvis conditionibus in ipsa permissione appositis.

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§ 3. Ut aedificentur et aperiantur schola, hospitium vel similis rationis aedes separata a domo etiam exempta, necessaria est et sufficit specialis Ordinarii scripta licentia.

§ 4. Ut constituta domus in alios usus convertatur, eaedem sollemnitates requiruntur de quibus in § 1, nisi agatur de conversione quae, salvis fundationis legibus, ad internum regimen et disciplinam religiosam dumtaxat referatur.

So far mention was made of the material requirements of a new foundation. Canon 497 further establishes the necessity of a *legal formality,* which consists in the consent of the proper authority.

1. To establish an *exempt religious house,* no matter whether it be *formata* (with at least six members) or *non-formata,* or whether it belong to regulars or nuns with solemn vows, a *papal indult* and the *written consent* of the *diocesan Ordinary* are required. The same requirements are demanded for the foundation of any house (whether exempt or not) in the territories subject to the S. C. Prop. Fide. For the foundation of a religious house which does not belong to exempt religious or nuns with solemn vows and which is not subject to the S. C. Prop. Fide, the permission of the Ordinary is sufficient. This decision definitively settles a controversy which existed among canonists [42] up to at least the publication of the Constitution, "*Romanos Pontifices*" of Leo XIII, May 8, 1881. Though the decretals [43] mention the Apostolic indult, it appeared to exclude or to supply the Ordinary's license. The Council of Trent [44] required only the Ordinary's consent. The decretals

42 Cfr. Bouix, *De Iure Regul.*, 1857, I, 247 ff.; also Bizzarri, *l. c.*, p. 78.

43 C. un., 6°, III, 17; c. un., 6°, III, 6.

44 Sess. 25, c. 3, de reg.

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were directly intended only for the Mendicants, and, as Bizzarri admits, there existed a controversy founded on no less an authority than Fagnani,[45] as to whether later papal constitutions were intended for the countries "beyond the Alps" (*ultra montes*). Benedict XIV was of the "opinion" that in as well outside of Italy both an Apostolic indult and the permission of the Ordinary were required. The controversy was settled for England by the above quoted constitution of Leo XIII, which was extended to our country in 1885, and has now entered the Code and consequently become binding everywhere. Hence a religious house in which members of an exempt order, or nuns with solemn vows, are to live habitually in common (be it called a monastery, or a convent, or an independent priory) if it conforms to the notion of a religious house, may no longer be founded without a papal indult and the written permission of the Ordinary. The same statement holds good concerning any religious house, whether exempt or not, to be founded in missionary territories subject to the Propaganda, which in 1901 demanded that all religious houses founded without such an indult should petition for a rectification of their status.[46]

Religious congregations, either of papal or of purely episcopal approbation, which are not subject to the S. C. Prop. Fide, need only the *permission,* written or oral, of the *Ordinary* in whose diocese they wish to found a new house. The reason for this difference undoubtedly lies in the exemption, which can be imparted only by the Holy See, and for houses subject to the S. C. Prop. Fide the reason must be sought, as a decree[47] of the same

45 *Comment.*, l. III, tit. 7, cap. "*Non amplius,*" n. 55 ff.; Reiffenstuel, III, 48, n. 38 f.

46 The S. C. Prop. Fide, Dec. 7, 1901 (*Analecta Eccl.*, X, 1902, p. 21) complained that Leo XIII's Constitution was not observed everywhere.

47 Dec. 7, 1901.

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congregation insinuates, in the desire for an orderly and uniform regime.

§ 2 of canon 497 determines the *effect* and *consequence* of the legitimate permission, which carries with it (a) for all *clerical religious* the right to have a church or public oratory attached to their house and to exercise the sacred ministry, (b) for *all religious* the right to perform the pious works proper to them under the conditions laid down in the act of permission.

As to (a) the Code appends one special condition, *viz.*, that of obtaining another permission, *viz.*, from the Ordinary for building a church or public oratory.[48] It would follow that they need *two permissions* from the Ordinary: one for building a house, and another for building a church. This may at first sight seem to savor somewhat of bureaucracy or "red tape." It would be difficult to imagine a Benedictine community without a public oratory, and hence the permission for building a religious house of that order was always considered as including that of having a public oratory. However, the legislator probably felt that the parish organization might suffer from the multiplication of religious houses. Benedict XIV plainly hints at this obstacle, especially in cities,[49] but the chief obstacle he finds in the fact that the people are attracted by the celebrations held in the churches of religious orders and consequently often neglect to hear the word of God. Perhaps the great Pontiff had the Eternal City and Bologna in view. He also wished the hour of services in parish churches and the churches of religious to be so regulated that one should not interfere with the other. The Code therefore most reasonably prescribes that the special permission of the

48 Cf. can. 1162, § 4.
49 "*Etsi minime*," Feb. 7, 1742, § 15; *Id., Inst.*, 44; 105.

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Ordinary be asked for the erection of churches by religious, thus enabling the bishop to regulate parish work so that it may not suffer from the building of churches and public oratories. The matter of financial support as well as the right of the parish priest to see his flock in his own church may have been another reason for demanding a special permission of the Ordinary.

The Code adds: *servatis de iure servandis,* which signifies, with due regard to that which is to be observed according to law. Hence religious are allowed to exercise the sacred ministry only in so far as it does not clash with the rights of others engaged in the same ministry. And here first of all the pastor's rights, as laid down in the Code,[50] are to be duly considered and respected. Note that the Code does not enumerate among the strict parochial rights the blessing of ashes on Ash Wednesday, and that of palms and candles,[51] nor has the parish priest any right to protest against or forbid religious saying low masses on feast-days before or at the same time he says *his* Mass.[52] The Code then establishes the right of *all religious* to pursue and exercise the pious works which they have assumed as their proper task. Therefore, if the Ordinary, when giving his permission, makes no restrictions (which he is at liberty to do) the religious may freely fulfill their obligations and pursue the end for which they were founded.

§ 3 contains a slight modification of Leo XIII's "*Romanos Pontifices.*" It declares that a special written permission of the Ordinary is required and suffices for building or opening a school or a hospice or similar building separate from a religious house, although the

50 Can. 462 f.

51 S. Rit. C., April 8, 1702 (*Decreta Authentica,* n. 2098).

52 S. Rit. C., April 21, 1635; March 23, 1641 (*ibid.*, nn. 620, 745), quoted also by Cardinal Gasparri.

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latter may belong to exempt religious. Leo's above mentioned Constitution had commanded all religious to obtain the express permission of the Ordinary *and* of the Apostolic See for founding or opening a new college or school, but made a distinction between elementary or parish schools and colleges, which latter it exempted from the Ordinary's jurisdiction. Nevertheless in the next paragraph the same Constitution demanded the permission of both the Holy See and the Ordinary. The Code is satisfied with enjoining the latter's written special consent. *Special consent* here signifies one that is not included in the permission for building a religious house, but is directed explicitly to the school or hospice or similar building to be erected separately from the religious house. *Separated* seems to imply that the buildings mentioned must be distinct from the religious house, so that they are not under one roof with the latter, but form a distinct and independent entity, for instance, for fire insurance or taxation. How far they must be separated the Code does not explicitly state. They may be called separated or distinct even if connected by a covered hallway or corridor. But if a school were erected inside the monastery or convent walls there would be no separation, but simply a religious house, part of which is destined for a separate purpose. In this latter case the special permission of the Ordinary would not be needed.

What *school* means is quite evident and shall be further explained in Book III, Title 22, *De Scholis*. Here it may be noted that the Code does not distinguish between elementary schools, high schools, universities, etc., and hence all kinds of schools are included. *Hospitium* is taken from the Latin *hospes* (guest),[53] and therefore may mean a lodging-house for guests, or a hospice or

[53] Du Cange, *Glossarium, s. v.* "*Hospitium.*"

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convent and refuge for travellers such as are kept by the canons of St. Maurice in Valais, Switzerland, on St. Gotthard and Great St. Bernard. But it may also mean a summer or health resort for religious, a mansion where they spend their vacation or sojourn for the sake of their health. These were the old *grangiae* [54] or country seats, villas which belonged to the religious and secular clergy as well as to laymen. Lastly by the name of hospice may also be understood a rural house inhabited by a lay brother who acts as superintendent or "farm boss" for the monastery.[55]

It may now be asked *why* the consent of the Ordinary is required for building or opening such houses. To answer this question is easy concerning schools, because the jurisdiction of the bishop extends to these and they are, moreover, institutions for the public welfare. But as to hospices a distinction was expected in favor of exempt religious, who are, however, expressly included in the text.[56] We may be permitted to observe that on the score of alienation exempt religious, with the exception of nuns and Sisters, are not bound to obtain the consent of the Ordinary.[57] Perhaps the reason for the law lies in the fact that hospices or similar buildings may have an oratory, for which, unless they are quasi-priories or dependencies of the main house, an Apostolic indult is needed, which is granted only after the bishop has inspected the chapel.[58] If a semi-public oratory is to be erected in such hospices the Ordinary's permission suf-

54 *Ibid., s. v.* "*Grangia.*"

55 Piatus M., *Praelectiones Iuris Reg.*, II, p. 230.

56 Gasparri refers to "*Romanos Pontifices,*" but this constitution does not mention hospices.

57 Cfr. can. 534, Apostolic indult.

58 Benedict XIV, "*Magno cum animi,*" June 2, 1751, §§ 11, 18; can. 1195. The Jesuits have the privilege to erect private oratories in such hospices, if they are quasi-houses of their order and dedicated to divine worship; cfr. Piatus M., II, 231 (ed. 2).

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fices.[59] In such cases, therefore, the intervention of the Ordinary is quite intelligible. But apart from the erection of a private or semi-public oratory in such hospices we fail to see the necessity of the Ordinary's permission; for such a house is neither a religious nor a sacred place.

§ 4 of can. 497 mentions the *formalities required for changing* a religious house, already established, into one devoted to a *different purpose*. They are the same as those prescribed in § 1 of the same canon: Apostolic indult and episcopal permission for exempt houses; the Ordinary's permission for other houses not subject to the S. C. Prop. Fide. The stress lies on *change*. What is the nature of the change that requires these formalities? A change may be local or material. No *local change* is here mentioned, which is somewhat surprising, since in the "*Romanos Pontifices*" a change from one place to another is made subject to the same formalities as are required for a new foundation. *Place* must be taken in the sense of a municipality, or at least township or parish; for a mere local change of site would not require the observance of these formalities.[60]

The text of the "*Romanos Pontifices*," from which our Code is evidently taken, goes on to determine what *material change* in a religious house means. Such a change would take place if a school were converted into a church, a convent into a college or boarding school or hospital, and conversely. A change of this kind would fall under the regulations that require full solemnities, *viz.*, a papal indult and the written permission of the Ordinary, for it would be equivalent to a new foundation.[61] If the original destiny of the house is retained, and merely a secondary purpose added, for instance, a

59 Can. 1192.
60 Piatus M., *l. c.*, II, 279.
61 C. un., 6°, V, 6.

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novitiate or junior department or house of studies for members of the congregation, the change would not transcend the purpose of the institute but be merely an act of administration and internal discipline requiring no formalities. If, on the other hand, the scope of the house should be widened, if, for instance, a school for interns or a scholasticate would be made a boarding school open to outsiders, the aforesaid formalities would have to be observed. The Code adds: *salvis fundationis legibus,* with due regard to the will of the founder, which means that if the house was endowed by a pious founder, his will must be respected, and a substantial change of its provisos would require the twofold permission of Pope and bishop, even though it would not exceed the limits of internal discipline. Of course, the last will must be in writing or at least testified to by two unimpeachable witnesses, else it is presumed that the founder has not laid down any specific conditions.

For can. 498 see *supra,* pp. 75 sqq.

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TITLE X

THE GOVERNMENT OF RELIGIOUS

CHAPTER I

SUPERIORS AND CHAPTERS

After dealing with the foundation and suppression of religious congregations and houses, the Code proceeds to treat of the organization or government of religious. Here, of course, no detailed enumeration of the different classes of superiors and their powers over the various institutes can be expected. Though the norms cover a wide range, they admit enough elbow space for the different constitutions, as far as these do not conflict with the new law. The superiors specially mentioned are: the Roman Pontiff, the Cardinal Protector, the Ordinary, the religious Superiors, the general Chapter and Counselors.

CAN. 499

THE ROMAN PONTIFF AND THE CARDINAL PROTECTOR

§ 1. Religiosi omnes, tanquam supremo Superiori, subduntur Romano Pontifici cui obedire tenentur etiam vi voti obedientiae.

§ 2. Cardinalis Protector cuiuslibet religionis, nisi aliud expresse cautum fuerit in peculiaribus casibus, iurisdictione in religionem aut in singulos sodales non pollet, nec potest se interiori disciplinae et bonorum administrationi immiscere, sed eius est tantummodo bonum religionis consilio et patrocinio promovere.

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All religious are subject to the Roman Pontiff as their highest superior and must obey him also by virtue of the vow of obedience.

This general principle is based upon the ordinary, full, and universal power vested in the Pope, in virtue of which he is the *highest superior of all religious.*[1] This means that no religious order or congregation may lawfully exist without his sanction, even as human societies need the permission of higher authority for legal existence. Furthermore it implies that the papal ordinances and laws, as far as they touch religious, either in general as members of the Catholic Church and as a body, or in particular as single bodies, orders or congregations, must be complied with by all without exception. And this obedience must be offered to any and every legally elected pope, no matter what his personal qualities may be.[2]

But the same obedience is due also to the immediate *legal representatives of the Sovereign Pontiff*, and therefore religious must obey especially the S. Congregation of Religious and the tribunals of the Roman Court which are set up by papal authority, and also papal legates, if they have special faculties concerning exempt religious. Religious also owe obedience to general councils, and, during the vacancy of the Holy See, to the Cardinals who govern the Church in the meanwhile.

The *extent* of this *obedience* is partly personal, partly material. *Personally* it comprises all religious, exempt and not exempt, those with solemn and those with simple vows, as well as papal and diocesan institutes. For though the latter are only approved by the Ordinary, yet

1 Sometimes the title "*abbas abbatum*" is given to the Pope to signify that he has jurisdiction even over abbots. In the XIIth century the abbots of Monte Cassino and Cluny contended for that title.

2 Known is the attitude of Savonarola towards Alexander VI.

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they would not belong to the religious state without at least an implied ratification by the highest superior of all religious. Hence no exception may be claimed by any religious. As to the *material extent* of this obedience a distinction must be made between that owing to the Pope as the supreme head of the Church, and that due to him in virtue of the vow of obedience.[3] The former reaches farther than the latter because the vow of obedience has its limits, as will be seen when we come to discuss the obligations arising from vows. In virtue of the *vow of obedience* religious are bound to obey the Pope as far as their rule and constitutions demand,[4] and no farther; for a religious has no intention to bind himself farther than the limits assigned by his rule and constitutions, wherefore he says: "According to that rule I promise," etc. The consequence is that where the rule stops, the vow of obedience also ceases, and even the Sovereign Pontiff cannot stretch it, because he himself has approved the rule or constitution. Hence the Pope could not, in virtue of the vow of obedience, command a religious to leave the order and accept secular dignities, or embrace the married state, or pass to a stricter or even a milder order,[5] although he has the power to dispense.

Nor could he, in virtue of the vow of obedience, command a Benedictine to pass from one congregation to another, because the vow of stability is made for the congregation, nay even (at least it was so in former times) for a particular monastery. Neither could the Pope command a member of the Minimi to accept the

3 Ferraris, *Prompta Bibliotheca, s. v.* "*Votum,*" art. II, n. 29; Bouix, *l. c.*, II, p. 434; Piatus M., I, 298; II, 367 (ed. 2).

4 Ferraris, *Prompta Bibliotheca, s. v. Votum*, art. II, n. 28.

5 Suarez, *De Statu Religioso*, l. 10, c. 10, nn. 1 ff.

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mitigation of fasting, or force a Jesuit of the fourth class of professed members to accept an ecclesiastical dignity, because these have taken a special vow not to accept dignities. But whatever is explicitly or implicitly contained in rule and constitutions as falling under obedience to the religious superior, the Roman Pontiff is entitled to command in virtue of the vow of obedience. *Still farther reaches his power as the supreme head of the Church.* As such he may command any religious to accept any ecclesiastical dignity or office for the utility or necessity of the Church,[6] because the supreme jurisdiction in ecclesiastical matters rests with the Sovereign Pontiff. Should any special vow be in the way of obeying the Pope's command, dispensation would be granted. This, however, does not exclude the possibility and admissibility of reverent remonstrances against acceptance. As to civil or secular matters we do not believe that the Pope should or would use his influence or power of command, because this sphere is not his. But in any matter not against the rule or constitutions the religious must obey the Pope in virtue of the vow of obedience.[7]

The next paragraph (§ 2) describes the *power* of the *Cardinal Protector.* A Cardinal Protector is given to every religious institute unless the Pope reserves the protectorate to himself. Leo XIII reserved to himself the protectorate over the united Franciscans; Pius X over the Benedictines. These are peculiar provisions which entirely depend on the will of the Pope. Otherwise a Cardinal Protector residing in Rome (*in curia*) is appointed for every religious order and congregation. This custom was introduced by St. Francis of Assisi.

6 Suarez, *l. c.*, l. 11, c. 20, n. 21 f.

7 The Friars Minor have a special formula concerning obedience to the Pope, but whether or not it forms a special vow the authors dispute. Cfr. Piatus M., I, 295 (ed. 2).

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Bishops are not appointed for this office, in order that they may not assume authority over another diocese.[8] But the Cardinal Protectors appear to have usurped a jurisdiction over orders and congregations which prompted the Constitution of Innocent XII, "*Christi fidelium*," Feb. 16, 1694, which reduced the authority of the Cardinal Protector to a merely paternal and consultive one, forbidding him to interfere in official information, dispensations, favors and the execution of rescripts, all of which is directly communicated by the Roman Congregations to the respective religious superiors.[9] These laws have been embodied in the Code, which rules that the Cardinal Protector enjoys no jurisdiction over the religious as a body or over single members of the same and may not interfere with their internal discipline or administration of property. His duty consists merely in promoting the welfare of the congregation by his advice and protection. Of course the Pope may, for particular reasons, grant a certain amount of actual jurisdiction to a Cardinal Protector, as the Code says; but there are few cases that require such extraordinary interference, *e. g.*, serious trouble between the religious and the Ordinary, or relaxed discipline.

THE ORDINARY'S POWER

CAN. 500

§ 1. Subduntur quoque religiosi Ordinario loci, iis exceptis qui a Sede Apostolica exemptionis privilegium consecuti sunt, salva semper potestate quam ius etiam in eos locorum Ordinariis concedit.

§ 2. Moniales quae sub iurisdictione Superiorum

8 S. C. EE. et RR., Feb. 21, 1851 (Bizzarri, p. 590, n. 12).

9 S. C. EE. et RR., May 9, 1715 (Bizzarri, *l. c.*, p. 302 f.).

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regularium ex praescripto constitutionum sunt, Ordinario loci subduntur tantum in casibus iure expressis.

§ 3. Nulla virorum religio sine speciali apostolico indulto potest sibi subditas habere religiosas Congregationes mulierum aut earum religiosarum curam et directionem retinere sibi specialiter commendatam.

After having determined the relation of the religious orders towards the Sovereign Pontiff and their respective Cardinal Protector, the Code regulates their relation to the Ordinary of the diocese. To him all religious of the diocese are subject, except those who have obtained the privilege of exemption from the Apostolic See, and these, too, in certain cases expressly provided by law.

The first paragraph states as a general principle that religious should by right be subject to the Ordinary of the diocese, because locally all religious belong to the diocesan organization. Of exemption, which in general means freedom from episcopal jurisdiction, enough has been said in the Introduction. Observe that the Code has done away with the Tridentine distinction between the Ordinary as such and the Ordinary as papal delegate, simply maintaining the right of the Ordinary. As to religious Congregations, the power of the Ordinary is more extended respecting diocesan institutes and less extended concerning papal institutes. The difference appears in the election of superiors, canonical visitation, administration of property, etc. Spiritual guidance and the administration of the Sacraments should not offer any great divergency.

As to *nuns, i. e.,* female orders with solemn vows, § 2 establishes that, if their constitutions subject them to the jurisdiction of regular superiors, they are withdrawn from the jurisdiction of the Ordinary, except in cases

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expressly stated in the Code. The only nuns of this class in the U. S., so far as we know, are those of five Visitation Convents, according to a decision of the S. Congregation of Bishops and Regulars in 1864,[10] which at the same time decreed that in all the monasteries to be afterwards erected the vows of these sisters should be simple only. We doubt very much whether the convents of the Visitation Sisters are actually exempt. They certainly are subject to the Ordinary, not to regular superiors. All other nuns in the U. S. take simple vows, unless otherwise decided by an Apostolic rescript.

The Code says, further, that *congregations of women* with simple vows may never, unless a special Apostolic indult is granted to that effect, be subjected to a religious order or congregation of men, nor is any such order or congregation allowed to retain the care and direction of such sisters as if specially entrusted to them. No male institute, exempt or not, may henceforth claim any jurisdiction, authority, or spiritual guidance over any sisterhood, for such power would curtail the bishop's rights and be tantamount to exemption. The Holy See has justly reserved to itself the appointment of such a spiritual director, and any jurisdictional or authoritative affiliation of a congregation of Sisters with a congregation of men is prohibited by common law and needs a special indult.[11]

Here it may not be amiss to mention what were called *double monasteries,* that is to say, religious communities of men and women living under the same rule and roof, or if not under the same roof, at least near together.

10 Bizzarri, *l. c.*, p. 735. The five convents are: Georgetown, Mobile, St. Louis (Kaskaskia), St. Aloysius (Frederick, Md.), and Baltimore.

11 S. C. EE. et RR., April 11, 1862 (Bizzarri, *l. c.*, p. 153 f.); "*Conditae,*" Dec. 8, 1900, I, 8: "In spiritual matters the congregations are subject to the bishops in whose dioceses they are established."

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Ecclesiastical legislation opposed such institutes,[12] but notwithstanding we find double monasteries in France, England, and Germany. Whitby in England was a famous abbey ruled by Hilda, who enjoyed great fame.[13] In France Remirmont was a most renowned foundation, as was that of Robert d'Arbrissel (+ 1117), who subjected nuns and monks alike to the jurisdiction of an abbess.[14] Such institutes were, of course, possible only on a basis of strict discipline and complete separation of the sexes, and may be explained by the peculiar conditions existing under the feudal system. Not seldom they were founded by the abbess herself or her near relatives, and she was therefore looked upon as the proprietress or "lady" of the monastery.[15] The priests and clerics who supplied the spiritual wants of the nuns had to conform themselves to her "rule." Fountevrauld claimed to represent the beloved Disciple under the maternal guidance of the Blessed Virgin,—a rather mystic view. Benedict XIV seems surprised that the superioress of Fountevrauld should be exempt from the jurisdiction of the Ordinary, but he does not deny the fact.[16] Now-a-days it would hardly be advisable to found such monasteries. Only one affiliation, as stated under can. 492, § 1, is admissible, *viz.*, that of Tertiaries by the superior general of the first order, to enable them to participate in spiritual favors.

RELIGIOUS SUPERIORS

The Code now lays down some rules concerning the powers of religious superiors and chapters, their election and obligations.

12 Cc. 12, 23, C. 18, q. 2.

13 St. Bede, *Hist. Eccl.*, IV, 23 (Migne, 95, 209).

14 *Studien O. S. B.*, 1885, 2, 64 ff.

15 Cfr. Lingard, *Anglo-Saxon Church*, I, 194 f.

16 "*Quamvis iusto*," April 30, 1749, § 17.

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POWERS OF RELIGIOUS SUPERIORS

CAN. 501

§ 1. Superiores et Capitula, ad normam constitutionum et iuris communis, potestatem habent dominativam in subditos; in religione autem clericali exempta, habent iurisdictionem ecclesiasticam tam pro foro interno, quam pro externo.

§ 2. Superioribus quibuslibet districte prohibetur quominus in causis ad S. Officium spectantibus se intromittant.

§ 3. Abbas Primas et Superior Congregationis monasticae non habent omnem potestatem et iurisdictionem quam ius commune tribuit Superioribus maioribus, sed eorum potestas et iurisdictio desumenda est ex propriis constitutionibus et ex peculiaribus Sanctae Sedis decretis, firmo praescripto can. 655, 1594, § 4.

A distinction is here made between domestic power and jurisdiction. The *domestic power* is granted to all superiors and Chapters over their subjects, but only in so far as their Constitutions and the common law permit; *ecclesiastical jurisdiction,* on the other hand, in the court of conscience as well as *in foro externo,* is possessed by the superiors of clerical exempt institutes only. Hence we have two kinds of superiors, namely (1) single persons and chapters; (2) such as are endowed with domestic power only, and such as enjoy jurisdiction proper.

1. *Single superiors* are either *maiores* or higher, or *inferiores,* lower or local. Among the *higher superiors* our Code enumerates the abbot primate, the abbot president of a monastic congregation, the abbot of an independent monastery, although the latter belongs to a mo-

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nastic congregation, the superior general, the superior provincial and the latter's representatives, as well as those who enjoy a power similar to that of provincials. All these persons, if they belong to an exempt clerical order, are possessed of jurisdiction proper, and are therefore called *prelates.*[17] For a prelature is a dignity that combines precedence or preëminence — hence the name *prælatus,* from *praeferre,* to prefer — with jurisdiction. What jurisdiction means has been explained in the second volume of this work, to which we refer.[18] It implies public legislative, judiciary, and coercive power within certain limits. This is not the case with the *domestic power* (*potestas dominativa*), which consists in the authority of the superior to direct the members of a religious body to the end for which the institute was founded, and is therefore confined to the scope of the institute itself and limited by its constitutions and rules. This power is essential to any community for the reason that without authority no organization can attain its end. As S. Scripture says: "Where there is no governor, the people shall fall" (Prov. 11, 14). The extent, then, of the domestic power of the superiors is coterminous with the end of the institute as defined in its constitutions, and religious superiors are not at liberty to permit substantial deviations from the regular life.[19] To this right vested in the superiors corresponds the duty of *obedience* in the members, of which we shall treat under the heading of obligations.

This domestic power was for centuries the only one

17 Cfr. can. 488, 8; Suarez, *De Statu Rel.*, tr. VIII, l. II, c. 1, n. 1 ff. (ed. Paris, 1860, t. 16, pp. 77 ff.).

18 Can. 196; Suarez (*l. c.*, tr. VII, l. II, c. 18, n. 5, ed. Paris, 1859, t. 15, p. 218) says that the power of jurisdiction belongs to the power of the keys (*potestas clavium*); but so does the sacramental power, and yet it involves no jurisdiction proper.

19 *Trid.*, Sess. 25, c. 1, de reg.

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religious superiors could wield. Gradually, especially since the tenth and more largely since the eleventh century, there was added to it the power of jurisdiction, which grew when certain orders attained exemption. Hence, when St. Benedict speaks in his Rule [20] of excommunication, he means what we call monastic, not ecclesiastical excommunication, although the two are similar.

It remains to say something of *lower superiors,* for the Code stops at the rank of provincials who are the last in the series of higher (*maiores*) superiors. Are *guardians, conventual priors, rectors,* higher superiors? It appears that the affirmative opinion may safely be held. Benedict XIV states that these are local superiors before whom trials concerning nullity of religious profession must be instituted.[21] Besides they are in law looked upon as dignitaries or at least such as may be appointed legates.[22] Hence there seems to be little doubt that they may be termed *superiors* in the sense of our Code. The same may not be said of cloistral priors (*priores claustrales*), who do not fall under the category of dignitaries (*in dignitate constituti*).[23]

The power of the superiors of exempt clerical religious orders is called *ordinary* because given in virtue of their office. For the same reason the Code states that these superiors are to be comprised under the name of Ordinaries.[24] The jurisdiction of these superiors is called *quasi-episcopal,* inasmuch as it extends to acts of jurisdiction, though not all, proper to bishops.[25] The Ordinary of the diocese has certain rights which these

20 *Reg.*, cc. 23 f.

21 "*Si datam,*" March 4, 1748, referred to by Gasparri, can. 488, 8.

22 C. 11, 6°, I, 3, *De Rescriptis;* c. 2, Clem., I, 2; Piatus M., *l. c.*, I, 493.

23 C. 2, Clem., I, 2; Reiffenstuel, I, 29, n. 70 f.

24 Can. 198.

25 Suarez, *De Rel.*, tr. VIII, l. II, c. 2, n. 14 (ed. Paris, 1860, t. 16, p. 90 f.).

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superiors must respect. Aside from this it is generally admitted that, as Pius V states, the religious superiors endowed with jurisdiction may exercise the same power over their subjects as the bishops over the clergy and faithful.[26] Hence when the Code speaks of "*Ordinarius,*" without the addition "*loci*" (diocesan), the religious superiors are included, unless the wording or context plainly excludes them.

Superiors of religious orders which are *not exempt* enjoy only domestic power within the limits of their respective constitutions. Therefore ecclesiastical censures, dispensations from ecclesiastical laws, absolution from reserved cases, etc., are not within the range of their power, for in such matters the members and superiors of non-exempt religious are subject to the Ordinary, who may, however, communicate the necessary faculties to the superiors.[27]

Besides the superiors there are the *chapters* (*capitula*) of the orders and congregations, which are assemblies held for the purpose of treating matters pertaining to the institute. St. Benedict already inculcated the necessity of calling together either the whole community, or at least the seniors, that the Scriptural injunction might be followed: "Do nothing without counsel; and thou shalt not repent when thou hast done" (Eccles. 32, 24). He might also have alleged the text, Proverbs 11, 14: "There is safety where there is much counsel." But after all was said and done the abbot decided. Only in elections the constitutional element appears. Later, with the changed position of abbots endowed with jurisdiction and often with feudal powers, the legislation of the

26 "*Romani Pontificis,*" July 21, 1571, § 3, which explicitly mentions the Dominican Priors.

27 Cfr. "*Conditae,*" II.

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Church bound them not only to the advice, but to the consent, of the monks.[28] The English Benedictines set a good example and thereby helped to frame "the great charter" of a constitutional monarchy which was absolutely necessary to counteract the almost frightfully increased power of the abbots. If the rule of St. Benedict is cited against us, we answer that no rule, and no law of human origin is destined to last the same forever. Besides, if the abbots have been endowed with prerogatives not even hinted at in the Rule of St. Benedict, it is difficult to understand why the monks should be denied development of their capitular rights.[29]

The Cistercians, therefore, and the great Mendicant Orders, riding the wave of the times, introduced into their constitutions the institution of chapters, which later were approved, nay insisted upon by the Fourth Lateran Council as well as by that of Trent.[30]

Chapters are either *general,* or *provincial,* or *local,* according as they meet from the whole order, or from a province, or from one convent. The *convocation* of a *chapter* belongs to the superior who is empowered to call it by the constitution of the order; for there is a variety of rules which we cannot detail here.[31] The same is true concerning the *subject matter* to be treated in chapters. The *manner of procedure* may be defined by the constitutions; if it is not, the common law (see canon 101) must be followed. Whatever requires the *consent* (*consensus*) of the chapter affects the validity of the acts which the superior performs, and he would therefore act validly if he neglected the chapter's rights. But

28 Cfr. cc. 2, 3, 6, X, III, 10, touching chiefly English monasteries.

29 Molitor, *Religiosi Iuris Capita Selecta,* 1909, *passim,* would have us go back 1400 years!

30 C. 7, X, III, 35; tit. 16 in 6°; tit. 10 in Clem.; *Trid.,* sess. 25, cc. 1, 8, de reg.

31 Cfr. Piatus M., *l. c.,* I, 613 ff. (2nd ed.).

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if the law or constitutions demand only the advice (*consilium*) of the chapter, transactions made by the superior without calling the chapter are valid.[32]

The power of a *General Chapter* is *supreme* in the respective order or congregation, not including the monastic congregations which are mentioned in § 3. It extends to the election, punishment and deposition even of the superior general, to the enactment and repeal of laws and statutes, unless these have been specifically ratified by the Pope. But the General Chapter may not enact laws or rules against the common law or against the rule of the order, either by making it stricter or relaxing its tenor, although mitigations may be introduced with the approval of the Holy See.[33] The power here described in general terms may, of course, be enlarged or restricted by the constitutions, which depend upon the approbation of the Holy See.

The *Provincial Chapter,* broadly speaking (for as to specified faculties the respective constitutions must be consulted), may enact laws touching the province, elect and depose provincial superiors, restrict and abolish privileges granted for the province, but not such as are granted to the whole order or congregation.

The *Local Chapter* is convoked for the consideration of matters touching the local community, especially novices and other affairs of importance. The monastic chapters are of greater authority than those of centralized orders whose convents generally consist of but a few members.

The *rights* of single *capitulars* in any religion are, habitually at least, granted by the first (simple) profession, although they may not be exercised during the time

[32] Can. 105. [33] Piatus M., *l. c.*, 616 ff.

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of simple or temporary vows.[34] But the Code has, as it were purposely, abstained from determining a more precise date for the exercise of capitular rights, evidently in order to avoid controversies. There is question about the requisite of sacred orders for the exercise of capitular rights in clerical religious. We can find no law text[35] whatever which requires a higher order for the right of voting, unless the chapters in question would be cathedral or collegiate chapters. It would, however, not contravene any law of the Church were the constitutions to prescribe a sacred order as a necessary condition of exercising capitular rights.

As to those who are *deprived* of that right consult can. 167, which excludes from the right of voting all who are incapable of a human act, minors, and censured and infamous persons.[36] Under can. 639 f. all those who are either temporarily or forever secularized are deprived of capitular rights.[37] The Code further mentions as liable to be deprived of capitular rights those who violate the rules of common life in a serious manner.[38] Finally the *lay brothers* (*fratres conversi*) are not admitted to the chapter rights; for although they are religious, they do not, according to the common law of the Church, belong to the clerical or hierarchic order properly so-called.[39] Besides the law was doubtless made in order to prevent dissensions, which were not rare in former times, especially on the occasion of elections, and to exclude undue lay influence in purely ecclesiastical matters.

34 Can. 578, § 3.

35 C. 2, Clem., I, 6, mentions churches of canons (collegiate chapters); *Trid.*, sess., 22, c. 4, refers to cathedral and collegiate churches only.

36 Cfr. also can. 2331, 2336, 2342, 2360, 2368, 2385.

37 Can. 639 f.

38 Can. 2389.

39 C. 32, § 1, 6°, I, 6; Engel, I, 6, n. 5.

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MATTERS PERTAINING TO THE HOLY OFFICE

Religious superiors, according to § 2 of can. 501, are strictly forbidden to handle or interfere with cases belonging to the Holy Office. Although the synod of Toulouse in 1229 had enjoined exempt abbots who were not subject to the Ordinary's jurisdiction to proceed like bishops against heretics and their protectors and promoters,[40] this injunction was, it seems, not conducive to the end for which the Inquisition had been instituted. Hence, especially after the Council of Trent, the *causae fidei,* or matters of faith, which fell under the jurisdiction of the Holy Office, were exclusively assigned to the latter in places where it was able to exercise its power. But when heresy sprang up and spread far and wide, the bishops were the natural defenders of the faith and judges in such matters. Paul V excluded religious superiors from proceeding in matters strictly belonging to the Holy Office.[41] These matters are the following:

a) Whatever appertains to heresy and schism, as well as the persons (bishops, inquisitors) who proceed against these crimes, if they are impeded or disturbed in prosecuting the guilty;

b) Whatever savors of divination, witchcraft, sorcery, superstition, astrology, etc.;

c) Whatever touches the sacredness of the confessional;[42]

d) Persons, lay or clerical, who, though not priests, attempt to say Mass or hear confessions.

e) The Code adds another, *viz.,* religious who become

40 Can. 2 (Hefele, *Concil.-Gesch.,* V, 873).

41 "*Romanus Pontifex,*" Sept. 1, 1606, § 2; H. O., May 15, 1901.

42 Cfr. Santi-Leitner, *l. c.,* I, 31, n. 70; Bachofen, *Compendium Iuris Regul.,* 1903, p. 325; the sacredness of the confessional concerns *sollicitatio ad turpia* and refusal of absolution unless the name of the accomplice be revealed.

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members of a Masonic sect or similar society must be denounced to the Holy Office.[43] These and similar matters, then, the religious superiors are not to prosecute, either criminally or judicially, by summoning witnesses or inflicting penalties, or in any way that would savor of inquisitorial procedure, but refer to the Holy Office if any proof is in their hands. They are not obliged to act on mere suspicion or rumor, because prudence and charity require an investigation; but they may administer fraternal correction or admonition. The culprits may be reported to the Ordinary or directly to the Holy Office.[44]

SUPERIORS OF MONASTIC CONGREGATIONS

These superiors, according to § 3, can. 501, have not the same power and jurisdiction as the higher superiors (*superiores maiores*), but only as much as they receive from their own constitutions and from special decrees of the Holy See. The same holds good also of the *Abbot Primate* of the Benedictine Order.

A special canon is devoted to the constitution of the Benedictines and their affiliated orders,— a deference for which these orders owe a debt to the sovereign legislator. To understand this the reader should consider that each Benedictine monastery deserving of that name is an autonomous or independent juridical person or corporation, whose head is from time immemorial called abbot (father). St. Benedict looked upon his communities as families over which the abbot was to rule with an authority similar to that of a Roman *paterfamilias*. He does not speak in his rule of an aggregation of the various monastic families, though it cannot be proved that the Benedictine Code excludes or condemns such amalgamation or confederation. To call the Cluniac Con-

43 Can. 2336, § 2.

44 H. O., May 15, 1901.

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gregation or order, as it was styled, a distinct departure [45] from St. Benedict's rule seems to us a rather subjective judgment. And even granted — *dato, non concesso,*— that union in a stricter sense should be called a deviation from the primitive rule of St. Benedict, would it not be foolish to make even of a sacred Code a petrified thing impervious to any, even salutary changes, which do not touch the substance or nerve of the rule? Changed conditions require a change of rules. In England, France, Italy, and Germany, especially after the IVth Lateran Council,[46] congregations and chapters seem to have been a necessary requisite for maintaining discipline and order, as well as to exert influence in, and command the respect of, the outside world. It could not escape the far-sighted Pope Leo XIII, who was so deeply interested in the Greek Union [47] and the Union of the Franciscans, that a closer confederation of the houses of the Order of St. Benedict would be productive of many advantages and benefits. With the coöperation of Cardinal Dusmet he succeeded in establishing a "*fraternal confederation* of the *Black Benedictines,*" over which he put an Abbot Primate, to be chosen for twelve years from any of the congregations. He resides in the College of St. Anselm in Rome, whose abbot with ordinary jurisdiction he is. But he has no jurisdiction over the single congregations or abbeys, or over the various abbots or members. No powers or rights are pointed out in the Apostolic brief [48]

45 Cfr. Alston in the *Cath. Encycl.*, IV, 73 f (*s. v.* "Cluny"); a more decisive deviation from the rule are temporary abbots. The author is correct insofar as the Cluniac system of priories was anything but Benedictine; but a union of abbeys is neither denounced nor recommended by the Rule.

46 C. 7, X, III, 35.

47 Cardinal V. Vanutelli reported to Leo XIII that the Benedictines would favorably impress the Orientals, and upon this report Leo XIII acted in supporting the new organization and reopening St. Anselm's College, Jan. 4, 1888.

48 "*Summum Semper,*" July 12, 1893; *Studien O. S. B.*, 1893, 454, 630 ff.

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that created the new dignity, but some were granted in the course of years by the Roman Court.[49] Thus the Abbot Primate may, leaving other faculties now dubious aside, call the abbots presidents for a meeting in Rome at least every six years.[50] But the decisions taken at such a meeting are not to be considered laws for the order, for no Order of St. Benedict, in the juridical sense, exists; nor are the presidents entitled to make laws for the order, or even for their congregations.

Chapters of each *congregation* are called by the presidents thereof, generally at stated times. Those who are to be present at the chapter are determined by the Constitutions of each congregation, which greatly differ from one another. Thus the English Congregation admits the president, the actual abbots, the Cathedral Prior of Newport, the delegates from single monasteries, the procurator at the Roman Court, the master of the schools, the assessor in judiciary matters and the inspector of the temporalities.[51] The American-Cassinese Congregation calls abbots and independent priors as well as delegates. The Swiss-American Congregation admits only abbots.[52] The reason why these chapters enjoy no legislative power for the congregation as such is because as long as a congregation is no juridically united body these authorities, even under the presidency of one acting as abbot president, no matter how solemnly they may gather, are merely single entities who represent their own communities, but not the whole congregation in the sense of an ecclesiastical corporation. We do not deny, however,

49 Cfr. *Annales O. S. B.*, 1908, pp. 22, 46, 57; S. C. EE. et RR., Jan. 31, 1902; Dec. 2, 1906; Dec. 21, 1907; Pius X, May 30, 1908.

50 Such a meeting was held in 1907.

51 Leo XIII, "*Diu quidem*," June 29, 1899 (*Bull. Cong. Ang. O. S. B.*, 1912, p. 125).

52 This is an anachronism, to be removed like the *regium placet*.

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that the Sovereign Pontiff could endow them with legislative power, in which case they would act as delegates of the Pope. The members of such chapters may propose and deliberate on matters of reform and regular discipline as well as mutual assistance and material support.[53] Precisely from this point of view it would be conducive to uniformity of discipline if not only abbots would be present at the so-called general chapters, but, according to the model of the English Congregation, also representatives of the communities with at least a consultive voice. The reason why our Benedictine Congregations, or at least most of them, are not a corporative unit is that profession, and especially the vow of stability, is made into the hands of the abbot, and is, at least intentionally, confined to the single monastery. Besides, although there may be a mutual promise of material help, yet the property of each monastery belongs to that monastery and not to the congregation as such. Whether two vital elements of the Benedictine "Order" should or may be changed, we leave to others to decide.

CAN. 502

Supremus religionis Moderator potestatem obtinet in omnes provincias, domos, sodales religionis, exercendam secundum constitutiones; alii Superiores ea gaudent intra fines sui muneris.

This canon enacts that the *superior general* is endowed with power over all the provinces, houses, and members of his institute within the limits of its constitutions, and that *other superiors* have as much power as their office requires.

The Constitution "*Conditae*" of Leo XIII had estab-

53 Molitor, *l. c.*, p. 526; p. 339 ff.

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lished the rule that the government of a religious congregation whose Constitutions are approved by the Holy See must not be tampered with by the Ordinary, but remains with the superiors, either general or local. Hence it empowered the supreme superiors to organize houses, to dismiss novices and professed members, etc., in accordance with the law as now set forth. But it also reserved to the Roman Pontiff the right to dispense from either temporary or perpetual vows.[54] How this is to be understood shall be explained under the title on *dismissal.* The *limitations* of the power granted to any superior, general or other, must be determined by the respective constitutions, which are supposed to be approved by the Holy See,— the supreme authority against which no inferior may act. It is not necessary to specify here because the different rights will be mentioned under various headings later. Only one point we will note. The domestic power includes the *right* of *punishing delinquent* members, but only in so far as no ecclesiastical censures or vindictive penalties are inflicted, because to mete out ecclesiastical penalties requires more than domestic power, *viz.,* jurisdiction. But from the infliction of a punishment which does not exceed the domestic authority of the superior no appeal in the proper sense can be made, although recourse may be had to a higher superior or to the S. Congregation of Religious.

CAN. 503

Superiores maiores in religionibus clericalibus exemptis possunt notarios constituere, sed tantum pro negotiis ecclesiasticis suae religionis.

Canon 503 grants the higher superiors of exempt cleri-

54 "*Conditae,*" II, 1 f.; Bastien-Lanslots, *l. c.,* p. 173.

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cal orders the right of appointing *notaries* to act in ecclesiastical matters pertaining to their order. This, as history tells, is an ancient custom. Abbots chose their own notaries, who were recognized by the civil courts.[55] Under the new Code their office is purely ecclesiastical, and consists chiefly in keeping records, taking depositions, and authenticating documents.[56] Before they enter upon their office, notaries must take an oath to perform their functions faithfully. This oath is to be made into the hands of the superior who appointed them.[57] Such notaries may play an important role in ecclesiastical lawsuits, *e. g.*, such as concern the validity of the profession or expulsion of religious, also in cases of beatification and canonization, elections, the installation of religious superiors, etc.

QUALITIES OF SUPERIORS

CAN. 504

Firmis propriis cuiusvis religionis constitutionibus quae provectiorem aetatem aliaque potiora requisita exigant, ad munus Superioris maioris inhabiles sunt qui eandem religionem professi non sunt a decem saltem annis a prima professione computandis, non sunt ex legitimo matrimonio nati et annos quadraginta non expleverunt, si agatur de supremo religionis Moderatore aut de Antistita in monialium monasterio; annos triginta, si de aliis Superioribus maioribus.

This canon lays down the minimum *requirements* for the office of superior. (1) It leaves it to the respective constitutions of each institute to demand a higher age or

55 Reiffenstuel, II, 22, n. 260.

56 Authenticating relics would also belong to their office, but see can. 1283.

57 Can. 364.

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more stringent requisites; (2) It rules that, to be elected higher superior, one must have been a member of the same institute for at least ten years from the date of his first or simple profession; (3) It demands that he must have been born of lawful wedlock; and (4) that the superior general of any religious institute and the superioress of nuns with solemn vows must have completed the *fortieth,* and every other superior the thirtieth year of age.

Concerning the first point note that while the religious constitutions may demand more extensive qualifications, they are not allowed to restrict the minimum determined by the Code; and hence all rules or constitutions contrary to canon 504 must be looked upon as abrogated.

The second point rules that the ten years during which one must have been a professed member of the religious institute of which he is to be elected superior are to be counted from the date of simple, not solemn, *profession,* that is to say from the date of that profession which is commonly made after the novitiate. Noteworthy is the phrase: "*the same institute.*" Clement V issued a decretal saying that the election of one who belongs to another *religio,* for instance, of a Franciscan as abbot of a Benedictine monastery, would be null and void.[58] The Code says "*religio,*" not congregation or province. From this point of view a religious of one monastic congregation of the same order may be validly elected abbot of a monastery of another congregation of the same order. However, a Cistercian could not legally be elected abbot of a monastery of Black Benedictines, because, though the original code of both is the same, yet they are justly called different orders.

The third requirement is *legitimate birth.* Various

58 C. 1, Clem. I, 3, de electione.

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councils, especially during the eleventh century, enacted strict rules concerning such as were born out of lawful wedlock; while admitting illegitimate children to religious profession, they excluded them from the higher offices, especially prelacies.[59] Sixtus V made still stricter rules concerning such as were born from an incestuous or a sacrilegious relation, entirely excluding them from the religious state.[60] A certain mitigation was introduced by the same pope by admitting such as were born from parents between whom a legitimate marriage could have existed at the time of birth, and who were legitimated by the subsequent marriage of the parents. The whole question, therefore, falls rather under marriage law, to which we refer.[61]

Of interest may also be that part of the declaratory Constitution of Sixtus V which provides that among the dignities from which religious of illegitimate birth are debarred, are the following: provosts, abbots, priors (conventual), guardians, *custodes,* provincials and generals. The offices of professors (*lectores*), confessors, doctors or masters of theology, preachers and rectors (of seminaries) are not considered dignities.[62]

The last quality required in a superior is *age.* The Decretals[63] were somewhat less rigorous on this point than is the Code, which extends the age limit, requiring forty years for a superior general and thirty for all other higher superiors, provincials, abbots, and local superiors. This rule is just, for theory and practice, theological knowledge and business abilities now-a-days require an experience not necessary in former times.

59 C. 1, X, I, 17 (synod of Poitiers, 1078); Reg. Iuris 87 in 6°.

60 "*Cum de omnibus,*" Dec. 1, 1587.

61 "*Ad Romanum spectat,*" Oct. 21, 1588; cfr. can. 1015, 1114, 1116.

62 Bizzarri, *l. c.*, p. 845.

63 C. 43, 6°, I, 6 (abbess = 30 years); c. 1, Clem. III, 10, required only twenty-five years for a prior.

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Inhabiles means that the lack of one of these requirements constitutes a canonical impediment.

DURATION OF OFFICE

CAN. 505

Superiores maiores sint temporarii, nisi aliter ferant constitutiones; Superiores autem minores locales ne constituantur ad tempus ultra triennium; quo exacto, possunt ad idem munus iterum assumi, si constitutiones ita ferant, sed non tertio immediate in eadem religiosa domo.

The text plainly betrays the preference of the legislator for temporary over permanent superiors. Unless the respective constitutions determine otherwise, the *higher superiors* should be elected for a *certain limited term.* As to *minor local superiors* the Code, setting aside the constitutions, simply rules that their term of office should not last more than three years, after the expiration of which they may be re-appointed for another term of the same length, provided the constitutions are not opposed to reëlection. But no one may serve three successive terms as superior of the same house.

The question whether it is *more expedient* to have temporary or permanent superiors is not without interest. That opinions upon it are divided is, we believe, due to more or less subjective prepossessions and perhaps to circumstances. It may be well to state the reasons for permanent superiors first. Superiors, like bishops, ought to be permanent, because permanency of tenure produces a stronger bond of charity between governor and governed. Besides, a perpetual superior is apt to take better care of his flock and to acquire experience which will benefit the subjects as well as the government itself.

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Against perpetual superiors the following reasons are alleged: humility and zeal are promoted by short terms; experience teaches that temporary superiors do not repeat the mistakes of their predecessors. If the predecessor has been a bad or incapable ruler, the evil produced is neither so intensive nor so extensive, and can be more easily remedied. Corruption is not so apt to become rooted during a short regime. When perpetual superiors grow old, their government is also apt to grow old and rusty.[64] Lastly, favoritism does not grow so strong and pernicious under temporary superiors. It is not necessary to develop this argument further, but one thing is certain, *viz.*, that the Congregations of the Roman Court have never been in favor of perpetual superiors for *female* orders and congregations. In Italy they do not even allow abbesses to remain in office more than three years, or to be reëlected for a third term, unless there is "a strict necessity" and a unanimous vote of the Sisters.[65] As to the *Benedictines* it is known that, under their rule, abbots are elected for life, and the Code permits this custom, if enacted by the Constitutions,[66] to continue.

Minor local superiors are not henceforth allowed to hold office for more than six years. Who are these superiors? All who are inferior in rank and power to the "provincials and their vicars and all others who have the same powers as the provincials." Therefore, conventual priors, guardians, *custodes* and similar superiors, who enjoy the same power in their houses as provincials,

64 Cfr. Piatus M., *l. c.*, I, 491 (ed. 2). An expedient for counteracting the evils attendant upon old age is the election of a coadjutor, as was done in several instances, in these latter years, in the O. S. B.

65 There is a great number of decisions on this point in the regesta of the S. C. EE. et RR.

66 The Cassinese Congregation had triennial abbots, the English Congregation elects its abbots for eight years.

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do not fall under this prohibition.[67] But we do believe that all local superiors who are not endowed with jurisdiction but enjoy only domestic power, as in congregations of non-exempt religious, are affected by the law. Neither are superiors of diocesan institutes which have only one house exempt from the law of a triennial term. The mystic argument that a superior, like a mother, should not be removed from his family, has no juridical value.

ELECTION OF RELIGIOUS SUPERIORS

CAN. 506

§ 1. Antequam ad Superiorum maiorum electionem deveniatur in religionibus virorum, omnes et singuli e Capitulo iureiurando promittant se electuros quos secundum Deum eligendos esse existimaverint.

§ 2. In monasteriis monialium, comitiis eligendae Antistitae praesit, quin tamen clausuram ingrediatur, Ordinarius loci aut eius delegatus cum duobus sacerdotibus scrutatoribus, si moniales eidem subiectae sint; secus, Superior regularis; sed etiam hoc in casu Ordinarius tempestive moneri debet de die et hora electionis, cui potest una cum Superiore regulari per se ipse vel per alium assistere et, si assistat, praeesse.

§ 3. In scrutatores ne assumantur ipsarum monialium confessarii ordinarii.

§ 4. In mulierum Congregationibus electioni Antistae generalis praesideat per se vel per alium Ordinarius loci, in quo electio peragitur; cui, si agatur de Congregationibus iuris dioecesani, peractam electionem confirmare vel rescindere integrum est pro conscientiae officio.

67 Pius V, "*Romani Pontificis*," July 21, 1571; Sixtus V, "*Ad Romanum spectat*," Oct. 21, 1588.

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CAN. 507

§ 1. In electionibus quae a Capitulis fiunt, servetur ius commune de quo in can. 160–182, praeter cuiusque religionis constitutiones eidem non contrarias.

§ 2. Caveant omnes a directa vel indirecta suffragiorum procuratione tam pro seipsis quam pro aliis.

§ 3. Postulatio admitti potest solum in casu extraordinario et dummodo in constitutionibus non prohibeatur.

These two canons establish the regulations or laws to be observed in the election of superiors. We may say that can. 506 determines the preliminaries, whilst can. 507 governs the act of election.

§ 1 of can. 506 enjoins all the members of *religious institutes of men,* before they proceed to the election of higher superiors, *to take an oath* by which they promise to elect only such candidates as they think should, before God, be chosen. This oath was prescribed by Clement VIII, and reinforced so strongly by a decision of the S. C. Concilii,[68] that not a few authors regarded it as essential.[69] The Code cannot be construed as enjoining it under penalty of nullity of the election, though it imposes it as a most serious and grievous obligation, as is evident not only from the sacredness of the oath itself, but also from the importance of the business in hand.

The oath may be administered either by the presiding officer or by the notary of the religious institute shortly before the election takes place, and must be taken by "each and every member of the chapter." This term

68 "*Nullus omnino,*" July 25, 1599, § 23; S. C. C., Sept. 21, 1624, § 1.

69 Ferraris, *Prompta Bibliotheca, s. v.* "*Electio,*" IV, 7 ff.

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would indicate that each has to take the oath singly, yet the electors would no doubt comply with the spirit of the law if all answered in a body, while one pronounced the formula of the oath.[70] The holding up of three fingers of the right with the left hand on the breast is sufficient, whilst the formula is pronounced.

The Code then defines the *object* of *the oath.* This object is more precisely described in the constitution of Clement VIII, thus: to elect him whom, in conscience, they believe to be more righteous and more fit. Our Code throughout uses the term "fit" (*idoneus*), not worthy (*dignus*). Therefore it is left to the conviction of everyone of the electors to give his vote to the one whom he believes more fit to fill the office. Fitness must be judged according to the qualities required by, and the obligations imposed on, the office under consideration. One quality should, according to St. Benedict's Rule, never be overlooked, *viz., discretion.*[71]

§§ 2 and 3 treat of the election of superiors in communities of *nuns* (*moniales*), that is, sisterhoods with solemn vows. If they are subject to the Ordinary of the diocese, the latter or his delegate, with two priests as tellers, must be present at the election of the superioress, without, however, entering the enclosure. If the nuns are subject to a *regular prelate,* he must be present, though also in this latter case the Ordinary of the diocese must be duly informed of the day and hour of the election, and may be present himself or by proxy at the election, together with the regular prelate, who must

70 The formula might read: "*Ego N. N., huius capituli membrum, promitto et iuro, me electurum quem secundum Deum eligendum esse existimo. Sic me Deus adiuvet (et haec sancta Dei evangelia)*" — these last words only if the Gospel is used.

71 Rule c. 64. Piatus M., *l. c.*, I, 494, justly remarks that the physical, mental, and spiritual qualities should be considered conjointly.

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cede the presidency to the bishop. The confessors in ordinary of the nuns may not be appointed tellers at such elections.

As already stated, there are only a few convents in this country to which this canon applies. Observe that the Ordinary or his delegate are not allowed to enter the enclosure, which is here intended to be the papal one; but they may watch the procedure at the grate of the church.

Neither the bishop, nor his chancellor, nor his vicar general, nor his delegate are entitled to gather or register the votes.[72] This right belongs to the two tellers, who, according to our Code, must be priests, but not regular confessors of the nuns. The same rule applies to the regular prelate who attends the election.[73] The votes must be deposited in a closed urn or box, which is to be opened by the prelate, bishop, or regular prelate, and the two tellers. The result is to be announced by the prelate. The same process must be repeated if the election was without result.

§ 4 rules that the Ordinary in whose diocese the election of a *superioress general of a woman's congregation* takes place, should assist thereat either himself or by a delegate. If the institute is a diocesan one, the Ordinary may ratify or nullify the election, according to his good pleasure and conscience. A distinction is here made between *papal* and *diocesan congregations of women.* At the election of a superior general of the first class the Ordinary in whose diocese the election is held, acts as delegate of the Holy See, and presides either himself or by proxy.[74] But he has no right to nullify the election

72 S. C. EE. et RR., June 19, 1671; April, 1729 (Bizzarri, *l. c.*, p. 265 f.; p. 323 f.).

73 *Trid.*, sess. 25, c. 6, de reg.; Richter, *Trid.*, p. 409; S. C. Rel., Aug. 27, 1910 (*A. Ap. S.*, II, 732).

74 Leo XIII, "*Conditae*," II, n. 1.

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if it has been held according to common law and the constitutions of the order. If the Ordinary is accompanied by one or two priests, these are not to act as tellers or to meddle in the election, by insinuation or other means. They are mere spectators. The election of tellers is the first act of the chapter meeting. Besides two tellers or scrutineers, there should also be chosen a secretary.[75] The duties of the tellers consist, as explained in Vol. II under can. 171, in collecting the votes, counting them, and comparing their number with that of the persons entitled to vote. If the number of votes is equal to that of the voters, and no invalid ballot is found, the votes deposited in the urn are opened and read before the chapter. All these acts must be faithfully recorded by the secretary, who, like the tellers, is bound by the obligation of natural and official secrecy. The bishop and his delegate may be present in the election room, for the law of enclosure does not debar him.

Over *diocesan institutes* the Ordinary enjoys greater power. Not only may he preside at the election of the superioress, but he may nullify the election or reject the person elected according to the dictates of his conscience.[76] After the third ballot, if no election has taken place, the bishop may appoint anyone he chooses. This right belongs to the Ordinary also in elections of papal congregations.[77] The question may be asked whether the *delegate* of the bishop may claim the same right as the bishop himself if he were present. The answer is affirmative if the Ordinary enjoined his delegate to act for him without reservation, but negative if he has reserved to himself the power of ratification or nullification or made an exception in regard to a certain person,

75 "*Normae*," n. 226.
76 "*Conditae*," I, n. 9.
77 Cfr. can. 101, § 1.

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or posited a condition. For, on the one hand, the Ordinary has full power over diocesan congregations, and, on the other, the delegate acts as a *mandatarius,* who must stick to the terms of his mandate and is not allowed to transgress the limits of his commission. However, in elections performed in papal congregations, the bishop's delegate must, like the bishop himself, observe the regulations laid down in the Constitutions and is therefore not at liberty to ratify or nullify the election unless a substantial mistake was made. Neither are the bishop or his delegate entitled to take exception to any person elected if she enjoys the qualities prescribed by the common law and the constitutions of the institute.

The three paragraphs of can. 507 govern the *act of election.* The first refers to the rules laid down in can. 160–182. Whenever, therefore, a chapter is held for the purpose of an election, the rules referred to must be strictly obeyed, and the regulations in the constitutions of the respective religious congregation or order governing elections may be followed only in so far as they are not against canons 160–182. These, we believe, have been sufficiently explained in our Vol. II.

§ 2 is taken verbally from Clement VIII's "*Nullus omnino,*" which strictly forbids any *soliciting* or procuring of *votes,* either for oneself or for another, directly or indirectly. Direct solicitation consists in campaigning for a candidate by collecting votes or getting promises to the effect of having that person elected in preference to another. Indirect solicitation consists in secretly influencing the electors, by words, in writing, or by promises, insinuations, and favors, on behalf of a candidate. All such machinations are strictly prohibited. If direct, they may approach simony, *i. e.,* giving temporal things for a spiritual thing, such as the office of superior.

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Altogether different from soliciting votes is the *tractatus praevius* or preliminary meeting, at which the merits or demerits of the candidates are freely and charitably discussed, in order to facilitate the election. This is not forbidden, and often produces good results, especially in a community of which many members live outside the convent and know but little of the qualities of the candidates and the needs of the congregation at large. But even in such preliminary meetings all pressure and solicitation must be avoided.

§ 3 mentions *postulation* as being admissible in an extraordinary case if the constitutions do not prohibit it. Concerning that point enough has been said under can. 179 ff. But attention must be drawn to the injunction of the Code that one who is not strictly eligible to office by reason of a canonical impediment may be postulated only in an *extraordinary case*. This means that, as a rule, an election should take place, and only if the candidate suffering from a canonical impediment is absolutely necessary for the welfare of the community, may he be postulated. In the petition that has to be sent to the S. Congregation of Religious asking for the privilege of postulation, the fact must be mentioned that the Constitutions prohibit postulation if this is the case. In such a case the suppression of the prohibition mentioned would invalidate the grant of the favor, because the legislator could not be supposed to know of the particular law, *i. e.*, the Constitutions, and therefore might not grant postulation if he knew. Therefore the reasons for postulation forbidden by the Constitutions and against the common law must be stronger than in the case of prohibition only against the common law.

Here again attention may be drawn to the strict definition of *postulation* and the canonical impediments set

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forth in can. 304. All confirm our view that the abbot of a Benedictine monastery may be elected but not postulated by another monastery of the same congregation. The reason why we restrict the statement to monasteries of the *same congregation* lies in the fact of *stability,* which, though primarily intended for the monastery, was occasionally extended to the congregation. Besides, since each congregation differs from all others in some point of discipline, it would not be advisable to elect an abbot from a different congregation, although the common law (can. 504) only speaks of profession in the same *religio,* and does not therefore exclude other congregations of the same order. The idea that there is a sort of mystic matrimony between the abbot and his monastery we reject absolutely, since it has no prop in the new Code, which rather favors temporary superiors.

RESIDENCE OF SUPERIORS

CAN. 508

In sua quisque domo Superiores commorentur nec ab eadem discedant, nisi ad normam constitutionum.

Religious superiors shall reside in their respective houses, which they are not allowed to leave except as far as the Constitutions permit.

This is the law of *residence* enjoined on superiors, not only of higher, but also of lower rank, because the canon mentions superiors in general. What it says concerning the *respective house* is to be understood of the office itself. Hence the general has to reside in the generalate, or if this is not accessible, in the house which serves as generalate (*casa generalizia,* in Italian). The provincial must reside in the house assigned to him as his habitual dwelling; the local superior, in the house of the local

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community, and so forth. A stricter rule is laid down, as we shall see presently, concerning enclosure.

The *obligation* of residence, grave as it is in general, varies according to the importance and requirements of the office. If it is true that a bishop's duties demand his personal residence in the diocese, it is perhaps not too much to say that a religious superior must exert his influence and authority within the community assigned to him, because a religious superior, too, is chosen in view of his personal qualities (*de industria personae*). Furthermore, a certain amount of enclosure or separation from the world and its affairs [78] is incumbent also on superiors. Lastly, the vow of stability, for instance, with the Benedictines, forbids frequent absence from the monastery, for one is not released from this vow by becoming a superior. Of course, if business or necessity or evident utility, or Christian charity, or the command of a higher superior call one away, he is justified in absenting himself, not only in the court of conscience but before the legislator as well, provided, of course, the respective Constitutions are properly observed.

DUTY OF INSTRUCTING THEIR SUBJECTS

CAN. 509

§ 1. Omnis Superior debet notitiam et exsecutionem decretorum Sanctae Sedis, quae religiosos respiciunt, suos inter subditos promovere.

§ 2. Curent Superiores locales:

1.° Ut saltem semel in anno, statis diebus, publice legantur propriae constitutiones, itemque decreta quae publice legenda Sancta Sedes praescribet;

78 C. 1, § 5, Clem. III, 10, forbids the frequenting of princely courts, and § 7, *ibid.*, strictly enjoins residence in the place of office, unless for the sake of studies.

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2.° Ut saltem bis in mense, firmo praescripto can. 565, § 2, christianae catechesis habeatur instructio pro conversis et familiaribus, audientium conditioni accommodata, et, praesertim in religionibus laicalibus, pia ad omnes de familia exhortatio.

Superiors should see to it that the decrees made by the Holy See for religious are made known to their subjects and carried into practice. For this purpose n. 1 of the following paragraph insists that at least once a year, on stated days, the Constitution be publicly read together with those decrees which the Holy See *shall* prescribe to be read.

This is a timely injunction, in concordance with Malachy 2, 7: "For the lips of the priest shall keep knowledge, and they shall seek the law at his mouth; because he is the angel [messenger] of the Lord of hosts." *Knowledge* presupposes study of the law, and especially of canon law, whilst *putting into effect* supposes knowledge and authority, or at least good will. The decrees referred to as more particularly touching religious, are those of the Holy Office concerning matters of faith,—all of which, as explained under can. 501, § 2, pertain to that Congregation;[79] the decree about the manifestation of conscience;[80] the decree on the *litterae testimoniales* before receiving novices,[81] etc. This rule was made by the S. Congregation of Religious, which enjoined seven decrees to be read publicly.[82] However, since these decrees are at least substantially embodied in the Code we

79 S. O., May 15, 1901.

80 "*Quemadmodum*," Dec. 17, 1890.

81 S. C. super Statu Regul., "*Romani Pontificis*," Jan. 25, 1848.

82 The S. C. Rel., July 3, 1910, mentions, besides those two: "*Singulari quidem*," March 27, 1896; "*Perpensis*," May 3, 1902; "*Sacra Tridentina*," Dec. 30, 1905; "*Praeter ea*," Sept. 1, 1909; "*Ecclesia Christi*," Sept. 7, 1909; "*Sanctissimum*," Jan. 4, 1910.

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believe we are correct in stressing the future tense of n. 1, § 2. Hence, unless the reading of these old decrees is especially prescribed by the Constitutions, they need no longer be read publicly. But any decree which the Holy See shall in future order to be read, must be read publicly. It would, however, be in keeping with the spirit of our canon if the section of the Code dealing with religious would be frequently read in religious communities.

No. 2 of § 2 speaks of *catechetical instruction* to be given at least twice a month, in a manner adapted to their capacity, to the *laybrothers or sisters* and dependents (*familiares*) of every religious community, and in lay institutes a pious exhortation to all members of the family. The novices (see can. 565, § 2) should receive more frequent instruction. Observe that the canon does not insist on such conferences for clerical institutes, the reason evidently being that they are supposed to have been instructed before and trained in the principles of the spiritual life, and to live in a higher atmosphere. Too many conferences may easily become a burden to the *conferencier* as well as to the hearers. The legislator wisely tells the lecturer not to speak above the heads of the hearers. Some practical subjects are mentioned in a decree of the S. C. of Bishops and Regulars, *viz.:* mental prayer, choir service, examination of conscience, frequent confession, silence, chapter of faults, reading at table and from Holy Scripture, pastoral conferences, regular discipline, acquisition of solid virtues, and other spiritual exercises.[83]

[83] Aug. 22, 1814 (Bizzarri, *l. c.*, p. 44 f.).

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DUTY OF REPORTING TO THE HOLY SEE

CAN. 510

Abbas Primas, Superior Congregationis monasticae et cuiusvis religionis iuris pontificii Moderator supremus debet quinto quoque anno vel saepius, si ita ferant constitutiones, relationem de statu religionis ad Sanctam Sedem per documentum mittere, subsignatum a se cum suo Consilio et, si agatur de Congregatione mulierum, etiam ab Ordinario loci in quo suprema Antistita cum suo Consilio residet.

The abbot primate, the superior of every monastic congregation, and the superior general of every pontifical institute must send every five years, or if the Constitution prescribes it, oftener, a written report on the status of his community to the Holy See. This report must be signed by the respective superior and his counsellors; and when the congregation is one of women, also by the Ordinary in whose diocese the general superioress with her counsel resides. This law, in its general form, is new, for the 1906 decree of the Congregation of Bishops and Regulars touched only religious with simple vows.[84] This same decree has appended an "Instruction," which contains ninety-three questions to be answered, somewhat like a questionnaire for exemption claimants. This instruction, however, cannot be simply extended to all religious, and it might be reasonably shortened. It contains a preamble and three parts: on persons, things (especially property), and discipline, on which a report was to be made every three years. Hence the insertion into our Code of the phrase: "or oftener," if the

84 July 16, 1906 (*Annal. Eccl.*, 1906, t. XIV, p. 340 ff.); English text in Appendix to this volume.

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Constitutions so determine. The Code says, "*per documentum mittere,*" to send a written statement, probably in order to preclude the pretext of taking a trip to the Eternal City. What was formerly demanded only of religious congregations, is now enjoined on all religious without distinction, except diocesan institutes, which are responsible only to the Ordinaries.

VISITATION

CAN. 511

Maiores religionum Superiores quos ad hoc munus constitutiones designant, temporibus in eisdem definitis, omnes domos sibi subiectas visitent per se, vel per alios, si fuerint legitime impediti.

CAN. 512

§ 1. Ordinarius loci per se vel per alium quinto quoque anno visitare debet:

1.° Singula monialium monasteria quae sibi vel Sedi Apostolicae immediate subiecta sunt;

2.° Singulas domos sive virorum sive mulierum Congregationis iuris dioecesani.

§ 2. Visitare quoque eodem tempore debet:

1.° Monasteria monialium, quae regularibus subduntur, circa ea quae ad clausurae legem spectant; imo etiam circa alia omnia, si Superior regularis ea a quinque annis non visitaverit;

2.° Singulas domos Congregationis clericalis iuris pontificii etiam exemptae, in iis quae pertinent ad ecclesiam, sacrarium, oratorium publicum, sedem ad sacramentum poenitentiae;

3.° Singulus domos Congregationis laicalis iuris pontificii non solum in iis, de quibus in superiore

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numero, sed etiam in aliis, quae internam disciplinam spectant, ad normam tamen can. 618, § 2, n. 2.

§ 3. Quod ad bonorum administrationem attinet, serventur praescripta can. 532–535.

CAN. 513

§ 1. Visitator ius et officium habet interrogandi religiosos quos oportere iudicaverit et cognoscendi de iis quae ad visitationem spectant; omnes autem religiosi obligatione tenentur respondendi secundum veritatem, nec Superioribus fas est quoquo modo eos ab hac obligatione avertere aut visitationis scopum aliter impedire.

§ 2. A decretis Visitatoris recursus datur in devolutivo tantum, nisi Visitator ordine iudiciario processerit.

These three canons establish, first and above all, the duty of the religious superiors as to visitation, secondly, the part assigned by law to the Ordinary concerning the same business, and, lastly, the rights and duties implied by visitation.

The fourth Lateran Council (1215) ordained that at the general chapters visitors should be appointed, who should be sent out in the name of the Holy See and correct whatever needed correction.[85] The Council of Vienne (1311–1313) ruled that visitation should be made every year by the Ordinaries or others of the monasteries of nuns and opportune remedies employed against abuses which seem to have crept in.[86] The Council of Trent repeated the aforesaid canons and enjoined frequent visitation upon all superiors, especially the heads of orders, who should also visit the monasteries called *com-*

[85] C. 7, X, III, 35.

[86] C. 2, Clem. III, 10.

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mendae.[87] All these laws prove the importance of canonical visitation.

Can. 511 provides that the *higher superiors* of religious orders as well as congregations, whom the constitutions entrust with the office of visitors, should, at times stated in the constitutions, visit all the houses subject to them. If they are lawfully prevented from performing that office personally, they may send others in their stead. It is evident that here regular or ordinary visitors are intended, because they perform that task in virtue of their office. Besides these, there may be extraordinary visitors and visitations for certain special causes, which are made known to the visitors, or perhaps to the Apostolic See, which may send a visitor under the circumstances. Hence surprise visitations are possible.[88] As a rule, however, visitations are to be made at *stated times,* the determination of which is left to each institute.

The extent of the visit is indicated by the phrase *all houses,* in as far, namely, as they are subject to the superiors. For it may be that some houses are exempt from visitation, or at least from visitation by a certain superior. All such conditions should be determined by the rule and constitutions.

The Code permits the regularly appointed visitator, in case of a lawful impediment, to send a *substitute,* according to the well-known rule of Canon Law, "What one may do himself, he may do through another."[89] Note, however, that the delegate must follow the instructions of the *delegans,* and should the latter die before the delegate has begun his visitations, the delegation

87 Sess. 25, cc. 1, 8, 20, de reg.

88 The visit of the late Abbot-Primate of the Benedictines to America, in 1910–1911, was not a canonical visitation, nor had he been sent by the Holy See to our country for that purpose.

89 Reg. Iuris in 6°, 68, 72.

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would cease unless it was given by the Constitutions. A visitation is supposed to have commenced after the reading of the letter of delegation to those who are to be visited.[90] For the rest, the delegate, unless something is especially excepted, enjoys the same power and has the same duties as the one who delegated him, as shall be seen in can. 513.

Under can. 512, § 1, the *Ordinary of the diocese* must, either himself or by delegate, every five years visit every convent of nuns in his diocese subject either to himself or immediately to the Holy See; also the houses of male and female diocesan congregations. The law gives full sway to the Ordinary over two kinds of institutes: *Nuns with solemn vows,* whose convents are subject either to the Ordinary himself or immediately to the Holy See, and *diocesan congregations* of both sexes. Concerning both no exception is made as to persons, places or things to be visited; and hence, as shall be seen in the following canon, they are subject to visitation in all respects. The only difference between the two kinds of religious, so far as episcopal visitation is concerned, lies in the fact that the convents of nuns with solemn vows are visited by the Ordinary as a delegate — *de iure* — of the Holy See, and the houses of diocesan congregations by the Ordinary in his own capacity. The effect is the same.

According to § 2 the bishop may also visit:

(1) The convents of nuns with solemn vows, which are subject to a regular superior, concerning the *enclosure* and everything else, if the regular superior has not made a canonical visitation for five years; for in this case the Ordinary is called upon to supply the negligence of the superior. As to the enclosure, the Ordinary is entitled to examine the communion-crate and the confes-

90 Piatus M., I, 638 (ed. 2).

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sional-crate, the inner and outer walls of the enclosure, the interior choir, the dormitories, cells and other rooms under enclosure. The Ordinary should wear his rochette and mantellette, be accompanied by two priests, and proceed without the assistance of any religious. If the Ordinary visits a convent because of the neglect of the regular superior, he is entitled to ask any nun personally, inquire about the observance of the enclosure and the number of religious, alumnae, and servants, and require a statement of the temporal and financial affairs.[91]

(2) He may also visit the houses of *clerical papal congregations,* including those that enjoy exemption, but only in what pertains to the church, sacristy,[92] public oratory, and confessional. There may be doubt concerning the phrase: *sedem ad sacramentum poenitentiae* — the seat for sacramental confession. Is the singular number instead of the plural (*sedes*) purposely made use of? Benedict XIV, in "*Firmandis,*" speaks only of one confessional, namely, that reserved to the parish priest.[93] But this interpretation appears to us too formal. Probably the term "seat" is here to be taken as a synecdoche or metaphor expressing all the confessionals. For the rest we refer to what we have said under canon 344.

(3) The Ordinary should also visit the houses of the *lay institutes* with papal approbation, not only concerning the places mentioned under n. 2, but also concerning other matters which belong to the *internal discipline,* with due regard to can. 618, § 2, n. 2.

As to the administration of *temporal affairs,* especially property, the Ordinary must observe the rules enacted in can. 532–535, which make a distinction between con-

91 S. C. EE. et RR., Sept. 8, 1725 (Bizzarri, *l. c.*, p. 319 f.).

92 The Latin reads *sacrarium;* but is certainly not to be understood of the waste place for sacred things, but of the sacristy proper.

93 Nov. 6, 1744, § 7.

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vents of nuns and monasteries of regulars, houses of papal institutes and of diocesan congregations. Note, however, that the bishop or Ordinary has no right to make any change in any point of discipline which is in accord with the constitutions approved by the Holy See, or the approbation of which is pending.

Can. 513 determines the *rights and duties of the canonical visitator,* which, according to § 1, are to ask any religious who he thinks should be asked, and to take cognizance of everything pertaining to a canonical visitation. On the other hand all religious are obliged to answer truthfully, and the superiors are not allowed to prevent them from fulfilling this obligation, or otherwise to impede the visitation. The *questions* which the visitor should chiefly ask, according to approved authors,[94] are the following:

(a) About the *regular discipline,* observance of vows, rules and constitutions, life in common and spiritual exercises in the choir and elsewhere, fast and abstinence, fraternal charity;

(b) Concerning the *duties to be performed by the superiors and officials,* teachers and employers towards their subjects and inferiors, about conferences and chapters of faults, schools and instruction, reading of the decrees prescribed, observance of laws and customary rubrics;

(c) *Regarding temporal affairs,* especially Mass obligations, founded and manual, property and debts, method of bookkeeping, alienation, etc.

The Code furthermore says that the visitator should *take cognizance* of everything pertaining to visitation. Though not explicitly stated in the Code, a distinction lies between visitators endowed with jurisdiction proper,

94 Cfr. Piatus M., I, 639 ff. (ed. 2).

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such as Ordinairies and regular prelates, or exempt visitors, and visitators endowed with domestic power (*potestas dominativa*) only. The former may inflict censures, whereas the latter may not, but may deal out such penalties only as the constitutions permit; and these, since they are given for non-exempt religious, cannot include ecclesiastical censures. This distinction becomes important in the way of procedure, which may be either paternal (also called evangelical) [95] and judiciary or canonical, as is evident from § 2.

A visitator should proceed paternally and use the canonical remedies only in extraordinary cases, as, *e. g.*, when a religious has committed a crime that calls for juridical procedure. But procedure supposes a plaintiff and witnesses, or at least a strong opinion against the accused religious, and therefore the beginning of a trial, as shall be explained in the fourth book.

The next question arises as to the *obligation of answering truthfully* the questions of the visitator. This supposes, first and above all, that the visitator has been admitted. If he acts in an official capacity and is lawfully appointed, admission cannot be refused to him by the religious. The members of the community must answer his questions, each according to the dictates of his conscience, with a view to the common welfare. But what if the visitator should demand of a religious that he reveal the secret misdeeds of other religious? Is the one thus asked bound to obey? Our answer is negative, for the office of visitator is limited to the public welfare of the community, and, therefore, as long as transgressions are secret, the transgressor has a right to his good name also before the visitator.[96] Should a crime have been com-

[95] Math. 18, 15; cf. Suarez, *De Rel.*, tr. X, l. 10, c. 8, n. 9 (Vol. 16, 1101 f.).

[96] Suarez, *l. c.*, maintains the affirmative opinion, but this must be called entirely peculiar to the So-

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mitted, which is liable to become notorious to the detriment and diffamation of the whole community, the revelation of that crime would be required by the common welfare. But transgressions which have been committed long ago, or have been remedied, or are known only by hearsay, or to the visitator only as an entrusted secret, are not to be manifested, even though the visitator should demand it.

The last clause of § 1 admonishes superiors not to deter their subjects from doing their duty at the time of visitation, and not to impede the latter. The text is plain enough. Superiors should not send religious away at the time of the visitation, or force them by threats to keep silence.

§ 2 of can. 513 says that *no appeal in suspensivo from the decrees of the visitator* is permissible, unless he has proceeded in a judiciary way. Reference is made to the Constitution of Benedict XIV, "*Ad militantis,*" of March 30, 1742, which rules that no inhibition, or what is here called recourse, may be had from decrees concerning divine worship and its due observance according to the sacred liturgy nor from decrees concerning the care of souls, the repair of churches, the administration of the sacraments in churches, the spiritual and temporal government of convents of nuns.[97] Therefore the decrees and corrections enjoined by the visitator must by all means be carried into effect. Should they prove irksome, or, what is worse, should they contradict the Constitutions and lawful customs of the congregation, recourse may be had to the S. C. of Religious. Sisters of papal congregations may appeal from the decrees of the Or-

ciety of Jesus; his quotations from sacred writers are to be taken for what they are worth. The natural law is above individual pious sentiments.

97 *Bull.*, Prati, 1845, t. I, p. 164, nn. 6, 10, 19, 20.

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dinary to the metropolitan or the Apostolic Delegate.

We add that the visitator, unless he foresees judiciary procedure, should not take anyone with him, either as secretary or counsellor, as the paternal way requires secrecy.[98]

PASTORAL DUTIES AND RIGHTS

CAN. 514

§ 1. In omni religione clericali ius et officium Superioribus est per se vel per alium aegrotis professis, novitiis, aliisve in religiosa domo diu noctuque degentibus causa famulatus aut educationis aut hospitii aut infirmae valetudinis, Eucharisticum Viaticum et extremam unctionem ministrandi.

§ 2. In monialium domo idem ius et officium habet ordinarius confessarius vel qui eius vices gerit.

§ 3. In alia religione laicali hoc ius et officium spectat ad parochum loci vel ad cappellanum quem Ordinarius parocho suffecerit ad normam can. 464, § 2.

§ 4. In funeribus servetur praescriptum can. 1221, 1230, § 5.

§ 1 says verbaily — the text is too important to brook paraphrastic translation —: "In every clerical institute the superiors have the right and duty to administer, either themselves or through another, the Eucharistic Viaticum and Extreme Unction to the sick professed members and novices and to others who dwell day and night in the religious house, either by reason of service, or education, or hospitality (*hospitii*) or sickness." This is a reasonable and welcome extension of the privileges granted to some orders[99] in favor of their dependents.

98 Piatus M., I, 643 (ed. 2).

99 For instance, to the Barnabites; S. C. EE. et RR., July 21, 1848 (Bizzarri, *l. c.*, p. 563 f.).

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(1) *All clerical* institutes (*i. e.,* orders or congregations), no matter whether exempt or non-exempt, whether of papal or diocesan institution, enjoy the right and have the duty of taking spiritual care of their *sick* members. This care devolves first and above all upon the superior, and, in case he is impeded, upon any one commissioned by him. Note that *only clerical institutes* are here intended, that is to say, orders and congregations whose members are mostly priests, or should be mostly priests by virtue of their constitutions, though, perhaps, in consequence of extraordinary conditions, for instance an epidemic, war, etc., the number of lay brothers is greater than that of priests.

(2) The *sick members* enumerated are of a twofold class: religious and others. The term *religious* comprises the novices, concerning whom no difficulty was ever raised. But the term *aliive* was not always understood in the same sense. These *others,* then, must dwell by *day and by night* in the religious house. By "day and by night" may signify habitual or protracted dwelling, or one day of twenty-four hours; however, "*diu*" (from *dies*) generally has the meaning of a protracted stay, *i. e.,* lasting more than one day, although we believe that in case of sickness the principle that "favors should be widely interpreted" may be applied here. The next term, "*religious house,*" is doubtless to be taken as the entire premises or precincts which belong to a religious house, for it seems to stand for the well-known canonical expression "*intra septa*[1] *monasterii,*" *i. e.,* within the walls or hedges of the monastery. Hence even a number or group of buildings may be understood as constituting "a religious house," so long as religious actually

1 *Septa* is used by Cicero to designate the inclosure within which the Roman people voted in the assemblies (*comitia*).

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possess and inhabit the buildings. Thus a hospital, hostelry, school, house for hired hands, workshops, etc., if they form part and parcel of a religious house, though distinct from it, may truly be said to be religious houses. However, these buildings must be within the precincts of the dwelling of the religious, else they would not fall under the category of religious houses, which are houses inhabited by religious. Therefore a distant farm house or villa, or a college or school entirely separated from the religious house and attended perhaps by only one religious, cannot be said to share the privileges of religious houses.

Religious houses, then, may shelter servants, students, guests or sick people. The first class, *servants — causa famulatus* — are those who work for the religious and live within the precincts of the monastery under the habitual (though not religious) obedience of the superiors.[2] Hence they must have board and lodging in the religious house, or at least in a building on the premises of the religious house, though they may truly be called hired hands. But if they have their lodging outside the religious house they may not be called servants. Another class who falls under the category of *familiares* or dependents is that of *boarding students,* who, together with their education, also receive board and lodging from the clerical institute. But day-scholars are excluded. The next category is that of *guests,* who live in the religious house habitually. Hence if a religious house would keep boarders, say, for instance, young Catholic men or students who work in shops or study at school, these would be living in a religious house.[3] Thus, also, if a pilgrims' house would be attached to a religious house, the

2 S. C. EE. et RR., July 21, 1848 (Bizzarri, *Coll.*, p. 564 ff.).

3 *Ibid.*; the case is identical with the one in the text.

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guests would belong to the latter. We furthermore believe that also single guests who have come to visit some of their religious relatives or friends, and live in the religious house or guests' department (*foresteria*) at least for one full day, may be beneficiaries of our canon. The last class is that of *sick persons* who are cared for by the religious in their own house, no matter whether they are related to the religious or not. Of course, this would be all the more so if the religious should manage a hospital on their own premises. Workingmen employed by the monastery, who would not otherwise enjoy the privilege, if nursed in their sickness in a clerical religious house, would also be included.

(3) The sacraments to be administered are the *Sacred Viaticum* and *Extreme Unction*. These appertain to strictly parochial rights.[4] Confession and communion, the administration of which is not exclusively the pastor's right, needed no mention. This paragraph marks a decided but benevolent change from former restrictions.[5]

Can. 514, § 2 vindicates the same rights and duties to the *confessor of nuns* with solemn vows and his *locum tenens*. Therefore, should any of the foregoing classes of persons live in a monastery of nuns, the confessor or his representative may administer the last sacraments to him. Female servants, alumnae (the socalled *educande*[6] in Italian monasteries), female guests — the male sex is excluded in virtue of the inclosure,— and sick persons would have to be attended by the confessor, not by the parish priest in whose parish the convent is situated.[7]

4 Can. 462, 3.

5 Pius IX, "*Apostolicae Sedis*," 1869, II, 14.

6 A number of decisions in the *Regesta S. C. EE. et RR.* treat of these.

7 S. C. EE. et RR., May, 1788 (Bizzarri, *l. c.*, p. 348); two sisters were collecting for nuns but maintained by the same as their quasi-servants.

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Note, however, that this is a privilege granted only to nuns with solemn vows.

§ 3 of the same canon says: in every other lay institute the same right and duty is incumbent on the pastor or the chaplain appointed by the Ordinary under can. 464, § 2.

Hence, in all *lay institutes* of religious, male or female,[8] the religious themselves as well as their servants, students, guests, and sick persons in their care, must by right be attended by the *pastor* in whose parish the institute is located. For, unless papal exemption can be proved, the parish priest is the pastor of such non-clerical and non-exempt religious. A difficulty might arise in our country from the fact of linguistic parish divisions. Where English and Italian or German speaking parishes overlap, who is the pastor? This depends, first and above all, upon the will of the founder or foundress, which should, if possible, be respected. Secondly, custom must be consulted, and, lastly, if these two factors are not sufficient to settle the question, the Ordinary should decide, so as to satisfy the needs of the community as well as the claim of the pastor.

However, as stated above, the Ordinary may, for just and weighty reasons, exempt any religious community from the jurisdiction of the pastor and subject it to its *own chaplain*. In that case the spiritual rights and duties mentioned in § 1, *viz.*, concerning the administration of the last sacraments, belong to the chaplain and the pastor may not interfere. Of course, prudence and justice require that the Ordinary notify the pastor of such quasi-exemption, in order to avoid unnecessary trouble.

8 The Salesian sisters employed in education had asked for exemption, but the S. C. EE. et RR., April 19, 1844 (Bizzarri, *l. c.*, p. 497), answered: not expedient.

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Notice the beginning of the text: *lay* religious. After mentioning clerical orders and nuns with solemn vows, the legislator proceeds to lay religious, where there are no distinctions made as to exemption. This affects the Christian Brothers as well as the Brothers Hospitallers of St. John of God; for both are lay institutes. However the bishop may — and certainly the institutes named deserve that attention — give them their own chaplain.

§ 4 of canon 514 determines the sepulture of religious, which is fully treated under can. 1221 and can. 1230, § 5, but may here be briefly described as follows: The bodies of professed members and novices are to be carried into the church or chapel of the religious house, unless novices have chosen another church for their funeral; the right of accompanying the corpse to the church of burial belongs to the religious superior. Should any member die outside the religious house and so far away from it that the corpse could not easily be transported to the church of the religious, he shall be buried from the parish church where he died; but novices may choose any church they wish.

Servants, as described above, have the same privileges in regard to sepulture as novices, and may therefore be buried from the chapel of the religious or any other church they may select.

Sisters and novices of sisterhoods who die in the religious house should be carried by the Sisters to the threshold of the enclosure, and thence, if they are exempt from the pastor's jurisdiction, to the church of the religious house, where the chaplain shall perform the funeral rites. If they are not exempt from the pastor's jurisdiction, the pastor must conduct the funeral services from the entrance of the enclosure to the church and chapel, where he shall hold the exequies.

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HONORARY TITLES DENIED TO RELIGIOUS

CAN. 515

Prohibentur tituli dignitatum vel officiorum mere honorifici; soli, si id permittant constitutiones, tolerantur tituli officiorum maiorum, quibus religiosi in propria religione reapse functi sint.

Ambition is the root of many evils in the Church and a vice more contemptible in a religious than in any other person. Therefore our canon quite naturally forbids religious to accept any honorary titles of dignities and offices. However, if the Constitutions permit, they may retain the title of higher offices which they once held in their own institute. This precludes the assumption of the title of Monsignore by any religious. The privilege of pontificating does not entitle one to bear the name of *titular abbot* if the dignity of *abbot* was never really held by the claimant. As to the Franciscans Pius X decided that only ex-ministers and ex-procurators general are allowed to keep that title in the whole order, and the ex-provincials in their province, together with precedence and active and passive voice at the general or provincial chapter, respectively, but not at the meetings of the "definitores."[9]

COUNSELLORS AND PROCURATORS

CAN. 516

§ 1. Supremus religionis aut monasticae Congregationis Moderator, Superior provincialis et localis saltem formatae domus habeant suos consiliarios, quorum

[9] "*Quo magis*," Oct. 23, 1911 (*A. Ap. S.*, III, 560 f., n. VIII); such titles were sought for by hook and crook to share in the chapters and elections; S. C. EE. et RR., Feb. 8, 1718 (Bizzarri, *l. c.*, p. 305 f.).

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consensum aut consilium exquirant ad normam constitionum et sacrorum canonum.

§ 2. Sint etiam pro administratione bonorum temporalium oeconomi: generalis qui religionis universae bona administret, provincialis qui provinciae, localis qui singularum domorum; qui omnes suo fungantur munere sub directione Superioris.

§ 3. Oeconomi generalis et provincialis munus gerere Superior ipse non potest; munus vero oeconomi localis, quamvis melius a munere Superioris distinguatur, componi tamen cum eo potest, si necessitas id exigat.

§ 4. Si de modo oeconomos eligendi constitutiones sileant, a Superiore maiore cum consensu sui Consilii eligantur.

§ 1 of can. 516 prescribes that the superior general of religious, and the president of a monastic congregation, the provincial and local superior of a canonically established house (*domus formata*), should have *counsellors,* whose consent or advice they should ask according to their constitutions and the prescriptions of the sacred canons. This was the wise counsel given by St. Benedict to abbots, and later entered as a law into the Decretals.[10]

A decree of 1909 made it imperative for all superiors to have counsellors, especially in financial matters.[11] This decree has partly been embodied in our Code, which, however, is not very explicit about the number or mode of electing the counsellors, although Cardinal Gasparri refers to that decree, which determines the number of counsellors as well as the manner of electing them. The counsellors should be at least four in number in com-

10 Reg. S. Ben., c. 3; lib. III, tit. 10, de his quae fiunt a praelato sine consensu capituli.

11 Cfr. *A. Ap. S.*, I, 696 f.

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munities with twelve or more chapter members, and two in such as have a smaller number of capitulars. All of them should be elected by the chapter for three years. They give their vote by secret ballot, whenever a decisive (not a merely consultive) vote is required. Thus, according to the same decree, the local superior would be bound by their vote in making debts or assuming obligations to the amount of less than $200, the provincial in cases amounting to less than $1000. However, since the Code directly mentions the constitutions as a norm for establishing the necessity of obtaining the consent of the counsellors, these must also be looked to for guidance regarding the affairs and amounts for which such consent is required. But one thing is certain: counsellors there must be, and they should be chosen by the chapter, not by the superior alone; otherwise it would be illusory to require the vote of counsellors, who are supposed to represent the chapter, or convent, or province. For if the superior were allowed to choose three, and the chapter one, the superior would be able always to have his own way. And this is neither the intention of the law-giver nor the purpose of counsellors.

The most important affairs which demand the *consent* (not merely advice) of the counsellors, according to our Code, are:

(a) The appointment of an *administrator* or procurator (*oeconomus*) (Can. 516, § 4);

(b) The *alienation* of property (Can. 534, § 1);

(c) *Admission* to the novitiate or simple profession (Can. 575, § 2);

(d) The *dismissal* of a professed member (Can. 547, § 1; Can. 650, § 1).

§ 2 of can. 516 requires an *oeconomus* or administrator of temporal affairs (procurator) — one for the whole

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institute, one for the province, and one for each single house; all to perform their duties under the direction of the respective superiors.[12]

§ 3 says that the superior himself may not be general or provincial administrator at the same time, but that the offices of local superior and local administrator are compatible, if it is necessary to combine them.

§ 4 says that if the constitutions do not determine the mode of appointing the administrator, the latter must be chosen by the higher superior with the consent of the counsellors. The Council of Trent had ruled that the administration of the property of religious should be in the hands of officials who could be removed at will by the superior. However, if the administrator is chosen with the consent of the counsellors, it is, to say the least, becoming that they should also be consulted about that official's removal. Only a few Benedictine congregations appoint an administrator for the whole congregation, but a local procurator is chosen from among the community, according to the Holy Rule (can. 31), generally by the abbot, without whose command he may do nothing. Hence, though the constitutions be silent about the mode of appointing the procurator, the rule of the O. S. B. vindicates that right to the abbot; but the Code requires the coöperation, *i. e.,* consent of the counsellors, and this ruling must be followed.

THE PROCURATOR GENERAL

CAN. 517

§ 1. Quaevis virorum religio iuris pontificii procuratorem generalem habeat, qui, secundum constitutio-

12 Note that the procurator is not a superior, and hence subject to minor superiors.

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nes designatus, negotia propriae religionis apud Sanctam Sedem pertractet.

§ 2. Antequam praescriptum in constitutionibus tempus exspiret, ne amoveatur, inconsulta Sede Apostolica.

Every papal congregation of men must have a procurator general, who is to be designated according to the constitutions, and must transact all business between the congregation and the Holy See.

The procurator general may not be removed from his office without the consent of the Holy See before his term determined in the constitutions has expired.

The S. Congregation of Bishops and Regulars by a decree approved by Pius VII, Aug. 22, 1814, ordained that all religious institutes which were not at all or inadequately represented in the Papal States, should have a procurator general residing in Rome.[13] Most of the older and more centralized orders had such an official for centuries. As to the Benedictines, single congregations, *e. g.*, the Cassinese, the English, and that of Subiaco, maintained relations with Rome by means of a procurator general, and the right of each congregation to have its own procurator in Rome was not taken away when the abbot primate was created.[14]

13 "*Ubi primum*," Bizzarri, *l. c.*, p. 42 f.

14 Leo XIII, "*Summum semper*," July 12, 1893, I.

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CHAPTER II

CONFESSORS AND CHAPLAINS

CONFESSORS OF CLERICAL INSTITUTES

CAN. 518

§ 1. In singulis religionis clericalis domibus deputentur plures pro sodalium numero confessarii legitime approbati, cum potestate, si agatur de religione exempta, absolvendi etiam a casibus in religione reservatis.

§ 2. Superiores religiosi, potestatem audiendi confessiones habentes, possunt, servatis de iure servandis, confessiones audire subditorum, qui ab illis sponte sua ac motu proprio id petant, at sine gravi causa id per modum habitus ne agant.

§ 3. Caveant Superiores ne quem subditum aut ipsi per se aut per alium vi, metu, importunis suasionibus aliave ratione inducant ut peccata apud se confiteatur.

These three paragraphs treat of the appointment of confessors and of the faculties of superiors in houses of religious institutes of clerics.

§ 1 provides that in each house a number of confessors proportionate to the number of inmates should be appointed, duly approved, and endowed with the faculty of absolving from cases reserved in the religious order concerning exempt religious. Here *appointment* means nothing else but the designating of one as confessor. This is generally done after an examination, or at least a

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verification of the fitness of the person to be appointed. *Approval* signifies the grant of jurisdiction or faculty to hear confessions validly and licitly. This is an act of public jurisdiction (*in foro externo*), for although the faculty of hearing confessions belongs to the court of conscience, yet the granting of that faculty is a result of jurisdiction proper. Therefore approval can be given only by one who enjoys jurisdiction. Concerning *clerical exempt religious orders,* the superiors of the same are empowered to grant delegated jurisdiction or approval, not only to priests of their own order, but also to priests of the secular clergy or of another order. The superior of an *exempt lay congregation* may present a confessor to the Ordinary in whose diocese the house is located in order to obtain from him the necessary jurisdiction.[1] Hence in the former case the religious superior of exempt clerical religious grants, in the name of the Sovereign Pontiff, yet in virtue of his ordinary power, the delegated jurisdiction to those whom he deems fit, whereas in exempt lay congregations the jurisdiction is given by the Ordinary.

The *number of confessors* to be appointed should be in proportion to the number of religious whose confessions are to be heard. Clement VIII speaks of two, or three, or more, according to the number of religious.[2] The opinion of some authors, that to each confessor should be assigned a certain number of religious, so that they would be bound to confess to that one exclusively, is intolerable.[3]

The *members* who may confess to the confessors approved by the superior of clerical exempt religious are

1 Can. 875.

2 "*Sanctissimus,*" May 26, 1593, § 3.

3 Justly rejected by Piatus M., I, 402 (ed. 2).

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those mentioned under can. 514, § 1, *viz.:* the religious, the novices, the servants, the students, the guests, and sick persons, provided the conditions set forth in said can. 514, § 1 are verified.[4]

The *superiors* who may grant delegated jurisdiction, or the faculty of hearing the confession of these members, are the higher superiors who enjoy jurisdiction *in foro externo;* therefore, the superior general of an exempt order, the provincial, and, in the case of monastic bodies, the abbot of each independent monastery.[5] Concerning conventual priors and guardians some authors doubted their jurisdiction or power of granting faculties, but the majority were on the affirmative side, and justly so; for the Constitution of Pius V, "*Romani Pontificis,*" expressly mentions the conventual priors as endowed with the same faculties as the Ordinaries with regard to absolution and dispensation.

Concerning *female religious* and novices of orders as well as of congregations, no matter whether they be otherwise subject to a regular prelate, the faculty of hearing their confessions is given by the *Ordinary alone* in whose diocese their house is located.[6]

Finally a word about *reserved cases* from which the confessors duly approved either by the religious superior or by the Ordinary may absolve. Clement VIII had permitted religious superiors, with the consent of their counsellors, to reserve certain cases, eleven in number.[7] Our Code[8] grants the same power to the superiors gen-

4 See can. 875.

5 The Abbot Primate and Abbots Presidents are not empowered to give faculties either for the order or for their respective congregation; neither may cloistral priors, except by subdelegation, grant such faculties, because this power is from the Pope and may therefore be subdelegated.

6 Can. 876.

7 "*Sanctissimus,*" May 26, 1593, § 3.

8 Can. 896.

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eral and abbots with their counsellors' consent, with due regard to certain restrictions, as seen in can. 519. However, after having granted that power, the Code *restricts the number of reserved cases* to four. Therefore it seems evident that the legislator wishes to limit the eleven cases to not more than four, and these of the "most grievous and atrocious crimes of public character."[9] Consequently we hold that the religious superiors are now-a-days no longer entitled to reserve more and other cases than determined by the Code. An obligation of reserving cases has never been enjoined, neither is it stated in the Code, which, moreover, plainly says that any duly approved confessor can absolve from them without being bound to refer the case to the superior.

§ 2 states that religious superiors who have power to hear confessions, may, if asked by them spontaneously and of their own accord, hear the confessions of their *subjects*, but should do so only for grave reasons and not habitually; besides, they must observe the laws and regulations prescribed (*servatis de iure servandis*). But they should beware lest they, either themselves or by means of others, endeavor to induce any of their subjects to confess to them. This law, already insisted upon by Clement VIII,[10] the Code emphasizes anew.

What is meant by "*servatis de iure servandis*"? Nothing else but the observance of the rules laid down in the Code concerning the administration of penance,[11] because the superiors, too, are bound to the seal of confession and may make no use of what they know from confession for the government of their subjects in whatever shape or form.

9 Can. 897.

10 Clem. VIII, "*Sanctissimus*," § 2; S. O., July 5, 1899.

11 Can. 885 ff.; can. 908 ff.

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LIBERTY OF CONSCIENCE

CAN. 519

Firmis constitutionibus quae confessionem statis temporibus praecipiunt vel suadent apud determinatos confessarios peragendam, si religiosus, etiam exemptus, ad suae conscientiae quietem, confessarium adeat ab Ordinario loci approbatum, etsi inter designatos non recensitum, confessio revocato quolibet contrario privilegio, valida et licita est; et confessarius potest religiosum absolvere etiam a peccatis et censuris in religione reservatis.

This canon embodies a decree, first issued for Rome, and then extended to all religious,[12] which aroused the religious zeal or anger of some superiors who endeavored to move Pius X to withdraw it.[13] And yet it stands, and now appears in the Code. It says: "Without detriment to the constitutions which prescribe or advise confession to be made at stated times to appointed confessors, a religious, even an exempt one, may, to quiet his conscience, go to confession to a confessor approved by the Ordinary of the diocese, though this confessor be not one of those appointed for religious, and the confession thus made is valid and licit, every privilege to the contrary being hereby revoked; besides, said confessor (though not of the appointed ones) can absolve such a religious also from all sins and censures reserved in his order." This decree did away with restrictions — of very doubtful efficacy — concerning the obligation of confessing to a traveling companion or that of confess-

12 Aug. 5, 1913; May 3, 1914; S. C. EE. et RR., July 4, 1862 (Bizzarri, *l. c.*, p. 155).

13 We were in Rome at that time and could give the name of a certain superior who approached the Pope.

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ing to appointed confessors only. On the other hand, it leaves the regular discipline about usual confessors and confessions untouched. That part of the constitutions which regulates this point is still in force, unless they run counter to the present canon, in which case they are void. The *number of times* which the religious may choose to go to another than the appointed confessor is not determined. His conduct is conditioned simply and solely by the *state of his conscience,*— a purely subjective matter with which the religious superior has no right to interfere. Hence a religious may choose another confessor whenever and as often as he thinks it wholesome for his conscience. Religious are now treated like other Catholics and this so-called privilege is done away with — to the relief of consciences and to the avoidance of torture and other worse consequences.

But what about the cases reserved in the order or congregation to which the disturbed religious belongs? The Code does not prohibit such reservation,[14] as stated above; but the confessor chosen may absolve from reserved cases without any scruple or obligation to report to the religious superior, which report is always connected with the danger of breaking the seal of confession.

CONFESSORS OF SISTERS

The following canons treat of the confessor-in-ordinary of Sisters, of extraordinary confessors, of provisions in particular cases, of the qualities, appointment, duration of office of confessors and their removal from office. It may be safely said that these canons embody former Apostolic constitutions, and especially that most excellent one of Benedict XIV, "*Pastoralis curae,*" of

14 Supposing, however, that their number does not exceed four.

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Aug. 5, 1748, and it is to be hoped that these wise laws will finally be carried into effect by every prelate everywhere.

THE ORDINARY CONFESSOR

CAN. 520

§ 1. Singulis religiosarum domibus unus dumtaxat detur confessarius ordinarius, qui sacramentales confessiones universae communitatis excipiat, nisi propter magnum ipsarum numerum vel aliam iustam causam sit opus altero vel pluribus.

§ 2. Si qua religiosa, ad animi sui quietem, et ad maiorem in via Dei progressum, aliquem specialem confessarium vel moderatorem spiritualem postulet, eum facile Ordinarius concedat; qui tamen invigilet ne ex hac concessione abusus irrepant; quod si irrepserint, eos caute et prudenter eliminet, salva conscientiae libertate.

§ 1 of this canon says that only *one* confessor-in-ordinary should be appointed for each house of nuns (and Sisters). He shall hear the confessions of the whole community, unless because of too great a number or for another just cause it is necessary to employ several confessors. The reason for appointing but one confessor lies in the unity and uniformity of regular discipline and spiritual guidance for religious women. It is exactly the same reason for which only one pastor is appointed for each parish. However, the number of persons to be heard, or other reasons may make it advisable to appoint one or more additional confessors, which the canon promptly grants. Thus, *e. g.*, the S. Congregation of the Council permitted the canons regular of Rimini to assign a vice-confessor in cases of absence or sickness of the

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ordinary confessor of nuns.[15] Note here and throughout the following canons, that no distinction is made between nuns and Sisters; for the approbation depends in all cases entirely upon the Ordinary.

§ 2. If any Sister, in order to quiet her conscience or to progress more rapidly on the path of holiness, should demand a special confessor or spiritual director, the Ordinary should readily grant the request, but at the same time see to it that no abuses arise, and if such should spring up, he shall root them out cautiously and prudently, duly safeguarding liberty of conscience. The first clause of this paragraph is almost verbally taken from the above-quoted Constitution of Benedict XIV, who justly reproaches some religious superiors for acting too severely towards Sisters. The Pontiff at the same time lays down the prudent rule that the qualities of the Sister as well as those of the confessor demanded should be carefully examined, and if no reason for suspecting either is to be discovered, the request may safely be granted. Abuses would be a disturbance of the regular discipline, extravagant expenses, a bad example, etc. But a little inconvenience to the superiors or the portress or the cook could not be styled an abuse.

CAN. 521

§ 1. Unicuique religiosarum communitati detur confessarius extraordinarius qui quater saltem in anno ad domum religiosam accedat et cui omnes religiosae se sistere debent, saltem benedictionem recepturae.

§ 2. Ordinarii locorum, in quibus religiosarum communitates exsistunt, aliquot sacerdotes pro singulis domibus designent, ad quos pro sacramento poeniten-

15 Richter, *Trid.*, sess. 25, c. 10, de reg., p. 412 f.; this confessor, of course, needed also the approbation of the bishop.

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tiae in casibus particularibus recurrere eae facile possint, quin necessarium sit ipsum Ordinarium toties quoties adire.

§ 3. Si qua religiosa aliquem ex iis confessariis expetat, nulli Antistitae liceat nec per se nec per alios, neque directe neque indirecte, petitionis rationem inquirere, petitioni verbis aut factis refragari, aut quavis ratione ostendere se id aegre ferre.

This canon grants an *extraordinary confessor* to every religious community at least four times a year.[16] To him all the Sisters must present themselves, at least to receive his blessing if they do not wish to confess. This confessor, of course, like the ordinary one, must be approved by the Ordinary of the diocese, although he may have been presented by the regular superior. The Sisters are not obliged to confess to the extraordinary confessor if they do not wish; but they must present themselves in order to receive his blessing. This is also done for a special purpose, *viz.*, that they may not accuse either the Ordinary or the superior of neglecting their duty with regard to offering an opportunity for quieting their conscience.

But the lawgiver goes still further in § 2, calling upon the Ordinary in whose diocese communities of Sisters exist, to designate for each house several priests on whom the Sisters may call for confession in particular cases.

The decree of Feb. 3, 1913, from which our text is taken, says that these confessors should be designated for each house.[17] Now it may be asked whether confessors appointed, for instance, for the Sacred Heart Convent, may validly hear confessions in the Precious

16 *Trid.*, sess. 25, c. 10, says *three* times a year.

17 *A. Ap. S.*, V, p. 63, 4.

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Blood Convent. That this question is not quite superfluous appears from a query put to the S. C. Concilii, thus: Whether the regular confessors who had been appointed and approved for hearing confessions of nuns of one monastery or for one time may be considered approved for hearing confessions of all monasteries and forever? The answer[18] was, "*Negative.*" However, we must pay attention to the term *designent* used in our canon. Hence the solution must be: If the Ordinary has granted general faculties[19] for hearing confessions of nuns or Sisters, and has not made a special condition or inserted a restrictive clause, the confessors appointed for the Sacred Heart Convent may validly hear confessions in the Precious Blood Convent, and vice versa. As to *licitness,* the answer depends partly on the will of the Ordinary, and partly on custom.

If a religious, says § 3, demands one of the aforesaid confessors, the superioress is not permitted, either directly or indirectly, either personally or through others, to inquire for the reason of the demand, or to refuse the petition either in word or deed, or to show herself displeased in any way. Neither the counsellors, nor the mistress of novices, nor any other official or third person is entitled to interfere in matters of conscience, either directly by demanding reasons for the petition, or indirectly by asking what the Sister may have done, where she was, who has spoken to her, who was in the parlor, etc., even by way of a joke. Nor may the superiors deny the petition by an evasive or downright refusal, or by sending her on an errand, or giving her work that would prevent the fulfilment of her wish. Neither should they shrug

18 S. C. C., June 7, 1755 (Richter, *Trid.*, p. 413).

19 This should be expressed in terms like these: *etiam ad monialium,* or better: *etiam ad omnium religiosarum confessiones audiendas.*

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their shoulders or use uncharitable words, or "make a face" at the petitioner, or let her feel it afterwards, or ridicule or criticise her.

CAN. 522

Si, non obstante praescripto can. 520, 521, aliqua religiosa, ad suae conscientiae tranquillitatem, confessarium adeat ab Ordinario loci pro mulieribus approbatum, confessio in qualibet ecclesia vel oratorio etiam semi-publico peracta, valida et licita est, revocato quolibet contrario privilegio; neque Antistita id prohiberc potest aut de ea re inquirere, ne indirecte quidem; et religiosae nihil Antistitae referre tenentur.

If notwithstanding the concessions made in can. 520 and 521, a Sister, to quiet her conscience, goes to a confessor approved by the Ordinary for hearing confessions of women, the confession thus made in any church or public or semi-public oratory is valid and licit, every privilege to the contrary being hereby revoked; neither is the superioress allowed to hinder such a one or make inquiries about the matter, even indirectly, nor are the Sisters obliged to report to the superioress.

The Roman congregations [20] had made allowance for secularized religious and for Sisters who because of their health or for other motives are compelled to confess outside the religious house. Such Sisters could go to confession to any priest who was approved for hearing confessions of both sexes (*pro utroque sexu*), although he had not been specially approved for hearing Sisters' confessions (*pro monialibus*). This decision was received into the decree of Feb. 3, 1913, which adopted the phrase "*pro utroque sexu.*" Our Code has another reading,

20 S. C. EE. et RR., Aug. 22, 1852 (Bizzarri, *l. c.*, p. 129).

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viz., "*pro mulieribus approbatum.*" In some countries, Belgium, France, and our own State of Louisiana, if we are not mistaken, the Ordinaries give special faculties for hearing women's confessions.[21] However, in most of our provinces there is no distinction made as to secular or lay persons concerning sex, but the formula generally reads: "*ad audiendas fidelium confessiones.*" Hence wherever the clause "*pro mulieribus approbatum*" is not in use, any confessor approved for hearing the confessions of the faithful of both sexes has the faculty of hearing the confessions of Sisters who come to a church or public or semi-public oratory.

Attention may be drawn to the term *religiosae,* nuns or Sisters. It stands to reason that a strictly cloistered nun is not allowed to leave the enclosure to go to confession. This is clearly expressed in the decree of 1913, which reads: "If it should happen that any nun or Sister would, for any reason, be outside her own religious house." Therefore a strictly cloistered nun could leave the convent only for such reasons as permit a departure from the conventual "*clausura.*" The admonition to the superioress is plain enough in the light of what has been said in the preceding canon.

CAN. 523

Religiosae omnes, cum graviter aegrotant, licet mortis periculum absit, quemlibet sacerdotem ad mulierum confessiones excipiendas approbatum, etsi non destinatum religiosis, arcessere possunt eique, perdurante gravi infirmitate, quoties voluerint, confiteri, nec Antistita potest eas sive directe sive indirecte prohibere.

21 Cfr. Innoc. XIII, "*Apostolici ministerii,*" May 23, 1723; Ballerini-Palmieri, *Opus Theol. Morale,* 1893, Vol. V, p. 286 f.

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Any Sister who is seriously ill, though not in danger of death, may call any priest approved for hearing the confessions of women, though not especially appointed for Sisters, and confess to him as often as she desires during the duration of her illness, and the superioress may not forbid it, either directly or indirectly. This is a concession for all Sisters, whether cloistered or not, and is more extensive even than that granted by Benedict XIV, because he added that the sick Sister must be in danger of death. Concerning the distinction of approbation for women and for Sisters nothing else need be added except that the Ordinary is bound to explain or emphasize that distinction.

QUALITIES OF CONFESSORS

CAN. 524

§ 1. In munus confessarii religiosarum et ordinarii et extraordinarii deputentur sacerdotes, sive e clero saeculari, sive religiosi de Superiorum licentia, morum integritate ac prudentia praestantes; sint insuper annos nati quadraginta, nisi iusta causa, iudicio Ordinarii, aliud exigat, nullam potestatem in easdem religiosas in foro externo habentes.

§ 2. Confessarius ordinarius non potest renuntiari extraordinarius nec, praeter casus in can. 526 recensitos, rursus deputari ordinarius in eadem communitate, nisi post annum ab expleto munere; extraordinarius vero immediate ut ordinarius renuntiari potest.

§ 3. Confessarii religiosarum tum ordinarii tum extraordinarii interno vel externo communitatis regimini nullo modo sese immisceant.

As confessors-in-ordinary and confessors extraordinary the bishop should appoint priests either of the secu-

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lar or regular clergy (the latter with the permission of their superiors) who are known for probity of life and prudence. They should be forty years of age unless in the Ordinary's judgment a just reason requires a departure from this rule. These confessors have no jurisdiction *in foro externo* over the religious. Benedict XIV required for both ordinary and extraordinary confessors [22] certain qualities which are now modified somewhat. Thus the Code makes no distinction between priests of the secular and the regular clergy. *Mature age* is required, unless circumstances such as a want of priests justify a suspension of that rule, in which case the lack of age must be supplied by good moral standing and prudence, which even age does not always guarantee. These confessors are warned to exercise no power or jurisdiction *in foro externo,* for instance, by censuring the religious or settling affairs or reserving cases which require an ecclesiastical trial.[23] Neither may they dispense in cases in which the pastors are empowered to dispense,[24] for this power, though given by law and belonging to the extra-judiciary court, requires jurisdiction *in foro externo.* This warning is or was opportune in convents of nuns subject to the regulars, who may have thought that their prelate, whom they represented, was endowed with such jurisdiction proper.

The ordinary confessor of a Sisters' community may not be appointed extraordinary confessor except a year after his term as ordinary confessor has expired; nor may the ordinary confessor be re-appointed for the same community until a year has elapsed (exceptions noted in

22 "*Demandatam,*" Dec. 24, 1743, § 24; "*Pastoralis curae,*" "*Quamvis iusto,*" April 30, 1749, § 14.

23 Can. 893, § 1.

24 Can. 1245, § 1: dispensation from servile work, fast and abstinence; of course the confessors may declare in single cases of single penitents that the law of fast, etc., does not bind.

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can. 526) ; but the extraordinary confessor may be immediately installed as confessor-in-ordinary.

The confessors of Sisters, ordinary as well as extraordinary, *shall in no way meddle* in the internal or external government of the community. This canon should deter confessors from playing the " factotum " of the Sisters. The *internal regimen* means religious discipline, authority of the superiors, election of superiors and officials, order of the day and employment of Sisters in the various branches, schools, hospitals, etc. The *external government* comprises the relation of the Sisters to the Ordinary, the visitator, and the parish priest, their congregational business, administration of property, etc. All these things do not concern the confessor, who, however, if asked, is allowed to give advice.

APPOINTMENT OF CONFESSORS

CAN. 525

Si religiosarum domus Sedi Apostolicae immediate subiecta sit vel Ordinario loci, hic eligit sacerdotes a confessionibus tum ordinarios tum extraordinarios; si Superiori regulari, hic confessarios Ordinario praesentat, cuius est eosdem pro audiendis illarum monialium confessionibus approbare et Superioris negligentiam, si opus sit, supplere.

The Ordinary of the diocese appoints confessors-in-ordinary as well as extraordinary for such Sisters' houses as are either immediately subject to the Apostolic See or to the Ordinary himself. If the house is subject to a regular prelate, the latter presents the confessors to the Ordinary of the diocese, who grants the usual approbation (faculties) for hearing the confessions of the nuns, and also, if necessary, supplies the superior's negligence.

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It is not necessary to explain this canon, because of nuns subject to a regular prelate there can scarcely be question among us. However, if there should be such houses, the negligence here mentioned must be that of granting an extraordinary confessor or of refusing to comply with can. 520, §2, and can. 521, 522, 523.

Benedict XIV mentions a special case, which, however, falls under the rubric, "quieting of conscience," *viz.*, if a Sister should have a strong and almost invincible aversion against a regularly appointed confessor. In such cases, he says, the Ordinary may supply a confessor, and even allow the nun to have recourse to the S. Poenitentiaria.[25]

DURATION OF THE CONFESSOR'S OFFICE

CAN. 526

Religiosarum confessarius ordinarius suum munus ne exerceat ultra triennium; Ordinarius tamen eum ad secundum, imo etiam ad tertium triennium confirmare potest, si vel ob sacerdotum ad hoc officium idoneorum penuriam aliter providere nequeat, vel maior religiosarum pars, earum quoque quae in aliis negotiis ius non habent ferendi suffragium, in eiusdem confessarii confirmationem, per secreta suffragia, convenerit; dissentientibus tamen, si velint, aliter providendum est.

The rule is that no confessor of Sisters (nuns) shall hold this office for more than three years. However, the Ordinary may leave him in office for three and even six years longer, if (a) no other priest fit for the place is available, or (b) if the majority of the religious votes, by secret ballot, for the confirmation in office of the confessor; in which scrutiny also such religious may cast a

25 *"Pastoralis curae,"* (*Bull.*, II, p. 401 f.).

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vote who would otherwise be excluded from voting. However, for those who vote against ratification provision should be made, if they demand it.

The limit, therefore, is nine years, beyond which term the Ordinary has no right to stretch the period of office. The regular term is three years, and only in two instances may this be protracted.

Concerning fitness, can. 524, § 1 must be consulted; it implies maturity of age, probity of life, and prudence.

But what is the Ordinary to do if a pastor is confessor of a religious house located in the country? If he does not wish to change the pastor after nine years, he has to appoint the neighboring priest as confessor, at least for one year, after which, according to can. 524, § 2, the pastor may again become confessor for another nine years.

What is said above concerning the *majority of votes* is to be understood of the absolute majority. Those who are entitled to vote are all the professed Sisters, though perhaps only in temporary vows, who would otherwise be prevented from voting, for instance, in business matters or at the election of a superior.[26]

How to provide for those who are opposed to the reinstatement of the confessor is, of course, a rather delicate matter. They must manifest their desire of having another confessor to the Ordinary, who shall send another priest, for a time at least, until the feeling of animosity has subsided.

REMOVAL OF CONFESSORS

CAN. 527

Loci Ordinarius, ad normam can. 880, potest, gravem ob causam, religiosarum confessarium tam

26 Cfr. Bizzarri, *Collectanea*, p. 116; *Normae*, n. 217 ff.

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ordinarium quam extraordinarium amovere, etiamsi monasterium regularibus subdatur et ipse sacerdos a confessionibus sit regularis, nec tenetur causam amotionis cuiquam significare, excepta Apostolica Sede, si ab ea requiratur; de amotione autem debet Superiorem regularem monere, si moniales regularibus subdantur.

This canon is modelled upon can. 454, § 5, and must be combined with can. 880. The Ordinary of the diocese may, for weighty reason, remove a Sisters' confessor, ordinary or extraordinary, even though the convent be subject to regulars and the confessor be one of the regulars. The bishop is not bound to state the reason for removal to any one except the Apostolic See, upon demand; but he must inform the regular superior to whom the nuns are subject.

Though the canon, as it sounds, is new law, yet the bishop could formerly remove a confessor of nuns subject to regulars if the latter's superior had been notified and failed to comply with the bishop's demand.[27] Even now the bishop is not entitled to remove a confessor except for grave reasons which touch the office, and, besides, he may not remove all confessors of the same religious house at one time because such a removal would be not only senseless, but injurious to the spiritual welfare of the nuns[28] and to the moral character of the priests involved.

27 Gregory XV, "*Inscrutabili*," Feb. 5, 1622, § 5, and the decisions of S. C. C., *ad calcem, ibid.*

28 Clement X, "*Superna*," June 21, 1670, § 6; S. C. EE. et RR., Nov. 20, 1615 (Bizzarri, *l. c.*, p. 21: "*ex nova causa eaque ad confessiones ipsas pertinente*").

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CONFESSORS OF LAY INSTITUTES OF MEN

CAN. 528

Etiam in laicalibus virorum religionibus deputetur, ad normam can. 874, § 1, 875, § 2, confessarius ordinarius et extraordinarius; et si religiosus aliquem specialem confessarium expostulet, illum Superior concedat, nullo modo petitionis rationem inquirens neque id aegre se ferre demonstrans.

Also in lay institutes of men an ordinary and an extraordinary confessor must be appointed, according to can. 874, § 1, where the Ordinary is enjoined to give a confessor either from the secular or religious clergy, and the religious must have the permission of his superior for being confessor; and according to can. 875, § 2, where it is said that in exempt lay institutes the superior may propose the confessor to be approved by the Ordinary. If any member wishes to have a special confessor, the superior must grant the petition and is not allowed to ask for a reason or to show displeasure.

CHAPLAINS

CAN. 529

Si agatur de religionibus laicalibus non exemptis, Ordinarii loci est sacerdotem a sacris designare et a concionibus probare; si de exemptis, Superior regularis eosdem sacerdotes designat eiusque negligentiam supplet Ordinarius.

In non-exempt lay institutes the Ordinary of the diocese appoints a priest for saying Mass and preaching; in exempt lay institutes the regular superior designates these priests, or, in case of the superior's negligence, the Ordinary of the diocese.

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The *functions* of a chaplain, therefore, consist in holding divine service and preaching;[29] beyond that he is only allowed to perform sacred functions for which the Ordinary grants special powers, or in as far as the religious are exempt from parish organization.

Chaplains, too, should abstain from meddling in the internal and external régime of the communities to which they are assigned.

MANIFESTATION OF CONSCIENCE

CAN. 530

§ 1. Omnes religiosi Superiores districte vetantur personas sibi subditas quoquo modo inducere ad conscientiae manifestationem sibi peragendam.

§ 2. Non tamen prohibentur subditi quominus libere ac ultro aperire animum suum Superioribus valeant; imo expedit ut ipsi filiali cum fiducia Superiores adeant, eis, si sint sacerdotes, dubia quoque et anxietates suae conscientiae exponentes.

All religious superiors are strictly forbidden to induce their subjects by any means whatever to manifest their conscience to them. But the subjects may of their own accord open their mind to their superiors: nay it is even expedient for religious to approach their superiors with confidence, and if they are priests, to reveal to them doubts and anxieties of conscience.

Note that *all superiors,* not only those of nuns,[30] are affected by this general prohibition. Voluntary manifestation of conscience is not forbidden, but rather recommended.

29 See can. 1338, § 3.

30 "*Quemadmodum,*" Dec. 17, 1890, was chiefly intended for superiors of Sisters.

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CHAPTER III

TEMPORAL POSSESSIONS AND THEIR ADMINISTRATION

CAN. 531

Non modo religio, sed etiam provincia et domus sunt capaces acquirendi et possidendi bona temporalia cum reditibus stabilibus seu fundatis, nisi earum capacitas in regulis et constitutionibus excludatur aut coarctetur.

Can. 531 establishes nothing else but the well-known and ancient truth that there are religious who are capable of owning property and others who are not. Not only the institute as such, it says, but each province and house are capable of acquiring and possessing temporal goods together with a stable income or funds, unless their rule or constitutions exclude or restrict this right.

This right of single ecclesiastical corporations to own property is an inherent right not only of the whole Church,[1] but of each society and corporation which forms part and parcel of the Church. Blackstone says[2] the third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.

The origin of private property is probably founded in

1 Cfr. can. 1495.

2 Blackstone-Cooley, *Commentaries*, Chicago, 1879, I, 137; II, 8.

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nature. By an easy transposition we may say that, since each institute, or province, or community consists of single persons — though they are not all Englishmen — endowed with that inherent right, it follows that the community as such also possesses the same. But it is also true that this right is controlled by the laws of a higher authority, which, so far as religious corporations are concerned, is that of the Apostolic See. We do not mean that the Apostolic See is the real owner of all corporative religious property. This would be incompatible with the true notion of property right.[3] The immediate and proper subject of property is the community itself, whether it be regarded as a legal fiction (*viz.*, the single members as one juridical or artificial person) or simply as a group of physical persons acting under special rules as far as representation is concerned, and governed by special rules as regards succession.[4] For it legally matters but little which theory is adopted either before the ecclesiastical or the civil courts. But essential to any corporation, in general, are two elements: a *group of members* and *corporate rights* vested in them as a corporation, asserted and applied by lawful representatives, be they trustees, managers, or directors. To these a third essential element must be added, as far as positive laws are concerned, namely, the *sanction of legitimate authority*. Though it is perfectly true that corporations were originally created by the mere act and voluntary association of their members,[5] and are therefore natural products of human and ecclesiastical society, yet the Church as well as the State is entitled to interpose its authority. The Church must give its ap-

3 Exception, of course, is to be made concerning orders (mendicant) incapable of possessing property.

4 Cfr. *New International Encycl.*, 1904, V, 438.

5 Blackstone-Cooley, *l. c.*, I, 472.

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probation. But the State is also concerned, since all temporal property is located within its territory and falls within its sphere. The U. S. does not recognize any ecclesiastical corporations as such, though it does acknowledge them as private civil corporations subject to the laws of each State. Therefore it is important that religious communities, at least those which, according to ecclesiastical law, are capable of holding property, should be *chartered,* because the charter grants them legal existence, fixes their right of making by-laws, and, in a word, endows them with an official character, which the courts must acknowledge.[6]

This last observation gives rise to a question, *viz.,* Is it in accordance with the "public policy" of any of our States to grant or acknowledge a charter to religious societies?

As stated above, the U. S. does not create or acknowledge any ecclesiastical corporation as such. Hence a purely religious society, for instance, for perpetual adoration need hardly apply to the State legislature for a charter. However, if an educational or charitable purpose is involved, the State will readily grant corporate rights. Thus, *e. g.,* a charter was issued by the New Jersey legislature, on March 5, 1868, to St. Mary's Abbey, Newark.[7] Thus also the Shakers and Oneida Communities received a charter from State legislatures. St. Mary's Abbey was acknowledged as "a society of religious men living in a community and devoted to charitable works and the education of youth."[8]

6 Cfr. K. Zollmann, *American Civil Church Law,* 1917, p. 81 ff., a splendid contribution to the science of laws as prevailing in our country with regard to ecclesiastical institutions.

7 Cfr. Brief in behalf of Plaintiff in Error, Supreme Court, Oct. term, 1913, n. 267.

8 *Ibid.,* p. 5.

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Certainly such an institution cannot be said to be against *public policy*. By public policy is meant that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, and which may be termed the "policy of law" or "public policy in relation to the administration of law." Whatever is contrary, or alleged to be so, must be determined from the constitution and laws and judicial decisions of each State. No religious society approved by the Church can embody a fact or principle which an honest man has to condemn, but all contain some things which all men ought to approve. All distinctly inculcate the duty of honest industry, contentment with a competency, and charity to the poor and suffering.[9] We may safely apply to any Catholic corporation or religious body what has been said of the Shakers' Community: So long as piety is recognized by common assent, and by the legislature, as a valuable constituent in the character of our citizens, the general law must foster and encourage what tends to promote it. In legal estimation, it must be viewed as what is not only estimable in itself, but as an appurtenance to the character of individual citizens, of great value to society, for its tendency to promote the general weal of the whole community.[10]

However, it is sometimes objected that by the *vow of poverty* one surrenders the inherent and natural right to acquire and hold property in his own name — a surrender to which our Constitution is apparently opposed.[11] We answer: If by surrendering his right to personal property a professed member of a religious community

9 *Ibid.*, p. 45; p. 47; p. 55.
10 *Ibid.*, p. 55.
11 This was the plaintiff's plea in the case of St. Mary's Abbey vs. the heirs of Fr. Augustine Wirth, O.S.B.

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would also surrender his right to a decent support and existence, it might be granted that there is something immoral in the vow of poverty. However, this is not and has never been the case. The very definition given by canonists should disperse any misgivings as to absolute surrender. They say that the vows are a bilateral contract between the individual member and the religious community, in virtue of which the former promises to devote his life and work and possessions to the community, in lieu of which the latter has to support him in health and sickness unto death. We might as well call marriage an immoral contract because it involves the surrender of the body.[12] A court in Maine said concerning the community of the Shakers that a contract with another to serve him for ten years, for an acceptable compensation, can not be proved to be illegal. This leads us to another aspect of the question. A religious community consists of various members, some of whom take the vows forever, while others take them only for a determined time, after which they may step out. No absolute surrender can be construed in the case of the last-mentioned class. Even those who have taken perpetual vows may be "secularized" with the cooperation of ecclesiastical authority. It is precisely for this reason that religious corporations have adopted by-laws governing cases of secession, by which they provide for the welfare of the community and its continuance and prevent seceding members from claiming compensation for services performed during their membership.

A last remark may conclude this section. How can a corporation endowed with property rights arise out of members who have given up their rights? Or, if all the members have vowed poverty, how may the community

[12] I Cor. 7, 4.

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possess property? The apparent paradox disappears if it is remembered that those who enter the religious state, although they surrender the right of possessing personal property, do not waive that of possessing property in common, as members of such or such a community, so far as the higher authority permits. To this authority, *viz.*, the Sovereign Pontiff, it belongs to decide whether or not property rights are attached to an ecclesiastical corporation. As to the vow, it requires no more than that personal claims be given up. Besides, let it again be emphasized, no religious can surrender the claim to decent support, for such an act would amount to suicide. Lastly, there are members, even in religious orders with solemn vows, who retain the right of holding property, for instance, the clerics with simple vows and lay brothers. Nor must it be overlooked that the Church may grant to a society property rights which are denied to the individual members. And this precisely is the distinction, alleged in our canon, between orders capable of property rights and such as are incapable of possessing — at least a certain kind of — property. However, even the so-called *Mendicant Orders* enjoy a certain right to property. The name Mendicant is applied to those religious orders which, by virtue of their original or primitive rule, observe poverty not only individually, but also as communities or convents, and are satisfied with alms humbly begged, or donations freely given, or things acquired by the labor and industry of the members.[13] But with the exception of the brown Franciscans and the Capuchins the Council of Trent decreed that even Mendicant Orders should possess land.[14] Concerning the two orders mentioned it is generally understood that the immovable property in their charge (convents, churches,

13 Reiffenstuel, III, 31, n. 27. 14 Sess. 25, c. 3, de reg.

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etc.) is held by the Apostolic See [15] as immediate proprietor, whilst the members and actual occupants have the usufruct of the same. Neither of these two orders is capable of receiving legacies, if the sum itself is to be delivered to them, but they may obtain and use the interest of legacies paid annually by the heirs.[16]

CAN. 532

§ 1. Bona tum religionis, tum provinciae domusque, administrentur ad normam constitutionum.

§ 2. Expensas et actus iuridicos ordinariae administrationis valide, praeter Superiores, faciunt, intra fines sui muneris, officiales quoque, qui in constitutionibus ad hoc designantur.

This canon provides that the property of a religious order or congregation, as well as that of the different provinces and houses, should be administered according to the rules laid down by the respective constitutions, which are supposed to agree with the common law, or, at least, to be approved by the Apostolic See.

§ 2 says that expenses and *juridical acts* of ordinary administration may be validly made or performed by the superiors within the limits of their office, and by the different officials appointed under the constitutions. Civil law requires that the names of the officials of corporate societies be registered at the State treasury. This requirement must be complied with also by ecclesiastical corporations if they are acknowledged as private civil corporations, otherwise their officials may not perform legal or juridical acts. For juridical acts are such as are harmonized with the law for the sake of legal validity.

15 Cfr. can. 582, 2°.

16 S. C. C., May 31, 1721; Oct. 3, 1731 (Richter, *Trid.*, p. 396 f.).

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Thus acts of buying and selling are juridical acts if performed in conformity with the law. *Acts of ordinary administration* are such as occur frequently and are performed without special formalities, such as are required, *e. g.,* if expenses are to be incurred that exceed the limits allowed by the Constitutions and the common law.

THE ORDINARY'S RIGHTS

CAN. 533

§ 1. Pro pecuniae quoque collocatione servetur praescriptum can. 532, § 1; sed praevium consensum Ordinarii loci obtinere tenentur:

1.° Antistita monialium et religionis iuris dioecesani pro cuiusvis pecuniae collocatione; imo, si monialium monasterium sit Superiori regulari subiectum, ipsius quoque consensus est necessarius;

2.° Antistita in Congregatione religiosa iuris pontificii, si pecunia dotem professarum constituat ad normam can. 549;

3.° Superior vel Antistita domus Congregationis religiosae, si qui fundi domui tributi legative sint ad Dei cultum beneficentiamve eo ipso loco impendendam;

4.° Religiosus quilibet, etsi Ordinis regularis alumnus, si pecunia data sit paroeciae vel missioni, aut religiosis intuitu paroeciae vel missionis.

§ 2. Haec item servanda sunt pro qualibet collocationis mutatione.

§ 1 refers, first and above all, to the *investment of money,* which must be made according to the constitutions with the *previous consent* of the *Ordinary,*

(1) As often as, and in whatever amount, the superioress of nuns (*monialium*), or of a diocesan institute, wishes to invest money. If the nuns are subject

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to a regular prelate, the superioress must also ask the consent of the prelate;

(2) The superioress of a papal congregation of religious must obtain the consent of the Ordinary in case she wishes to fix the dowry of a professed member in money, according to the rule laid down in can. 549;

(3) The superiors and superioresses of religious congregations need the consent of the Ordinary in case they wish to use for the house or school funds that were given or bequeathed for divine worship or benevolent purposes;

(4) Religious, including members of the regular orders, need the consent of the Ordinary for investing money which was given to the parish or mission, or to the religious himself for a parochial or missionary purpose.

The same rules must be observed if any change of investment is made.

This canon *does not touch* communities of men with solemn vows, but it embraces, in one way or the other, all other religious, even women with solemn vows, and individual regulars as far as they are connected with parish work. The reason for this difference lies in exemption. It may seem strange that the superiors of female congregations approved by the Holy See are not subject to the same regulation as superioresses of nuns of diocesan congregations regarding investment of money. Can. 510 solves the riddle, for it requires that the quinquennial report to be sent to the Holy See must first be submitted to the Ordinary in whose diocese the mother-house is, and who is therefore entitled to examine the financial state of such congregations in order to persuade himself as to the truthfulness of superiors, etc.

(1) First among the matters subject to the consent of

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the Ordinary we note *investment of money* (*pro pecuniae collocatione*). To *invest* [17] is to spend money in the purchase of property, especially for permanent use, or to put capital into other forms of property, for instance, government or other bonds, shares in stock companies, etc. But we do not call it investing when we put money into a bank, even though with the intention of obtaining interest; for money is generally put into banks in order to facilitate trading by checks and drafts, which is the common way in our country, though not yet so universal in Italy and elsewhere. Therefore the consent of the Ordinary is not required for banking money; the opposite opinion would lead to absurdities.[18] But any investment properly so-called, as defined above, needs consent. The amount is stated in the text, which simply says: for *any* money (*cuiusvis pecuniae*), little or much. The *consent* of the Ordinary need not be asked each time, but may be given for a certain sum, to be invested in various ways, or even for a certain time, nor is written consent prescribed, oral being sufficient.

(2) Episcopal consent is required if the superioress of any papal institute wishes to *fix the dowry* in money or cash. The reason for this ruling is to be sought in can. 549, which demands that the dowry be established "in safe, licit, and fruitbearing titles." Hence, if the dowry is to be demanded in cash, rather than in secure titles, the consent of the Ordinary must be asked.

(3) The superiors of religious congregations, whether of men or women, must obtain the consent of the Ordinary if they wish to use *funds donated or bequeathed for purposes different from those for which they were*

17 Cicero uses the expression, "*collocare pecuniam in fundo*," to invest money in landed property.

18 Neither is the daily buying and selling of cattle, products, implements, etc., properly called an investment.

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given. Thus, for instance, a pious lady may have given or bequeathed a certain sum for the chapel or church of a religious community, or another may have left a donation or legacy for an orphanage or home for the aged. Now although these religious may own the chapel or be in charge of the charitable work, the use of such funds for other purposes is not allowed except with the consent of the Ordinary, he being the guardian of all charitable institutes and places of worship.[19] However, if the funds are given to a religious congregation because of the charitable works it does, they may be freely administered and used by the superior without asking the bishop, who must only see to it that the money is used properly and according to the intentions of the donor.[20] Canonical visitation is the proper occasion for investigating, as also the examination of the quinquennial report.

(4) Any religious, even though a member of a regular order, must have the consent of the Ordinary if he wishes to invest *church or mission money, viz.,* money received from pew-rent, receipts from seats, church collections, collections taken up at lectures in favor of the church, house collections and subscriptions. In this category also belongs money given to a religious for his mission or church, but not personal donations, or such donations as are given to a religious because he is a religious or a member of a certain community. Hence any investment of church money needs the consent of the Ordinary of the diocese in which the church or mission is located, not of the Ordinary in whose diocese the investment is to be made.

§ 2 prescribes that the Ordinary's consent must also be obtained — not only asked for — for a *change of in-*

19 Cf. can. 1493, 1513–1515; Leo XIII, "*Conditae,*" II, 9.

20 Cf. Bastien-Lanslots, *l. c.,* p. 146 f.

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vestment. Thus if the money was invested in real estate and is to be re-invested in stocks or bonds, or conversely, episcopal consent must be obtained. If the money was loaned on interest, and is now to be invested in real estate, the consent is also required.

ALIENATION

CAN. 534

§ 1. Firmo praescripto can. 1531, si agatur de alienandis rebus pretiosis aliisve bonis quorum valor superet summam triginta millium francorum seu libellarum, vel de contrahendis debitis et obligationibus ultra indicatam summam, contractus vi caret, nisi beneplacitum apostolicum antecesserit; secus, requiritur et sufficit licentia, in scriptis data, Superioris ad normam constitutionum cum consensu sui Capituli seu Consilii per secreta suffragia manifestato; sed si agatur de monialibus aut sororibus iuris dioecesani, accedat necesse est consensus, in scriptis praestitus, Ordinarii loci, necnon Superioris regularis, si monialium monasterium eidem subiectum sit.

§ 2. In precibus pro obtinendo consensu ad contrahenda debita vel obligationes, exprimi debent alia debita vel obligationes, quibus ipsa persona moralis, religio vel provincia vel domus, ad eum diem gravatur; secus obtenta venia invalida est.

The first paragraph contains two main clauses, divided by the sum of alienation, and the second clause finds its demarcation line in the kind of religious. The whole paragraph treats of alienation of church or religious property. *Alienation* means any act by which property is either diminished or deteriorated, transferred or exchanged, as by sale, gift, renting, mortgaging of a specified

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piece of property (*hypotheca specialis*), contract, lease or other transmission by mutual consent of the parties concerned.[21]

The reason for setting up laws against alienation is the conservative spirit of the Church, who naturally wishes to have property destined for religious purposes to remain in the possession of the ecclesiastical owner. A thousand years before Paul II issued the famous decretal "*Ambitiosae*" (1468), popes and synods enacted rules against unlawful and detrimental alienation. Leo I told the bishops that they were dispensers, not proprietors of church property, and therefore not allowed to donate, change or sell it, and that if anything was to be sold or exchanged, it must be done with the consent of the clergy.[22] The seventh general synod (II Nic., 787) forbade bishops and abbots to grant any church property to worldly princes or to persons under penalty of deposition.[23] This legislation continued until Paul II made the rather strict law against alienation,[24] which, however, was seldom carried out "beyond the mountains." Pius IX ("*Apostolicae Sedis,*" 1869) renewed the laws against alienation and wished them to be enforced everywhere.[25] Our Code adopts these laws in a modified shape, so that they are now written and general laws, and ignorance can no longer be pretended.

In can. 534 the Code rules, first, that can. 1531 must be observed. That canon provides:

§ 1. No property may be alienated for less than it is appraised.

§ 2. Unless circumstances advise otherwise, alienation

21 Engel, III, 13, n. 13; Blackstone-Cooley, *l. c.*, II, 287.

22 C. 52, C. 12, q. 2.

23 C. 19, *ibid.*

24 Cfr. tit. 13, X, III; tit. 9, 6°, III; tit. 4, Clem. III; c. un. *Ambitiosae*, Extrav. Comm., III, 4.

25 "*Apostolicae Sedis,*" Oct. 12, 1869, IV, 3

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must be made by public bidding, or at least by advertisement, and to the highest bidder.

§ 3. The money received by alienation must be invested cautiously, securely, and usefully for the benefit of the Church.

The quintessence of this canon is: business methods and safety. Auction or bidding are prescribed, as we learn from innumerable decisions, in order to prevent squandering of property or undue personal favoritism, or, what is worse, nepotism. But auctioning is not always advisable, especially if profane eyes and ears are to be kept away.

The Code goes on to say:

(1) An Apostolic indult is required for the alienation of precious things or other goods exceeding 30,000 francs or lire in value, as also for making debts over and above that sum. Any contract made before the Apostolic indult has been obtained is ecclesiastically invalid.

The Apostolic indult is a permission granted by the Congregation of Religious, to which application must be made.

(2) The *matter* alienated may be either precious things or property. By the name *precious things* are understood church vessels, vestments, treasures and books which have a special value, either by reason of antiquity or of artistic excellence.[26] "Other goods" (*aliisve bonis*) comprise especially immovable property, such as buildings and landed estates, but also[27] certain rights and revenues, *e. g.*, a lease on coal-fields or mines, liabilities to certain burdens or duties, the right of fishing or hunting, rights of way, etc. Revenue would be State pensions, bonds, stocks, etc. If the value exceeds the

26 Engel, III, 13, n. 5; Reiffenstuel, III, 13, n. 12.

27 C. 1, Clem. III, 4; Reiffenstuel, III, 13, n. 10.

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sum of 30,000 francs or lire, the transaction requires an Apostolic indult. Selling of stocks and produce is no alienation.

(3) How much is *30,000 francs or lire in our money?* In normal times, such as the Code doubtless has in view, it would be about 6,000 dollars. "And for that small sum we have to ask Rome?" This question was put to us more than once, and those who put it asserted that a lira or franc is practically equal to a dollar of our money, and hence the Code means $30,000. However, this reasoning is wrong. We know from experience that a dollar does not equal a franc, but that the average proportion would be about 1 : 2½, that is to say, one dollar would buy as much as two lire and a half in Italy or two francs and a half in France. Furthermore, it is well known that the bishops needed special faculties to alienate property exceeding $5,000.[28] Gradually, because of the decline in the value of money, the Holy See raised the sum from 10,000 francs to 30,000 francs, which it considers almost excessive. To fully convince the reader that the legislator intended the market value of Italian or French currency as the standard of valuation (*i. e.*, about $6,000 in our money), we will state this case: A rescript arrives from Rome, which costs 8 lire, or about $1.60. Will the prelate remit $8 instead of $1.60? We believe, however, that now-a-days about $10,000 or $12,000 would correspond to the intention of the Code, because land as well as building material have risen so much in value that $6,000 are really but a small sum for religious institutes worthy of that name. On the other hand, it is a lamentable fact that religious houses often run into debt simply in order to outshine one

[28] *Conc. Balt., III,* n. 20; Bachofen, *Compendium Iuris Reg.,* p. 305.

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another. The Roman Court, as we know, could tell tales to that effect.

(4) The Code then applies the requisite of an Apostolic indult to the *contracting of debts* to the same amount. Here observe the difference between the new legislation as set forth in our Code and that of the S. Congregation of Religious, July 30, 1909, which required an Apostolic indult for any sum exceeding 10,000 lire, whilst our Code raises the sum to 30,000 lire or francs — the two being almost equal in market value before the war.

The next clause of can. 534, § 1, rules that if the sum does not exceed 30,000 lire or francs, the *written permission of the superior,* according to the respective constitutions, is *required and sufficient,* provided the consent or counsel (given by secret ballot) of the chapter was obtained. Cardinal Gasparri, in his notes, refers to the above-quoted instruction of the S. Congregation of Religious of 1909, which, therefore, may be said to be the will of the legislator, at least as a directive norm. No. I of the instruction referred to requires the *consent* of the chapter or counsel of either the religious house, or the province, or the congregation or order, according as the matter touches these entities respectively. But our Code leaves it to the constitutions, which must therefore be consulted. No. V of the instruction insists that every superior have counsellors elected by the free choice of the community; their number to be four if the community has more than twelve members, and two, if there are less than twelve. No. VI rules that the votes are to be given secretly and are decisive, and the permission granted by the superior in accordance with the decisive votes given by the counsellors, or the chapter, must always be given in writing. No. VII gravely enjoins religious superiors

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not to hide any income, debts, obligations, or donations of value from their counsellors. The sum below 30,000 lire, for which the consent of the counsellors or chapter is required, is not stated in the Code, except in so far as it refers to the Constitutions. But one thing is certain, namely, that under the new Code *consent* is required, not only *advice,* and therefore any transaction performed by the superior without the consent required by the Constitutions would be not only illicit, but invalid.[29]

The second part of the second clause treats of *nuns and Sisters of a diocesan congregation* who wish to alienate or contract debts below the sum of 30,000 francs. These, says the Code, must obtain the written consent of the Ordinary of the diocese, and if they are subject to a regular prelate, also the written consent of the latter. Hence these nuns and Sisters must first and above all obtain the consent of the chapter or counsellors, given by secret vote; secondly, the written consent of their ecclesiastical superiors, either of the Ordinary alone, if they are a diocesan institute, or of both the Ordinary and the regular prelate, if they are nuns with solemn vows. Why are the Sisters of a papal institute not obliged to obtain the consent of the Ordinary? Because their constitutions, which must necessarily contain a chapter on temporal administration, are approved by the Pope, who regulates that matter according to common law and the constitutions.

The *petition* submitted to obtain the papal consent for contracting debts or obligations must state all the debts and obligations of the corporation, institute, province or house up to the day of the petition. If no mention thereof is made, the rescript is invalid. What *debts* are

[29] Cfr. can. 105.

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is evident. As to *obligations,* the term includes all financial or economical titles, bonds or deeds whereby the maker obliges himself, his heirs, executors, and administrators, to pay a certain sum of money on an appointed day.[30] This may be done legally or informally, by a mortgage or note, by giving security or bail, conditionally or absolutely. Mass-obligations are not included because they are not financial obligations.

The Code requires that mention be made of all debts or obligations, no matter how large or small the sum — because no amount is specified — in the application for a papal indult, if required according to can. 534, § 1, that is to say, if the institute wishes to contract new debts or obligations exceeding the sum of 30,000 francs or lire. The statement must be truthful, because subreptitious mention might invalidate the rescript,[31] especially if a considerable sum were concealed.

To complete the law on alienation we may add that the Code has also fixed penalties[32] which increase with the sum unjustly alienated, the greatest of which is excommunication, not reserved to any one. A religious superior may be deprived of his office and rank if he alienates without the necessary consent a sum less than 30,000 francs. Furthermore any religious may appeal to the S. Congregation of Religious, or to the Ordinary, if his or her superior violates the laws laid down in canon 534, as the Decretals,[33] which are not corrected or repealed in our Code, clearly state.

It is, however, evident that papal consent is not required in cases of urgent need, as, for instance, to satisfy creditors demanding immediate payment through a court,

30 Blackstone-Cooley, II, 340; S. C. Rel., July 30, 1909 (*A. Ap. S.*, I, 696).

31 Can. 42, § 1, cannot be applied here.

32 Can. 2347.

33 C. 6, X, III, 13; c. 2, 6°, III, 9.

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or in case of absolute necessity or charity admitting of no delay, or in case of evident utility where postponement would entail a serious loss.[34] But the law requiring the chapter's consent can never be set aside, for cases of such urgency are hardly imaginable.

RENDERING OF ACCOUNTS

CAN. 535

§ 1. In quolibet monialium monasterio etiam exempto:

1.° Administrationis ratio, gratis exigenda, reddatur semel in anno, aut etiam saepius si id in constitutionibus praescribatur, ab Antistita Ordinario loci, itemque Superiori regulari, si monasterium sit eidem subiectum;

2.° Si ratio administrationis Ordinario non probetur, ipse potest opportuna remedia adhibere, etiam removendo, si res postulet, oeconomam aliosque administratores; quod si monasterium sit Superiori regulari subiectum, eum Ordinarius, uti prospiciat, moneat; quod si ille neglexerit, ipse per se consulat.

§ 2. In aliis mulierum religionibus, ratio administrationis bonorum quae dotes constituunt, Ordinario loci reddatur occasione visitationis et etiam saepius, si Ordinarius id necessarium duxerit.

§ 3. Loci Ordinario ius insuper esto cognoscendi:

1.° De rationibus oeconomicis domus religiosae iuris dioecesani;

2.° De administratione fundorum legatorumque de quibus in can. 533, § 1, nn. 3, 4.

§ 1. For every monastery of nuns, even those who are exempt,

34 Bastien-Lanslots, *l. c.*, p. 229.

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1.° The superioress must furnish gratuitously once a year, or oftener if the constitutions so prescribe, an account of her administration to the Ordinary of the diocese, and to the regular superior if the monastery be subject to regulars.

2.° If the Ordinary does not approve of the account of the administration furnished him, he may apply the necessary remedies, including even the removal from office of the procuratrix and other administrators; but if the monastery is subject to a regular superior, the Ordinary shall request him to see to it; and if the regular superior fail to do so, the Ordinary himself must deal with the case.

§ 2. In other institutes of women, the account of the administration of the property constituted by the dowries must be furnished to the local Ordinary at the time of the canonical visitation, and even oftener if the Ordinary deems it necessary.

§ 3. The Ordinary of the diocese has also the right of enquiring into:

1.° The economic status of every religious house with diocesan approval;

2.° The administration of the funds and bequests made for divine worship or charitable work, as well as of all property belonging to the church or mission, although administered by regulars.

To this canon we will only add that it would be advisable for the bishop to appoint as *auditor* for that purpose a priest whose practical knowledge he could make use of at visitations.

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RESPONSIBILITY AND DONATIONS

CAN. 536

§ 1. Si persona moralis (sive religio, sive provincia, sive domus) debita et obligationes contraxerit etiam cum Superiorum licentia, ipsa tenetur de eisdem respondere.

§ 2. Si contraxerit regularis cum licentia Superiorum, respondere debet persona moralis, cuius Superior licentiam dedit; si religiosus votorum simplicium, ipse respondere debet, nisi de Superioris licentia negotium religionis gesserit.

§ 3. Si contraxerit religiosus sine ulla Superiorum licentia, ipsemet respondere debet, non autem religio vel provincia vel domus.

§ 4. Firmum tamen semper esto, contra eum, in cuius rem aliquid ex inito contractu versum est, semper posse actionem institui.

§ 5. Caveant Superiores religiosi ne debita contrahenda permittant, nisi certo constet ex consuetis reditibus posse debiti foenus solvi et intra tempus non nimis longum per legitimam *amortizationem* reddi summam capitalem.

CAN. 537

Largitiones ex bonis domus, provinciae, religionis non permittuntur, nisi ratione eleemosynae vel alia iusta de causa, de venia Superioris et ad normam constitutionum.

§ 1. If a corporation (whether an institute, a province, or a house) contracts debts and obligations, even with the permission of superiors, it is personally responsible for them.

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§ 2. When a regular, with the permission of his superiors, contracts debts and obligations, the corporation whose superior gave the permission, bears the responsibility; if it is a religious with simple vows, he himself is responsible, unless he acted with the permission of the superior, and on behalf of the institute.

§ 3. If a religious contracts debts and obligations without any permission of superiors, he himself is responsible, but not the institute, the province or the house.

§ 4. In every case, it is a rule that an action can always be brought against him for whom the contract has been a source of profit.

§ 5. Superiors must beware not to allow the contracting of debts unless it be certain that the interest on them may be met from current revenue, and that within a reasonable time the capital may be paid off by means of a lawful sinking-fund.

This canon is intended to protect religious institutes and to warn outsiders against unguarded dealing with religious who have not the proper authorization. It is evident that a corporation acting in its own name is responsible for its action, although the superior alone may have sanctioned it, for the quality of a juridical person is inherent in the corporation as such, not in the superior. A regular superior with solemn vows cannot form a corporation sole, unless he has obtained a special papal indult. Hence legal action must be instituted against the corporation as such.

§ 2 speaks of *individual religious* contracting debts. Here a distinction is made. A *regular,* or member of an order with solemn vows, is incapable of transacting business and therefore the corporation as such is liable for his acts. A *religious with simple vows* retains the right to acquire and own property, and consequently must be

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held personally responsible for all business transacted by him, unless he is the authorized representative of the community. This is also true of a religious with simple vows who, though belonging to an order with solemn vows (for instance, a lay brother or a cleric in temporary profession) contracts debts or obligations without being commissioned thereto by his superior.

§ 3 is taken from the Decretals,[35] where there is a canon of the IVth Lateran Council which says that a convent should not be held responsible if a religious went security for another or borrowed money without the consent of chapter or superior, unless the transaction was favorable to the community. Lay persons may sometimes be deceived by a religious who pretends to act in the name of his community, but careful business men will always assure themselves of the official character of any religious they may have to deal with.

Notice that in this paragraph (3) no distinction is made between regulars and religious with simple vows; hence the text covers all.

Though the ancient ecclesiastical law seemingly excludes *legal action* against a religious institute, the Code says in § 4 that such action may be instituted for unfair dealing. Therefore a business man may sue a religious institute to recover money or goods acquired by a member who acted without authority. But the first subject to be dealt with would be the offending religious himself, and then only the community. The latter could be condemned to restitution or compensation if the enrichment was illegal. Attention must be drawn to can. 120 (*privilegium fori*), which requires the Ordinary's permission for citing religious before a civil court.

§ 5 warns religious against making debts which would

[35] C. 4, X, III, 22.

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weigh too heavily on the community. What the Code says of *amortization* or reduction and extinction of debts by means of a sinking-fund is certainly good advice. On the other hand, however, it is a well-founded saw that debts are a good thing for religious communities because they stimulate the members to untiring labor and prevent religious houses from becoming too rich.

Can. 537 prohibits the making of presents out of the goods of a religious house, province, or institute, unless by way of almsgiving or for other just reasons and with the consent of the superior and in conformity with the constitutions. The reason for this prohibition lies in the vow of poverty as well as in the desire of cutting off opportunities for feasts and banquets, as we read in a circular letter of the S. Congregation of Bishops and Regulars, of July 28, 1708.[36] The Code has taken as its standard the Constitution of Urban VIII, "*Nuper*," of Oct. 16, 1640, which mitigated the severe Constitution of Clement VIII, "*Religiosae congregationes*," of June 19, 1594. The latter had prohibited any gifts or donations by religious and obliged the receiver to make restitution. Urban VIII permitted presents in token of gratitude or for other religious motives, which turn to the benefit of the house, excluding, however, donations of any considerable amount by superiors as well as officials and individual religious in their own name, enjoining that all be done in the name of the monastery.[37] Urban VIII did not revoke that part of Clement VIII's Constitution which obliged to restitution the recipients of presents illegitimately made by religious.

Here it may not be amiss briefly to state the moral obligations of donors and recipients in case they have acted

[36] Bizzarri, *l. c.*, p. 398.
[37] S. C. EE. et RR., Feb, 1791 (Bizzarri, *ibid.*).

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against canons 536 f. Supposing the sum alienated or donated (*e. g.*, to relations or friends) is over $10, which, according to Innocent XII ("*Romanus Pontifex*") was considered enough to reserve the case to the S. Penitentiary,[38] we may say:

a) A *religious with solemn vows,* being unable to own property, cannot make restitution in the proper sense. But he is obliged to tell the recipients that they must restore the value of the present, unless they are poor or unwilling to make restitution. If they are in good faith and it is not likely that an admonition would avail, the donor may omit this admonition and leave them in good faith. If the recipient is poor and needy, nothing is to be done.

b) A *religious with simple vows,* who retains the right of holding property, is obliged to make restitution out of his own means, supposing that he or she has property or may expect such in the future; and this obligation never ceases. Of course, if he can prevail upon the recipient to restore the goods given out of the religious property, this would be the simplest way out of the difficulty. It may be added that tips to waiters or porters, small gifts as tokens of gratitude, etc., do not oblige to restitution, and if made for a good reason, are not against poverty. Religious articles, such as medals, pictures, etc., may be given without fear of violating poverty. A religious when travelling is allowed to act like a gentleman towards those whose help or assistance or good will he needs. Finally, can. 537 allows donations to be made as alms or for any just reason, provided the superior consents.

[38] There is, of course, no longer any reservation, because common law makes no mention thereof. The religious (exempt) superior might reserve the case if there were an urgent reason for doing so. Besides, 10 *scudi* would now-a-days barely amount to $50.

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This consent may be presumed in cases of urgency or necessity. Too rigid an insistence upon poverty when charity calls is against the very groundwork of religion. Religious are not to be stingy, but the saying of the Apostle was also intended for them: "It is a more blessed thing to give rather than to receive" (Acts 20, 35). Besides, every religious community has a social position to fill and a social duty to live up to. The ancient monasteries were fully aware of this great and noble task.

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TITLE XI

ADMISSION TO RELIGIOUS INSTITUTES

CAN. 538

In religionem admitti potest quilibet catholicus qui nullo legitimo detineatur impedimento rectaque intentione moveatur, et ad religionis onera ferenda sit idoneus.

Every Catholic who is not prevented by any legitimate impediment, and is inspired by a right intention, and fit to bear the burdens of the religious life, can be admitted to the same.

Four general conditions are here set up for entering the religious life:

(1) The aspirant must be a *Catholic,* for the Code does not legislate, at least not directly, for non-Catholics. Besides, since no religious institute can legally exist without the approval of the Church, and the Church in concrete terms is the Catholic Church, it is evident that the religious state is open only to such as acknowledge the legitimate authority of that Church. Finally, as a matter of experience, the religious state appears to prosper only within the pale of the Catholic Church.[39]

(2) The person who wishes to enter a religious institute *must not suffer from any legitimate impediment* (see

[39] It is a well-known fact that some Anglicans endeavored to imitate the example of the Catholic Church, not at all to the detriment of the latter, as some communities returned corporatively to the Mother Church.

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can. 542). The natural law precludes the assumption of the religious habit by a person who is mentally unsound.[40] As to bodily defects, it may be well to follow the instruction of Clement VIII (1603), which demands that the postulant be examined to ascertain whether he suffers from a considerable deformity, or shows sign of great bodily debility or stupidity (*fatuitas*). For such defects, though not disgraceful to the individual, may draw ridicule upon a religious community and the religious state in general.[41]

(3) A *right intention* is required because the end of the religious life is holy,— namely, Christian perfection, which demands full attention and a determined effort. A right intention is the glory of God and one's own salvation. Any other would be either sinful or dangerous. A wrong intention would be material interest, provision for life, honor and dignities.[42] It is not without reason, therefore, that canonists require a special vocation as a condition of admission to the religious state. On the other hand, St. Thomas is satisfied with a general call, which may also satisfy us. This general call, he says, consists in the invitation of Christ to follow the evangelical counsels.[43] An ambiguous use of terms seems, however, to have caused some divergency of opinion.[44] The invitation to the higher life is extended to all, but the actual choice of the religious state seems to proceed from either efficacious or sufficient grace, no matter how we look at the working of that mysterious divine impulse. The word of our Lord: "He that can take it, let him take it," (Matt. 19, 12) is a strong argument in favor of a special vocation, unless we choose to deny the

40 Cf. c. 15, X, III, 31.
41 Bizzarri, *l. c.*, p. 848, 5.
42 C. 20, C. 16, q. 7.
43 S. Th., II–II, q. 189, a. 10.
44 Cf. Piatus M., I, 32 ff.

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suave workings of divine providence. Only we must guard against a too specialized drawing to the religious state. The safest means to arrive at a practical result for each one is to pray and to consult with others.

(4) The last general requisite is *fitness* for bearing the burdens of the religious life. This fitness may be either *general* or *special*. *General fitness* must be considered from the view-point of the three religious vows, particularly that of chastity, because celibacy is not to everyone's taste. Obedience, too, may deter some from embracing a state which requires self-denial and subordination. *Special* fitness turns upon the nature of each religious order or congregation. Some are of a contemplative trend — of these there are but few in our country — whereas others have an active tendency; some spend much time and labor on choir service and schools, while others devote themselves to missionary and charitable work. Each requires a peculiar mental and physical [45] aptitude in the aspirant.

[45] An important defect of the body would be the lack of a limb endowed with special functions, for instance, hand, leg, nose, ear, eye (Bizzarri, *Coll.*, p. 848); perhaps after the war a more lenient practice will be admitted.

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CHAPTER I

POSTULANCY

DURATION

CAN. 539

§ 1. In religionibus a votis perpetuis mulieres omnes et, si agatur de religione virorum, conversi, antequam ad novitiatum admittantur, postulatum ad sex saltem integros menses peragant; in religionibus vero a votis temporariis, ad necessitatem et tempus postulatus quod attinet, standum constitutionibus.

§ 2. Superior maior praescriptum postulatus tempus potest prorogare, non tamen ultra aliud semestre.

§ 1 distinguishes between various orders of men and women, such with perpetual and such with temporary vows. In religious institutes of *women* with *perpetual vows* the period of postulancy must last at least six whole months. The same rule applies to the *lay brothers* of male orders with perpetual vows. In institutes with temporary vows the duration of the postulancy is regulated by the respective constitutions.

§ 2. The higher superior can prolong the time prescribed for the postulancy, but not beyond another term of six months.

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PLACE, DRESS, ENCLOSURE

CAN. 540

§ 1. Postulatus peragi debet vel in domo novitiatus vel in alia religionis domo in qua disciplina secundum constitutiones accurate servetur sub speciali cura probati religiosi.

§ 2. Postulantes vestem induant modestam ac diversam a veste novitiorum.

§ 3. In monasteriis monialium adspirantes, dum postulatum peragunt, lege clausurae tenentur.

The postulancy must be made either in the novitiate house or in another house of the institute, where the discipline prescribed by the constitutions is faithfully observed under the special care of an experienced religious.

The postulants should wear a humble dress, different from that of the novices.

In the monasteries of nuns (with solemn vows) the aspirants, during their postulancy, are bound by the law of enclosure.

CAN. 541

Postulantes, antequam novitiatum incipiant, exercitiis spiritualibus vacent per octo saltem integros dies; et, iuxta prudens confessarii iudicium, praemittant generalem anteactae vitae confessionem.

Before beginning their novitiate, postulants should make a spiritual retreat of at least eight full days, and according to the discretion of the confessor, a general confession of their past life.

To these three canons we will only add that they do not affect the validity of the novitiate or profession; that in clerical religious houses only the lay brothers, not the

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clerics, have to make the six months' postulancy; that the institutes with perpetual vows cannot force the members to a postulancy lasting more than a year, even though the constitutions prescribe a longer term, as the latter in this point are devoid of legal force.

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CHAPTER II

THE NOVITIATE

A certain period of probation for aspirants has always been customary in religious institutes. Thus Pachomius in his rule [1] prescribes a term of probation, and Cassian in his "Institutions" speaks of it also.[2] This term of probation must have been a hard time for novices and candidates. The *term of a year* has been hallowed by a long-standing tradition; almost all the ancient rules prescribe it.[3] The *place* of the novitiate was separate from the rest of the monastery. At St. Gall in Switzerland, for example, the novices had their own enclosure, dining-room, kitchen, dormitory, infirmary, and laundry, as we see from the plan of that famous abbey built by Gotzbert in the beginning of the ninth century. Later, among the Cluniacenses, if the number of novices was small, they were allowed to mix with the professed members.[4] Probation chiefly turned upon obedience and capability of bearing the burdens of the religious life.[5]

1 Reg., c. 49 (Migne, 23, 70).

2 *Inst.*, l. IV, cc. 3 ff. (Migne, 49, 154 ff.).

3 Migne, 66, 816.

4 Migne, 66, 812; concerning the change of dress, custom was different in different monasteries; *ibid.*, Col. 836.

5 The devices employed sometimes bordered on the ridiculous and are not to be imitated now-a-days.

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ARTICLE I

THE CONDITIONS REQUIRED FOR ADMISSION TO THE NOVITIATE

CAN. 542

Firmo praescripto can. 539–541, aliisque in propriis cuiusque religionis constitutionibus,

1.° Invalide ad novitiatum admittuntur:

Qui sectae acatholicae adhaeserunt;

Qui aetatem ad novitiatum requisitam non habent;

Qui religionem ingrediuntur vi, metu gravi aut dolo inducti, vel quos Superior eodem modo inductus recipit;

Coniux, durante matrimonio;

Qui obstringuntur vel obstricti fuerunt vinculo professionis religiosae;

Hi quibus imminet poena ob grave delictum commissum de quo accusati sunt vel accusari possunt;

Episcopus sive residentialis sive titularis, licet a Romano Pontifice sit tantum designatus;

Clerici qui ex instituto Sanctae Sedis iureiurando tenentur operam suam navare in bonum suae dioecesis vel missionum, pro eo tempore quo iurisiurandi obligatio perdurat.

2.° Illicite, sed valide admittuntur:

Clerici in sacris constituti, inconsulto loci Ordinario aut eodem contradicente ex eo quod eorum discessus in grave animarum detrimentum cedat, quod aliter vitari minime possit;

Aere alieno gravati qui solvendo pares non sint;

Reddendae rationi obnoxii aut aliis saecularibus ne-

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gotiis implicati, ex quibus lites et molestias religio timere possit;

Filii qui parentibus, idest patri vel matri, avo vel aviae, in gravi necessitate constitutis, opitulari debent, et parentes quorum opera sit ad liberos alendos vel educandos necessaria;

Ad sacerdotium in religione destinati, a quo tamen removeantur irregularitate aliove canonico impedimento;

Orientales in latinis religionibus sine venia scripto data Sacrae Congregationis pro Ecclesia Orientali.

Without prejudice to the rules laid down in can. 539–541, and to others contained in the constitutions proper to each institute,

1.° The following are *invalidly* admitted to the novitiate:

Those who have belonged to a non-Catholic sect. The term "*adhaerere*" certainly means a wilful act on the part of the candidate, or, in other words, a formal heretic or schismatic, as may be seen from can. 1325, § 2, where the definitions of heretic and schismatic are given. In both a wilful, stubborn act is required. Hence a boy or girl educated by non-Catholic parents or relatives would not fall under the prohibition, as long as he or she had merely materially and unknowingly followed a non-Catholic sect, and never pertinaciously denied an article of the Catholic faith. On the other hand, a *sect* is an organization based on contradiction to the Catholic faith and the unity of the Church. Hence it matters nothing whether one is a formal adherent of a Protestant sect or of a schismatical body. For in neither case can he be validly admitted to the novitiate. Besides, a sect is generally understood as a body that proclaims some kind

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of Christian profession, as is evident from the Constitution of Pius IX, "*Apostolicae Sedis,*" Oct. 12, 1869.[6] Hence apostates from the Catholic faith, and members of a non-Christian denomination (Buddhists, Mohammedans, Jews) are not comprised in this prohibition. However, as the Code uses the term *acatholicae,* non-Catholic, it would seem to include all sects opposed to the Catholic faith, but not individual apostates, as long as they are not members of an organized sect. This latter interpretation seems very probable, because the underlying reason of the prohibition is not only horror of heresy, but weakness of faith, as there is even now an impediment against receiving orders for neophytes,[7] and formerly was an irregularity from "defect of confirmed faith."

Those who have not reached the age required for the novitiate, which, according to can. 555, is fifteen years.

Those who enter religion under the influence of violence, or grave fear, or are induced thereto by fraud; also those whom the superior receives under pressure of the same influences. Compulsion (*vis*) destroys the voluntariness of an act; grave fear diminishes it; fraud, if deliberate and inspired by the intention of coaxing one into the religious state, affects the consent of the contracting party.

Physical compulsion is no longer as common as formerly, when parents brought their young children to the monastery. A notable case is that of Gottschalk, who was an oblate at Fulda under Rhabanus Maurus.[8] The Decretals mitigated this practice, which to us seems appalling, and ruled that a boy was free to embrace the

6 I, 1: "*Omnes a christiana fide apostatas et omnes ac singulos haereticos quocumque nomine censeantur et cuiuscumque sectae existant.*"

7 Can. 987.

8 He wrote a work on the "Oblation of Boys," in which he defends the prevailing custom (Migne, 125, 419 ff.).

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religious state after fourteen years, and a girl could repudiate her parents' decision after she had reached the age of twelve.[9] Of *grave fear* that prompted one to enter religion an instance is mentioned in the Decree of Gratian.[10] Landulph of Corsica through fear of death and the remembrance of his sins left his wife and became a monk. Alexander III declared the step null and void and allowed Landulph to return to his wife. Grave fear may be inflicted by foolish parents or relatives, who sometimes use means of persuasion of a very doubtful character, such as threats, to induce their children to enter the religious state. All such measures render the step invalid.

A more knotty question is that of *deceit,* because it cannot be easily proved.[11] However, circumstances sometimes uncover a fraud. Thus, for instance, if parents, desirous of keeping their property together, induce their younger sons or daughters to enter religion, there is palpable fraud. Deceit may also be practiced by the religious, for instance, by holding out a good and pleasant position, honors and dignities, or, as the saying is, a good time, or by hiding the truth and the real conditions of the community. However, not every kind of deceit necessarily makes admission to the novitiate invalid, but it must be a fraudulent device either on the part of those who have influence over the candidate or on the side of the institute which he joins, and it must be *decisive* in causing him to enter.[12] A person who is of age and of sound mind is not easily deceived.

The Code says, furthermore, that if the superior has been induced to receive a candidate by compulsion, fear or deceit, the act would be invalid. This may happen

9 Cc. 8, 12, X, III, 31.
10 C. 2, C. 33, q. 5.
11 Reiffenstuel, III, 16, 32 ff.
12 Reiffenstuel, II, 14, n. 8 f.

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by threats against the superior himself, or against the religious house (defamation), or financial reverses, etc. It would be deceit if the candidate pretended to be intelligent, healthy or rich, whilst in reality he is the opposite. But mere lack of riches or brain — unless the candidate were too dull for any occupation — would not be sufficient to make the admission invalid. Feigned health would be sufficient, but a physician's verdict may save an institute from deceit of this kind. The moral character is more liable to be made an object of deception. However, the testimonials required and a sincere statement of the candidate's past life would give some clue to a wise action on both sides. If the candidate should nevertheless have succeeded in deceiving the order or congregation, the latter would be justified in dismissing him even after profession. The same must be said concerning health,[13] if a serious defect was concealed, as well as of debts, which must be revealed to the religious superior.

A married person as long as the marriage bond lasts. Since *divorce* is not acknowledged by the Church, a divorced husband or wife cannot enter religion. But if the ecclesiastical authority (episcopal or Roman court) decides against the existence of a marriage, the parties are free. As to the sentence of the episcopal court it must be understood of the final sentence not appealed. *Separation,* granted either perpetually or for a time by the ecclesiastical court, does not dissolve the marriage tie, and therefore parties thus severed cannot be admitted to a religious institute. Neither can mutual consent or permission solve the marriage bond, wherefore the old practice on this head must be discarded.[14] The text is

13 Cfr. can. 637.

14 Cf. X, III, 32. With the consent of his wife a man could enter religion on condition that the wife,

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brief, but clear and pointed, and we believe our notes on it to be correct.[15]

Those who are or have been bound by the bonds of religious profession. This law excludes all who are or were members of any other religious community by profession. Of course, the profession must have been *valid,* otherwise he was not bound (*obstrictus*). Hence if a profession is for any reason declared null and void, the one who made it may be validly admitted to the novitiate. Note that *any* valid profession, whether temporary or perpetual, simple or solemn, has the effect of binding one to the religious institute in which it is made. For the text simply says, without distinction: religious profession.

Those who are menaced with punishment for a serious crime, of which they have been or can be accused. A crime is a public transgression in a matter that touches the public welfare, and in civil law has a penal sanction attached to it. Under this heading falls the threefold category of crimes, *viz.,* treason, felony, and misdemeanor, although the latter might perhaps be excluded here, because the text says: *gravis* (serious) crime. Note that the Code does not limit the term to ecclesiastical crimes, but simply says a serious crime of which one has been or can be accused. The reason is evident, *viz.,* to protect the decorum and reputation of the religious life, which should not be a shelter and refuge for criminals. The wording, "who are amenable to punishment" (*quibus imminet poena*), supposes that the penalty is probable. Hence if one should be declared

if under fifty years, would also enter a religious order, or, if beyond that age, would take the vow of chastity.

15 Papi, H., *Religious Profession,* 1918, p. 14: "A married person, while his or her partner is alive"—does not render the text adequately.

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"not guilty," although he may have committed the crime, he may be validly received, though not while the trial is pending.

Every bishop, whether residential or titular, even though only nominated by the Roman Pontiff. The reason for this prohibition lies in the mystic marriage between the bishop and his diocese, which also forbids a transfer from one diocese to another, except by special permission from the Pope.[16] *"Designatus"* (nominated or appointed) means promulgated by the Pope in public consistory. Consequently a bishop-elect, or one merely postulated or presented for the episcopate, but whose election is not yet ratified, postulation not admitted, or presentation not effected by investiture, may freely be admitted to the religious state. Consecration is not required to make the prohibition effective.

Clerics who, by a disposition of the Holy See, are bound by oath to consecrate themselves to the service of their diocese or mission, for the period during which their oath binds them. This is the impediment that arises from the title of the *service of the Church* for which one is ordained. The oath is taken before one is ordained subdeacon[17] and contains a special clause prohibiting entrance into religion.

The North American College in Rome is now under the superintendence of the S. C. Consistorialis, which watches over the taking of this oath, and grants dispensations from the same.[18] If the title of *servitium Ecclesiae* is changed into another, *e. g.*, that of patrimony or pension, which may be done by the bishop with the

16 C. 2, X, I, 7; c. 18, X, III, 31, which latter text justly says that if a weighty or solid reason is advanced, the petition shall easily be granted.

17 Cfr. the Instruction of the S. C. Prop. Fidei, April 27, 1871 (*Collectanea S. C. P. F.*, II, n. 1369).

18 S. C. Consist., Jan. 7, 1909 (*A. Ap. S.*, I, 148 ff.).

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permission of said sacred Congregation, the obligation ceases. If one is ordained on any other ecclesiastical title, for instance, that of patrimony, the oath must not be taken, and the clergyman is, on that score, free to enter religion.

Can. 542 then continues as follows:

2.° The following are *illicitly* but validly admitted [to the novitiate]:

Clerics in sacred orders, without the consent of the local Ordinary or against his will, if his objection is based on the serious loss to souls that their withdrawal would entail, when that loss cannot by any means be otherwise avoided. This is the old practice followed by the Roman Court, as several constitutions, especially that of Benedict XIV, "*Ex quo,*" Jan. 14, 1747, prove. The welfare of souls being the supreme law, it is but natural that private desires and aspirations must make way for it. Ordinary politeness, if nothing else, would dictate that a clergyman who wishes to join a religious order should manifest his desire to the Ordinary. In case the latter is persuaded of the necessity of retaining such a priest in the service of the diocese, he may claim him even after he has made his profession.[19] But a bishop is not entitled to keep a priest from entering the religious state on the plea that he is indebted to the diocese for his seminary expenses, because a clergyman is not bound to repay these.[20]

Those who are burdened with debts which they are unable to discharge. These were dealt with severely by Sixtus V, but more leniently by Clement VIII. Our Code makes their admission merely illicit.[21] Note that

19 Benedict XIV, "*Ex quo.*"

20 Nilles, *Disputationes Selectae,* p. 55; Piatus M., *l. c.,* I, 74.

21 Sixtus V, "*Cum de omnibus,*" Dec. 1, 1587; Clement VIII, "*In suprema,*" Jan. 2, 1602; "*Cum ad regularem,*" March 19, 1603.

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no one who is heavily indebted is to be admitted to the religious state, even though the order or congregation he wishes to enter is willing to pay his debts. Such an offer would imply alienation, which is not permitted. Minor debts may be assumed by a religious community. *Heavy* debts is a relative term, depending on one's fortune. One is heavily indebted if compelled to declare himself insolvent, or to sell all his property to satisfy his creditors.

Those who are liable to furnish accounts or are implicated in other secular negotiations from which the institute may have reason to fear lawsuits and annoyances. Hence all public officials liable to render accounts, guardians and tutors, trustees and treasurers, administrators and procurators must first acquit themselves of their accounts before they can be received. This was the meaning of the Constitution of Sixtus V, "*Cum de omnibus,*" Dec. 1, 1587.

Persons whose parents, that is, father or mother, grand-father or grand-mother, are in great necessity and need their assistance, and parents whose help is necessary for the support and education of their children. The Code is explicit as to the degrees of relationship within which persons are bound to succor their relatives. Parents or grand-parents would be in "great necessity" if they depended for support solely on the child or grandchild who wishes to enter the religious state. *A parent's* first duty is to support and educate his or her children. However, if these can be cared for equally well by others, the parent would be permitted to join a religious order, as the text speaks conditionally.

Those who in religion would be destined for the priesthood, from which, however, they are debarred by an irregularity or other canonical impediment. On these im-

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pediments consult can. 984 to 991. *Illegitimate* children may be licitly received into a religious order or congregation with solemn vows, because the Code [22] reasserts the old law [23] that solemn profession removes irregularity and admits one to holy orders, the priesthood included, but not to higher orders or dignities. Note that these impediments affect only members of a clerical institute who are destined for the priesthood. Hence lay religious and women's congregations and orders are not touched by the prohibition at all.

Orientals may not be received into institutes of the Latin rite without the written permission of the S. Congregation for the Eastern Church. This applies to all Orientals who belong to the Oriental Rite. For those who have, with the Holy See's permission, changed to the Latin rite, there is no impediment as to being received into a Latin institute.[24] This canon is a logical corollary of can. 98, which prohibits indiscriminate mingling of the Oriental and the Latin rites.

THE RIGHT OF ADMITTING NOVICES, ETC.

CAN. 543

Ius admittendi ad novitiatum et subsequentem professionem religiosam tam temporariam quam perpetuam pertinet ad Superiores maiores cum suffragio Consilii seu Capituli, secundum peculiares cuiusque religionis constitutiones.

The right of admitting to the novitiate and to the subsequent profession, whether temporary or perpetual, be-

22 Can. 984, 1°.

23 Cfr. X, I, 17; 6°, I, 11; c. 14, X, V, 34; Reg. Iuris 87, in 6°.

24 On the Aventine Hill in Rome in the Xth century there was a monastery, S. Alessio, in which Latin and Greek monks lived under one abbot, the former following the rule of St. Benedict, the latter that of St. Basil.

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longs to the higher superiors, who, however, depend on the vote of the council or chapter, according to the requirements of the constitutions of each particular institute.

The reception of novices is a matter of great importance for the upkeep of discipline, and concerns not only the individual postulant, but the whole community, and therefore it is but proper that the whole community should have a share in it. The Code instructs superiors and convents to coöperate in the matter. In congregations with a chapter, properly so-called, like the Benedictines, the whole chapter must vote on each case, and this vote is not only consultive, but decisive. Where *counsellors* take the place of the chapter, they must be consulted and their vote obeyed. In each case the majority decides, and only when there is a tie, is the superior's vote decisive. For the rest, the constitutions must determine the manner of receiving novices.

We may add that the Ordinary of the diocese has no right to admit candidates to the novitiate of papal institutes, but under the Constitution "*Conditae*" of Leo XIII he is entitled to be informed about the candidates who wish to be received, and those who are to be admitted to vows; he may also examine them, according to the customary rules, and if no objection is found, admit them.[25] This, however, does not mean that the Ordinary may arbitrarily reject some and command others to be received.

TESTIMONIALS

CAN. 544

§ 1. In quavis religione omnes adspirantes, antequam admittantur, exhibere debent testimonium recepti baptismatis et confirmationis.

[25] I, n. 7; cf. can. 552.

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§ 2. Adspirantes viri debent praeterea testimoniales litteras exhibere Ordinarii originis ac cuiusque loci in quo, post expletum decimum quartum aetatis annum, morati sint ultra annum moraliter continuum, sublato quolibet contrario privilegio.

§ 3. Si agatur de admittendis illis qui in Seminario, collegio vel alius religionis postulatu aut novitiatu fuerunt, requiruntur praeterea litterae testimoniales, datae pro diversis casibus a rectore Seminarii vel collegii, audito Ordinario loci, aut a maiore religionis Superiore.

§ 4. Pro clericis admittendis, praeter testimonium ordinationis, sufficiunt litterae testimoniales Ordinariorum in quorum dioecesibus post ordinationem ultra annum moraliter continuum sint commorati, salvo praescripto § 3.

§ 5. Religioso professo, ad aliam religionem ex apostolico indulto transeunti, satis est testimonium Superioris maioris prioris religionis.

§ 6. Praeter haec testimonia a iure requisita, possunt Superiores quibus ius est adspirantes in religionem cooptandi, alia quoque exigere, quae ipsis ad hunc finem necessaria aut opportuna videantur.

§ 7. Mulieres denique ne recipiantur nisi praemissis accuratis investigationibus circa earum indolem et mores, firmo praescripto § 3.

§ 1. In every institute, all the aspirants, before being admitted, must present a *certificate of their baptism and confirmation*. The certificate of baptism may be issued by the pastor or his assistant, but it must be signed in the name of the pastor and sealed with the parish seal. The certificate of confirmation may be issued by the diocesan chancellor but must bear the diocesan seal.

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Until he has presented his certificate of baptism and confirmation an aspirant cannot receive the religious habit.[26]

§ 2. The *male aspirants* must, besides, furnish *testimonial letters from the Ordinary* of the place of birth, and from the Ordinary of whatever other place in which, after completing their fourteenth year, they have lived for more than a year, morally continuous, notwithstanding any privilege to the contrary. This rule was inculcated by the decree "*Romanos Pontifices,*" of Jan. 25, 1848, which need no longer be read at table, the promulgation of the Code being sufficient.[27] The Code fixes fourteen years instead of fifteen, as did the decree. The Ordinary of the place of birth is the one in whose diocese the father of the candidate lived when the candidate was born. Persons of illegitimate parentage follow the domicile of the mother. Besides the testimonials of the bishop of the place of birth, the candidate must have letters from the Ordinaries of all other dioceses in which he has dwelt for more than one morally continuous year. The phrase *morally continuous* indicates habitual residence. A few weeks' absence from a diocese would not impair this moral continuity of residence. Much depends on the intention, but if a man comes and goes, but always returns to the same place, he is morally present in the diocese in which that place is situated.

§ 3. When there is question of admitting aspirants who have been in a *seminary,* a *college,* or in a postulancy or novitiate of *another institute,* testimonial letters, given,

[26] S. C. EE. et RR., May 29, 1857, n. 2 (Bizzarri, *l. c.*, p. 850). Of course, these rules are to be urged only in normal times; in times like ours it is often impossible to obtain the necessary information. In every such case the S. C. Rel. should be informed of the facts, and if no answer comes, the novitiate may be begun licitly,— its validity not being in question.

[27] Cfr. can. 509, § 2, 1, which says those decrees shall be read which the Holy See will in future prescribe (*prescribet*).

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according to the circumstances, by the rector of the seminary or college, after consulting the local Ordinary, or by the higher superior of the institute, are also necessary. This paragraph enumerates three hypotheses: (a) the aspirant may have been a student of a seminary or (b) of a college, or (c) a postulant or novice of a different religious order. But in neither case is § 2 invalidated, wherefore the Code says, *praeterea,* besides, *viz.,* besides the testimonials demanded in § 2, supposing, of course, that the aspirant belongs to the male sex.

Seminary means a theological (grand) seminary, but does not exclude a preparatory (petit) seminary. The term *college* includes academies for young ladies, because § 7 includes female religious. Now if a candidate has been an alumnus of such a seminary or college or academy, no matter how long, he must present testimonial letters from the respective rector or president or superioress. Before they issue such testimonial letters, these officials must consult the Ordinary of the diocese and obtain his approval. Testimonial letters thus approved and signed by the Ordinary, or his vicar-general or chancellor, may serve at the same time as episcopal testimonials as to residence in the diocese, where such are required. A nine months' stay in a seminary or college or academy would in itself not make it necessary for an aspirant to obtain testimonial letters from the Ordinary of the diocese in which the seminary or college or academy is situated.[28] Sometimes it happens that students spend the whole year in such an institution. Observe that no seminary or college, even though conducted by exempt religious, is free from the obligation in question. The last clause provides that aspirants who have

[28] A three months' vacation would certainly interrupt the "morally continuous" year supposed to require such a testimonial.

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been *postulants or novices* of some other institute must also present testimonial letters from the higher superiors (those mentioned in can. 488, n. 8). Note, first, that the Ordinary need not be consulted before issuing such testimonial letters. Secondly, that the term *alius religionis* may be insisted upon. For *religio* means an organization different from others. Consequently a change from one province to another, or from one monastic congregation to another of the same order would not require testimonial letters from the religious superior who had dismissed the postulant or novice. The decree of the S. C. Rel., Sept. 7, 1909, mentions only dismissal from "orders and religious congregations,"[29] although in another decree (April 5, 1910) the same congregation speaks of a "religious family."[30] But the latter decree is only an interpretation of the former, and therefore, until an authentic interpretation is given to the contrary, we cling to the strict wording of the Code.

§ 4. For the admission of *clerics,* it suffices, besides the certificate of ordination, to have testimonial letters from the Ordinaries of the dioceses in which the clerics have lived for more than one morally continuous year after ordination, without prejudice to the prescription of § 3. *Ordination* is the conferring of higher and minor orders, and includes the first tonsure,[31] by which one formally enters the ranks of the clergy. Clerical aspirants to the religious life, therefore, need: (a) a *certificate of ordination,* (b) *testimonial* letters from the *Ordinaries,* as stated in this paragraph and in § 2, *if* they have lived in their dioceses for one morally continuous year; (c) testimonial letters from the superior of a seminary, college or religious institute, *if* they had been received

29 *A. Ap. S.,* I, 701.
30 *Ibid.,* II, 231.
31 Can. 950.

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as seminarians, students, postulants or novices.[32] The reason why they do not need testimonial letters from the bishop of their place of birth lies in the fact of their ordination, which presumes the necessary documents.

§ 5. For a *professed religious* passing, by virtue of an apostolic indult, to another institute, the testimony of the higher superior of the institute which he leaves suffices. One who, having made temporary or perpetual, simple or solemn profession in one order or congregation, wishes to be transferred to another, and has obtained a papal indult permitting him to make the change, needs only the testimony of the superior of the order he desires to leave. This superior is the general or provincial, or, if the order or congregation is distributed into provinces, the local superior. Should the aspirant have changed previously, only the superior of the institute to which he last belonged must give his testimonial letters. But before granting them, the superior should carefully investigate the character of the applicant.[33]

§ 6. Besides these testimonials required by law, the superiors, who have the right of admitting aspirants to the institute, can exact *others* also, if it seems to them necessary or opportune. This rule was no doubt made in order to provide surer guaranties for the moral and physical fitness of candidates.

§ 7. *Women* are not to be received until careful investigation has been made regarding their character and conduct, with due regard to § 3.

We will add a decision of the Roman Court[34] concerning the necessity of testimonial letters: for they are necessary only to make the profession licit, but not to make it

32 S. C. EE. et RR., Nov. 5, 1852 (Bizzarri, *l. c.*, p. 849).

33 S. C. EE. et RR., Nov. 5, 1852, ad 2; May 29, 1857, ad 3 (Bizzarri, *l. c.*, p. 849 f.).

34 S. C. super Statu Regul., May 1, 1851 (Bizzarri, *l. c.*, p. 841, n. 9).

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valid. The same view is taken by our Code, which nowhere, neither in can. 555 nor in can. 572, makes testimonial letters a condition for the validity of the novitiate or profession. But superiors are gravely obliged in conscience to see that such letters are furnished when required by law.[35]

TESTIMONIALS — CONTINUED

CAN. 545

§ 1. Qui litteras testimoniales ex praescripto iuris dare debent, eas non ipsis adspirantibus, sed Superioribus religiosis dent gratuito intra trimestre spatium ab arum requisitione, sigillo clausas et, si agatur de illis qui in Seminario, collegio vel alius religionis postulatu aut novitiatu fuerint, a Superiore iuramento firmatas.

§ 2. Si ob graves rationes iudicaverint se eis respondere non posse, causas Apostolicae Sedi intra idem tempus exponant.

§ 3. Si reposuerint adspirantem satis non esse sibi cognitum, per aliam accuratam investigationem ac fide dignam relationem Superior religiosus suppleat; si vero nil reposuerint, Superior requirens de non recepta responsione Sanctam Sedem certiorem reddat.

§ 4. In suis litteris testimonialibus, postquam diligentem investigationem, etiam per secretas notitias, instituerint, referre debent, graviter eorum conscientia onerata super veritate expositorum, de adspirantis natalibus, moribus, ingenio, vita, fama, conditione, scientia; sitne inquisitus, aliqua censura, irregularitate aut alio canonico impedimento irretitus, num propria

35 "*Gravissime onerata conscientia eorum*"; cfr. can. 2411, which states that careless superiors may be deprived of their office.

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familia eius auxilio indigeat, et tandem, si agatur de illis qui in Seminario, collegio, aut alius religionis postulatu aut novitiatu fuerint, quanam de causa dimissi sint vel sponte discesserint.

§ 1. Those who must, according to the law, give testimonial letters, should not consign them to the aspirants, but to the religious superiors, and this gratuitously within three months from the date of request, closed and sealed, and if the aspirants are persons who have been in a seminary, a college, postulancy or novitiate of another institute, the testimonial letters must be signed under oath by the superior.

As to the testimonial letters, they may be private, without official character, but they must be sealed. Concerning the superior's oath, it must be given in writing, for instance: "In witness whereof I invoke the name of Almighty God and hereto set my hand" (and seal, if the writer has an official seal).

According to § 2 and § 3, if they who are to give testimonial letters feel that they cannot comply with the request for them, they must make known the reasons to the Holy See (S. C. Rel.) within the time stated, *i. e.*, three months. If they reply that the aspirant is not sufficiently known to them, the religious superior shall supply the deficiency by making careful inquiries of sources worthy of credence; but if they give no reply, the superior who made the request must inform the Holy See that he has received no response. Of course, this legislation is intended for normal times, when mail travels safely. Other reports may be made by those who knew the aspirants,— parents, relatives, pastors, teachers, friends, schoolmates, etc. The decree from which our text is chiefly taken admonishes the superior to keep the

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candidate in the convent for at least three months and test him carefully.[36]

§ 4. In their testimonial letters, the Ordinaries and superiors, after having made careful investigation, even by secret enquiries, must give information, the accuracy of which they are under grave obligation in conscience to control, on the birth, conduct, character, life, reputation, condition (social status), and learning of the aspirant; whether he be suspect, or under any censure, irregularity, or any other canonical impediment; whether his family needs his help; and, finally, when there is question of persons who have been in a seminary, a college, or in a postulancy or novitiate of another institute, the reasons for their dismissal or spontaneous departure. This moral passport needs no further explanation. The term "*inquisitus*" may mean, "demanded in court," either civil or ecclesiastical. This seems to be confirmed by can. 542, § 1, but the official English translation renders it by "suspect," as given above.

CAN. 546

Omnes qui praedictas informationes receperint, stricta obligatione tenentur secreti servandi circa notitias habitas et personas quae illas tradiderunt.

All those who have received the aforesaid information are strictly obliged to keep secret not only the information itself, but also the names of the persons who supplied it.

[36] S. C. super Statu Regul., May 1, 1851 (Bizzarri, *l. c.*, p. 840).

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DOWRY

CAN. 547

§ 1. In monasteriis monialium postulans afferat dotem in constitutionibus statutam aut legitima consuetudine determinatam.

§ 2. Haec dos ante susceptionem habitus monasterio tradatur aut saltem eius traditio tuta reddatur forma iure civili valida.

§ 3. In religionibus votorum simplicium, quod ad religiosarum dotem pertinet, standum constitutionibus.

§ 4. Dos praescripta condonari ex toto vel ex parte nequit sine indulto Sanctae Sedis, si agatur de religione iuris pontificii; sine venia Ordinarii loci, si de religione iuris dioecesani.

In monasteries of nuns, the postulant shall provide the dowry fixed by the constitutions or determined by lawful custom. This dowry must be given to the monastery before the reception of the habit, or at least its payment guaranteed in a manner recognized by the civil law.

In institutes with simple vows, the constitutions must be obeyed with regard to the dowries of religious women. The prescribed dowry cannot be condoned either totally or partially, without a papal indult in the case of institutes approved by the Holy See, in pontifical, or without the consent of the local Ordinary in the case of diocesan institutes.

Dowry means a security in money or its equivalent for the purpose of maintaining a religious institute. Hence it is not a donation, nor an offering to gain entrance,[37] which would be simony, but a permissible and irreprehensible mode of guaranteeing the necessary support.

[37] This was the opinion of the Febronian canonist Van Eybel; cfr. Bachofen, *Compendium Iuris Reg.*, p. 109.

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Neither must it be confounded with legacies, bequests, hereditary acquisition, patrimony, or pension. If a monastery of Sisters has no special law or rule concerning dowries — which should not be less than $100 — the following canons do not concern it. The amount of the dowry should be established in the constitutions, and any condonation, either total or partial, requires the consent of the legitimate authority (§ 4). The amount fixed by the constitutions may not be raised without the permission of the Holy See.[38] The dowry must be secured in a form that is valid according to the laws of the State. A notary public and witnesses are therefore required. Any secure source of income, either money or title-deeds, government or State bonds, bank deposits, shares in sound stock companies, are admissible. But the dowry itself or guarantee thereof must be delivered before the candidate receives the habit.

CAN. 548

Dos monasterio seu religioni irrevocabiliter acquiritur per obitum religiosae, licet haec nonnisi vota temporaria nuncupaverit.

The dowry is irrevocably acquired by the monastery or the institute on the death of the religious, even though she had made profession of only temporary vows. For as long as a Sister lives, the monastery is the sole trustee or administrator of her dowry.

CAN. 549

Post primam religiosae professionem dos in tutis, licitis ac fructiferis nominibus collocetur ab Antistita

[38] The reason is that it would be alienation, which is prohibited, and derogate from the authority of the Holy See, which had approved the constitutions.

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cum suo Consilio, de consensu Ordinarii loci et Superioris regularis, si domus ab hoc dependeat; omnino autem prohibetur eam quoquo modo ante religiosae obitum impendi, ne ad aedificandam quidem domum aut ad aes alienum exstinguendum.

After the first profession of the religious, the superioress with her council, and with the consent of the local Ordinary and the regular superior, if the house be dependent on regulars, must place the dowry in a safe, lawful and productive investment; but it is strictly forbidden that, before the death of the religious, the dowry be expended for any purpose, even for the building of a religious house or the payment of debts.

For any alienation of the dowry an apostolic indult is required. However, the interest accruing from the dowry may be used for any purpose.

CAN. 550

§ 1. Dotes caute et integre administrentur apud monasterium vel domum habitualis residentiae supremae Moderatricis aut Antistitae provincialis.

§ 2. Ordinarii locorum conservandis religiosarum dotibus sedulo invigilent; et praesertim in sacra visitatione de eisdem rationem exigant.

The dowries must be carefully and integrally administered at the monastery or house of habitual residence of the Mother General or Mother Provincial.

The local Ordinaries must diligently see that the dowries of the religious are conserved; and they must demand an exact account thereof, especially at the canonical visitation.

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CAN. 551

§ 1. Dos religiosae professae sive votorum sollemnium sive votorum simplicium quavis de causa discedenti integra restituenda est sine fructibus iam maturis.

§ 2. Si vero religiosa professa ad aliam religionem ex apostolico indulto transeat, durante novitiatu, fructus, salvo praescripto can. 570, § 1; emissa vero nova professione, dos ipsa huic religioni debentur; si ad aliud eiusdem Ordinis monasterium, huic debetur ipsa dos a die transitus.

If, from whatever cause, a professed religious with either solemn or simple vows leaves the institute, her dowry must be returned to her intact, but not the interest already derived therefrom.

But if, by virtue of an apostolic indult, the professed religious joins another institute, the interest on the dowry, during her new novitiate, without prejudice to the prescription of can. 570, § 1, and, after the new profession, the dowry itself must be given to the latter institute; if the religious passes to another monastery of the same order, the dowry belongs to it from the day the change takes place.

This canon refers to can. 570, § 1, concerning a Sister changing from one religious institute to another, which allows a certain alimony for the postulancy and novitiate.

EXPLORATIO VOLUNTATIS, OR EXAMINATION

CAN. 552

§ 1. Religiosarum etiam exemptarum Antistita debet Ordinarium loci, duobus saltem mensibus ante, certiorem facere de proxima admissione ad novitiatum et ad professionem tum temporariam tum perpetuam sive sollemnem sive simplicem.

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§ 2. Ordinarius loci vel, eo absente aut impedito, sacerdos ab eodem deputatus, adspirantis voluntatem, saltem triginta diebus ante novitiatum et ante professionem, ut supra, diligenter et gratuito exploret, non tamen clausuram ingrediens, num ea coacta seductave sit, an sciat quid agat; et, si de pia eius ac libera voluntate plane constiterit, tunc adspirans poterit ad novitiatum vel novitia ad professionem admitti.

The superioress even of exempt religious must inform the local Ordinary, at least two months in advance, of the approaching admission to the novitiate and to the profession both of temporary and perpetual or of solemn or simple vows. Hence the bishop must be informed three times, *viz.*, before the novitiate, before temporary profession, and before perpetual profession.

The local Ordinary, or, if he is absent or otherwise impeded, a priest delegated by him, must, at least thirty days before the admission to the novitiate and to profession, carefully examine the disposition of the aspirant, and this gratuitously, without, however, entering the enclosure. He must inform himself as to whether she has been forced or beguiled, and if she understands the import of what she is doing, the step she is about to take; and if he is fully satisfied regarding her pious intention and freedom of action, then the aspirant may be admitted to the novitiate, or if already a novice, to profession. The examination must be made free of charge, and outside the enclosure, at least if the convent has papal enclosure. This is the safeguard against physical or moral compulsion erected by the Council of Trent [39] and the Roman Congregations.

39 Sess. 25, c. 17, de reg.

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ARTICLE II

THE TRAINING OF NOVICES

CAN. 553

Novitiatus incipit susceptione habitus, vel alio modo in constitutionibus praescripto.

The novitiate begins with the reception of the habit, or in any other manner prescribed by the constitutions. It was not always customary to doff the secular dress and don a special religious habit when one became "converted." At least St. Benedict's Rule (c. 58) would seem to teach us differently. A synod of Aix-la-Chapelle (816–817) enjoined that the secular dress should not be changed until one had promised obedience. However, Benedict of Aniane (482) assumed the monastic habit as a novice and the Clunians tonsured their novices and clothed them with the monk's habit, except the cowl (*cuculla*); and ever since the IXth and Xth centuries the custom of investing novices with a religious habit became almost universal.[40] Yet exceptions were and are made, and hence the Code refers to the constitutions of each institute. What is necessary is that the novice as well as the community know the exact date of the beginning of the novitiate.

ERECTION OF THE NOVITIATE

CAN. 554

§ 1. Erigatur domus novitiatus ad normam constitutionum; si vero agatur de religione iuris pontificii, ad

40 Cfr. Migne, 66, 837.

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eam erigendam necessaria est licentia Sedis Apostolicae.

§ 2. Plures in eadem provincia novitiatus domus, si religio in provincias divisa sit, designari nequeunt, nisi gravi de causa et cum speciali apostolico indulto.

§ 3. Superiores in novitiatus ac studiorum domo ne collocent, nisi religiosos qui sint ad exemplum regularis observantiae studio.

The novitiate house shall be erected in accordance with the prescriptions of the constitutions; but in case of institutes approved by the Apostolic See the permission of the latter is necessary for the erection. If the institute is divided into provinces, more than one novitiate must not be erected in the same province without a grave reason and a special apostolic indult. Superiors shall have in the novitiate houses and houses of study only religious who are exemplary in their zeal for regular observance. A novitiate may be erected by diocesan institutes with the permission of the bishop, according to their own constitutions. But any order or congregation which has received the decree of recognition (*decretum laudis*), or has been formally approved by Rome, must have permission from the S. C. of Religious. Note that permission for founding a religious house does not include permission to erect a novitiate, unless express mention was made of it in the petition.

§ 2 emphasizes a law which was first given and observed in Italy, but is now general, at least in a certain measure. Clement VIII had ruled that only one novitiate, designated for each province by the Apostolic See, could receive novices validly.[41] The Code is not so strict.

41 "*Regularis disciplinae*," March 12, 1596; "*Sanctissimus*," June 20, 1599, § 1.

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It merely enjoins that each province should have but one novitiate. This rule binds only those religious institutes which are divided into provinces. The term *province* must be interpreted strictly. It does not mean a congregation, but a local or national organization. One novitiate for each province will, as a rule, accommodate and be adequate to the training of all novices (cfr. can. 501, § 3). If, however, the number is too large, or linguistic or other difficulties render it advisable to have more than one novitiate, a special indult is required — *special,* because not implied in the one given according to § 1 of this canon by the Apostolic See.

REQUISITES FOR THE VALIDITY OF THE NOVITIATE

CAN. 555

§ 1. Praeter alia quae in can. 542 ad novitiatus validitatem enumerantur, novitiatus ut valeat, peragi debet:

1.° Post completum decimum quintum saltem aetatis annum;

2.° Per annum integrum et continuum;

3.° In domo novitiatus.

§ 2. Si longius tempus in constitutionibus pro novitiatu praescribatur, illud ad validitatem professionis non requiritur, nisi in eisdem constitutionibus aliud expresse dicatur.

§ 1. Besides the other conditions enumerated in can. 542 for the validity of the novitiate it is further required that the novitiate be made:

1.° After the aspirant has completed at least the fifteenth year;

2.° For an entire and uninterrupted year;

3.° In the novitiate house.

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§ 2. If the constitutions prescribe more than one year for the novitiate, the extra time is not required for the validity of the profession, unless the constitutions expressly declare otherwise.

The conditions enumerated under can. 542, § 1, have been dealt with. The other three conditions are plain enough. We need only add that the age is the same for both *sexes, viz.,* the fifteenth year, fully completed. A *full year* comprises 365 days, even though the novitiate be begun or finished in a leap-year. But the severity of some older canonists, who insisted upon moments, is out of place under the new Code. Thus if one commences his novitiate on the morning of June 21st, 1919, he may make his profession on June 21st, 1920, at any time of the day. But if he commenced the novitiate at noon or in the evening of June 21st, he could not validly make his profession until June 22, 1920 (cfr. can. 34). The term *continuum* here means physically and morally uninterrupted, of which more shall be said in the following canon. The *novitiate house* is the special building or space reserved for novices. Where only a certain space or room or department is set aside for the novitiate, the whole house is a quasi-novitiate. Novitiate here simply means the house or place approved by the Apostolic See for the training of novices, though it is evident that the Holy See wishes to see a special novitiate house erected for every province and congregation. Thus the English Benedictine Congregation has a novitiate house, and Leo XIII fully approved its rule.[42] Proper training and uniformity of discipline can be achieved only where there is *one* novitiate.

§ 2 allows religious institutes to insert in their constitutions a clause decreeing a longer novitiate, but they

42 "*Diu quidem,*" June 29, 1899.

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must explicitly state whether this clause touches the validity of the novitiate. If they merely say, " the novitiate lasts two years " without making it a condition of validity, one year is sufficient.

INTERRUPTION OF THE NOVITIATE

CAN. 556

§ 1. Novitiatus interrumpitur, ita ut denuo incipiendus ac perficiendus sit, si novitius, a Superiore dimissus, e domo exierit, aut domum sine illius licentia non reversurus deseruerit, aut extra domum, etsi reversurus, ultra triginta dies sive continuos sive non continuos permanserit quacunque ex causa, etiam de Superiorum licentia.

§ 2. Si novitius ultra quindecim, sed non ultra triginta dies etiam non continuos, de Superiorum licentia vel vi coactus extra domus septa permanserit sub Superioris obedientia, ad validitatem novitiatus necesse et satis est dies hoc modo transactos supplere; si non ultra quindecim dies, supplementum potest a Superioribus praescribi, sed non est ad validitatem necessarium.

§ 3. Superiores licentiam manendi extra septa novitiatus, nisi iusta et gravi de causa, ne impertiant.

§ 4. Si novitius a Superioribus in aliam novitiatus domum eiusdem religionis transferatur, novitiatus non interrumpitur.

The novitiate is interrupted, and must be recommenced and completed: (a) if the novice is sent away by the superior and leaves the house, or (b) if, without the permission of the superior, he leaves the house with the intention of not returning, or (c) if, even with the superior's permission from whatever motive, he has re-

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mained for more than thirty days, whether continuously or not, outside the house, although he may return to it.

Here are three distinct cases. The first is *dismissal* by the superior, followed by the departure of the novice. If the dismissal would be revoked before the novice had left the house or premises, there would be no interruption.[43] But there is interruption as soon as the dismissed novice has left the house, even though the dismissal is made upon false accusations, and the novice be reinstated. For our text cannot be otherwise construed, although some authors [44] deny interruption in that case. A somewhat different aspect is offered by this case: A novice is dismissed and leaves the house after having spent a full and continuous year in the novitiate, and later is readmitted; what then? We believe with solid writers that there is no interruption of the novitiate in this case, because the novitiate had already ended.

The case mentioned under (b) supposes *two conditions:* leave without permission and the intention of not returning. Whenever these two conditions are present, there is an interruption, no matter whether the novice leaves with or without the habit, or for a long or a short time. Neither is the nature of the action to be considered, as Suarez says; [45] for such a novice is looked upon as a deserter (*deseruerit*), and desertion requires no specified length of time, if the will is there.

The last (c) case supposes only one condition, *viz.: absence protracted for more than thirty days,* even though with the permission of the superior and for a just reason. Hence if a novice would live on a farm or in a summer resort ten days in one month, ten days in another month,

43 Piatus M., *l. c.*, I, 99.

44 Ferrari, *De Statu Religioso*, 1906, p. 78.

45 *De Rel.*, tract. VII, l. V, c. 15, n. 6 (ed. Paris, Vol. 15, p. 368 f.).

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and ten days, say, with a specialist (physician), the novitiate would be interrupted and would have to be recommenced. The same holds true if a novice would spend three days each month in a physician's office, away from the novitiate. But if he would spend fifty-nine half-days away from the novitiate house, he would not interrupt his novitiate, because the law by *day* understands a space of twenty-four hours.[46]

Note the phrase: *in the novitiate house.* If a person would spend, say, thirty-one days in a religious house which is not designated as the novitiate house, his novitiate would be interrupted. Living on a farm away from the house where the novitiate is established, for more than thirty days, would also involve an interruption.

§ 2. If a novice, with the permission of superiors or constrained by force, has passed more than *fifteen but not more than thirty days, even interruptedly,* outside the precincts (*septa*) of the house, under obedience of the superior, it is necessary and sufficient for the validity of the novitiate that he supply the number of days so passed outside; if for a period not exceeding fifteen days, the supplementing for this period can be prescribed by the superiors[46] but it is not necessary for validity. This text is a repetition of two decrees of the S. C. Relig., May 3, 1914, the latter of which (Paris.) also explains what is meant by "*vi coactus.*" It is military service which one had to render.[47] The decision is remarkable as it concerns a novice who was forced to serve as a soldier in the barracks of a city, we suppose Paris, where the religious have a novitiate. The soldier spent all the time he could spare from military service in the novitiate house and obeyed the orders of the religious superior. But the S. Congregation justly held that the time thus

46 Can. 32, § 1. 47 *A. Ap. S.*, VI, 229 f.

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divided between military service and the duties of the novitiate should not be reckoned as fulfilling the requirements for the novitiate. Compelled by force may also refer to a contagious disease, for instance, smallpox, cholera, etc., which require a quarantine in a house especially destined for such purposes.[48] Therefore if this separation would not last more than thirty days, the novitiate would not be interrupted.

§ 3. Superiors must not grant novices permission to remain outside the precincts of the novitiate except for a just and grave reason. No superior can grant such a permission for more than thirty days without involving an interruption of the novitiate.

§ 4. If the novice be transferred by the superiors to another novitiate of the same institute, the novitiate is not interrupted.

CAN. 557

Integer novitiatus peragatur in habitu quem constitutiones pro novitiis praescribunt, nisi speciales locorum circumstantiae aliud exigant.

The full year of the novitiate must be spent *in the habit* prescribed *for novices* by the constitution, unless special local circumstances determine otherwise. Non-observance of this law does not invalidate the novitiate. Local custom, especially in missionary countries, may justify not wearing the habit, at least in public. In the U. S. novices do not usually appear in public in their religious habit. This custom, the Code says, may be respected.

[48] The same would have to be said of mental aberration lasting more than thirty days, although occasional lucid intervals might be in evidence. Yellow fever, they say, is not really contagious, but carried chiefly by mosquitos, against which a bar might be needed.

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CAN. 558

In religionibus in quibus duae sunt sodalium classes, novitiatus pro altera classe peractus, pro altera non valet.

In institutes whose members are divided into two classes, the novitiate made in one class does not avail for the other. Thus the novitiate made by lay Brothers or Sisters is not valid for clerical members or choir nuns if the latter constitute a class for themselves.

THE MASTER OF NOVICES AND HIS ASSISTANT

CAN. 559

§ 1. Novitiorum institutioni praeficiendus est Magister, qui sit annos natus quinque saltem ac triginta, decem saltem ab annis a prima professione professus, prudentia, caritate, pietate, religionis observantia conspicuus et, si de clericali religione agatur, in sacerdotio constitutus.

§ 2. Si ob novitiorum numerum vel aliam iustam causam expedire visum fuerit, Magistro novitiorum adiungatur socius, eidem immediate subiectus in iis quae ad novitiatus regimen spectant, annos natus saltem triginta, quinque saltem ab annis a prima professione professus, cum ceteris dotibus necesariis et opportunis.

§ 3. Uterque ab omnibus officiis oneribusque vacare debet, quae novitiorum curam et regimen impedire valeant.

§ 1. The training of the novices must be entrusted to a master who shall be at least thirty-five years of age, and professed for at least ten years from the date of his first profession, and be distinguished for prudence, char-

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ity, piety, and fidelity to regular observance, and if the institute be clerical, he must be a priest.

§ 2. A companion or assistant should be given to him, if the number of novices or other reasons require it. This assistant shall be immediately subject to the master in all matters pertaining to the government of the novitiate, and must be at least thirty years of age, and professed five years from the date of his first profession and have the other necessary and suitable qualities.

§ 3. Both (master and assistant) should be free from all other occupations which could hinder them in the care and government of the novices.

Can. 560

Magister novitiorum eiusque socius eligantur ad normam constitutionum, et si quod in his tempus ad durationem muneris praescriptum sit, eo durante, ne removeantur sine iusta gravique causa; sed iidem rursus eligi possunt.

The master of novices and his assistant shall be selected according to the direction of the constitutions, and, if these prescribe a fixed term of office, they must not within that time be removed from their charge without a just and grave cause; besides, they may be reappointed.

Can. 561

§ 1. Uni Magistro ius est et officium consulendi novitiorum institutioni, ad ipsumque unum novitiatus regimen spectat, ita ut nemini liceat hisce se, quovis colore, immiscere, exceptis Superioribus quibus id a constitutionibus permittitur ac Visitatoribus; ad disciplinam vero universae domus quod attinet, Magister, perinde ac novitii, Superiori est obnoxius.

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§ 2. Novitius potestati Magistri ac Superiorum religionis subest eisque obedire tenetur.

The master of novices alone has the right and the duty of providing for the proper training of the novices, he alone is charged with the direction of the novitiate, so that none, under whatever pretext, may interfere in these matters, except the superiors, who are permitted to do so by the constitutions, and the visitators; as to the general discipline of the house, the master, together with the novices, is subject to the superior.

CAN. 562

Gravi obligatione tenetur Magister novitiorum omnem adhibendi diligentiam ut sui alumni in religiosa disciplina, secundum constitutiones, sedulo exerceantur, ad normam can. 565.

The master is under grave obligation to employ all diligence in assiduously forming his novices in the discipline of the religious life, conformably to the constitutions and to the terms of can. 565.

CAN. 563

Intra annum novitiatus Magister, ad normam constitutionum, de agendi ratione singulorum alumnorum relationem Capitulo vel Superiori maiori exhibeat.

During the course of the year of novitiate, the master of novices, conformably to the constitutions, must present to the chapter or the higher superior a report concerning the conduct of each of the novices.

CAN. 564

§ 1. Novitiatus ab ea parte domus, in qua degunt professi, sit, quantum fieri potest, segregatus ita ut,

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sine speciali causa ac Superioris vel Magistri licentia, novitii nullam habeant communicationem cum professis, neque hi cum novitiis.

§ 2. Conversis autem novitiis locus separatus adsignetur.

The novitiate shall be, as far as possible, separated from that part of the house inhabited by the professed religious, so that, without a special cause and the permission of the superior or of the master, the novices may not have communication with the professed religious, nor these latter with the novices. For the lay-brother novices a special place must be set apart. Futile reasons are sometimes advanced to abolish this pedagogically sound law.

CAN. 565

§ 1. Annus novitiatus debet sub disciplina Magistri hoc habere propositum, ut informetur alumni animus studio regulae et constitutionum, piis meditationibus assiduaque prece, iis perdiscendis quae ad vota et ad virtutes pertinent, exercitationibus opportunis ad vitiorum semina radicitus exstirpanda, ad compescendos animi motus, ad virtutes acquirendas.

§ 2. Conversi praeterea diligenter in christiana doctrina instituantur, speciali collatione ad eos habita semel saltem in hebdomada.

§ 3. Anno novitiatus ne destinentur novitii concionibus habendis aut audiendis confessionibus aut exterioribus religionis muniis, neve dedita opera studiis vacent litterarum, scientiarum aut artium; conversi autem in ipsa religiosa domo eatenus tantum fungi possunt officiis fratrum conversorum (non tamen uti primarii officiales), quatenus ab exercitiis novitiatus pro ipsis constitutis non praepediantur.

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§ 1. The year of novitiate under the direction of the master must have for its object the forming of the mind of the novice by means of the study of the rule and constitutions, by pious meditation and assiduous prayer, by instruction on those matters which pertain to the vows and virtues, by suitable exercises in rooting out the germs of vice, in regulating the motions of the soul, in acquiring virtues.

§ 2. The lay-brother novices should be carefully instructed in Christian doctrine, for which purpose a special conference should be given to them at least once a week.

§ 3. During the year of novitiate, the novices must not be employed in preaching or hearing confessions, or in the external charges of the institute, or even in the study of letters, the sciences or arts; the lay-brother novices, however, may perform within the religious house itself all the duties of lay brothers (but in a subordinate capacity), in so far only as such duties do not prevent them from taking part in the exercises prescribed for them in the novitiate. Work may be prayer, indeed; but manual labor, if it takes the place of the prayer and religious exercises prescribed for novices, is not a substitute for holy practices, nor an incentive to religious fervor.

CAN. 566

§ 1. Circa sacerdotem a confessionibus in mulierum novitiatibus serventur praescripta can. 520–527.

§ 2. In religionibus virorum, salvo praescripto can. 519:

1.° Pro novitiorum numero unus vel plures habeantur ordinarii confessarii, salvo praescripto can. 891;

2.° Confessarii ordinarii, si agatur de religione clericali, in ipsa novitiatus domo commorentur; si de laicali,

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saltem frequenter ad domum novitiatus accedant, novitiorum confessiones audituri;

3.° Praeter confessarios ordinarios, designentur aliqui confessarii, quos novitii in casibus particularibus adire libere possint, nec Magister aegre id se ferre demonstret;

4.° Quater saltem in anno detur novitiis confessarius extraordinarius, ad quem omnes accedant saltem benedictionem recepturi.

§ 1. As regards the *confessor for the novitiates of women,* the prescriptions of can. 520–527 must be observed.

§ 2. For the *institutes of men,* without prejudice to can. 519:

1.° There shall be, according to the number of novices, one or more ordinary confessors; but the religious superior and the master of novices are allowed to hear the confessions of the novices for a grave reason in special cases, if the novices ask them to do so of their own accord (can. 891).

2.° In clerical institutes the ordinary confessors for the novitiate shall live in the novitiate house itself; while in lay institutes they shall at least frequently visit the novitiate house to hear the confessions of the novices.

3.° Besides the ordinary confessors other confessors must be designated, to whom in particular cases the novices may freely go; nor may the master of novices manifest any displeasure at this.

4.° At least four times a year the novices are to be given an extraordinary confessor, to whom all are to present themselves at least to receive his blessing.

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CAN. 567

§ 1. Novitii privilegiis omnibus ac spiritualibus gratiis religioni concessis gaudent; et si morte praeveniantur, ad eadem suffragia ius habent, quae pro professis praescripta sunt.

§ 2. Ad ordines, durante novitiatu, ne promoveantur.

§ 1. The novices enjoy all the privileges and spiritual favors granted to the institute; and if they die during the novitiate, they have a right to the same suffrages as are prescribed for the professed members.

§ 2. They must not be promoted to orders during the novitiate.

Concerning the *privileges* of novices, it has always been maintained that they share all of them, as far as they are capable, because they go by the name of religious as to favors. Therefore theirs are the privileges of the *forum* and *canonis,* and immunities, the privilege of exemption if their institute is exempt, the privileges of dispensation, commutation of vows, and absolution. As to *spiritual favors* they can gain all the indulgences granted to their institute, as far as they are capable, and no restriction is made in favor of professed members. Another spiritual right they enjoy is that to have offered for them, if they die, the prayers for the repose of the soul which, the Code says, must be offered for novices as well as professed members. We confess that this clause appeared new to us, and no quotation is given in support of it in Cardinal Gasparri's notes. But it is a logical interpretation of the general rule that novices partake of the favors of religious proper. However, the distinction between persons in sacred orders and in minor orders, between lay-brothers and clerical members, is certainly to be retained. Hence if a definite number of masses

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and communions are prescribed for each class, the novices are entitled to the same according to the class to which they belong.

A privilege not especially mentioned here, but certainly still in force, which therefore may safely be made use of, is that granted to the Dominicans by Pius V, and six years ago extended *to all novices*. This privilege permits novices to make profession in *case of sickness* which according to the judgment of the physician may be considered *danger of death*. Now this privilege may be made use of, provided (1) the novitiate was duly commenced and the novice admitted by the actual superior of the novitiate; (2) that the vows be pronounced according to the usual formula and without addition as to the length of time or character of the vows, whether temporary or perpetual.

The *effects* of that profession are merely to gain the plenary indulgence in the form of a jubilee indulgence, but no other juridical effects follow. Hence the religious institute obtains no material right as to said novice's property or other rights; and the novice may afterwards freely leave the institute or be dismissed therefrom, and must renew the profession after the time of the novitiate has expired.[49a]

RENUNCIATION OF PROPERTY

CAN. 568

In novitiatus decursu, si suis beneficiis vel bonis quovis modo novitius renuntiaverit eademve obligaverit, renuntiatio vel obligatio non solum illicita, sed ipso iure irrita est.

49 Clem. VIII "*Cum ad regularem*" March 19, 1603.

49a S. C. Rel., Sept. 10, 1912 (*A. Ap., S.*, V., 589 f.).

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The Council of Trent[50] strictly forbade the giving away of property by novices under pain of nullity. The reason for this enactment is to guarantee the freedom of the novice, so that no obstacle may detain him if he wishes to return to the world. Our Code formulates this rule as follows: If, during the novitiate, the novice in any way whatever renounces his benefices or his property, or encumbers them, such a renunciation or encumbrance is not only illicit but null and void.

Hence (1) no *ecclesiastical benefice,* as defined under can. 1409, may be renounced by the novice, no matter what its value or importance may be. Hence no parish, no chaplaincy, no canonicate, no prebend, if they are canonical benefices, may be given up. But what about *our parishes?*[51] Although they perhaps lack an essential feature of benefices, *viz.*, objective perpetuity, we believe that the mind of the legislator regards them as benefices.[52] For, as we have said, the end of the law is to safeguard liberty, which may be just as seriously impaired by the resignation of a parish as of a strict benefice. (2) The novice may not renounce his property — *bona.* To this category belong all donations of considerable amount, title-deeds or other claims to property, shares, bonds, interest, contracts which are more favorable than injurious to the novice,[53] legacies and bequests already received or to be received during the novitiate; but *not* small donations or alms given to the poor or to the monastery, nor legacies or inheritances to be expected after the death of relatives or friends.[54] (3) *Renunciation* may be made in favor of friends, relatives or other persons, also in favor of the institute one wishes to enter, or of another

50 *Trid.*, sess. 25, c. 16 de reg.

51 Can. 584.

52 This law, although seemingly restrictive, yet is favorable to the novice, and therefore open to a broad interpretation.

53 Cfr. Piatus M., I, 124.

54 Reiffenstuel, III, 31, n. 136.

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institute. It means to disclaim any right to such goods. *Obligation* is here understood not only in the legal sense of bond or bail, but in a wider sense, comprising vows, oaths, promises, and the moral duty which binds one to do or omit something. For any such act is a restriction of liberty. Now all such acts are declared *null and void,* and therefore would not bind the novice nor convey a legal title to the recipient. Hence even though the civil court would uphold the legality of such an act, in conscience those benefited by it could not accept the property.

CAN. 569

§ 1. Ante professionem votorum simplicium sive temporariorum sive perpetuorum novitius debet, ad totum tempus quo simplicibus votis adstringetur, bonorum suorum administrationem cedere cui maluerit et, nisi constitutiones aliud ferant, de eorundem usu et usufructu libere disponere.

§ 2. Ea cessio ac dispositio, si praetermissa fuerit ob defectum bonorum et haec postea supervenerint, aut si facta fuerit et postea alia bona quovis titulo obvenerint, fiat aut iteretur secundum normas § 1 statutas, non obstante simplici professione emissa.

§ 3. Novitius in Congregatione religiosa ante professionem votorum temporariorum testamentum de bonis praesentibus vel forte obventuris libere condat.

§ 1. Before the profession of simple vows, whether temporary or perpetual, the novice must cede, for the whole period during which he will be bound by simple vows, the administration of his property to whomsoever he chooses and dispose freely of its use and usufruct except the constitutions determine otherwise.

§ 2. If the novice, because he possessed no property,

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omitted to make this cession, and if subsequently property should come into his possession, or if, after making provision, he becomes under whatever title the possessor of other property, he must make provision, according to § 1, for the newly acquired property, even if he has already made simple profession.

§ 3. In every religious congregation the novice, before making profession of temporary vows, shall freely dispose by will of all the property he actually possesses or may subsequently possess.

The enactment of this canon would at first sight appear contrary to can. 568, which forbids any renunciation or encumbrance of property. Here certain acts are permitted which seemingly violate that prohibition. However, the contradiction is but apparent. For can. 568 speaks of the time during the novitiate (*in novitiatus decursu*), whereas can. 569 refers to the period immediately preceding profession. The Tridentine Council [55] permitted a disposal of property to be made within two months before profession. Besides, in can. 569 the question turns on ceding the administration and disposal of the use and usufruct, whilst can. 568 speaks of the property itself. *Administration* means the management of affairs pertaining to property or estates of any kind, also incorporeal rights, such as copyrights and patent rights. Now this function must be given to another, who may be a layman, or the religious order or congregation itself.[56] Of course, this must be done in a legal form, in other words, in court, unless the religious community is acknowledged by law as a civil corporation, in which latter case the by-laws should provide for such eventualities.

The next act which a novice should freely perform is

55 *Trid.*, sess. 25, c. 16, de reg.

56 S. C. super statu Reg., June 12, 1858, n. 9 (Bizzarri, *l. c.*, p. 856: "*ac etiam suo ordini.*")

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to *dispose of the use and usufruct of his property.* There is a little difficulty as to the term *use.* If it involved the consumption of the whole property it would impair the freedom of the owner and run counter to can. 581, which says that professed religious of simple vows cannot validly renounce their property, except within the sixty days immediately preceding the taking of solemn vows. Hence use must here be taken as an application to a good and useful purpose of the *income* from the capital or property. This is more clearly expressed in a declaration of June 12, 1858, where we read of "expending and using the income or revenues (*redditus*)."[57] *Usufruct* is the temporary use of a thing, or profit and advantage derived therefrom without destroying or wasting its substance, for instance, of a house or farm.

The cession of the administration and disposal of such property must be made before simple profession and remains in force for the whole period during which the subject is bound by simple vows.

§ 2 applies this ruling to two cases: (a) when a novice had no property, the administration of which he would have to cede, or of which he could freely dispose, but comes into the possession of property subsequently; (b) when he foresees an increase of his property after simple profession. In both cases, says the Code, the simple profession does not prevent the novice from ceding the administration and disposing of the property newly acquired.

§ 3 mentions the testament or *last will,* by which a novice, before making profession of temporary vows, shall dispose of the property he actually possesses or may subsequently possess. This, of course, only for the

[57] *Ibid.*, cfr. *Normae*, n. 115.

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case of death. The Code restricts the making of a last will to novices of *religious congregations,* excluding the orders, which, however, may be benefited by an act of the novice *inter vivos,* or a donation, properly so-called.

CAN. 570

§ 1. Nisi pro alimentis et habitu religioso in constitutionibus vel expressa conventione aliquid in postulatu vel novitiatu ineundo solvendum caveatur, nihil pro impensis postulatus vel novitiatus exigi potest.

§ 2. Quae adspirans attulerit et usu consumpta non fuerint, si e religione, non emissa professione, egrediatur, ei restituantur.

Except the constitutions or a formal agreement require the payment of a certain sum for food and clothing during the postulancy or novitiate, nothing may be exacted to defray the expenses of the postulancy or novitiate.

All that the aspirant brought with him and has not consumed, shall be returned to him if he leaves without making profession.

The ancient monastic rules were not in favor of demanding anything, in whatever shape or form, from those who knocked at the door of the monastery.[58] Councils forbade the exaction of fees for admission to the religious state, justly comparing such money to simoniacal extortion.[59] The same rule, although in a somewhat mitigated form, was followed by the S. Congregation of Bishops and Regulars.

The mitigation consisted in permitting a moderate tuition fee to be charged for the time of probation, an oblation for the sacred functions and for a banquet, but not

58 Cfr. Migne, 66, 831 ff.

59 Cfr. cc. 2, 3, C. 1, q. 2; c. 5, C. 20, q. 3; c. 2, X, 35; cc. 19, 25, 30, 40, X, V, 3; *Trid.*, sess. 25, c. 16, de reg.

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too sumptuous. But no stipulation as to these latter offerings was allowed, and the custom of receiving or demanding any admission fee reprimanded.[60] Our Code confirms this practice, but adds that the expenses must be either mentioned in the Constitutions or determined by special agreement.

ENDING THE NOVITIATE

CAN. 571

§ 1. Novitius potest religionem libere deserere, aut a Superioribus vel a Capitulo, secundum constitutiones, quavis iusta de causa dimitti, quin Superior vel Capitulum teneantur dimissionis causam dimisso patefacere.

§ 2. Exacto novitiatu, si iudicetur idoneus, novitius ad professionem admittatur, secus dimittatur; si dubium supersit sitne idoneus, potest a Superioribus maioribus probationis tempus, non tamen ultra sex menses, prorogari.

§ 3. Votis nuncupandis spiritualia exercitia novitius praemittat per octo saltem solidos dies.

The first paragraph of this canon provides

(1) That a novice may freely leave the institute.

(2) That he may be for any just cause dismissed by the superiors or chapter, who are not bound to make known to him the reasons for his dismissal.

(3) That the dismissal must be according to the terms of the constitutions.

As to the last point note that the Code insists upon the constitutions of the institute. If these prescribe that the chapter has the right to dismiss novices, the chapter must decide each case by secret ballot. If the constitutions

[60] S. C. EE. et RR., Dec. 11, 1789 (Bizzarri, *l. c.*, p. 396).

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are silent on this point, the superior may dismiss the novice. But neither superior nor chapter are obliged to make known to the novice the reason for his dismissal; for, as the novice is free to leave, so the institute is free to dismiss one whom it deems unfit. However, justice requires that no one be dismissed without a just cause, because arbitrary proceeding might destroy or injure the good name of the novice. Therefore a Decretal of Gregory IX ruled that if the novice absolutely insisted on remaining to serve God, he should be allowed to do so.[61] Of course this meant that he must be willing to observe the rule and fit himself for membership, for no religious institute or society can be compelled to retain an unfit member.

§ 2. After the completion of the novitiate, the novice, if deemed fit, shall be admitted to profession; otherwise he shall be dismissed; but if there arises a doubt regarding his fitness, the higher superiors can prolong the novitiate, but not beyond six months. Some misgivings might arise as to religious institutes which prescribe a two years' novitiate; have their superiors, too, the right to prolong the novitiate for six months? Our answer is, yes, because, on the one hand, the Code (can 555, § 2) admits a two years' novitiate, and, on the other, it only says, *exacto novitiatu*, after the novitiate is completed. If the text would say, after the year's novitiate (*exacto novitiatus anno*) the answer would be negative; this, however, is not the wording of the text.

The last paragraph of can. 571 prescribes a spiritual retreat of at least eight whole days before profession. "Eight whole days" means that the retreat must commence in the morning and end in the evening of the eighth day, so that profession takes place on the morning of the ninth, or on the evening of the eighth day.

61 C. 23, X, III, 31.

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CHAPTER III

RELIGIOUS PROFESSION

The term profession, from *profiteri,* denotes an external act of conviction. Thus we speak of the profession of faith, and St. Paul says: "With the heart we believe unto justice; but with the mouth confession is made unto salvation." [1]

Religious profession, therefore, is an external act of the mind by which one embraces the religious state, or the external testimony of one who aspires to be a servant of God. It is well known that the ancient ascetics had a predilection for the word profession and defined it as a "covenant with God." [2] This flows from the very essence of the religious state, which involves service or worship of God.

As the Sacraments have their visible signs, so, too, religious profession is clothed in outward ceremonies. As the "second baptism" [3] (thus it was styled), profession was ever surrounded by more or less elaborate *rites.* We know from St. Benedict's Rule (c. 58) that the act of profession was performed in the oratory in the presence of the abbot and the community; that the novice made a promise the contents of which were formulated according to the rule and written in the document, which is signed by the novice and placed upon the altar. This was followed by the investiture. Thenceforth the

1 Rom. X, 9.

2 St. Basil, *Reg. fusior,* tr. 14 (Migne, *P. G.,* 31, 950); Herwegen, *Beiträge zur Gesch. des alten Mönchtums,* 1912, III, I, p. 6.

3 Migne, *P. L.,* 66, 827.

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novice was a member of the community, with all the obligations and rights of membership. A document was drawn up containing his petition to be received, as well as the promise to live perpetually in the community under the obedience of the abbot, for the purpose of striving after perfection. Note, however, that after the act was performed, the newly professed was considered to be a member of the congregation endowed with rights. According to the ideas of the olden time, the obedience promised was looked upon as a sort of personal vassalage to the abbot. It would hardly be possible now-a-days to conceive of such absolute subjection, and the spirit of our time is opposed to any such relation. Yet the spirit of obedience, being essential to the religious state, can never be sacrificed to the idol of a falsely so-called democracy.

Concerning the *sacred virgins,* we know from St. Ambrose that the bishops "consecrated" them, usually on the feast of the Resurrection, on which, as he says, Baptism is conferred in the whole world.[4] The bishop blessed the veil and put it on the head of the virgin.[5] This veil seems to have covered the head and upper part of the body like a helmet or breast-plate. Its color was sombre, in opposition to the yellow bridal veil,[6] because it signified holy sorrow.[7] The ceremony was accompanied by appropriate prayers and the people answered: "Amen."[8] It is evident that the sacred veil signified the mystic espousal with Christ, to whom these virgins dedicated themselves.

Having said this much concerning the rite and significance of profession, which is nothing else but public en-

4 Migne, *P. L.*, 16, 331, 348.
5 *Opp. Nicetae,* Migne, *P. L.*, 52, 1099 f.
6 Ramsay-Lanciani, *Roman Antiquities,* 1901, p. 478.
7 Migne, *P. L.*, 52, 1000.
8 Migne, *P. L.*, 16, 372.

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trance upon the exclusive service of God, according to a determined rule or constitution, we may now hear what the Code says concerning profession. The classification of profession into temporary, perpetual, simple, and solemn is to some extent new. For, as said before, to the middle of the XVIth century only one profession, the solemn, was acknowledged, which was supposed to take place after the novitiate. With the exception of the Jesuits this practice was followed by all religious institutes until 1858, when the S. C. super Statu Regularium issued the decree, "*Neminem latet.*" This decree enacted that after the novitiate the members of male religious institutes should take simple vows, which were to be continued for three years from the date of the simple profession, or longer, according to the prudent judgment of the superiors, but not beyond twenty-five years. Leo XIII ("*Perpensis,*" May 3, 1902) extended this decree to nuns with solemn vows. Yet it has always been the opinion of authors and the practice of the Roman congregations up to a few years ago to consider these simple vows as perpetual on the part of the religious. But lately the Roman Court commenced to regard them as temporary or triennial, and this view has been embodied in the Code.

REQUISITES OF VALIDITY

CAN. 572

§ 1. Ad validitatem cuiusvis religiosae professionis requiritur ut:

1.° Qui eam emissurus est, legitimam aetatem habeat ad normam can. 573;

2.° Eum ad professionem admittat legitimus Superior secundum constitutiones;

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3.° Novitiatus validus ad normam can. 555 praecesserit;

4.° Professio sine vi aut metu gravi aut dolo emittatur;

5.° Sit expressa;

6.° A legitimo Superiore secundum constitutiones per se vel per alium recipiatur.

§ 2. Ad validitatem vero professionis perpetuae sive sollemnis sive simplicis, requiritur insuper ut praecesserit professio simplex temporaria ad normam can. 574.

1. For the validity of any religious profession whatever it is required that he who makes it be of the legitimate *age, viz.,* for the first temporary profession he must have completed his sixteenth year; for *perpetual* profession, whether simple or solemn, the twenty-first, according to

CAN. 573

Quilibet professionem religiosam emissurus oportet ut decimum sextum aetatis annum expleverit, si de temporaria professione agatur; vicesimum primum, si de perpetua sive sollemni, sive simplici.

The Code determines the minimum age, but leaves the question as to a more advanced age undetermined. The *Normae*[9] rule that in institutes with simple vows the candidate should not be more than thirty years, and although these are not law, yet if the constitutions contain a prescription to that effect, it would not be against the law. But they may not go below the minimum as fixed by can. 573.

2. The novice must be *admitted* by the lawful *superior*

[9] **N. 61. Those who had passed the 30th year, in female congregations, needed a papal indult.**

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according to the constitutions. Who that superior is, must be determined by the rule and the constitutions (cfr. can. 543).

3. The profession must be preceded by a *valid novitiate* according to the terms of can. 555, which have been explained *supra*.

4. The profession must be *free from compulsion, fear, and fraud.* These three conditions may be reduced to one: *freedom of profession.* For further explanations see under can. 542, 1.° *Deceit* (*dolus*) would be present if the one professing subscribed the formula of profession either in a faulty way or with the wrong name.

5. The profession *must be expressed in formal terms.* This means that it must be made either in writing, or if orally, in such a way that no reasonable doubt is left as to the consent of the one who makes it. A deaf and dumb person would, therefore, have to express his consent in writing to eliminate all doubt. *Tacit profession* is no longer [10] admitted. It used to be assumed [11] if the novice was admitted to capitular acts (voting) permitted only to professed members, or allowed to wear the religious habit after a year's novitiate. Now profession, to be valid, must be made in words or signs which formally express the intention.

6. The profession *must be received by the lawful superior* or his *representative* (as mentioned in can. 543). Note the distinction between No. 2 and No. 6. There admission to profession was the subject of the enactment, here the question turns about the superior, in whose presence the profession must be made. The constitutions determine who is the legitimate superior authorized

10 S. C. EE. et RR., June 12, 1858; Leo XIII, "*Perpensis*" May 3, 1902.

11 Cf. cc. 22, 23, X, III, 31; cc. 1, 3, 4, 6°, III, 14.

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to receive professions. In diocesan congregations the bishop of the diocese is entitled to this privilege, whilst in papal institutes it depends entirely on the constitutions.

The *delegate* of the lawful superior [12] should be a priest if the ceremony takes place during Mass and the delegate personally receives the profession. Wherefore in the formula of profession both the superior's name and that of the delegate must be mentioned. However, if profession is made into the hands of the superioress, or her delegate (who may be any professed sister) the formula of profession must contain the name of the diocesan Ordinary, in whose hands the profession is made, and also the name of the delegate of the Ordinary, if the latter is not personally present at the ceremony. For the rest we refer to can. 576.

For the validity of perpetual profession, whether solemn or simple, the following requirements are laid down:

TEMPORARY PROFESSION

CAN. 574

§ 1. In quolibet Ordine tam virorum quam mulierum et in qualibet Congregatione quae vota perpetua habeat, novitius post expletum novitiatum, in ipsa novitiatus domo debet votis perpetuis, sive sollemnibus sive simplicibus, praemittere, salvo praescripto can. 634, votorum simplicium professionem ad triennium valituram, vel ad longius tempus, si aetas ad perpetuam professionem requisita longius distet, nisi constitutiones exigant annuales professiones.

§ 2. Hoc tempus legitimus Superior potest, renovata a religioso temporaria professione, prorogare, non tamen ultra aliud triennium.

12 *Regula Iuris*, 68, in 6°.

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§ 1. In every order, both of men and of women, and in every congregation with perpetual vows (except the case of transfer according to can. 634) the novice must, after completing the novitiate, and in the novitiate house itself, make profession of simple vows; this profession, which must precede perpetual vows, whether solemn or simple, is valid for three years, or for a longer period if the age required for perpetual profession has not been reached, unless the constitutions prescribe annual professions.

§ 2. The legitimate superior can prolong this period, but not beyond three years, the religious meanwhile renewing the temporary profession.

Here we have the new legislation, no longer a wavering practice. In every religious institute, therefore, whether of men or of women, exempt or not exempt, papal or diocesan, a *temporary profession,* lasting as a rule, for three years, must precede perpetual profession.

Profession in general, we said, is the public entrance upon the religious state according to a determined rule or constitution. In this are included the three essential elements of the religious state: poverty, chastity, and obedience. Only the last element might be more elaborate; for obedience supposes acceptance. Hence, more fully defined, profession is *a bilateral contract by which one consecrates himself to God through the three vows, and to the service of a community approved by ecclesiastical authority, the religious superior accepting the vows in the name of the Church and admitting the person to share in the rights and privileges of the community.*[13]

13 Thus Schmier, *Iurisprudentia Canonico-Civilis,* l. III, li, 1, c. 3, n. 168; Schmalzgrueber, III, 31, 187 f.; Wernz, *Jus Decret.,* III, n. 640.

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It would be useless, and we might say dangerous, to attempt [14] to deny that religious profession partakes of the nature of a contract: useless, because the essential elements of a contract are present, *viz.*: two parties, mutual consent, and obligation. It would be dangerous, because who would enter the religious state if his spiritual welfare were not safeguarded and his support guaranteed? We may look at the consecration of oneself to God from the highest view-point of mysticism and absolutism, a man endowed with reason and free will cannot, from the viewpoint of natural law, abstract from the idea of receiving rights for assuming duties, nor from the right to an honest living. The Rule of St. Benedict is not opposed to this view.[15] For promise and petition must be rewarded, and they are recompensed, because henceforth the *professus* is to be considered a member of the congregation,[16] and membership without rights would be a mere phantasm.

Applying the definition set forth above, it is evident that a distinction must be made between temporary and perpetual, simple and solemn profession. *Temporary profession* does not involve such an absolute and lasting contract as *perpetual profession*. In regard to the latter the difference between simple and solemn vows is most important. *Simple perpetual profession* implies no absolute and irrevocable covenant, whilst *solemn perpetual profession,* by its very nature, spells irrevocable consecration to God and acceptance of the same on the part of the religious superior in the name of the Church. The difference will become more palpable when the conse-

14 Molitor, *Religiosi Iuris Capita Selecta*, 1909, p. 69 ff., who "selected" for his aim the aggrandizement of abbatial power.

15 Reg., c. 58.

16 A *pactum* or covenant was contained in the formula of profession prescribed by S. Fructuosus of Braga (VIIth century).

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quences and obligations are considered (can. 579 and title XIII, ch. I).

Temporary profession may be made after the *age* of sixteen has been completed; *perpetual profession* after the 21st year. Hence if one makes profession at the age of sixteen, he has to remain in simple profession for five full years. The term may even be protracted for three years more, if the superior finds it necessary. A difficulty may arise concerning the date from which the superior may prolong the temporary profession: is it from the lapse of the third year of profession or from the age of twenty-one years, completed? If the end of the third year of temporary profession coincides with the twenty-first year completed there is no difficulty. For instance, a Sister would have to make profession on Nov. 21, 1918, having completed her twenty-first year of age as well as the third year of temporary profession. She wavers in her decision; — may the superioress prolong her time for one, two, or three years? Yes. And in the meanwhile she may renew the profession every year on Nov. 21. But what, if the Sister should be twenty-four years of age when she would have to make perpetual vows? Is the superioress in that case allowed to prolong her profession — to the limit of three years? Yes, because (as we believe) the dividing line is not so much the twenty-first year completed, this being only the minimum, than the date of temporary profession. This is especially convenient for institutes which prescribe five years' annual profession — a custom that may certainly be followed, since the text itself admits annual profession. But at the same time the triennial term must be kept and the prorogation should only be applied in really doubtful cases, and until the Code can be fully applied. Note that the Code makes the temporary profession imperative only

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for institutes in which perpetual vows are taken. But it includes all these institutes. Hence also *lay brothers* of religious orders, who would take solemn or simple perpetual vows, must now make, first the temporary profession, and after three (respectively five years, if the candidate was only 16 at the time of the first profession) perpetual vows.

The Code excepts *cases of transfer* (see can. 634).

The *legitimate superior* who may prolong the period of temporary profession is the one who admits to profession, not the one who assists at the act; therefore the higher superior.

CAN. 575

§ 1. Exacto professionis temporariae tempore, religiosus, ad normam can. 637, vel emittat perpetuam professionem, sollemnem vel simplicem secundum constitutiones, vel ad saeculum redeat; sed etiam, durante tempore professionis temporariae, potest, si dignus non habeatur qui vota perpetua nuncupet, dimitti a legitimo Superiore ad normam can. 647.

§ 2. Suffragium Consilii seu Capituli pro prima professione temporaria est deliberativum; pro subsequente professione perpetua, sollemni vel simplici, est consultivum tantum.

When the period of temporary profession has expired, the religious, according to can. 637, must either make perpetual profession, whether solemn or simple, according to the constitutions, or return to secular life; but even during the period of temporary profession he can, if not judged worthy to pronounce perpetual vows, be dismissed by the legitimate superior in accordance with can. 647.

The vote of the council or chapter for the first tem-

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porary profession is deliberative; for the subsequent perpetual profession, solemn or simple, it is advisory only.

This canon clearly shows that the temporary profession is a sort of protracted novitiate. At the age of twenty-one, if the temporary profession or three years' term expires at the same time, or after the three years' profession, but not before the twenty-first year of age, the religious may freely return to the world, if he does not wish to assume the responsibility of perpetual vows, or have the temporary profession prolonged according to can. 574, § 2. Besides, he may be dismissed if he lacks the necessary qualities. In the latter case it must be observed: (a) That *sickness* contracted after the first profession during the temporary profession is no cause for dismissal; only if it had been deceitfully concealed or simulated at the time of the first profession would it be a sufficient reason for dismissing one (can. 637); (b) that the terms of can. 647 must be observed, as shall be explained later.

What is prescribed in § 2 concerning the *nature of the vote or ballot* is now law, and has been since 1862, when the S. C. Regularium decreed that the *chapter, i. e.,* the whole electoral college, or the *counsellors, i. e.,* a chosen number of religious, must *decide* by secret ballot whether or not one is to be admitted. But at that time the simple profession was considered perpetual in religious orders. Hence, logically, the admission to solemn profession had not necessarily to be submitted to the decisive vote again, the advisory vote being sufficient. However, since the new legislation changes the nature of the first profession into a merely temporary affair, it would have been but logical to change the advisory vote for perpetual profession into a decisive vote.

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CAN. 576

§ 1. In emittenda professione religiosa servetur praescriptus in constitutionibus ritus.

§ 2. Documentum emissae professionis, ab ipso professo et saltem ab eo coram quo professio emissa est, subscriptum, servetur in tabulario religionis; et insuper, si agatur de professione sollemni, Superior eam excipiens debet profitentis parochum baptismi de eadem certiorem reddere, ad normam can. 470, § 2.

§ 1. In making the religious profession, *the rite prescribed by the constitutions must be observed. Rite* means the sum total of the formalities or ceremonies which surround the religious act. Hence, it is essentially distinct from the consent of the religious, by which he dedicates himself to the service of God, and which the lawful superior accepts in the name of the Church, and the rite *does not affect the validity of the act,* unless the constitutions rule otherwise. Rite, therefore, indicates the place, time, and ceremonies prescribed by the constitutions and the decree of the Congregation of Rites, Aug. 27, 1894.

(a) As to the *place,* can. 574 says that the temporary profession should be made in the *novitiate house itself.* For other professions, whether annual or perpetual, simple or solemn, the Code prescribes no definite house, but leaves the matter to custom and the constitutions. But it may be safely assumed that the *oratory* or chapter room is the proper place for making profession.

(b) Concerning the *time,* as far as the period or term is not considered, nothing special is required or prescribed that would affect validity. Any day, therefore, and any time of the day may be called suitable for profession.

(c) The *ceremonies,* if the constitutions do not pre-

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scribe otherwise, are those contained in the above-mentioned decree of the Sacred Congregation of Rites.[17] They are briefly as follows: If profession takes place *during Mass,* the celebrant, who is to receive the profession, after having taken the Precious Blood, and after the recital of the *Confiteor, Misereatur,* and *Indulgentiam,* turns towards the candidates, holding in his hand the Sacred Host. Each candidate reads with a loud voice the formula of profession and thereupon receives the Blessed Sacrament.

At the *renewal* of vows, the celebrant turns towards the altar and waits until all have read the formula of renewal. This is read aloud by one and repeated by the others. After this recital all receive Holy Communion in the order of precedence established by the date of profession. However, adds the decree, this method of making profession must not be appended in the respective constitutions. Besides, it is chiefly intended for Sisters' and lay institutes. We may also cite a decision — not a general decree — of the same Congregation, given in reply to a query of a former arch-abbot of the Beuronese Congregation. He had asked whether at the solemn profession made during Mass other prayers may be added from authentic sources of the Roman Rite. The S. Congregation answered: "It is not expedient."[18]

The nuns with solemn vows receive the veil, ring and crown (wreath) at the simple profession; but the formula of solemn profession, which may, at the request of the superioress or community, be made publicly, must expressly contain the words: solemn profession.[19]

§ 2. A *written declaration of the profession,* signed by

17 *Decreta Authentica,* n. 3836, which is not a particular decision, but a general decree, specially approved by Leo XIII.

18 *Decreta Authentica,* n. 3736.

19 S. C. EE. et RR., Jan. 15, 1903 (*Annal. Eccl.,* XI, p. 415).

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the person professed and at least by him in whose presence the profession was made, must be kept in the archives of the institute. Besides, the superior who has received solemn profession must notify the pastor in whose parish the professed religious was baptized, according to can. 470, § 2.

This paragraph contains two different clauses; the first concerns a written declaration of the profession, the second registration in the baptismal record.

The "*Normae*" (n. 99) prescribed — and this rule still holds good — that the *formula of profession* must be substantially inserted in the constitutions. It must be clear and simple, expressing that the religious consecrates himself to God by the three vows, according to the constitution of the institute, either temporarily or perpetually. The formula actually used in the ceremony of profession may be more elaborate, but should not contain any essential additions.

As St. Benedict (c. 58) had already provided, this formula must be *written* or signed by the person who makes the profession. If he is unable to write, he may make the sign of the cross on the paper and then place it on the altar. St. Benedict says nothing, however, of the superior signing the formula. Perhaps the abbot signed the document, because it was considered a sort of legal contract; promise and petition and the whole apparatus of ancient documents seem to point to that,[20] and hence it is not surprising that the legislator demands that the one in whose presence the profession was made should also subscribe to the formula. Notice the wording *coram quo,* "in whose presence,"— an evident allusion to St. Benedict's Rule (c. 58), which says, "in the presence of all" (*coram omnibus*). There might be a

20 Herwegen, *l. c.*, p. 4.

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doubt whom the legislator means. Is it the superior into whose hands the profession is supposed to be made, or the superior who acts as his representative? In diocesan congregations there is little difficulty. For the one in whose presence the profession is made is the Ordinary or his delegate, who therefore has to sign the document or formula of profession. In papal institutes, especially of women, there is the superioress and the priest who assists at the rite of the profession. Which of them must sign the formula? We believe we are justified in saying (according to can. 572, § 1, 6) that the superioress or her delegate assisting at the profession has to sign the formula of profession together with the religious.

The document thus signed — if other bystanders wish to sign the Code does not forbid it — must be preserved in the archives of the institute. By institute (*religio*) the law implies that every order, or congregation, or convent, or monastery has its archives. It matters little in which of these archives the document is preserved.[21]

The second clause provides that the fact of *solemn profession be registered in the baptismal record* of the parish where the solemnly professed religious was baptized. Therefore the baptismal records ought to have a special column for such entries.

The reason for this ruling is not far to seek. For can. 1073 makes solemn profession, and simple profession by special apostolic indult,[22] an impediment to marriage.

21 This is also in accordance with St. Benedict's Rule (c. 58): "*in monasterio reservetur.*"

22 This is the case of the Society of Jesus.

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RENEWAL OF VOWS

CAN. 577

§ 1. Elapso tempore ad quod vota sunt nuncupata, renovationi votorum nulla est interponenda mora.

§ 2. Superioribus tamen facultas est ex iusta causa permittendi ut renovatio votorum temporariorum per aliquod tempus, non tamen ultra mensem, anticipetur.

When the period for which the vows have been taken has expired, they must be immediately renewed. Superiors, however, are empowered, for a just cause, to anticipate the renewal of vows, but not beyond one month.

It is evident that the *renewal* of vows here is meant not as an act of mere devotion, but as producing juridical obligations. Therefore at the moment when the period, say one year, has elapsed, the renewal must take place after the 365th day, or on the first day after the year is completed. A sufficient reason for *anticipating* the renewal of vows would be sickness, departure for a study house, or a certain task. Of course, it is supposed that the religious freely consents to the anticipation. A *month,* canonically, is a period of thirty days.[23]

RIGHTS AND OBLIGATIONS OF PROFESSED PERSONS

CAN. 578

Professi a votis temporariis, ed quibus ni can. 574:

1.° Fruuntur iisdem indulgentiis, privilegiis et spiritualibus gratiis, quibus gaudent professi a votis sollemnibus aut professi a votis simplicibus perpetuis; et si morte praeveniantur, ad eadem suffragia ius habent;

23 Cfr. can. 32, § 2.

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2.° Eadem obligatione tenentur observandi regulas et constitutiones, sed, ubi viget chori obligatio, divini officii privatim recitandi lege non obstringuntur, nisi sint in sacris constituti aut aliud constitutiones expresse praescribant;

3.° Voce activa et passiva carent, nisi aliud in constitutionibus expresse caveatur; tempus autem praescriptum ad fruendum voce activa et passiva, silentibus constitutionibus, computetur a prima professione.

Those who have made profession of temporary vows treated of in can. 574:

1.° Enjoy the same indulgences, privileges, and spiritual favors as the professed of solemn vows or of simple perpetual vows; and in case of death they are entitled to the same suffrages.

2.° They are equally obliged to the observance of the rule and constitutions, but where choir service is obligatory, they are not bound by law to the private recitation of the divine office, except they are in holy orders or the constitutions expressly impose it.

3.° They have neither active nor passive vote, except the constitutions expressly declare otherwise; but the time requisite for the enjoyment of an active and passive voice, when the constitutions are silent on the matter, is to be reckoned from the date of the first profession.

The first number puts all members of a religious community, order or congregation on an equal footing concerning *spiritual rights and privileges.* The Code mentions indulgences, spiritual favors, and *privileges.* What the last-mentioned term means has been sufficiently explained in the first book, title V.

Of *indulgences* the Code speaks in the third book, can. 911 ff. A *spiritual favor* is of a somewhat mixed nature.

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It may be called a privilege, since every privilege is a favor,[24] yet it is restricted to the court of conscience. Such a favor is absolution from censures or reserved cases, change of private vows, dispensation from fast and abstinence, etc. Privileges one enjoys as far as he is capable of making use of them. Privileges granted to clerical orders as such are not intended for orders or congregations of women; privileges given to priests cannot be used by clerics who have only minor orders, etc. Among spiritual favors are also the *prayers for the dead*. These, the Code says, are enjoyed by those who have made profession of temporary vows in the same measure as by those who have taken perpetual vows; but we suppose, with the distinction noted under can. 567.

The second number of our canon enjoins the *same obligations* on all, with one exception. All professed religious are bound by the vow of obedience to observe the rule and constitutions of the community to which they belong. The exception noted concerns the recitation of the *Breviary*. Most of the religious orders prescribe the public recitation of the divine office in choir, at which all have to attend who are not legitimately excused. The divine office, according to common agreement, forms part and parcel of the religious state, and therefore all the members of every religious community are bound in conscience to take part in it in the spirit of the Church and according to their respective constitutions. Now the Church says that in religious communities which demand attendance in choir, also those members who have made profession of temporary vows, should be present at the divine office.[26] On the other

24 Suarez, *De Legibus*, VII, 2, 7.

25 Piatus M., *l. c.*, I, 96 f.

26 Cf. can. 589, § 2, where allowance is made for those engaged in studies.

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hand, the Church does not oblige these to private recitation, unless, in accordance with can. 135, they are in higher orders, *i. e.*, at least subdeacons, or unless the constitutions prescribe private recitation. The Code does not mention custom. Therefore mere custom would not oblige them to private recitation, and this should be taught in the novitiate in order not to create an erroneous conscience.

No. 3 determines the *right to vote*. This is either *active, i. e.*, the right of partaking in capitular acts by casting one's vote; or *passive, i. e.*, the right to being appointed or elected to an office or prelacy. Both these rights are given radically by temporary profession, but are suspended — until when? Here the Code stops short, whilst Cardinal Gasparri refers the reader to certain decisions. We know them, but they do not settle the controverted point. The quintessence of all these declarations is that the date from which the right of active and passive voice is to be reckoned is that of the first profession. Thus, for instance, to be elected superior, ten years of profession, according to can. 504, are required; the date from which this period must be reckoned is the first or temporary profession. However, the constitutions may fix another date. But when does the right of *active* voice start? A declaration of the S. C. super Statu Regularium, June 12, 1858, would seem to insinuate that this right commences on the date of solemn profession.[27] Where only simple perpetual profession is made, it would naturally follow that this right starts from the date of the perpetual profession. No law text, however, prescribes the requisite of minor orders for enjoying the active voice, although particular constitutions may make higher or sacred orders a condi-

27 Bizzarri, *l. c.*, p. 858 f.

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tion for the exercise of the ballot.[28] In *female congregations* the active, not passive, voice is now granted only to such who have made perpetual vows. Yet, if the constitutions say that those with temporary vows may partake in the election of a delegate for the chapter, this right must be respected, as it was formerly granted according to the "*Normae*" (n. 217), and the Code upholds these constitutions. Therefore a superioress would not be entitled to exclude a Sister with temporary vows from exercising that right on the strength of can. 578. Only if the constitutions are not explicit on this point, the Sisters with temporary vows may be excluded. But in that case *all* must be treated equally, because no superior has a right to limit the number of votes except for reasons expressed in common law [29] or the constitutions. The same holds good of all religious orders and congregations, the reason being evident. Arbitrary proceedings and injustice would result from the contrary practice.

EFFECTS OF RELIGIOUS PROFESSION

CAN. 579

Simplex professio, temporaria sit vel perpetua, actus votis contrarios reddit illicitos, sed non invalidos, nisi aliud expresse cautum fuerit; professio autem sollemnis, si sint irritabiles, etiam invalidos.

This and the following canons determine what are called the effects or consequences of religious profession. Can. 579 establishes these in general. Note that there is but one distinction made, *viz.:* between simple

28 The decretals and the Council of Trent demanded higher orders only for cathedral and collegiate churches, in order to stimulate the members to receive these orders.

29 Cfr. c. 14, X, I, 6; c. 32, 6°, I, 6; this is called the limitation of votes (*coarctatio votorum*).

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and solemn profession. *Simple profession,* whether temporary or perpetual, renders acts contrary to the vows illicit but not invalid, unless it be otherwise formally expressed; while *solemn profession* renders such acts also invalid, if they can be nullified.

1. *Simple profession,* being a species of bilateral contract between the religious institute or community and the professed member, necessarily produces certain effects. Some of these have been mentioned in can. 578, *viz.:* the rights and obligations in general. The present canon speaks of certain "*acts contrary to the vows.*" *Contrary* means opposed to another person or thing, so as to destroy it, or at least incompatibility. Thus we say truth is contrary to falsehood, coldness to warmth, in the same subject, at the same time, and under the same conditions. The *vows* referred to are the three religious vows of poverty, chastity, and obedience, not excluding special vows. The acts contrary to these vows are declared to be either illicit or invalid. They are *illicit,* in as far as they are simply forbidden by the vows themselves, or, let us rather say, they are prohibited because contrary to the vows, without any penal sanction or nullifying consequence being attached to the prohibition. *Invalid* are acts which are contrary to the vows and have an ecclesiastical sanction attached to them by which they are rendered destitute of any juridical value. Acts are illicit, therefore, because they are immoral, invalid because, besides being immoral, they are juridically or legally null and void. It is evident that the Church alone has the right to make the distinction between simple and solemn profession. In matter of fact the State pays little attention to the effects of religious profession. Hence it is, especially in matters of property rights, all-important that religious communities should

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make by-laws determining the position of their members as to business transactions and compensation due them in case they choose to leave.

Acts contrary to the vow of *poverty,* induced by *simple profession,* are the free and independent disposal and administration of property after this has been ceded to the community. Hence a religious with simple vows may not dispose of his own property or that of the community. If he would dispose of his personal property, freely and without permission of the superior, he would commit a sin against the vow of poverty. But if he would dispose of community property, he would also commit a sin against justice, and be obliged to restitution, as far as he is capable, and as far as a serious damage would have been done to the community, unless the latter would be in a condition and ready to condone the damage. Restitution, however, is required only if the amount of property disposed of illegitimately would involve a grievous sin. This depends not only on the customs of the respective institute, but also on the size and welfare of the community, the value of money, and the extent of the damage done, as well as on personal persuasion and ability. We cannot name fixed sums,—five, ten or more dollars. It looks ridiculous to us to weigh a grievous sin by dollars and cents, as if to set an admission fee to purgatory or hell. We leave that to the moralists. Such acts contrary to the vow of poverty are illicit, but valid, *i. e.,* an illicit disposal of property would be legally valid and the contracting parties would be held responsible. However, the terms of can. 536 must be taken into consideration here, especially § 3 and § 4, as explained above.

The *vow of chastity* imposed by simple profession covers the whole matter of the *virtue of chastity,* but no

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more. The distinction between simple and solemn profession becomes very palpable in reference to marriage. For simple profession renders a *marriage* of a religious with a lay person or another religious of simple profession merely *illicit,* but not invalid, provided, of course, the ecclesiastical formalities have been duly observed. A pastor, or rather the Ordinary, would certainly have to stay such a marriage until the religious would have been dispensed or dismissed. An exception to this rule is the simple vow of chastity taken by the scholastics of the *Society of Jesus,* which renders a subsequent marriage not merely illicit but also invalid.[30] This so-called privilege is nothing but an application of the old theory[31] that every vow taken in a religious order is a solemn vow and therefore entails this invalidating impediment.

The vow of *obedience* excludes all contrary acts in as far as the rule and the constitutions are concerned. Authors generally enumerate under this heading *private vows* and *paternal authority. Private vows* are vows made by a religious before entering the religious state, for instance, a pledge in the form of a vow or promise to recite the Little Office of the Blessed Virgin. Simple profession extinguishes all previous vows as long as one remains in simple profession. But a vow made forever revives if the subject leaves the religious state.[32] A vow made in favor of a third person, for instance, to recite certain prayers or keep a fast for another's benefit, supposing that the promise was accepted by the other, would not be extinguished by simple profession, because made to a third person and not contrary to the religious state, as we presume. A pilgrimage promised in favor

30 Gregory XIII, "*Quanto fructuosius,*" Feb. 1, 1583; "*Ascendente Domino,*" May 25, 1584; Papi, *l. c.*, p. 39.

31 Cfr. c. 10, X, III, 32; cc. 3, 7, X, IV, 6; c. m. 6°, III, 15.

32 Cfr. can. 1312 f.

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of a third person, however, could be changed into some other good work, either by the religious superior or by a confessor empowered by the proper authority.[33]

Paternal authority is excluded, because obedience and piety are transferred to the religious superiors, *i. e.*, ultimately, God. Therefore parents who claim their sons and daughters after profession sin against the will of God and should be properly instructed, either in the confessional or outside the sacred tribunal.[34]

2. *Solemn profession* is one taken in an order with solemn vows, acknowledged as such by the Church. It has the following effects:

The *vow of poverty* excludes the right of owning property and disposing of anything without the permission of the lawful superior. The Code does not insert the clause, "unless special provision has been made." Hence a last will, or a gift *inter vivos* made by a solemnly professed religious, in favor of a convent or other pious cause would be invalid.[35] But the Holy See (S. C. Rel.) may grant the faculty of disposing or possessing, as was done in favor of nuns in France and Belgium,[36] where extraordinary conditions seemed to demand an exception. If these same nuns would establish a foundation in this country, they could not claim the privilege here, and would make only simple profession, according to

33 Cfr. c. 4, X, III, 34: "He does not violate the vow who changes a temporary service into the perpetual observance of religion." *S. Th.*, II–II, q. 88, art. 12, ad 1; q. 189, art. 3, ad 3; confessors taken from orders have that power.

34 Bouix, *De Iur. Reg.*, I, 617.

35 S. C. EE. et RR., March 11, 1853 (Bizzarri, *l. c.*, p. 620 f.). A religious had been forced by the government to remain outside the convent and obtained an indult from the S. Poenitentiaria to use money for himself and for pious purposes; he made a will in favor of a pious cause before a notary public, which was declared invalid, because the indult was only for the court of conscience, and besides he was ordered to return to his convent.

36 Bouix, *l. c.*, I, 493 ff.; Piatus M., I, 10 ff.

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the decree of the S. C. of Bishops and Regulars, Sept. 30, 1864,[37] unless the S. C. of Religious would make special rules for them.

With regard to the *vow of chastity,* solemn profession, according to our Code (can. 1073), entails an invalidating impediment to matrimony, and hence an attempted marriage between a solemnly professed and a lay person, or another religious, would be null and void before the Church. Only if there were danger of death could the Ordinary or pastor rectify such an unlawful marriage, provided, however, neither of the contracting parties were a priest.[38]

As to the *vow of obedience,* we must repeat what we have said concerning simple profession, *viz.,* that solemn profession extinguishes all private vows and paternal authority.

As to vows note that, though one may be secularized or dispensed afterwards, these vows do not revive, because solemn profession is supposed to produce this effect irrevocably.

Such, then, is the relation of certain acts which are contrary to the vows. The Code proceeds to the further determination of acts which specifically touch the vow of poverty.

PROPERTY AND RIGHT OF ADMINISTRATION

CAN. 580

§ 1. Quilibet professus a votis simplicibus, sive perpetuis sive temporariis, nisi aliud in constitutionibus cautum sit, conservat proprietatem bonorum suorum et capacitatem alia bona acquirendi, salvis quae in can. 569 praescripta sunt.

37 Bizzarri, *l. c.,* p. 723 f.

38 Cfr. can. 1043 f.

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§ 2. Quidquid autem industria sua vel intuitu religionis acquirit, religioni acquirit.

§ 3. Cessionem vel dispositionem de qua in can. 569, § 2, professus mutare potest non quidem proprio arbitrio, nisi constitutiones id sinant, sed de supremi Moderatoris licentia, aut, si de monialibus agatur, de licentia Ordinarii loci et, si monasterium regularibus obnoxium sit, Superioris regularis, dummodo mutatio, saltem de notabili bonorum parte, non fiat in favorem religionis; per discessum autem a religione eiusmodi cessio ac dispositio habere vim desinit.

§ 1 states that those who have made profession of simple vows, temporary or perpetual, retain the *proprietorship of their property* and the capacity to acquire other property, unless the constitutions declare otherwise; with due regard to can. 569.

In order to fully understand this paragraph we must examine what *dominium* or ownership involves.[89] It is generally defined as the right to have, hold, and dispose freely of a corporeal thing, unless it be prohibited by law. Thus one possesses a house or a farm. This right is clearly distinguished from the so-called usufruct or useful dominion. Thus a renter has the usufruct of a house or farm, but he cannot be styled the owner.

A *radical dominion* must necessarily retain the essential elements of the definition of ownership or dominion, but it has a somewhat restricted meaning. And this we find in the limitation appended by law. Wherefore one may have and hold and even dispose of corporeal things, but the disposal is limited by law, or, let us say, suspended, whilst having and holding are not limited. A

89 Cfr. Barbosa, *Tractatus Varii, s. v.* "*Dominum*," "*Proprietas*" (p. 188, p. 287); also the commentaries on the Decretals, bk. II, tit. 12; Hill, *Ethics*, ed. 8, p. 229; Blackstone-Cooley, *l. c.*, II, 1 ff.

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similar way of limiting the disposal of property is found in minors, in whose name their guardians and tutors act, because the law, out of due consideration for younger people who sometimes act rashly, has restricted their freedom of action. How far the Code wishes to apply this restriction will be seen in § 3.

The text of § 1 says that they retain "the capacity to acquire other property" (*alia bona*). This text is taken from "*Perpensis,*" 1902, where we read: "If during the period of simple vows other property accrues to them by any lawful means, they retain the radical dominion thereof, etc." The meaning evidently is, if a fortune comes to them which they did not acquire by financial operations, or by increasing the capital through interest, but as it were unexpectedly (*obvenire*) or at least without coöperation. Because "ordaining that their revenues must go to increase their capital,"[40] is an act of administration, which is only allowed with the permission of the superior, as the S. C. of Bishops and Regulars, Nov. 21, 1902, in accordance with "*Perpensis,*" decided.[41] What has been stated under can. 569 need not be repeated here; we will only say that for such an acquisition no permission of the superior is mentioned, hence not required.

§ 2. Whatever a simple professed religious acquires by personal *labor or in respect of his institute, belongs to the institute.* An ancient principle is here renewed with the addition: "in respect of the institute." The reason for this clause is the dualistic status of a religious who may act as such and as an official person. Thus a reli-

40 Thus Papi, *l. c.*, p. 51, who thinks that for such an act no permission of the superiors is required; but he seems to be wrong.

41 *Analecta Eccl.* 1904, XII, p. 248.

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gious may be pastor of a parish, a Sister may be employed as nurse in a railroad or State hospital, or as a school teacher. Here a distinction must be made according to can. 533, § 1, 4. What he acquires for his mission or parish or school does not belong to the religious house, but mass stipends, fees or offerings for special lectures, if they are not intended to benefit his church, the salary — subtracting, of course, necessary household expenses — the profit from selling books, literary or art products — all this belongs to the institute of which he is a member. Thus also the earnings of a religious who practices a profession or performs manual labor belong to the order. A Sister acting as nurse or as teacher must surrender her salary to the religious community to which she belongs. If she receives donations, she must ascertain the intentions of the donors. A donation given to her personally, for instance, for good nursing or teaching, belongs to the religious house of which she is a member; if the present is made for the hospital or school, it belongs to the latter.[42]

§ 3 refers to can. 569, which governs the cession or disposition of property to a trustworthy person. Now both these acts, the appointment of an administrator and the disposal of the revenues, should not be arbitrarily modified during the period of simple profession, but only with the permission of the superior general, unless the constitutions permit a free change. Nuns may make a change with the permission of their Ordinary and their regular prelate, if they are subject to one; however, such change, even with proper permission, may never be made in favor of the religious institute, at least no notable part of the property; and all provisions made for the appoint-

42 Clement VIII, May 20, 1601 (Bizzarri, *l. c.*, p. 521).

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ment of an administrator and the disposal of property become null and void after one has left the religious institute.

a) The *permission* required is not qualified, but it would seem that an express or explicit permission is meant, since a habitual one might involve arbitrary changes. A case in point was decided June 2, 1905. A Sister had made a disposal of her fortune or property, half of which she willed to her institute, and the other half to her brother. In course of time her brother needed a larger subsidy. Was the sister allowed to change her will? The S. Congregation answered: Yes, with the permission of the superioress.[43] From this we may also deduce what a notable part of a property would be, *viz.*, a little over half of the total income or revenues.

b) *Nuns* must have the permission of the Ordinary, and in case of their being subject to a regular prelate, also that of the latter.

c) *After one has left a religious* institute, all provisions as to cession of administration and disposal of revenues cease automatically. The reason for this enactment is evident. Retaining the proprietorship during the period of simple profession after leaving the institute — we suppose legitimately — the religious becomes a lay person with all personal rights restored. The canon, however, does not state whether the institute would have to reimburse only the capital made over to the institute, or also the interest. Here again constitutions and by-laws ought to safeguard the rights of both, individual religious and institute. The intention of the lawgiver may be guessed from can. 531, § 1, where the dowry is mentioned. This, said canon says, must, when a religious leaves the institute, be restored to her entirely, but with-

43 S. C. EE. et RR. (*Anal. Eccl.*, 1906, XIV, p. 250).

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out the interest due. Hence an enactment might be made in the by-laws to the effect that the entire capital deeded over to the institute must be restored without the interest accruing thereto in the course of time.

RENUNCIATION OF PROPERTY BEFORE SOLEMN PROFESSION

CAN. 581

§ 1. Professus a votis simplicibus antea nequit valide, sed intra sexaginta dies ante professionem sollemnem, salvis peculiaribus indultis a Sancta Sede concessis, debet omnibus bonis quae actu habet, cui maluerit, sub conditione secuturae professionis, renuntiare.

§ 2. Secuta professione, ea omnia statim fiant, quae necessaria sunt ut renuntiatio etiam iure civili effectum consequatur.

Aside from special indults granted by the Holy See, a professed religious of simple vows cannot validly renounce his property except within sixty days preceding solemn profession, but within this time he must renounce in favor of whomsoever he pleases, all the property which he actually possesses, on condition of his profession subsequently taking place.

This renunciation should, after profession has been made, be followed by the necessary civil formalities to make it effective also according to the civil law.

The Code applies the rule laid down by the Tridentine Council [44] concerning *renunciation* of all property which a religious actually, *hic et nunc,* possesses. This rule concerns only orders in which *solemn* vows are taken, and only such property as the members *actually possess before* solemn profession.

44 Sess. 25, c. 16, de reg.

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Hence any property they may receive *after* solemn profession must be disposed of according to can. 582. Renunciation means abdicating ownership as well as disposal. Of course a last will, being made *mortis causa,* is not a renunciation proper, because revocable. Donations or bequests would seem to be the proper way of renouncing property. The *time* runs sixty days, counting forward to the prospective day of solemn profession. Hence, if for one reason or another, solemn profession would have to be postponed, the abdication would still hold good. The *beneficiary* of a renunciation may be any person capable of possessing, including the religious institute. But the *legal form* (notary public and witnesses) is to be applied only after profession has taken place, for neither binds by ecclesiastical law before the solemn vows are taken.

PROPERTY RECEIVED AFTER SOLEMN PROFESSION

CAN. 582

Post sollemnem professionem, salvis pariter peculiaribus Apostolicae Sedis indultis, omnia bona quovis modo obveniunt regulari:

1.° In Ordine capaci possidendi, cedunt Odini vel provinciae vel domui secundum constitutiones;

2.° In Ordine incapaci, acquiruntur Sanctae Sedi in proprietatem.

After solemn profession, likewise without prejudice to special indults of the Apostolic See, all the property which comes in whatever way to a solemnly professed religious belongs to the order, or province, or house, according to the constitutions, if the order is capable of ownership; if the order is incapable of ownership, the Holy See becomes the owner of such property.

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This canon distinguishes between *mendicant* and non-mendicant orders.[45] The former are those whose primitive rule forbids ownership in common, not only in the individual members. Such are the brown Franciscans, the Capuchins, the Carmelites, etc. The Society of Jesus has a peculiar constitution, which forbids professed houses to possess real estate in common, whilst houses of probation and colleges enjoy real ownership.[46] *Non-mendicant* orders are the shoed Augustinians, the Benedictines, the Cistercians, the Dominicans, the Praemonstratensians, etc. Note that the Code says: "*without prejudice to special indults.*" Such may be granted to single institutes and cannot be discussed here. In the non-mendicant orders, or such as have obtained special indults from the Holy See, the solemnly professed member, after solemn profession, acquires everything for his institute.[47] This may be the order itself, if it be centralized, or the province, if endowed with the qualities of a corporation, or the local house, which is chiefly the case with the Benedictines and similar monastic orders and congregations. It all depends on the respective constitutions. Nothing is exempt from the capability of possessing property enjoyed by such orders, or provinces, or houses. Hence movable and immovable property, revenues and salaries, pensions and bequests, legacies and wills, may be conveyed to such institutes, as well as literary and patent rights, etc., so far as the law does not interfere.

The second clause may cause some little trouble, inasmuch as the Holy See is not recognized by our government as a corporation, except in the Philippines and

45 The Code is absolutely silent about mendicant congregations.

46 Pius V, "*Cum indefessae*," July 7, 1571; Wernz, *Ius Decret.*, III, n. 592 (1 ed.).

47 Cfr. c. 11, C. 12, q. 1; c. 6, X, III, 35; c. 1; Clem. V, II; cc. 3, 5, Extrav. Ioan. XXII, tit. 14; Bizzarri, *l. c.*, p. 520 ff.

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Porto Rico, and the territory included in the treaty of Paris after the Spanish-American War.[48] Therefore houses incapable of owning property, or at least real estate, should obtain from the Holy See a special indult or else incorporate their property as diocesan property, as a corporation sole or aggregate. The civil government, of course, acknowledges no mendicants, and from that point of view there is little difficulty. "As a sovereign power, a political and ecclesiastical State, the Catholic Church can acquire property in the various States only by treaty with the government at Washington."[49] This is simply a logical consequence of the separation of State and Church existing in this country.

SIMPLY PROFESSED MEMBERS OF RELIGIOUS CONGREGATIONS

CAN. 583

Professis a votis simplicibus in Congregationibus religiosis non licet:

1.° Per actum inter vivos dominium bonorum suorum, titulo gratioso abdicare;

2.° Testamentum conditum ad normam can. 569, § 3, mutare sine licentia Sanctae Sedis, vel, si res urgeat nec tempus suppetat ad eam recurrendi, sine licentia Superioris maioris aut, si nec ille adiri possit, localis.

Those who have made profession of simple vows in any religious congregation:

1.° May not abdicate gratuitously the dominion over their property by a voluntary deed of conveyance;

2.° May not alter a will made according to can. 569,

48 Zollmann, *l. c.*, p. 47 f.

49 K. Zollmann, *ibid.* This does not, of course, imply that the Catholic Church is incapable of possessing property; as a matter of fact ecclesiastical institutions own property, but as private civil corporations.

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§ 3, without the permission of the Holy See, or, if the case be urgent and time does not admit of recourse to the Apostolic See, without the permission of the higher superior, or, if recourse cannot be had to him either, without the permission of the local superior.

The first number treats of *donations.* A donation is a free gift of something not due to the receiver, or, as our text says, *titulo gratuito.* A donation made to show gratitude or to recompense merits is not a donation in the proper sense.[50] Nor is a bilateral contract, *e. g.,* a loan or sale, a donation. For the text itself requires that an abdication of ownership must follow the act made in favor of another. But ownership is not lost by contract, loan or sale, which involve only a change. Furthermore, notice the phrase, *bonorum suorum,*— of their property. This would imply one's whole fortune or property, or at least the bulk thereof. Hence small donations which would not entail a great loss, and donations made out of gratitude or in acknowledgment of services rendered are not forbidden.

No. 2 speaks of a *last will,* which takes effect only after the death of the testator, and must, of course, be vested with the necessary formalities. In can. 569, § 3, the novice is admonished — it cannot be called a strict law, as is apparent from the milder form of the subjunctive (*condat*) — to make a will. After he has made one, it may be changed only with the *permission of the Holy See.* The reason for this ruling lies in the sacredness of the last will, as well as in the fact of religious being bound to the supreme authority more closely than laymen. Besides, a religious being looked upon as a minor needs to be protected in his freedom.

This permission may in *urgent cases,* which do not ad-

50 Reiffenstuel, III, 24, n. 5.

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mit of the delay involved in recourse to the Apostolic See, be given by the superior general, or by the provincial, or the local superior, if the higher superior cannot be reached. An urgent case would be a sudden departure from the religious congregation caused by an unforeseen call to arms, sickness, etc. The canon affects all religious with simple vows, whether temporary or perpetual, even of exempt congregations. For the Code makes no distinction. On the other hand it does *not affect* the professed members with simple vows of religious *orders,* and hence lay brothers and clerics with simple vows belonging to such orders are not included.

VACANCY OF BENEFICES

CAN. 584

Post annum ab emissa qualibet professione religiosa, vacant beneficia paroecialia; post triennium cetera.

Parochial benefices become vacant after one year from the date of any religious profession; other benefices three years after profession.

We suppose that the term *benefice* must not be pressed too rigorously, so as to exclude parochial offices. The canon would seem to include our country, where benefices in the strict sense (as understood before the Code) do not exist. A pastor who wishes to enter a religious order cannot resign his office during the period of his novitiate, according to can. 568. Under the Decretals [51] a vacancy was created *ipso iure* by any valid profession made after the novitiate. However, since the triennial profession came into vogue, the vacancy was held to take place only after solemn profession.[52] This was inconvenient, since

51 C. 4, 6°, III, 14.

52 Bened. XIV, "*Ex quo,*" Jan. 14, 1747. The S. C. EE. et RR., Aug. 25, 1903, ruled (for the mis-

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a parish would then be vacant at least four years, which is against the spirit of the Church. Hence the aspirant was allowed to anticipate his solemn profession. Now the Code rules that the vacancy is to be reckoned one year after profession, no matter whether the latter be temporary or perpetual, simple or solemn. Hence, counting the year's novitiate and one year after the profession, the vacancy of a parish may at most last two years. During that time the bishop has to provide the parish with a vicar, to be paid out of the benefice, if there be such, or out of the usual revenues which furnish the pastor's salary. The pastor, however, may retain or receive what is left over and above the decent support paid to the vicar or substitute. Of course, in special cases, which demand the appointment of a regular pastor, the bishop may have recourse to the Holy See (S. C. Concilii or S. C. Rel.). A canon who is bound to attend choir service in his church loses his share of the daily distributions during his stay in the novitiate and for the three years of profession, but he would not be deprived of the benefice until three years after profession, because a canonicate is not a parochial benefice.[53] Neither are chaplaincies or the offices of assistants and rectors parochial benefices. Hence such would not become vacant until four years had elapsed.

sionaries of the S. Heart of Mary) that all residential, hence all parochial, benefices became vacant at the moment of perpetual profession (*Anal. Eccl.*, 1903, XI, p. 448).

53 Bened. XIV, *l. c.*; Suarez, *De Rel.*, tr. VII, l. V, c. 16, n. 12 (t. 15, p. 375, ed. Paris). The Jesuits are bound to resign after two years' probation. However our canon does not refer to any special constitution or indults or provisions — hence *videant ipsi*.

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LOSS OF INCARDINATION

CAN. 585

Professus a votis perpetuis sive sollemnibus sive simplicibus amittit ipso iure propriam quam in saeculo habebat dioecesim.

By perpetual profession, whether solemn or simple, a person ceases to belong to the diocese which he had as a secular.

This canon, as also can. 115, only mentions excardination, and, judging from the lack of any quotations in Card. Gasparri's edition, is entirely new. It refers to the diocese to which one belonged before entering religion. Hence the bishop no longer has a claim on a layman or clergyman who has made his profession as a religious, and the latter's connection with the diocese is severed. This is true even if the institute entered by a cleric is situated within the diocese to which he belonged. The reason is because, as can. 111 says, by embracing the religious life, one ceases to be a vagabond cleric, and his service is transferred to the institute he embraces by perpetual profession.

INVALID PROFESSION

CAN. 586

§ 1. Professio religiosa irrita ob impedimentum externum non convalescit per subsequentes actus, sed opus est ut a Sede Apostolica sanetur, vel denuo, cognita nullitate et impedimento sublato, legitime emittatur.

§ 2. Si autem irrita fuerit ob consensus defectum mere internum, hoc praestito, convalescit, dummodo ex parte religionis consensus non fuerit revocatus.

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§ 3. Si contra validitatem professionis religiosae gravia sint argumenta et religiosus renuat ad cautelam sive professionem renovare sive eiusdem sanationem petere, res ad Sedem Apostolicam deferatur.

§ 1. The religious profession which is invalid by reason of an *external impediment,* is not convalidated by subsequent acts, but must either be healed by the Apostolic See, or a new profession made after the nullity has been discovered and the impediment removed.

This paragraph supposes that the profession, whether temporary or perpetual, simple or solemn, was null and void on account of an *external impediment,* such as one of the conditions mentioned in can. 572, § 1, which are all more or less external, with the exception perhaps of grave fear. What is to be done if an invalid profession must be convalidated? Here is an actual case. A pseudo-provincial admitted several novices to profession. As he had been illegally elected, all his acts were invalid, therefore also the professions. The religious thus invalidly professed renewed their profession annually with the usual words: "If we had not yet obliged ourselves to your Majesty, we would now bind ourselves, and therefore renew our vows." The S. C. of Bishops and Regulars decided (Dec. 10, 1841) that these professions required to be "healed in the root," and the Holy See did so, convalidating them all.[54] Hence the quoted formula of renewal in case of an external impediment is juridically valueless.

Another mode of convalidation is that mentioned in the second clause, *i. e., renewal of consent.* This requires

54 Bizzarri, *l. c.*, p. 476 f.; notice the date 1841, that is to say, before tacit profession had been declared invalid by the "*Neminem latet,*" and declarations of the same Congregation 1858 and ff. years, and by the "*Perpensis,*" 1902.

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two conditions: knowledge of the impediment and removal of the same. Hence if the profession was invalid because of lack of age, the professed person must know the fact and wait until the required age is reached. In case the superior holds his office unlawfully, the profession must be renewed in the presence of the lawful superior after the mistake is discovered. The renewal would be more difficult if the time or place of the novitiate affected the validity. For in that case the novitiate would have to be repeated, unless the Holy See granted a dispensation. The similarity between marriage and religious profession in this point is obvious.

§ 2. If the profession be invalid on account of a purely *internal defect of consent,* it suffices for convalidation that the consent be given, provided that consent on the part of the institute has not been revoked. The difference between § 1 and § 2 consists in the fact that the latter concerns the private, not the public welfare, because the formalities were observed, and the vow is a personal one, while the contractual or external matter was supposedly complied with. Here grave fear or momentary mental aberration [55] might enter. Therefore, if one, after the fear has subsided and the mind has returned to its normal condition, would renew his profession, for instance, together with others at the annual renewal, it would be valid, because this is a mere matter of conscience; always provided that the institute has not in some palpable way withdrawn its consent.

§ 3. If there be serious arguments against the validity of a religious profession, and the religious refuses, as a measure of precaution (*ad cautelam*), either to renew the profession or to ask for its convalidation, the matter shall be referred to the Holy See.

[55] Cfr. c. 1, X, I, 40; c. 15, X, III, 31.

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The Code says "serious arguments," because futile and imaginary reasons [56] should not be proposed, especially after the time for putting in the claim has elapsed. The S. Congregation to which matters of this kind must be referred, is, of course, that of Religious.

[56] Such arise sometimes from scrupulosity, which must be treated according to the rules given by moralists on scrupulous conscience; sometimes they arise from subsequent dissatisfaction or a critical trend of mind, which must be disposed of, if possible, by resistance to unreasonable claims or pretensions. A weighty reason would be deceit on the part of the institute, or physical weakness on the side of the religious, or a serious doubt as to the correct observance of the required formalities.

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TITLE XII

THE STUDIES IN CLERICAL INSTITUTES

CAN. 587

§ 1. Quaelibet clericalis religio habeat studiorum sedes a Capitulo generali vel a Superioribus approbatas, firmo praescripto can. 554, § 3.

§ 2. In studiorum domo vigeat perfecta vita communis; secus studentes ad ordines promoveri nequeunt.

§ 3. Si religio aut provincia studiorum domos rite instructas habere nequeat, aut si quas habet, adire, Superiorum iudicio, difficile sit, religiosi alumni mittantur vel ad recte ordinatam studiorum sedem alius provinciae aut religionis, vel ad scholas Seminarii episcopalis, vel ad publicum catholicum athenaeum.

§ 4. Religiosis, qui studiorum causa longe a propria domo mittuntur, non licet in privatis domibus habitare, sed opus est ut in aliquam suae religionis domum se recipiant, vel, si id fieri non possit, apud religiosum aliquod institutum virorum, vel Seminarium aliamve piam domum, cui sacri ordinis viri praesint, quaeque ab ecclesiastica auctoritate approbata sit.

We need not enlarge upon the text of this title, which forms a glorious page of our Code. *Every clerical institute* must have a house of studies. None is exempt from this rule, except those that are unable to have their own building, and these should send their students either to

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the study house of another province, or of another institute, or to the diocesan seminary, or to a Catholic university. It is known that Pius X, *f. m.*, endeavored to abolish the small seminaries in Italy because of incompetency of the professors and lack of good example to the students. Of course, if a monastery maintains a theological seminary, this is sufficient. Can. 554, § 3, requires that only religious who lead an exemplary life should be placed in the houses of study, which does not, however, imply that they must be religious "cranks."

Can. 588

§ 1. Toto studiorum curriculo religiosi committantur speciali curae Praefecti seu Magistri spiritus qui eorum animos ad vitam religiosam informet opportunis monitis, instructionibus atque exhortationibus.

§ 2. Praefectus vel Magister spiritus iis qualitatibus praeditus sit oportet, quae in Magistro novitiorum requiruntur ad normam can. 559, §§ 2, 3.

§ 3. Superiores vero sedulo invigilent ut ea quae can. 595 pro omnibus religiosis praescribuntur, in studiorum domo perfectissime observentur.

The Prefect of Studies must be endowed with the same qualities as the master of novices; if no such person is available, the age limit of thirty-five need not be strictly enforced; but lack of age may be supplied by learning, piety, and prudence.

Can. 589

§ 1. Religiosi in inferioribus disciplinis rite instructi, in philosophiae studia saltem per biennium et sacrae theologiae saltem per quadriennium, doctrinae D. Thomae inhaerentes ad normam can. 1366, § 2, dili-

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genter incumbant, secundum instructiones Apostolicae Sedis.

§ 2. Studiorum tempore magistris et alumnis officia ne imponantur quae a studio eos avocent vel scholam quoquo modo impediant; supremus autem Moderator et in casibus particularibus alii quoque Superiores possunt pro sua prudentia eos a nonnullis communitatis actibus, etiam a choro, praesertim nocturnis horis, eximere, quoties id studiis excolendis necessarium videatur.

§ 1 requires that religious, before taking up philosophical studies, should be duly instructed in the lower branches. This enactment is less severe than the decree of the S. C. of Religious, of Sept. 7, 1909.[1] Our Code does not determine how many years the academic and how many the collegiate course must comprise. It merely requires (can. 1364, 3.°) that in the smaller seminaries (colleges) the course of studies pursued must be adapted to the general education and the clerical state of the province or region in which the students are to exercise the sacred ministry. Neither does the Code exclude private study of the *humaniora,* because only the theological course must be made in a school properly so-called (can. 976, § 3). Therefore, based upon the rules of sound interpretation, we believe that the necessary knowledge may be supplied by private study, as far as the college training is concerned. The *philosophical course* must last at least two years. The method, doctrine and principles should be taken from St. Thomas Aquinas. But as the Angelic Doctor has not left us a manual of philosophy proper, other manuals may be used that are based on the "*principia Divi Thomae,*" no mat-

1 *A. Ap. S.*, I, 701 ff.

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ter whether they be Molinistic or Thomistic in tendency.

The *theological course* must comprise four years, that is, strictly four years, not three with shortened vacations. Each of these four study years should last nine months, neither more nor less.[2]

In theology, too, the "*ratio, doctrina et principia*" of St. Thomas must be followed, and it is the intention of the Holy See that the "*Summa Theologica*" should, if possible, be used as text-book. However, speaking from passive and active experience, we humbly submit that it is almost impossible to comply with this praiseworthy intention. The bulky commentaries needed to elucidate the "*Summa*" would require ten years of study, not to mention other branches which are equally necessary now-a-days. We may also be permitted to say, as a canonist, that the study of Canon Law, now that the new Code is in force, requires more time than was formerly given to it. If the moralists will strictly stick to their subject and abstain from grappling with topics properly belonging to Canon Law, we believe the Code could be mastered in a three years' course, with four hours a week. Moral Theology, if limited to its proper sphere — *i. e.*, the fundamental principles, the Commandments, including the treatise *de iustitia et iure,* and the virtues, could be taught in a three years' course, with three hours a week. This is *our* opinion, for which we claim no authority, but which the legislator, we believe, would not reprimand.

The next paragraph (§ 2) of can. 589 is to be recommended to religious superiors for their pious and efficacious consideration. Overburdening professors and students is somewhat similar to overtaxing the stomach.

2 S. C. Rel., Sept. 7, 1909, III (*A. Ap. S.*, I, 702); this rule still holds, May 31, 1910 (*A. Ap. S.*, II, 449 f.) and is referred to by Cardinal Gasparri.

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Proficiency and progress can result only from quietly conducted and duly limited courses of study. *Non multa, sed multum!*

YEARLY EXAMINATIONS

CAN. 590

Religiosi sacerdotes, iis tantum exceptis qui a Superioribus maioribus gravem ob causam fuerint exempti, aut qui vel sacram theologiam, vel ius canonicum vel philosophiam scholasticam doceant, post absolutum studiorum curriculum, quotannis, saltem per quinquennium, a doctis gravibusque patribus examinentur in variis doctrinae sacrae disciplinis antea opportune designatis.

This canon provides that all religious who are priests must pass an *annual examination for a period of five years after completing their theological course.* This examination is to cover all the various branches of sacred theology,— the specific matter to be pointed out beforehand — and must be held in the presence of learned and grave fathers. The law exempts from these examinations those who are engaged in teaching dogmatic or moral theology, canon law, and Scholastic philosophy. The higher superiors may exempt others for weighty reasons. This latter clause practically upsets the intention of the legislator. For weighty reasons may always be found, especially in a busy country like ours.

MONTHLY CONFERENCES

CAN. 591

In qualibet saltem formata domo, minimum semel in mense, habeatur solutio casus moralis et liturgici, cui, si Superior opportunum existimaverit, addi potest

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sermo de re dogmatica coniunctisve doctrinis; et omnes clerici professi qui studio sacrae theologiae operam navant aut illud expleverunt et in domo degunt, assistere tenentur, nisi aliud in constitutionibus caveatur.

In every house in which there are at least six members, *theological conferences* must be held regularly *once a month*. We reasonably suppose that the legislator does not object to omitting these conferences in the summer vacation time, when many are usually absent, while others are ailing or exhausted, and still others suffering from the heat. At these conferences moral or liturgical cases are to be solved and a discourse delivered on dogmatical or kindred subjects. These meetings must be *attended* by all the professed clerical students of theology and by those clerics present in the house who have already finished their course,[3] unless the constitutions prescribe otherwise. The holding of conferences is a strict duty and has always been inculcated. Attention must be paid also to can. 131.

3 This rule includes those who have been ordained. We believe that the conferences prescribed in can. 131 may licitly and reasonably be combined with these. Therefore all priests who have obtained faculties for hearing confessions must be present. Besides, if we interpret the term *clerici professi* strictly, all priests or professed clerical members (not lay-brothers) must attend these conferences.

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TITLE XIII

THE OBLIGATIONS AND PRIVILEGES OF RELIGIOUS

CHAPTER I

THE OBLIGATIONS

CAN. 592

Obligationibus communibus clericorum, de quibus in can. 124–142, etiam religiosi omnes tenentur, nisi ex contextu sermonis vel ex rei natura aliud constet.

The common obligations of clerics, as laid down in can. 124–142, also bind all religious, unless it appears otherwise from the context of the law or from the nature of the case.

These obligations have, we trust, been sufficiently explained in Vol. II. Note that some of them bind only the clergy, for instance, can. 126 concerning retreats, 120 concerning promptness in accepting the sacred ministry, can. 129–131 regarding study, annual examinations, and conferences, can. 135 respecting the recitation of the Breviary, 143 f. governing residence and incardination. These do not apply to female religious. Some of them do not even concern male religious as such, *e. g.*, can. 128, which is not intended for clerical religious who have made perpetual vows, because can. 585 excardinates them, and unless in case of strict necessity the bishop is not entitled to compel exempt religious to assume the ministry. Other obligations, for instance, as to wearing the

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clerical dress (can. 126), if this is not distinct from the religious habit, abstaining from worldly and prohibited occupations and amusements (can. 137, 138, 139, 140, 141, 142) oblige all religious of both sexes.[1] Can. 133, concerning housekeepers, obliges religious who are parish priests or act as such.

CAN. 593

Omnes et singuli religiosi, Superiores aeque ac subditi, debent, non solum quae nuncuparunt vota fideliter integreque servare, sed etiam secundum regulas et constitutiones propriae religionis vitam componere atque ita ad perfectionem sui status contendere.

All religious, superiors as well as subjects, are bound not only to observe faithfully and entirely the vows they have taken, but also to order their lives according to the rules and constitutions of the institute to which they belong, and thus tend to the perfection of their state.

The legislator exhorts all religious to live the life required by their state. *Superiors* are not exempt from the observance of the vows, although with them the vow of obedience is seemingly in abeyance. Yet they too are bound by the rule and the constitutions, from which they are not allowed to deviate except in so far as their office or dignity requires, and in so far as they could exempt their own subjects. Besides the lower superiors owe obedience to the higher, and the higher to the Pope and his lawful representatives. The Code binds them all to the fullest extent, unless privileges, sound interpretation, or approved constitutions grant them the right of dispensing or changing in certain cases.

1 Benedict XIV, *Apostolicum ministerium*, May 30, 1753, § 18 (applying chiefly to England).

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a) As to the *power of dispensation,* a distinction must be made between exempt and non-exempt institutes. The superiors of an *exempt* religious institute enjoy this power to the same extent as diocesan Ordinaries and, like these, are bound by the regulations laid down in can. 81. Can. 1245 also has a place here because it refers directly to exempt clerical religious. Hence regular superiors of exempt institutes may dispense not only single members but the whole community from the law of fast and abstinence. Over non-exempt religious, the Ordinary or bishop in whose diocese the house is located, exercises this power. As to the dispensations required for ordination, religious superiors have no power, because whatever touches that subject belongs to the bishop.[2]

Religious superiors, whether exempt or not, may *dispense single members,* but not the whole community as such, at least as a rule, from the observance of the precepts contained in the rule or constitutions. However, they may, at times, because the constitutions themselves grant them that right, dispense the whole community from silence, or from a fast prescribed by the constitutions only and not by common law, and from similar obligations.

As to dispensation from *penalties* inflicted by the law (see Book V) and from *irregularities,* the superiors of exempt religious enjoy no more power than diocesan Ordinaries, apart from certain privileges granted to regulars concerning irregularities. With regard to penalties inflicted by the rule and constitutions, the superior general,[3] but not the inferior prelate, may relax them, without prejudice to the constitutions.

2 This is evident from the canons on ordination; whether the religious superior may declare one free from irregularity matters little if the Ordinary is not satisfied with his statement.

3 Or the abbot of every autonomous monastery.

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Concerning the dispensation from *vows,* note that the religious vows cannot, *per se,* be dispensed from by any superior. But the superior of a clerical exempt institute may dispense from vows that go beyond the three substantial vows, whilst the Ordinary has the same power with regard to non-exempt religious and vows not reserved.[4]

b) As to the *changing* or commutation of vows, or promises made in the form of vows, the Code says that a change into a lesser or less perfect work may be made by the one who has the power of dispensing, provided, of course, the vow be not one of those reserved.[5]

In cases in which the superiors are entitled to dispense their subjects, they may also dispense themselves,[6] although it is wisely added by canonists that they should not do so except through their confessors.[7]

Finally, the superiors of a religious institute may not change the rule or constitutions which are approved by the Holy See. Hence any substantial change of the same must be submitted to the supreme authority. However, this does not exclude the admission of usages which do not affect the substance of the rule and the constitutions. On the other hand it is also certain that a mitigation introduced by custom and approved by the Holy See cannot be abolished except by the Holy See, although a general chapter could adopt a stricter reformation. Should the Holy See formally impose the abolition of such a mitigation, the religious would be obliged to obey, though in that case members who made profession under the mitigated rule or constitutions could scarcely be obliged to accept the reformation, at least if new austerities were

4 Cfr. can. 1313.
5 Can. 1314.
6 Can. 201, § 3.
7 Cfr. Piatus M., I, p. 571 (ed. 2). Concerning the *power of absolution* we refer to Book III (Confession) and Book V (Censures).

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imposed,[8] for they had no intention to take upon themselves such "extras."

This leads to the consideration of the question *what the vow of obedience means for all religious.*

(1) The vow of obedience is a promise made to God, by which one obliges himself to obey the religious institute one enters and its lawful superiors.

(2) The *extent* of this vow is commensurate with the rule and the constitutions, but goes no further. However, not only what is explicitly stated in the rule and constitutions falls under the vow of obedience, but also all acts which are necessary for the preservation of the institute itself and for the observance of the rule or constitutions. Thus mutual charity and fraternal obligations, charges and offices of the institute, just penalties and appropriate and moderate exercises, though not expressly stated, oblige by reason of obedience. To read more into the rules and constitutions is absurd, because the religious must have an objective norm. Besides no religious is bound to obey, by reason of the vow, if his superior commands something foolish, indifferent or impossible, or something which would cause serious damage or danger to the religious. On the other hand religious should obey their superior when he commands a reasonable internal act, for instance, the application of a Holy Mass[9] for a certain purpose.

There is a *limit to religious obedience* set by the common law of the Church. As those inferior to the Ro-

8 V. Bachofen, *Compendium Iuris Regul.*, p. 129 f.; p. 224.

9 Piatus M., I, p. 288. However it is evident that the internal act must in some way be connected either with the vows or the regular discipline and the rule or constitutions, which all tend to external observance; thus a superior might prohibit saying the office privately during a conventual *missa cantata*, if the singing in common or ceremonies would suffer thereby; otherwise there would be neither a moral nor a juridical reason for such a prohibition.

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man Pontiff have no power, in general at least, against the common law, so neither is a religious bound to obey a superior commanding anything opposed to that law. Neither is a religious obliged to obey a superior who is notoriously deprived of his office,[10] excommunicated or suspended.[11]

LIFE IN COMMON AND POVERTY

CAN. 594

§ 1. In quavis religione vita communis accurate ab omnibus servetur etiam in iis quae ad victum, ad vestitum et ad supellectilem pertinent.

§ 2. Quidquid a religiosis, etiam a Superioribus, acquiritur ad normam can. 580, § 2, et can. 582, n. 1, bonis domus, provinciae vel religionis admisceatur, et pecunia quaelibet omnesque tituli in capsa communi deponantur.

§ 3. Religiosorum supellex paupertati conveniat quam professi sunt.

§ 1. In every religious institute all must carefully observe the common life even in matters of food, clothing, and furniture.

§ 2. Whatever is acquired by the religious, including the superiors, according to can. 580, § 2, and can. 582, n. 1, must be incorporated in the goods of the house, or of the province, or of the institute; and all money and *titles* shall be deposited in the common safe.

§ 3. The furniture of the religious must be in accordance with the poverty of which they make profession.

St. Benedict in his Rule (c. 1) mentions four kinds of monks, two of whom were a pretty bad lot, *sarabites* and the *gyrovagi,* loafers or ramblers going about

10 Piatus M., II, 639. 11 Cfr. can. 2264, etc.

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in the garb of religious. In the twelfth century Innocent II tried to do away with all kinds of religious who would not lead a *common life*. What he meant by that phrase is explained by the words: "in the church, in the refectory, and in the dormitory."[12] These three localities indicate almost perfectly the conditions of community life, and no doubt the Code has these three places in view. The church or chapel unites the religious in the praise of God, the dining-room in fraternal charity, and the dormitory in peaceful rest. Of course, recreation, which is but another sort of rest, is also included. Hence an ostentatious avoidance of the recreation-room would show a lack of community spirit.

The Code mentions three things in particular which pertain to a life in common: food, dress, and furniture. Of course this is intended only for healthy members of the community, because reason dictates that the sick and delicate require special care, and the Decretals provided for emergencies.[13] A decree of the S. C. EE. et RR. also mentions uniformity in the employment of medicine and in traveling.[14] However, as to medicine we must reckon with modern methods and leave particulars to the physicians. Only extravagance must be avoided. Travelling, too, is to be judged in the light of modern conveniences (automobiles, etc.), and according to the custom of the country, which, with us, permits the use of a sleeping car for a night's rest.

§ 2 says that whatever is acquired by the religious, including the superiors, either by personal effort or in the form of presents given for the benefit of the house, or of

12 C. 25, C. 18, q. 2. The S. C. EE. et RR., April 22, 1851, forbade superiors, who had not professed a life in common, to reside in a house where the common life is observed (Bizzari, *l. c.*, p. 852).

13 C. 6, X, III, 35; cfr. *Reg. S. Bened.*, c. 37.

14 Cfr. Bizzarri, *l. c.*, p. 44.

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the province, or of the institute (can. 580) belongs to the community. Money or property may also come by inheritance or donations *inter vivos* (can. 580, 1°). All such acquisitions go into the common treasury.

Is a religious entitled to refuse a donation? A free donation to which the religious is in nowise entitled, he may refuse, because it depends on mere acceptance, which is not an act of dominion. He would, however, offend against charity by refusing a donation if the house or institute to which he belongs were needy. A religious would commit a sin against the vow of poverty if he would refuse a bequest or legacy coming to him by inheritance, or to which he was otherwise entitled, because he would refuse what belonged by right to his institute,[15] supposing the institute to be capable of possessing property.

Another question arises, on account of a decision of the S. C. Rel., July 13, 1913. It was asked, whether a religious of either solemn or simple vows, who had written a book during the time of his profession, was allowed to donate or alienate the manuscript *quocumque titulo?* The answer was "*Negative.*" [16] In order to understand this decision,— which caused some surprise,— it must be remembered that an author, whether he be professed with simple or solemn vows, has full proprietorship over his manuscripts as long as they remain in his hands, so that no superior can compel him to have them published or otherwise make use of them. A manuscript is intellectual property to which the author has a natural right. This right is not denied by that decision. But if the author would donate said manuscript to another, an outsider not a member of his institute, or sell it for any consideration, his ownership would cease, because donation

15 Piatus M., I, p. 244.

16 *A. Ap. S.*, V, 366.

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or alienation are acts of dominion. However, this decision is not in keeping with some papal constitutions, especially that of Clement VIII, "*Religiosae congregationes,*" which permits religious to donate manuscripts one to another, and that of Benedict XIII ("*Postulat*") which allows religious who are promoted to the episcopate to take their manuscripts with them.[17] These constitutions are certainly as weighty as any particular decision of a Roman Congregation. We believe the reason for that decision was to ward off the danger of avoiding the necessary *imprimatur,* which is required especially for religious.

No doubt may be raised as to the right of a religious community to the royalties and copyrights belonging to its members under the laws of the country.

With regard to *paintings and sculptures,* canonists[18] draw a distinction: if the material was furnished by the community, the product belongs to the latter, not to the individual artist; but if an outsider has furnished the materials (paint, canvas, brushes, marble, stone, silver, gold, etc.), the work belongs to him.

The next clause touches the *common treasury,* and indirectly the *peculium.* Where the common life is observed as it should be, this rule is safe. But niggardly and miserly treatment of religious is the quickest road to private property (*peculium*). There is no one thing for which the founders of the early religious orders and the laws of the Church had greater horror than this.[19] And,

17 Piatus M., I, p. 243. As long as no other decisions are forthcoming, we cling to the old *sententia communissima,* based as it is on papal constitutions, which allowed full possession of manuscripts to the author; the natural law cannot be overthrown by one particular decision.

18 Piatus M., I, p. 243; what we say in the text is to be taken in the sense that the material would be of considerable value.

19 *Reg. S. Bened.,* c. 55; cfr. c.

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indeed, a *peculium* of which the superior knows nothing and over which he has no control, is incompatible with the vow of poverty, supposing, of course, that the religious are treated fairly. On the other hand, the practice of having a *peculium* in common, with the permission of the superior, such as exists here and there in Europe, where it was brought about by the civil government, cannot be rejected as unlawful or against the Code, though, strictly speaking, it is not in conformity with the spirit of poverty.

CAN. 595

§ 1. Curent Superiores ut omnes religiosi:

1.° Quotannis spiritualibus exercitiis vacent;

2.° Legitime non impediti quotidie Sacro intersint, orationi mentali vacent, et in alia pietatis officia, quae a regulis et constitutionibus praescripta sint, sedulo incumbant;

3.° Ad poenitentiae sacramentum semel saltem in hebdomada accedant.

§ 2. Superiores suos inter subditos promoveant frequentem, etiam quotidianam, sanctissimi Corporis Christi receptionem; frequens autem, imo etiam quotidianus accessus ad sanctissimam Eucharistiam religiosis rite dispositis libere pateat.

§ 3. Si autem post ultimam sacramentalem confessionem religiosus communitati gravi scandalo fuerit aut gravem et externam culpam patraverit, donec ad poenitentiae sacramentum denuo accesserit, Superior potest eum, ne ad sacram communionem accedat, prohibere.

§ 4. Si quae sint religiones votorum sive sollemnium

11, C. 12, q. 1 (St. Aug.); c. 25, C. 18, q. 2; cc. 2, 4, 6, X, III, 35. The religious who after death was found to have had property, was to be buried in non-consecrated ground, or his body, if possible, to be exhumed.

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sive simplicium, quarum in regulis aut constitutionibus vel etiam calendariis communiones aliquibus diebus affixae aut iussae reperiantur, hae normae vim dumtaxat directivam habent.

This canon draws the attention of superiors to some special obligations of piety. They should take care:

§ 1. That all the religious make an annual spiritual retreat; that those not lawfully excused daily assist at Mass and faithfully perform the other exercises prescribed by the rule and constitutions; and that they go to confession at least once a week.[20]

§ 2. Superiors should promote amongst their subjects *frequent, even daily reception of Holy Communion;* and liberty must be given to every properly disposed religious to approach frequently, even daily, the Most Holy Eucharist. Of this exhortation enough was said and written — though not always with due regard to historical facts — when the decree of Pius X, "*Sacra Tridentina Synodus,*" was promulgated, Dec. 20, 1905. We may note that this decree need no longer be read at table, as its substance is embodied in the Code.[21]

§ 3. If a religious has, since his last confession, given grave scandal to the community, or committed a serious external fault, the superior can forbid him to receive Holy Communion until he shall have again approached the Sacrament of Penance. Note the two different clauses: *grave scandal* and *serious external fault.* The two are not necessarily connected. To stay away from the common exercises without excuse or reason may give scandal and yet not involve a serious fault. To strike a superior or co-religious might be grievously sinful and

20 We believe that the custom of going to confession every other week in large communities may be tolerated, if the members are allowed to go oftener.

21 Cfr. can. 509, § 2.

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yet, if done quietly, not cause grave scandal. Still, in both cases the superior would be entitled to forbid the religious to approach the Sacred Table. This is a ruling taken from the decree "*Quemadmodem,*" Dec. 17, 1890, which, by the way, has now lost its penal sanction.

§ 4. If in any institute, whether of solemn or simple vows, the rules or the constitutions or even the calendars assign or prescribe certain fixed days for the reception of Holy Communion, such regulations are to be regarded as merely directive.

This paragraph is taken from the decree on frequent communion, "*Sacra Tridentina,*" and means that no real obligation can be derived from said regulations, and hence the superiors must not urge their observance in virtue of the vow of obedience.

THE RELIGIOUS HABIT

CAN. 596

Religiosi omnes proprium suae religionis habitum deferant tum intra tum extra domum, nisi gravis causa excuset, iudicio Superioris maioris aut, urgente necessitate, etiam localis.

All religious should wear the habit of their institute both inside and outside the house, unless a weighty reason excuses them, according to the judgment of the higher, or, in urgent cases, of the local superior. This rule is taken from the Decretals and the Council of Trent.[22] It has, as is well known, been modified for our country,[23] and missionary countries generally. On days when the mercury occasionally shows more than 100 degrees, the contrary custom may be adopted without misgiving.

22 C. 2; 6°, III, 24; c. 2, *Clem.* III, 1; *Trid.*, sess. 25, c. 19, de reg.

23 *Conc. Balt. III.*, n. 17; cfr. can. 136.

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ENCLOSURE

The nature of coenobitism requires a solitary or retired mode of life. Hence the saying, "As a fish cannot live outside the water, so neither can a monk live outside the monastery." [24] St. Benedict wished to see the monasteries built in such a way that the monks would have no excuse to go outside.[25] St. Gregory the Great expressed to a certain Abbot (Valentine) his surprise that women entered his monastery indiscriminately and called upon the monks to be god-fathers of their children. He forbids the continuation of this lax practice absolutely.[26] The decree of Gratian as well as the well known chapter "*Periculoso*" of Boniface VIII insist upon enclosure, especially of convents of nuns, and the Tridentine Council enforced these laws vigorously.[27] Later papal constitutions insisted upon them and admitted a mitigation only in favor of founders and ruling princes and princesses.[28] (Cfr. Pius IX, "*Apostolicae Sedis,*" Oct. 12, 1869.) Yet in spite of the endeavor of Pius V to put all female congregations under the same strict laws, practice and theory soon began to distinguish between *papal* and *episcopal enclosure.* The former, or strict, enclosure is imposed only on regulars, or, more precisely, those institutes whose members take solemn vows, especially the female orders. The *episcopal* enclosure is less strict and open to a wider interpretation. The penalties inflicted by law for a violation of the papal may not be applied to the episcopal enclosure. This premised, the Code first treats of

24 C. 8, C. 16, q. 1, which must, however, be taken with a grain of salt.

25 Reg., c. 66.

26 *Regist. Greg. M.*, I, 40 (ed. Hartmann-Ewald).

27 Cfr. c. 1, C. 16, q. 1; c. un. 6°, III, 16; *Trid.*, sess. 25, c. 5, de reg.

28 See the quotations in Card. Gasparri's edition of the Code.

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PAPAL ENCLOSURE

CAN. 597

§ 1. In domibus regularium sive virorum sive mulierum canonice constitutis, etiam non formatis, servetur clausura papalis.

§ 2. Lege clausurae papalis afficitur tota domus quam communitas regularis inhabitat, cum hortis et viridariis accessui religiosorum reservatis; excluso, praeter publicum templum cum continente sacrario, etiam hospitio pro advenis, si adsit, et collocutorio, quod, quantum fieri potest, prope ianuam domus constitui debet.

§ 3. Partes clausurae legi obnoxiae patenter indicentur; Superioris vero maioris vel Capituli generalis secundum constitutiones, aut, si agatur de monasterio monialium, Episcopi erit clausurae fines accurate praescribere aut legitimis de causis mutare.

§ 1. In canonically erected houses of regulars, even though they are not *formatae,* of men as well as women, the papal enclosure must be observed. *When* a house is *canonically erected,* must be deduced from the approval or permission of the Holy See and of the Ordinary. It is evident that before the regulars move in, there is no enclosure. The text says that even in houses which are not *formatae, i. e.,* have less than six members, the enclosure must be observed. This must, of course, be understood only of a canonically erected house. A so-called priory or *expositura* or *grangia* (farm house or summer resort, villa, *villeggiatura*) is not a canonically erected house, even though inhabited by more than six members at a time.

§ 2. The law of papal enclosure affects the *whole house*

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inhabited by the regular community, including the orchards and gardens reserved to the religious, but not the public church with its sacristy, the guest-house, if there be one, and the parlor, which latter should, where possible, be placed near the entrance to the house. Note carefully the wording of the text, because it mitigates the opinion of some authors.[29] The sacristy is exempt from enclosure, even if it has two doors, of which one leads to the enclosure, provided it immediately adjoins the church. Should another room separate it from the church, the enclosure would have to be applied. As to the *gardens* and *viridaria,* the text does not require that a wall or hedge should separate them from the enclosure proper; it suffices that they be so reserved to the regulars that no one else is allowed access. *Viridaria,* properly speaking, are places set with trees and plants, hence orchards, parks, etc., also places for games. Whether these fall under the law of enclosure must be determined by § 3.

§ 3. The *parts of the house subject to the law of enclosure must be clearly indicated;* it pertains to the higher superior or to the general chapter according to the constitutions, or, in the case of a monastery of nuns, to the Bishop, to determine exactly the limits of the enclosure or to modify them for lawful reasons. This paragraph gives a wide scope to the superiors. However, it is evident that no superior may change the boundaries of the enclosure *ad hoc, i. e.,* for a case of emergency, for instance, to introduce a party into certain rooms, in order to evade the canonical penalty.

Once fixed, the boundaries must remain, unless cogent reasons make a change lawful. Besides, the boundaries

[29] Cfr. Ferraris, *Prompta Bibliotheca, s. v. Conventus,* art. III, n. 9 ff.

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must be clearly indicated, not only to the regulars themselves, but also to outsiders, for instance, by a sign inscribed, "Private Entrance" or "Positively No Admittance." The superiors and officials should carefully see to it that no freedom of way or servitude arises from allowing strangers to walk over the private property of the community. This might cause trouble and unnecessary lawsuits.

ENCLOSURE OF MALE RELIGIOUS

CAN. 598

§ 1. Intra regularium virorum clausuram ne admittantur mulieres cuiusvis aetatis, generis aut conditionis sub quovis praetextu.

§ 2. Eximuntur ab hac lege uxores eorum qui supremum actu tenent populorum principatum, cum comitatu.

§ 1. Into the enclosure of male regulars women of whatever age, class, or condition may not under any pretext be admitted.

§ 2. From this law are exempt the wives of actual rulers of states with their retinue.

The text excludes *all members of the female sex,* including children, which latter it had been customary to admit. What *genus,* which the authorized translation renders by "class," means, is not so easy to determine. It may signify birth, family, but also kin, and thus have the meaning of descent or blood relationship. Thus interpreted, even the female relatives of regulars are excluded. If it is taken to mean birth it would refer to nobility; but this seems to be included in *conditio. Conditio* may signify social status or position, rank, pro-

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fession, office. No matter how "blue-blooded" a person may be, if a woman,[30] she is excluded.[31]

§ 2 makes *one exception, viz.,* in favor of the wives of actual rulers. There is little danger that any community of regulars in this country will receive such a visit. The President's wife, and the governor's wife, we are sorry to say, are not included in this privilege, because their husbands are not actual rulers in the commonly accepted sense of the word. If the wife of a European monarch should visit a monastery in our country, the law would admit her, because the text does not limit the privilege to their own country.

COLLEGE OR SCHOOL ENCLOSURE

CAN. 599

§ 1. Si domus regularium virorum adnexum habeat convictum pro alumnis internis vel alia opera religionis propria, separata saltem aedis pars, si fieri possit, religiosorum habitationi reservetur, clausurae legi subiecta.

§ 2. Etiam in loca extra clausuram alumnis externis aut internis vel operibus religionis propriis reservata, personae alterius sexus, nisi aequa de causa et de Superioris licentia, ne admittantur.

§ 1. When a house of male regulars has annexed to it a college for boarding pupils, or for other works proper to the institute, a separate part at least of the house should, if possible, be reserved for the habitation of the religious, and subject to the law of enclosure.

§ 2. Even to places outside the enclosure reserved for extern or intern pupils or for works proper to the insti-

30 Hermaphrodites of the male sex prevailingly, might be admitted,

31 Pius V, *Regularium,* Oct. 24, 1566; Benedict XIV, *Regularis disciplinae,* Jan. 3, 1742.

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tute, persons of the other sex should not be admitted except for a just reason and with the permission of the superior.

This enactment sounds more like a guiding norm —" if possible "— than a strict law, and hence it would be uncanonical to apply the full vigor of papal enclosure to these institutes.

PAPAL ENCLOSURE OF NUNS; ADMISSION OF OUTSIDERS

CAN. 600

Intra monialium clausuram nemo, cuiusvis generis, conditionis, sexus, aetatis admittatur sine Sanctae Sedis licentia, exceptis personis quae sequuntur:

1.° Ordinario loci aut Superiori regulari, monasterium monialium visitantibus vel aliis Visitatoribus ab ipsis delegatis licet clausuram ingredi dumtaxat inspectionis causa, cautoque ut unus saltem clericus vel religiosus vir maturae aetatis eos comitetur;

2.° Confessarius vel qui eius vices gerit potest, cum debitis cautelis, ingredi clausuram ad ministranda Sacramenta infirmis aut ad assistendum morientibus;

3.° Possunt clausuram ingredi qui supremum actu tenent populorum principatum eorumque uxores cum comitatu; itemque S. R. E. Cardinales;

4.° Antistitae est, adhibitis debitis cautelis, ingressum permittere medicis, chirurgis, aliisque quorum opera sit necessaria, impetrata prius saltem habituali approbatione ab Ordinario loci; si vero necessitas urgeat nec tempus suppetat approbationem petendi, haec iure praesumitur.

No one, of whatever class, condition, sex or age, may, without papal permission, be permitted within the enclosure of nuns, except the following persons:

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1.° The canonical visitator or his delegate, who must be accompanied by a clergyman or religious;

2.° The confessor or his substitute, to administer the sacraments to the sick or to assist the dying;

3.° Rulers of states with their wives and suite, and also cardinals;

4.° After taking due precautions, the superioress may permit the physician, the surgeon, and others whose work is necessary, to enter the enclosure, having previously obtained at least the habitual approval of the local Ordinary, which permission may be presumed in cases which suffer no delay.

Note the difference between the papal enclosure of regulars and that of nuns. The latter admits not even women. The so-called *educande* (pupils) were admitted under a papal permission granted to that effect.

The "*debitae cautelae*" or precautions concerning confessors provide that a religious must be accompanied by another religious, whereas a secular priest needs no companion, but must wear stole and surplice. As to laymen, they must be of good moral character, and should not tarry within the enclosure before sunrise or after sunset.[82] This rule, of course, is not always applicable to physicians and surgeons.

DUTY OF NUNS TO KEEP WITHIN THEIR ENCLOSURE

CAN. 601

§ 1. Nemini monialium liceat post professionem exire e monasterio, etiam ad breve tempus, quovis praetextu, sine speciali Sanctae Sedis indulto, excepto

82 Cfr. Greg. XIII, "*Deo Sacris*," Dec. 30, 1572; Alexander VII, "*Felici*," Oct. 20, 1664; Bachofen, *Compendium Iuris Reg.*, p. 163 ff.

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casu imminentis periculi mortis vel alius gravissimi mali.

§ 2. Hoc periculum, si tempus suppetat, scripto recognoscendum est loci Ordinario.

No nun, after profession, may, under whatever pretext, leave the monastery even for a short time, without a special papal indult, except in the case of imminent danger of death or other very serious evil; and this danger, if time permits, must be recognized as such by the local Ordinary in writing.

The Code almost verbally rehearses former laws,[33] which seem somewhat rigorous to modern students, but were most reasonable. Danger of death would be a fire or threatening collapse of the building, a flood, devastation brought about by war, danger of defloration, etc. A Sister suffering from a contagious disease may leave the convent; and, we believe, also one compelled to undergo an operation which could not be safely performed in the convent. The judgment of the sufficiency of the reason lies with the Ordinary, and in urgent cases with the superioress.[34]

CAN. 602

Clausura monasterii monialium ita circumsepta esse debet ut, quoad fieri potest, nullus sit in eam vel ab ea prospectus externarum personarum.

The enclosure of every monastery of nuns should be protected on every side in such a manner as to prevent, as

33 Cfr. Pius V, "*Decori*," Feb. 1, 1570.

34 The *Regesta S. C. EE. et RR.* contain a great number of permissions granted to nuns, especially of Portugal, who wished to go to health resorts; they were to travel in a closed carriage with the curtains down, accompanied by two other Sisters, and without a prolonged stop.

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far as possible, those within from being seen by, or seeing, persons outside. Of course, if the ecclesiastical authorities could always enforce their laws,— as they formerly did in the Papal States,[35]— this canon might also be insisted upon. But a little more light and air would not hurt the nuns.

Can. 603

§ 1. Clausura monialium, etsi regularibus subiectarum, sub vigilantia est Ordinarii loci, qui potest delinquentes, regularibus viris non exceptis, poenis quoque ac censuris corrigere et coercere.

§ 2. Etiam Superiori regulari custodia clausurae monialium sibi subiectarum commissa est, qui moniales aut alios suos subditos, si quid hac in re deliquerint, poenis quoque punire potest.

The Ordinary of the diocese must diligently watch over the observance of the enclosure of nuns, even those subject to regulars; he must also punish offenders, not excepting male regulars, even with penalties and censures. The regular superiors must do the same and duly punish nuns or other subjects who violate the enclosure.

Enclosure of Religious Congregations

Can. 604

§ 1. In domibus etiam Congregationum religiosarum sive pontificii sive dioecesani iuris clausura servetur, in quam nemo alterius sexus admittatur, nisi ii de quibus in can. 598, § 2 et can. 600, aliique quos ex iustis ac rationabilibus causis Superiores admitti posse censuerint.

35 A proprietor who had raised his house too high and built too many windows, which permitted a view into a convent, had to change it. (Bizzarri, *l. c.*, p. 81.)

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§ 2. Praescriptum can. 599 etiam domibus Congregationum religiosarum sive virorum sive mulierum applicetur.

§ 3. Episcopus in adiunctis peculiaribus, gravibusque intercedentibus causis, potest hanc clausuram, nisi agatur de religione clericali exempta, censuris munire; semper autem curet ut eadem rite servetur et quidquid in eam irrepat vitii corrigatur.

Here we meet the so-called *episcopal enclosure,* which must be observed in the houses of religious congregations, whether approved by the Holy See or the diocesan Ordinary. Into their enclosure, says § 1, no one of the other sex is to be admitted, except actual rulers and the persons mentioned in can. 600; but the superiors (both higher and local, because the Code does not determine which), may admit other persons of either sex for just and reasonable motives. Such a motive would be, *e. g.,* a visit of relatives, good friends or benefactors, parents of pupils, etc.

§ 2 applies can. 599 to these congregations, whether of men or women.

§ 3 says that the bishop may, in particular circumstances and for grave reasons, safeguard the enclosure by censures, except in the case of an exempt clerical institute. Always, however, he should see to it that the episcopal enclosure is duly observed, and correct any abuses that may arise. Such an abuse would be a case of episcopal reservation, reserved to the bishop himself, but not by law. However, as censures in general, and especially reserved ones, should be few and inflicted only for grave reasons, it is evident that these reasons would have to be very particular; for instance, if scandal should have occurred, or if the community would do only housework

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which would exclude communication with the outer world. Yet, at any rate, the enclosure would always be episcopal, not papal.

VISITS

CAN. 605

Omnes quibus est clausurae custodia, sedulo advigilent ne, alienis invisentibus, inutili collocutione disciplina perturbetur et spiritus religiosus detrimentum patiatur.

All those who have the custody of the enclosure shall carefully see lest, from intercourse with outsiders, the discipline be relaxed and the religious spirit weakened by useless conversation. This rule is intended not only for the superiors, but for the master or mistress of guests as well as for the doorkeeper and those who receive visitors.

As Cardinal Gasparri's edition draws our attention to the point, a word may here be added concerning the *access of regulars and laymen to convents of nuns.* A strict prohibition was always maintained concerning regulars,[36] and the S. C. of Bishops and Regulars added very severe regulations with regard to their visits. Lay persons were more easily admitted, but not during Lent, Advent, on vigils or feast-days. Our Code mentions nothing respecting these visits. Hence the former strict regulations, unless they are inculcated in the respective constitutions, may be considered as abrogated.

[36] C. un. 6°, III, 16; S. C. EE. et RR., Dec. 6, 1838 (Bizzarri, *l. c.*, p. 437 f.). Such visits were, of course, allowed only at the grates.

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EXIT FROM ENCLOSURE

CAN. 606

§ 1. Curent Superiores religiosi ut accurate observentur quae sive circa egressum subditorum e claustris, sive circa excipiendos vel adeundos extraneos, in propriis constitutionibus praescripta sunt.

§ 2. Superioribus fas non est, salvis praescriptis in can. 621–624, permittere ut subditi extra domum propriae religionis degant, nisi gravi et iusta de causa atque ad tempus quo fieri potest brevius secundum constitutiones; pro absentia vero quae sex menses excedat, nisi causa studiorum intercedat, semper Apostolicae Sedis venia requiritur.

§ 1. Religious superiors must take care that the rules laid down in their constitutions be faithfully observed regarding the egress of subjects from the cloister, or their receiving visits from, or paying visits to, outsiders.

§ 2. Religious superiors may not allow their subjects to stay outside the house of their own institute except for a just and grave cause and for as short a time as possible. But for an absence of more than six months, unless for study, the permission of the Holy See is always required.

To keep religious from wandering about, Ordinaries were formerly commissioned to send them back each to his own house.[37] Alexander III (A. D. 1180) forbade religious to leave their monasteries in order to frequent lectures on civil law and physical science.[38] We have read many grants of the S. C. of Bishops and Regulars touching upon the study of civil law. Now our Code grants them that permission in general, saving the disposition of can. 587, § 4. The lawgiver makes no distinc-

[37] C. 7, X, I, 31.

[38] C. 3, X, III, 50.

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tion as to branches of study or private studies, in a library, for instance, or archives.

CAN. 607

Antistitae et Ordinarii locorum serio advigilent ne religiosae, citra casum necessitatis, singulae extra domum pergant.

The superioresses and local Ordinaries shall carefully watch that Sisters do not leave the house singly, without a companion, except in case of necessity.

ASSISTANCE IN THE SACRED MINISTRY

CAN. 608

§ 1. Curent Superiores ut religiosi subditi, a se designati, praesertim in dioecesi in qua degunt, cum a locorum Ordinariis vel parochis eorum ministerium requiritur ad consulendum populi necessitati, tum intra tum extra proprias ecclesias aut oratoria publica, illud, salva religiosa disciplina, libenter praestent.

§ 2. Vicissim locorum Ordinarii ac parochi libenter utantur opera religiosorum, praesertim in dioecesi degentium, in sacro ministerio et maxime in administrando sacramento poenitentiae.

The religious superiors should always be ready to lend a helping hand, especially if their own Ordinary or a pastor of their diocese calls for assistance in attending to the needs of the people; and this help should be granted willingly not only to the churches and public oratories subject to religious, but also to others, as far as compatible with religious discipline. On the other hand it is but meet that the local Ordinary and parish priests should employ religious, especially those living in the diocese,

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for the sacred ministry, and particularly for the administration of the Sacrament of Penance. The text is sufficiently clear. But a question connected with the subject may be mooted: Are religious obliged to go on such errands in virtue of obedience? We answer, if the religious character of the community excludes outside work in the sacred ministry, in other words, if the order is exclusively monastic, the members are not obliged to obey. If, however, the order or community is of a clerical nature and aims at procuring the spiritual welfare of others, the religious are not at liberty to refuse the command of the superior.[39] In our country, as far as we are aware, the first-mentioned hypothesis would be verified only in the case of the Trappists, to some extent at least. Benedictines, Cistercians, and the congregations affiliated with them are no longer merely monastic. We may extend the case of obedience to the circumstances of an epidemic or contagious disease; because in that case obedience would demand that religious assist the secular clergy, provided the latter were doing their full duty.

PARISH CHURCHES IN CHARGE OF RELIGIOUS

CAN. 609

§ 1. Si ecclesia, apud quam residet communitas religiosa, sit simul paroecialis, servetur, congrua congruis referendo, praescriptum can. 415.

§ 2. In ecclesia religiosarum a votis sive sollemnibus sive simplicibus paroecia erigi nequit.

§ 3. Advigilent Superiores ne divinorum officiorum in propriis ecclesiis celebratio catecheticae instructioni aut Evangelii explanationi in ecclesia paroeciali tra-

[39] Suarez, *De Rel.*, tr. VIII, l. II, c. 8, n. 19 (ed. Paris., t. 16, 144); Piatus M., I, p. 288.

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dendae nocumentum afferat; iudicium autem utrum nocumentum afferat, necne, ad loci Ordinarium pertinet.

§ 1. If the church attached to the residence of a religious community is at the same time a parish church, the prescriptions of can. 415 are, in due proportion, to be observed. These regulations should be carried out faithfully, because the government of the parish is in the hands of the religious who acts as pastor. To him, therefore, belong the duties of preaching, teaching catechism, applying the *missa pro populo,* etc. Not the religious superior but the pastor is entitled to assist at marriages or to perform funeral services or to baptize children. But, as he enjoys the rights, so he also has the obligations, as the natural law dictates.

§ 2. The churches of nuns or Sisters, whether with solemn or simple vows, cannot be parochial.

§ 3. This last paragraph, taken from the Constitution of Benedict XIV, "*Etsi minime,*" Feb. 7, 1742, shows the care which the Church wishes to see bestowed on parochial work. The religious superiors are commanded to see that the divine office in their own churches does not interfere with the catechetical instruction or the explanation of the Gospel given in the parochial church; it pertains to the local Ordinary to judge whether or not this hindrance exists. Benedict XIV says that the Pontiff would assist the bishop in carrying out his regulations. The welfare of souls is the first and supreme law.

CHOIR SERVICE AND MASS

CAN. 610

§ 1. In religionibus sive virorum sive mulierum, quibus est chori obligatio, in singulis domibus ubi qua-

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tuor saltem sint religiosi choro obligati et actu legitime non impediti, et etiam pauciores, si ita ferant constitutiones, debet ad normam constitutionum quotidie divinum officium communiter persolvi.

§ 2. Missa quoque officio diei respondens secundum rubricas quotidie celebrari debet in religionibus virorum et etiam, quoad fieri possit, in religionibus mulierum.

§ 3. In eisdem religionibus sive virorum sive mulierum, sollemniter professi qui a choro abfuerunt, debent, exceptis conversis, horas canonicas privatim recitare.

It is a custom, nay, we might say, a customary law, that religious should chant or recite the divine office. Clement V insisted upon this service, not only in cathedral churches, but in all churches of religious, and exhorted them to recite the office with proper attention and devotion.[40] That St. Benedict devoted eleven chapters of his rule to this matter shows his intention of keeping the sacred fire burning. Hence it is not surprising that the Church imposed this duty on all religious whose constitutions prescribe the recitation of the divine office. Therefore, says § 1, all religious, whether male or female, who are obliged to choir service, are bound to perform it daily in every house in which there are at least four members who are not lawfully prevented, and even fewer if the constitutions so prescribe.

This *obligation* is a *grievous one* for all institutes whose constitutions prescribe choir service, and the superior is not allowed to dispense from it, except in case there be not sufficient members present to perform it. The Code rules that at least four members obliged to

40 C. 1, *Clem.* III, 14. Sometimes birds and dogs were brought into church!

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choir service must be present in a house for which the choral obligation exists.[41] If the constitutions oblige the members to choir service even when less than four are present, they must be obeyed, even if four, or three, or two novices only were present who could perform the duty.[42] The community, as such, is under strict obligation to chant or recite the divine office, and a superior who would neglect his duty in this respect would be guilty of mortal sin.

On the other hand, *single members,* as such, are not obliged to choir service, at least not *sub gravi,* unless the rule or constitutions or the laws of foundation oblige them, or if the office could not be performed for lack of a sufficient number, or one would by his absence cause scandal to others.[43] Clement VIII, although very severe in inculcating the obligation, allowed superiors to grant a dispensation to choir members who are too much occupied with some special charge or office, *e. g.,* procurators, *oeconomi,* prefects; also teachers and preachers on the days on which they preach and teach; finally those who are sickly or engaged in studies.[44]

Of *nuns* with solemn vows, only those are obliged to choir service whose rule or constitutions, approved by the Holy See, impose this obligation. This was decided by the S. C. of Bishops and Regulars, April 19, 1844.[45] The decision added that if a legitimate custom involved this obligation, the nuns would be bound to follow it. As to Sisters with *simple* vows, the same decision says that they are, as a rule, not obliged to choir service. Now the Code must be consulted, and therefore, should the

41 Innocent X, "*Ut in parvis,*" Feb. 10, 1654, § 2.

42 Piatus M., I, 313.

43 Piatus M., I, 311 f.

44 "*Nullus ommino,*" July 25, 1599, § 1. The latter class embraces those who publish and print books for the good of the Church; Piatus M., *l. c.,* I, 314.

45 Cfr. Bizzarri, *l. c.,* p. 495 ff.

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constitutions approved by the Holy See oblige a community to choir service, the obligation must be complied with. Hence Dominican, Franciscan and Capuchin Tertiaries, regardless of the primitive rule of these orders, are obliged to choir service only if their constitutions expressly prescribe it. The same applies to Benedictine Sisters with simple vows; unless their approved constitutions oblige them to choir service they are not bound to render it, for the above-quoted decision clearly states: "*ubi vero vota simplicia sint, non teneri.*"

As to the *Breviary*, the Constitution of Pius V, "*Quod a nobis*," July 9, 1568, says that those orders which have had their own Breviary for two hundred years prior to the date of said constitution, may retain it, whereas all others must adopt the Roman Breviary. The orders which had their own Breviary were allowed to adopt the Roman if the superior general and the chapter general favored the change.[46] The modern congregations must all follow the Roman Breviary.

With regard to *nuns* with solemn vows, what has just been said about regulars applies also to them, especially to those who are subject to regulars. *Sisters* with simple vows, if obliged for one reason or another to choir service, generally recite the Little Office of the Blessed Virgin, unless, by a strange mixture of ancient custom and modern legislation, they follow the rule of an order in reciting the full office.[47]

Concerning the *calendar*, this depends upon special indults granted by the Holy See (S. Rit. C.). Those religious who have the privilege of using their own calen-

46 Hence the Benedictines would be allowed, even now, to adopt the Breviary prescribed by Pius X's Constitution "*Divino afflatu*," Nov. 1, 1911; nor would St. Benedict's Rule (c. 18) be opposed to the change.

47 This is the case with some Benedictine Sisters of our country.

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dar must follow it or adopt the diocesan calendar. *Nuns* subject to regular orders follow the calendar of these orders; others must follow the diocesan calendar, unless special indults grant them the use of their own calendar. *Sisters* with simple vows, with the sole exception of the Franciscans, must adopt the diocesan calendar, to which also their chaplain, even if he has his own ordo, must conform.[48] The Franciscan Sisters aggregated to any of the three branches (Brown Franciscans, Conventuals, Capuchins), although they recite only the Little Office of the B. M. V., are entitled to follow the calendar, Missal and Martyrology of their respective order.[49] Furthermore all regulars who govern a parish not incorporated, or entrusted to them only for a time, must use the diocesan calendar to which the people are accustomed.[50]

§ 2 of can. 610 says: the *Mass* corresponding to the office of the day according to the rubrics must be celebrated daily in the institutes of men and even, where possible, in the institutes of women. *Regulars* who are bound to choir service are certainly obliged to have one conventual Mass sung or read.[51] The same obligation is imposed on *nuns* who are obliged to choir service.[52] (The Code is not opposed to that statement, because the Mass is the principal part of the divine office.) But those who are not obliged to choir service are not bound by a strict obligation to have a conventual Mass, except "where possible." The possibility depends on many circumstances, for instance, whether they have a chaplain, or the means of supporting one, the locality, occupation,

48 S. Rit. C., July 17, 1896; July 9, 1895 (*Decreta Auth.*, n. 3927, n. 3862).

49 S. Rit. C., Jan. 22, 1906 (*Anal. Eccl.*, t. XIV, p. 106).

50 S. Rit. C., Feb. 4, 1908 (*Decreta Auth.*, n. 3779).

51 But they are not obliged to two conventual masses; S. Rit. C., Dec. 2, 1891 (*Decreta Auth.*, n. 3757).

52 Piatus M., I, p. 327.

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and so forth. The same is true, *a fortiori,* of Sisters with simple vows. As to the locality, can. 1192 must be consulted with regard to *semi-public oratories,* which may only be erected with the permission of the Ordinary, who must inform himself as to proper construction.[53] In these semi-public oratories the number of masses is not limited (can. 1193).

As to *rubrics,* the mass must correspond to the office of the day. Where the office of the day is not recited, the calendar or ordo must be followed. The chaplain is supposed to know the rubrics. We will only add that Mass is generally said after the Tierce (or Sext, or None, as the rubrics prescribe) and the color of the feast must be used, unless a votive Mass or *missa de requie* is permitted.

§ 3 says that religious men or women with solemn vows are obliged to the *private recitation* of the divine office if they have been absent from choir. Lay brothers are excepted. This rule, of course, applies only to such religious as are obliged to choir service. Can. 135 obliges all clergymen *in sacris* to the recitation of the divine office, from which they are excused only by physical or moral impossibility. If some particular constitutions oblige *lay brothers* to the recitation of the Little Office of the B. M. V. this obligation does not entail a strict duty,[54] though the prayers prescribed must, of course, be said.

53 The chapel must not be a mere hallway, nor may a bedroom be placed immediately above the sanctuary, it must be decently furnished and neatly kept.

54 S. C. EE. et RR., Jan. 29, 1906 (*Anal. Eccl.,* XIV, p. 209 f.; *Congreg. Bavarica O. S. B.*); April 19, 1844 (Bizzarri, p. 495 ff.).

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. LETTERS NOT SUBJECT TO INSPECTION

CAN. 611

Omnes religiosi sive viri sive mulieres, libere possunt mittere litteras, nulli obnoxias inspectioni, ad Sanctam Sedem eiusque in natione Legatum, ad Cardinalem Protectorem, ad proprios Superiores maiores, ad Superiorem domus forte absentem, ad Ordinarium loci cui subiecti sint et, si agatur de monialibus quae sub regularium iurisdictione sunt, etiam ad Superiores maiores Ordinis; et ab istis omnibus praedicti religiosi, viri aut mulieres, litteras item nemini inspiciendas recipere.

All religious, whether men or women, can freely send letters, exempt from all control, to the Holy See and its legate in the country, to their Cardinal Protector, to their own higher superiors, to the superior of their house when absent, to the local Ordinary to whom they are subject, and, in the case of nuns subject to regulars, to the higher superiors of the order; and from all these persons the religious, men or women, can also receive letters which nobody has the right to open.

We add only one thought, which has often struck our inquiring mind. Authors, especially moralists, base the right of inspecting letters *sent to religious* on the necessity of maintaining the religious discipline. But they never mention the natural right which those outside the house have to privacy and secrecy of correspondence. It is acknowledged by all that letters should never be opened or read by persons not concerned. Is a religious superior by virtue of his office entitled to know the secrets of the family of a religious? Has he any right to make use of that knowledge? This is privileged knowledge,

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and we fail to see how it can be conducive to the right government of his subjects. Besides the manifestation of conscience not being to be extorted, we fail to see into the claim of knowing the conscience of others.

PUBLIC WORSHIP

CAN. 612

Praeter praescriptum can. 1345, si loci Ordinarius ob causam publicam sonitum campanarum, preces aliquas vel sacra sollemnia indicat, religiosi omnes, etiam exempti, obedire debent, salvis constitutionibus et privilegiis suae cuiusque religionis.

Besides the prescription of can. 1345, if the local Ordinary from a motive of public utility prescribes the ringing of the bells, certain prayers or sacred solemnities, all religious, even those exempt, must obey, without prejudice to the constitutions and privileges of each institute.

Can. 1345 rules that the Ordinary is entitled to command religious, even those exempt, to impart a brief instruction in their own churches on feast-days if the people assist at the service. As to the ringing of bells, the recitation of prayers, and solemn services, the Ordinary may command them only for a public cause. Such a one would be war, a public calamity, the election of a pope or the bishop's taking possession of the diocese. Regulars must also insert the *imperata* commanded by the Ordinary, and are not allowed to quit saying it at will.[55] From this injunction of the Ordinary no appeal is permissible,[56] although the privileges of the orders are not thereby touched or revoked. Thus, according to Pius V's Constitution, "*Etsi mendicantium,*" May 16, 1567, Ordi-

55 S. Rit. C., April 3, 1821 (*Decreta Auth.*, n. 2613 ad 1 et 2).

56 Bened. XIV, "*Ad militantis,*" March 30, 1743.

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naries are not allowed to prohibit regulars from ringing the bells or celebrating the office whenever they please.[57]

[57] S. C. EE. et RR., March 11, 1892 (*A. S. S.*, XXIV, 558).

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CHAPTER II

THE PRIVILEGES OF RELIGIOUS

CAN. 613

§ 1. Quaelibet religio iis tantum privilegiis gaudet, quae vel hoc in Codice continentur, vel a Sede Apostolica directe eidem concessa fuerint, exclusa in posterum qualibet communicatione.

§ 2. Privilegia quibus gaudet Ordo regularis, competunt quoque monialibus eiusdem Ordinis, quatenus eorum sint capaces.

§ 1. Each institute enjoys only those privileges which are contained in this Code, or may have been directly granted to it by the Apostolic See; every communication of privileges is henceforth excluded.

§ 2. The privileges which a regular order enjoys belong also to the nuns of the same order, in so far as they are capable of enjoying them.

On privileges in general the reader may consult Vol. I of this Commentary, where mention is also made of the communication of privileges.[1] There are only two sources of privileges: the law and a direct grant by the Holy See. All intercommunication of privileges is forbidden for the future. However, this law, as we stated before, is not retroactive, and hence the orders may retain what they possess, except where the Code rules differently. In order to ascertain what privileges each insti-

1 Vol. I, pp. 155 ff.

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tute possesses, the superiors of regulars have been called upon, in a circular of the S. C. of Religious, to meet after the war and prepare a list of privileges granted and communicated to their respective orders. Since the different orders enjoy many different privileges, it cannot be our task to collect them. It seems certain that any privilege which concerns the outward activity of the regulars, not merely their internal government and discipline, must now be looked upon as abolished if it contradicts the explicit wording of any part of the Code. Thus, for instance, the hearing of confessions, the celebration of Mass, preaching, and funerals must be judged according to our Code. The privileges concerning ordination *extra tempora* and without the necessary intervals are no longer in effect. We confess that uniformity of law and discipline seems to us a greater benefit than a shadowy so-called privilege, sometimes ostentatiously vindicated. There can be no greater glory than to belong to the Church universal, as long as religious are left free to pursue their vocation and are not unnecessarily molested.

The second section of our canon states that *nuns* with solemn vows partake of all the privileges enjoyed by the regular order whose rule they follow. Note that the text does not say that they must be subject to the prelate of the respective order. Hence though, for instance, Dominican nuns be subject to the Ordinary of the diocese, yet they enjoy all the privileges of the male order. "*In so far as they are capable of enjoying them*" means that female religious cannot partake of the privileges granted to male religious who are employed in the sacred ministry or in the exercise of jurisdiction *in foro externo* and *interno*. But they enjoy dispensations, commutations, and spiritual favors. Thus, for instance, a plenary indulgence granted to the Franciscan Order on the feast

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of St. Francis may be gained by the nuns of the same order (all three branches), and the brethren O. F. M. may gain a similar indulgence granted for the feast of St. Clare of Assisi (Aug. 12). As to *Sisters*, our Code is silent. Yet it is certain that the Tertiaries of St. Francis who live a common life, though they pronounce only simple vows, if duly aggregated to any of the three branches, partake of all the indulgences granted to the first and second orders, and that their churches and (public or semi-public) oratories are endowed with the same indulgences as those of the first and second orders.[2] Other sisterhoods enjoy only such privileges as are granted by the Code or the Holy See.

CLERICAL PRIVILEGES

CAN. 614

Religiosi, etiam laici ac novitii, fruuntur clericorum privilegiis de quibus in can. 119–123.

Religious, even lay brothers and sisters, and novices, enjoy the privileges of clerics mentioned in can. 119–123. Hence they are inviolable by reason of the *privilegium canonis*, they are not to be dragged before the civil court, are free from military service and public offices, and cannot be stripped of all their possessions in case of insolvency.[3]

They are not allowed to waive these privileges because they are attached not to the person, but to the religious state.

2 S. C. EE. et RR., Nov. 18, 1905 (*Annal. Eccl.*, XIV, 20); S. C. Indulg., Aug. 28, 1903 (*Annal. Eccl.*, XI, 489); S. O., June 7, 1916 (*A. Ap. S.*, VIII, 263 ad 1; but V is now to be suppressed); S. C. EE. et RR., Sept. 1840 (Bizzarri, *l. c.*, p. 450 ff.).

3 Cfr. Vol. II of this Commentary.

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PRIVILEGE OF EXEMPTION

CAN. 615

Regulares, novitiis non exclusis, sive viri sive mulieres, cum eorum domibus et ecclesiis, exceptis iis monialibus quae Superioribus regularibus non subsunt, ab Ordinarii loci iurisdictione exempti sunt, praeterquam in casibus a iure expressis.

Regulars, both men and women, including the novices, except those nuns who are not subject to regular superiors, are exempt with their houses and churches from the jurisdiction of the local Ordinary, except in the cases provided for by law.

As to the history of exemption, enough has been said *supra*.[4] Here the Code determines what exemption implies and what persons are exempt, as well as the exceptions to the rule.

1. Exemption means *freedom from the jurisdictional power of the Ordinary* in whose diocese a house is located in all matters except ordination. Exemption is called *passive* in regard to persons, and only by reason of personal exemption do houses and churches share the privilege. Hence, properly speaking, as Benedict XIV says,[5] the houses and churches of regulars are not severed from the diocesan organism; they do not form a separate territory *nullius*. The Code simply says: "*cum eorum domibus*," not *et eorum domus*.

2. Exemption is now granted to *all regulars, i. e.*, to all religious orders with solemn vows, even though the

4 Pages 24 sqq.

5 *De Synod. Dioec.*, II, 11, 2; Id., "*Apostolicae servitutis*," March 14, 1743. The statement in the text is of practical value in case of hearing confessions of secular priests, because a regular may hear such confessions in the monastery-enclosure, not only in the church, as at least one moralist claims.

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members are not all solemnly professed. Thus also the novices and lay brothers and clerics with simple vows enjoy exemption. But we dare not extend the privilege to the *familiares,*[6] or dependents, as the text does not mention these, though it expressly includes novices; but the *familiares* partake of certain other favors granted to regulars. *Nuns* with solemn vows are withdrawn from the jurisdiction of the Ordinary only if they are subject to the power of a regular prelate. All these regulars are now no *longer obliged to prove* that they enjoy exemption, because, being regulars, they are exempt by law. Any religious order which conforms to can. 488 of the Code is entitled to exemption.

Religious congregations, on the other hand, must prove their claim to exemption by a papal brief, because without such an indult no congregation now enjoys the privilege. Thus the Passionists can produce the privilege granted them by Clement XIV, Sept. 21, 1771, and the Redemptorists may point to the Constitution of Pius VI, "*Sacrosanctum,*" of Aug. 21, 1789. Sisterhoods are not easily granted exemption.[7]

3. Exemption, meaning freedom from episcopal jurisdiction, implies that the episcopal court cannot summon religious to appear before it; that the exempt religious need not heed ecclesiastical censures inflicted by the Ordinary; that they may bring their case directly before the S. Congregation of Religious; that diocesan rules or statutes do not touch them, except, of course, as far as the sacred ministry is concerned; that episcopal interference in their domestic affairs and government is entirely excluded; that their property and its administra-

6 Cfr. can. 514.

7 The Sisters of the Holy Cross, of Ingenbohl, Switzerland, among whom the author spent many a happy vacation day and whom he remembers with deep gratitude, enjoy exemption to a certain extent.

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tion are in their own hands. This, in general, is the extent of exemption. Should a doubt arise, the Roman *Curia* will decide it if the bishop is not satisfied with the interpretation given by the exempt religious.[8] However, there are exceptions, as the Code says: "*nisi in casibus a iure expressis*," *i. e.*, in cases expressly mentioned in the Code the exemption ceases and the jurisdictional power of the Ordinary is restored. These cases are generally comprised by the phrase: *etiam exempti*.[9]

REGULARS OUTSIDE THEIR HOUSES

CAN. 616

§ 1. Regulares extra domum illegitime degentes, etiam sub praetextu accedendi ad Superiores, exemptionis privilegio non gaudent.

§ 2. Si extra domum delictum commiserint nec a proprio Superiore praemonito puniantur, a loci Ordinario puniri possunt, etsi e domo legitime exierint et domum reversi fuerint.

§ 1. Regulars unlawfully absent from their houses, even under the pretext of having recourse to their superiors, do not enjoy the privilege of exemption.

§ 2. Regulars who have committed a crime outside their house and are not punished by their superior, though the latter was warned of the fact, can be punished by the local Ordinary, even though they may have lawfully left their house and have returned to it.

§ 1 is taken from the Council of Trent,[10] where the

8 C. 13, X, IV, 17; c. 31, X, III, 39; S. C. C. April 16, 1648; Piatus M., II, p. 7.

9 The most important exceptions are stated in separate canons: 131, 344, 612, 614, 616, 804, 831, 874, 919, 1279, 1293, 1338, 1382, 1385 mostly taken from the Council of Trent.

10 Sess. 6, c. 3 de ref.; sess. 25, c. 4 de reg.

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term *unlawfully* is explained. A religious is unlawfully absent from his house if he leaves it without being sent or called by the superior. Hence a religious who would depart from the monastery without the permission of his superior, in order to go to the higher superior, or to Rome, to seek redress from grievances, would be unlawfully absent. However, it is generally understood that if the superior has been duly asked for leave and denied the same, a religious is allowed to go straightway (*recto tramite*) to the superior next in rank. In the latter case, therefore, he would not be deprived of the privilege of exemption. This interpretation appears legitimate because the Code says, "under pretext," which indicates a pretended or feigned reason. One who has asked his superior for leave of departure and has been denied permission, cannot be said to act "under pretext." Besides religious are not denied the right of seeking redress and defending themselves against injustice. The Code says "*extra domum,*" which, according to the Council of Trent, means monastery or convent. A monastery or convent is the habitual domicile of a religious, even though he may be absent from it frequently for the purpose of giving missions, lecturing, preaching, etc. Nay even our *expositi* are not unlawfully absent from the religious house, although they may not be said to have their domicile in the convent. Another case was solved by Benedict XIV concerning missionaries in England.[11] He says that if they had to live in private homes, these would be considered as their religious houses, and if they illegally absented themselves from them, they could be punished. But if religious are cast out of their houses by force — as was lately done in France — and cannot come together elsewhere to lead a common life, their tempo-

11 "*Apostolicum ministerium,*" May 30, 1753, § 15.

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rary lodgment would not be looked upon as a convent.[12]

How long illegitimate absence must last before a religious forfeits the privilege of exemption, is not stated in the Code. A decretal of Martin IV, which is referred to in a note of Cardinal Gasparri's edition, seems to fix fifteen days as the length of a presumed illegitimate absence.[13]

§ 2 mentions another case[14] in which regulars are liable to be punished by the Ordinary, *viz.*, if they commit a *crime outside their house*. The *crime* must be a real crime, that is, a public or scandalous transgression of the law made notorious by the fact of being witnessed by others. It is also generally presumed that it must be committed in daylight, and outside the religious house; if committed in church, or anywhere outside the monastic enclosure, the offender is liable to punishment. Note well that in this paragraph the legislator supposes that the absence is legitimate. Hence whether one is an *expositus*, or absent on a lawful errand, is immaterial in case of crime, as described above.

But the Ordinary may proceed only after the *superior* of the delinquent religious has been warned and failed to proceed within fifteen days from the date of warning. The superior must notify the Ordinary of the punishment inflicted.[15] All this must be observed, even if the religious has returned to his house or convent.

Can. 617

§ 1. Si in regularium aliorumve religiosorum exemptorum domibus eorumve ecclesiis abusus irrep-

12 S. C. C., Sept. 4, 1875; S. Poenit., Sept. 12, 1872; Piatus M., I, 3091.

13 C. 1, Extrav. Comm., III, 8.

14 *Trid.*, sess. 6, c. 3, de ref.; sess. 7, c. 14 de ref.; sess. 25, c. 14, de reg.

15 Cfr. Piatus M., II, p. 74 f.

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serint, et Superior monitus prospicere neglexerit, Ordinarius loci obligatione tenetur rem ad Sedem Apostolicam statim deferendi.

§ 2. Domus autem non formata manet sub peculiari vigilantia Ordinarii loci, qui, si abusus irrepserint et fidelibus scandalo fuerint, ipse per se potest interim providere.

1. If abuses have crept into the houses or churches of regulars or of other exempt religious, and the superior, having been warned of the fact, neglects to provide a remedy, the local Ordinary is bound to refer the matter immediately to the Apostolic See.

§ 2. Every house in which there are less than six members, remains under the special vigilance of the local Ordinary, who, if abuses arise and become a source of scandal, can himself provisionally deal with them.

The first paragraph of this canon is entirely new, and we daresay, not exactly in keeping with the privilege of exemption, because the Ordinary is set up as a sort ot policeman over exempt monasteries. The second section recalls the regulations which emanated under Urban VIII, decree June 21, 1625, and Innocent X, "*Instaurandae*," Oct. 15, 1652, "*Ut in parvis*," Feb. 10, 1654. But the Code cannot be supposed to wish to contradict the constitution of Leo XIII, "*Romanos Pontifices*," May 5, 1881, which grants exemption even to smaller houses of regulars.

RELIGIOUS CONGREGATIONS

CAN. 618

§ 1. Religiones votorum simplicium exemptionis privilegio non gaudent, nisi specialiter eisdem fuerit concessum.

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§ 2. In religionibus tamen iuris pontificii Ordinario loci non licet:

1.° Constitutiones ullatenus immutare aut de re oeconomica cognoscere, salvo praescripto can. 533–535;

2.° Sese ingerere in regimen internum ac disciplinam, exceptis casibus in iure expressis; nihilominus in religionibus laicalibus ipse potest ac debet inquirere num disciplina ad constitutionum normam vigeat, num quid sana doctrina morumve probitas detrimenti ceperit, num contra clausuram peccatum sit, num Sacramenta aequa stataque frequentia suscipiantur; et, si Superiores de gravibus forte abusibus admoniti opportune non providerint, ipse per se consulat; si qua tamen maioris momenti occurrant, quae moram non patiantur, decernat statim; decretum vero ad Sanctam Sedem deferat.

§ 1. Institutes with simple vows *do not enjoy the privilege of exemption,* unless it has been specially granted to them, as was done in the case of the Passionists, Redemptorists, and some others.

§ 2. As regards institutes approved by the Holy See, the local *Ordinary* may not:

1.° Make any change in the constitutions or enquire into the temporal administration, saving the dispositions of canons 533–535;

2.° Interfere in the internal government and discipline, except in the cases expressed by law; nevertheless, in regard to *lay religious,* he can and must enquire:

a) Whether the discipline is maintained according to the constitutions;

b) Whether sound doctrine and good morals have suffered in any way (through Modernism or other heretical tendencies);

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c) Whether there have been breaches of the law of enclosure;

d) Whether the Sacraments are duly and regularly frequented;

e) If superiors having been warned of the existence of grave abuses, have failed duly to remedy them, the Ordinary himself shall *provide;* if, however, something of greater importance, which will suffer no delay occur, he shall *decide* at once, and report his decision to the Holy See.

The "*Conditae*" of Leo XIII, from which these rules are taken, furthermore says that the Ordinary is not allowed to limit or modify the authority granted to religious superiors by their constitutions; that the appointment to offices and charges belongs to the chapter and council of each house, but that the Ordinary himself or his delegate may preside at the chapters which make such appointments. The enclosure, called episcopal, is under the supervision of the bishop. As to the Sacraments, the Ordinary must see to it that they are administered according to the laws of the Church. These congregations are also subject to the Ordinary in whatever regards censures, reserved cases, dispensations from vows not reserved to the Pope, dispensations from general laws, as far as the Ordinary can dispense therefrom, and also with respect to public prayers (cf. can. 612). Abuses may creep into the management of schools, hospitals, asylums, especially concerning debts and buildings, the treatment of inmates, pronounced favoritism, indiscriminate communication with persons of the other sex, etc. If the abuse be a serious one, the Ordinary ought to gather written information, if possible supported by affidavits, and then draw the attention of the superior to the matter and give him time to correct the evil. If after some time no

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result appears, the Ordinary may summon the superior and threaten ecclesiastical punishment, including censures. All matters of greater importance must subsequently be reported to Rome. This report must embody the testimony of reliable witnesses who are ready to make oath to the facts they assert. Of course, in case of grave scandal, the Ordinary can punish the delinquent immediately, even by removal, if necessary. Note the terms *provide* and *decide;* the former is paternal and non-judiciary, whilst the latter spells judicial or at least summary trial and sentence.

PUNISHMENTS

CAN. 619

In omnibus in quibus religiosi subsunt Ordinario loci, possunt ab eodem etiam poenis coerceri.

In all cases in which religious are subject to the local Ordinary, he may coerce them even by penalties.

There can no longer [16] be any dispute as to the power of the Ordinary to proceed according to the penal Code against all religious in cases in which they are subject to him. In order to render that power efficacious, various papal [17] constitutions had already decided that it included the infliction of censures. Exemption is not absolute, but relative, *i. e.,* it reaches only so far as the law grants it. The Ordinary's power of correction may be wielded not only at the time of the canonical visitation, but whenever religious make themselves guilty of transgressions which the law has expressly placed under the power of the Ordi-

16 Cfr. Piatus M., II, p. 8 ff.

17 Greg. XV, "*Inscrutabili,*" Feb. 5, 16, § 4, § 6; Innocent X, "*Cum sicut,*" May 14, 1648, § 4. No privilege can now be claimed against the common law, unless it be granted since the promulgation of the Code.

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nary. The latter, however, is not allowed to stretch the law.

DIOCESAN INDULTS

CAN. 620

Per indultum ab Ordinario loci legitime concessum, obligatio legis communis cessat quoque pro religiosis omnibus in dioecesi commorantibus, salvis votis et constitutionibus propriis cuiusvis religionis.

Every indult lawfully granted by the local Ordinary dispensing from the obligation of the common law, avails likewise for all religious living in the diocese, without prejudice to the vows and particular constitutions of their own institute.

With regard to this enactment consult can. 1245, which empowers Ordinaries to dispense from fast and abstinence in particular cases. This indult may be applied also to religious communities, as has been decided by the Holy Office, Dec. 20, 1871. There is but one restriction,— that of the *vow*. Thus the Minimi have a special vow of fasting, from which the superiors cannot dispense. Our Code adds: without prejudice to the *constitutions*, which might be interpreted as if the superiors could not use the episcopal indult whenever the constitutions prescribed a day of fast or abstinence. However, since the Ordinaries and superiors of exempt orders are by common law entitled to dispense in said cases (can. 1245, § 3), we believe that they may legally apply the power granted if the whole diocese is exempt from a restriction. Besides, the S. C. of Bishops and Regulars has declared that superiors of religious congregations may dispense in particular cases from the constitutions.[18]

18 March 2, 1894; Bachofen, *Comp. Iuris Reg.*, p. 383. Too rigorous an application of the constitutions when the whole diocese is

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Therefore, they too may apply the indult granted by the Ordinary in a particular case, especially since the dispensation is granted and all that is needed is to apply it. If there should be any scruple, especially in female communities, the Ordinary may be asked to dispense in their behalf, provided, of course, no special vow stands in the way.

BEGGING

CAN. 621

§ 1. Regulares, qui ex instituto mendicantes vocantur et sunt, eleemosynas in dioecesi, ubi religiosa domus est constituta, quaerere valent de sola Superiorum suorum licentia; extra dioecesim vero indigent praeterea licentia scripto data ab Ordinario loci in quo eleemosynas colligere cupiunt.

§ 2. Hanc licentiam Ordinarii locorum, praecipue dioecesium finitimarum, nisi gravibus et urgentibus de causis, ne denegent neve revocent, si religiosa domus ex mendicatione in sola dioecesi, in qua est constituta, vivere nullo modo possit.

The Council of Trent[19] did not favor begging, and doubtless it had good reasons for its sweeping prohibition. Yet subsequent papal constitutions[20] mitigated this somewhat harsh measure, or rather furnished an authentic, but extensive, interpretation of the Tridentine law. This interpretation safeguarded the right of *regulars who by their rule belong to the class of mendicant orders* to beg alms in the diocese in which their house is situated. All that is needed is the oral or written per-

dispensed and the supreme lawgiver allows the use of a dispensation, does not foster the spirit of willingness nor respect for the law.

19 Sess. 21, c. 7, de ref.

20 Pius V, "*Etsi mendicantium*," May 16, 1567; Clement XI, "*Exponi nobis*," July 8, 1717.

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mission of their superior, either local or higher. This is the law laid down in the first paragraph of our canon. However, if they wish to beg outside their own diocese, regulars must obtain the written leave of the Ordinary in whose diocese they wish to beg.

§ 2 admonishes the Ordinaries, especially of adjoining dioceses, not to refuse or withdraw the license allowing mendicant regulars to beg, except for weighty and urgent reasons, if the religious house cannot possibly subsist on the alms gathered in the diocese in which it is situated.

It is certain that, according to the rule of St. Francis and certain authentic declarations of the Holy See,[21] the begging must be done by the regulars themselves. The text would also seem to exclude begging by letter or other indirect means. This is borne out by our Code, which recalls the fact that the mendicants need only the permission of their superiors to beg. The Apostolic grant, which is a privilege granted to mendicants only, must be interpreted according to the old law (cf. can. 623).

NON-MENDICANT ORDERS AND CONGREGATIONS

CAN. 622

§ 1. Alii omnes religiosi Congregationum iuris pontificii, sine peculiari Sanctae Sedis privilegio, stipem petere prohibentur; quibus, si hoc privilegium impetraverint, opus erit praeterea licentia scripto data ab Ordinario loci, nisi aliter in ipso privilegio cautum fuerit.

§ 2. Religiosi Congregationum iuris dioecesani stipem quaeritare nequaquam possunt sine licentia scripto data tum ab Ordinario loci in quo sita est

21 *Const. cit.*

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eorum domus, tum ab Ordinario loci in quo stipem quaerere cupiunt.

§ 3. Religiosis, de quibus in §§ 1 et 2 huius canonis, Ordinarii locorum licentiam quaeritandae stipis ne concedant, praesertim ubi sunt conventus regularium nomine et re mendicantium, nisi sibi constet de vera domus vel pii operis necessitate, cui alio modo occurri nequeat; quod si necessitati provideri possit stipe quaerenda intra locum seu districtum vel dioecesim in qua iidem commorantur, ampliorem licentiam ne largiantur.

§ 4. Sine authentico et recenti rescripto Sacrae Congregationis pro Ecclesia Orientali, Ordinarii latini nec sinant orientalem ullum cuiusvis ordinis et dignitatis in proprio territorio pecuniam colligere, nec suum subditum in orientales dioeceses ad eundem finem mittant.

§ 1. The Code now passes to institutes which do *not belong to the class of mendicant orders, and to papal congregations.* These, it says, need a special indult from the Holy See in order to be allowed to collect alms. A special indult is one not included in the approval of the consituations, or at least not specifically mentioned in that approval.[22] Besides this papal indult, these institutes need the written permission of the local Ordinary, unless this is not required by reason of a special provision made in the papal indult. Hence the Ordinary in whose diocese they wish to beg, must be asked for his permission, and the granting of it as to time and place and persons depends entirely on his judgment.

§ 2. *Diocesan institutes* need the written permission of

22 In Latin the papal indult would contain the clause: *nulla requisita vel obtenta Ordinarii licentia,* or, *non obstante iure ordinarii de petenda licentia,* etc.

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the Ordinary of the diocese in which their house is located, as well as of that of the Ordinary in whose diocese they wish to beg.[23]

§ 3. Both kinds of religious mentioned (§§ 1 and 2) should not be permitted by the Ordinary to beg, unless the latter is convinced of the absolute neediness of the religious house and the necessity of their work. If the necessary means can be provided within their own place, or district, or diocese, no permission to go begging elsewhere is to be granted. The restriction made in this paragraph applies especially to dioceses in which there are convents of regulars who are in name and reality mendicants. This last clause is very just and based upon the old rules prohibiting a convent from being erected within about three hundred feet from a convent of mendicants.[24]

§ 4. Latin Ordinaries may never allow an *Oriental* of any order or dignity (patriarch, metropolitan, bishop, priest, religious of either sex) to collect alms in their dioceses without an authentic and recently issued rescript of the S. Congregation for the Oriental Church; nor should Latin Ordinaries send any collectors into Oriental dioceses. Authenticity is proved by the seal and signature of the S. C. for the Oriental Church; "recently issued" means not more than six months old. If a priest cannot show such a document, he should not be allowed to say Mass and should be publicly denounced.[25]

23 S. C. EE. et RR., *Singulari quidem*, March 27, 1896.

24 Cfr. Piatus M., II, p. 284.

25 Alexander VIII, *Alias emanavit*, Oct. 21, 1690; Clement XII, *Dudum*, March 26, 1736; S. C. Prop. Fide, June 1, 1912 (*A. Ap. S.*, IV, 532 ff.)

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CAN. 623

Non licet Superioribus stipem colligendam committere, nisi professis aetate animoque maturis, maxime si de mulieribus agatur, nunquam autem iis qui in studia adhuc incumbunt.

Superiors must not entrust the collection of alms to others than professed subjects of mature age and character, especially in the case of women, and never may students be so employed.[26]

CAN. 624

Quod vero attinet ad modum in quaeritanda stipe servandum et ad disciplinam a quaestuantibus custodiendam, religiosi utriusque sexus stare debent instructionibus a Sede Apostolica hac de re datis.

As to what concerns the method to be followed in seeking alms and the discipline to be observed by those who seek them, religious of both sexes must conform to the instructions given by the Holy See on this subject.

These instructions are:

(1) That there should always be two sent out seeking alms; only in case of strict necessity is it permitted to send one, and he or she must be of approved moral character.

(2) When begging outside the place where their convent is located, religious should lodge with the clergy or pious benefactors.

(3) They should not remain outside their convent longer than one month, if begging in their own diocese; and not longer than two months if in a strange diocese.

(4) When begging in the place where their convent is

[26] S. C. Rel., Nov. 21, 1908 (*A. Ap. S.*, I, 153 ff.)

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situated they are not allowed to remain out over night.

(5) They must conduct themselves humbly, modestly, and be clean in appearance, avoid places not suitable to their religious profession, and comply with their religious duties.

(6) Superiors are under strict obligation to make these instructions known to their subjects.

(7) If religious seeking alms do not conduct themselves properly, but give scandal, the Ordinary of the diocese may proceed against them according to law (cf. can. 616, § 2).

(8) Religious who go begging must carry with them the necessary permit, either from their superiors (cf. 621), or from both superior and Ordinary (if required according to can. 622) and be ready to show the same to the pastors and Ordinaries upon demand. The permission of the Ordinary is supposed to be valid until expressly revoked.[27]

PONTIFICAL RIGHTS OF ABBOTS

CAN. 625

Abbates regulares de regimine, legitime electi, debent intra tres menses ab electione benedictionem accipere ab Episcopo dioecesis in qua monasterium situm est; postquam vero benedictionem receperint, praeterquam potestate conferendi ordines ad normam can. 964, n. 1, fruuntur privilegiis de quibus in can. 325, excepto pileolo violaceo.

Lawfully elected abbots who actually govern a community must be blessed by the bishop in whose diocese the monastery is located, within three months from the

27 S. C. Rel., Nov. 21, 1908 (*A. Ap. S.*, I, 134 f.).

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date of election. After they have been blessed, they enjoy the power of conferring the tonsure and minor orders on those subject to them by virtue of the religious (at least simple) profession, and also, according to can. 325, the privilege of using pontificals, except the purple skullcap.

Concerning the right of pontificals some historical notes have been given in the section dealing with exemption. We add that formerly abbots had to ask the bishop three times for the blessing, and if he refused, they enjoyed their rights without the blessing.[28] Now the Code makes it imperative on all, even temporary abbots, who formerly (*e. g.*, in the Cassinese Congregation) did not receive it, to obtain the blessing. It follows that the bishop is obliged to impart it when requested. Should he demur, recourse may be had to the S. C. of Religious.

After an abbot has been duly blessed, he enjoys two rights in particular: he may *confer first tonsure and minor orders* and he may *pontificate*.

The first is plainly stated in can. 964, 1.° Three conditions are required for licit and valid ordination. The abbot must be blessed, he must be a priest, and the *ordinandus* must be his own subject. (a) He must be *blessed,* whether by the diocesan or another bishop is immaterial as to the validity of the orders to be conferred. No privilege shall any longer be granted in this matter.[29] (b) The abbot must himself be a *priest,* which is not only appropriate, but absolutely required. (c) The one who is to be tonsured[30] or promoted to minor orders must be the *abbot's own subject* by virtue of at least simple pro-

28 C. 1, X, I, 10.

29 Formerly an abbot, even though not blessed, could by an apostolic privilege, confer these orders; S. C. C., May 11, 1624; March 16, 1647 (Richter, *Trid.*, p. 199).

30 C. 3, 6°, V, 7 mentions tonsure only.

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fession. The once mooted question [31] whether ordination performed on one who is not subject to the abbot was only illicit, but not invalid, is now settled; it is invalid. A religious becomes subject by profession to that abbot in whose hands and name he makes profession, or rather for whose community he pronounces the vows. Therefore an Abbot President or the Abbot Primate can no longer confer minor orders on the members of the congregation or of the order, unless their faculties are renewed, or unless these were understood as privileges. But even in that latter sense, it would not seem safe to act on them.[32]

The second abbatial *privilege* is that of *pontificating, i. e.,* performing pontifical functions with throne and baldachino. Abbots may also wear a pectoral cross and a ring set with a precious stone, wherever they go. But the purple skullcap is not allowed them, except by indult. The Code does not limit the right of pontificating to a certain number of times, and hence the decree of Alexander VII, Sept. 27, 1659, is obsolete. However, as prelates *nullius* are allowed to pontificate only in their own territory (can. 325), the privilege of using pontificals seems to be restricted to their own churches, *viz.,* such as are fully incorporated with the order. Neither would it be in accordance with the Code if abbots would pontificate outside the diocese without the consent of the Ordinary of the other diocese, since can. 337 requires this even for bishops. Nor does the Code (see can. 625, as compared with can. 325) grant to abbots the right of consecrating churches and altars, otherwise it would not enumerate that power specifically under can. 325, § 2.[33]

31 Cfr. Bachofen, *Comp. Iuris Reg.*, p. 255 f.

32 Card. Gasparri refers to no decree of the S. C. EE. et RR., which had granted that faculty to the Abbot Primate and Abbots Presidents; but unless profession is explicitly made for the monastic congregation — not for the monastery — the text is against that privilege or faculty.

33 Cfr. can. 1147, § 1.

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CHAPTER III

OBLIGATIONS AND PRIVILEGES OF RELIGIOUS PROMOTED TO ECCLESIASTICAL DIGNITIES OR ADMINISTERING PARISHES

The laws laid down in the following chapter are partly new and partly taken from Leo XIII, "*Romanos Pontifices,*" May 8, 1881. History, as said elsewhere, testifies that monks were not found incapable of ruling a diocese or parish or even the whole church. Concerning parishes, the Decretals made it obligatory that a companion should be given to the pastor if possible.[1] But on account of the scarcity of fit members this rule was often neglected, and, in fact, by contrary custom, abolished. The Apostolic See thereupon set up the law (called "recent" by Benedict XIV) that regulars should not be appointed to pastoral charges without an apostolic dispensation.[2] However, it was always and is still understood that if a parish is *pleno iure* incorporated with a monastery, the latter can, without an indult, appoint one of its members to govern it, because such a parish has become a regular benefice.[3]

CAN. 626

§ 1. Religiosus nequit, sine Sedis Apostolicae auctoritate, ad dignitates, officia aut beneficia promoveri, quae cum statu religioso componi non possint.

1 C. 5, X, III, 35 says that ancient canons allowed the monks to be pastors.

2 "*Cum nuper,*" Nov. 8, 1751.

3 The principle stated above touched only secular benefices, *i. e.*, such offices as by original right were held by the secular clergy.

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§ 2. Legitime ab aliquo collegio electus, nequit electioni assentiri sine licentia Superioris.

§ 3. Si voto teneatur non acceptandi dignitates, specialis Romani Pontificis dispensatio est necessaria.

§ 1. No religious may, without the authority of the Apostolic See, be promoted to any dignity, office, or benefice which is incompatible with the religious state. To a *dignity* in the proper sense, *i. e.*, an ecclesiastical office which implies precedence, rank, and jurisdiction, if it be a secular office, a religious cannot be promoted without a dispensation. But the supreme pontificate and the episcopacy has never been, by law, barred to religious. Hence the dignities here intended must refer to cathedral chapters. The *vicar-generalship* may also be included, as this dignity, according to can. 367, is to be conferred on secular priests only, unless the government of the diocese is entrusted to a religious family. *Office* would comprise all the minor offices, such as canonicates, pastorships, or chaplaincies held by secular priests, and also benefices, though, as stated before, if a parish belongs to a religious family by decree of the S. C. of Religious, a religious may be appointed to it.[4] Besides, as seen from the chapter on pastors and assistants, religious may be appointed temporary pastors or substitutes. Whether religious may be appointed *diocesan consultors* seems doubtful, because can. 425 requires consultors to reside in or near the episcopal city. But religious are not excluded from the office of *synodal examiners,* provided, of course, they have the permission of the superior or are themselves superiors. Neither does the Code forbid religious who are pastors to be rural deans. The main reason for excluding them from these offices is the in-

4 Cfr. can. 432, 456.

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compatibility of the latter with the religious profession. Now where the Code does not explicitly state that the religious clergy is excluded, as is the case with the vicar-generalship, religious are capable of assuming offices which do not interfere with their profession. Hence a religious who is lawfully appointed pastor may also assume offices which are generally conferred on pastors.

§ 2. *One who is legally elected by an electoral college may consent to his election only with the permission of his superior,* as the Decretals [5] already stated. Hence a religious who would be elected superior for another monastery than his own, would need the special permission of his own superior. A general license to that effect is insufficient,[6] though if the electors had asked the superior before election to permit the choice of one of his subjects, this would suffice. An abbot who is elected bishop needs the consent of the Holy See for leaving his monastery.[7] Of course, here in this country this is of little practical value, since the Apostolic See, by freely appointing bishops is supposed to give its consent. For the rest, such cases are not frequent.

§ 3. If religious are bound by a vow not to accept ecclesiastical dignities (not mere offices), a special dispensation is required from the Roman Pontiff. This vow may be a religious vow, as the last class of the Jesuits pronounce, or a private conditional one. The Code makes no distinction.[8]

5 C. 27, 6°, I, 6. Neither is the superior obliged to ask the advice of his chapter or counsellors; *ibid.*, § 1.

6 Engel, I, 6 n. 44.

7 C. 36, 6°, I, 6.

8 Urban VIII, "*Honorum,*" Feb. 24, 1643, § 2. A vow is conditional if made dependently on the will of the superior; if made before profession, the superior may annul it afterwards; can. 1312, § 1.

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CAN. 627

§ 1. Religiosus, renuntiatus Cardinalis aut Episcopus sive residentialis sive titularis, manet religiosus, particeps privilegiorum suae religionis, votis ceterisque suae professionis obligationibus adstrictus, exceptis iis quas cum sua dignitate ipse prudenter iudicet componi non posse, salvo praescripto can. 628.

§ 2. Eximitur tamen a potestate Superiorum et, vi voti obedientiae, uni Romano Pontifici manet obnoxius.

A religious who is created cardinal or appointed bishop, either residential or titular, remains a religious with all the rights and obligations proper to his profession, but may exempt himself from such obligations as he deems incompatible with his dignity, without prejudice, however, to the rule laid down in can. 628.

He is also exempt from the jurisdiction of his superiors and by virtue of the vow of obedience becomes subject to the Roman Pontiff. Hence a religious thus promoted enjoys all the privileges and spiritual favors which his institute enjoys, and remains bound by the *obligations* proper to his state. He must observe the rule and the constitutions, as far as they do not conflict with his new dignity. This entails the observance of the fast and abstinence and the penances prescribed by the rule and constitutions. Whether these prescriptions are compatible with his dignity, the religious dignitary himself is allowed to judge.[9] As to the *Breviary* he must follow that of his diocese, and if another religious recites with him, he also may follow the bishop's breviary.[10] A Cistercian, we presume, would be obliged to add the Office of the

[9] Benedict XIII, "*Custodes,*" March 7, 1726; S. C. EE. et RR., May 6, 1864 (Bizzarri, *l. c.*, p. 712 ff.).

[10] S. Rit. C., June 11, 1605.

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Blessed Virgin, unless important occupations excused him. With regard to the *habit,* a religious dignitary has to wear the same as his religious brethren, as far as form and color are concerned,[11] but may have it trimmed with purple buttons. Canons regular and such as are especially privileged, may dress like secular bishops.

CAN. 628

Religiosus ad dignitatim episcopalem vel aliam extra propriam religionem evectus:

1.° Si per professionem dominium bonorum amiserit, bonorum, quae ipsi obveniunt, habet usum, usumfructum et administrationem; proprietatem vero Episcopus residentialis, Vicarius Apostolicus, Praefectus Apostolicus, acquirit dioecesi, vicariatui, praefecturae; ceteri, Ordini vel Sanctae Sedi, ad normam can. 582, salvo praescripto can. 239, § 1, n. 19;

2.° Si per professionem dominium bonorum non amiserit, bonorum quae habebat, recuperat usum, usumfructum et administrationem; quae postea ipsi obveniant, sibi plene acquirit;

3.° In utroque autem casu de bonis, quae ipsi obveniunt non intuitu personae, debet disponere secundum offerentium voluntatem.

A religious promoted to the episcopal or any other dignity outside of his institute must observe the *vow of poverty* as follows:

1. If he has lost the right of possessing property,—as is the case with solemnly professed religious — he retains the use, usufruct, and administration of all property that comes to him during his actual exercise of the dig-

11 Benedict XIII, "*Custodes*"; however, the Apostolic See may grant and has granted dispensation to wear the regular episcopal dress.

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nity, but the property itself belongs to the diocese, vicariate, or prefecture apostolic, if the religious is a residential bishop, vicar, or prefect apostolic. If he is none of these, the property belongs either to the order, if the latter is capable of possessing property, or to the Holy See, if it is a mendicant order. A titular bishop is therefore obliged to his monastery, or province or order, which may claim all his belongings after his death. However, Cardinals may bequeath their appurtenances to a church, or pious place, or religious community; otherwise they go to the pontifical sacristy, with the sole exception of the ring, pectoral cross, and reliquaries.[12]

2. A religious who has not lost the right of owning property by his profession, by promotion to a dignity regains the use, usufruct, and administration of all the property he possessed at the time of his profession; and what comes to him after his promotion, belongs to him as owner. In other words, he does not differ in this respect from a secular bishop.

3. However, a religious with solemn or simple vows, if promoted to a dignity, must use all donations that he receives according to the intention of the donor, unless they are intended for his own person.

ABDICATION

CAN. 629

§ 1. Dimisso cardinalatu vel episcopatu vel expleto munere extra religionem sibi a Sede Apostolica commisso, religiosus ad religionem redire tenetur.

§ 2. Potest tamen Cardinalis et Episcopus religiosus quamlibet suae religionis domum eligere in qua degat; sed caret voce activa et passiva.

12 Can. 239, § 1, 19; can. 1298, § 1.

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When a religious cardinal or bishop resigns or goes out of office, because his mission is discharged, for instance, as a legate or special envoy of the Holy See, he must return to his institute. If he has held the dignity of cardinal or bishop, he may choose any religious house for his home, but is not entitled to either an active or a passive voice. And this prohibition holds not only for the respective house, but for the whole institute.[13] Of course, if the religious dignitary is bound to return *ad penates,* his institute is bound to support him.[14]

RELIGIOUS AS PASTORS

Can. 630

§ 1. Religiosus, qui paroeciam regit sive titulo parochi sive titulo vicarii, manet adstrictus ad observationem votorum et constitutionum, quatenus haec observatio potest cum muneris sui officiis consistere.

§ 2. Quare, in iis quae ad religiosam disciplinam attinent, subest Superiori, cuius proinde est, et quidem privative respectu Ordinarii loci, in eius agendi rationem circa haec omnia inquirere eumque, si casus ferat, corrigere.

§ 3. Bona quae ipsi obveniunt intuitu paroeciae cui praeficitur, ipsi paroeciae acquirit; cetera acquirit ad instar aliorum religiosorum.

§ 4. Non obstante voto paupertatis, eidem licet eleemosynas in bonum paroecianorum, vel pro scholis catholicis aut locis piis paroeciae coniunctis, quovis modo oblatas accipere aut colligere, et acceptas sive collectas administrare, itemque, servata offerentium voluntate, pro prudenti suo arbitrio, erogare, salva semper vigilantia sui Superioris; sed eleemosynas pro

13 Paul IV, "*In sacra,*" July 19, 1559, § 2.

14 S. C. C., Sept. 25, 1858.

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ecclesia paroeciali aedificanda, conservanda, instauranda, exornanda accipere, apud se retinere, colligere aut administrare pertinet ad Superiores, si ecclesia sit communitatis religiosae; secus ad loci Ordinarium.

§ 1. A religious who governs a parish, either as pastor or as vicar, remains bound by the vows and the constitutions in so far as compatible with his office.

§ 2. Therefore, as to religious discipline, he is responsible, not to the Ordinary, but to his superior, who may inquire into his conduct and correct him, if necessary.

§ 3. Property intended for the parish belongs to the parish; all else is acquired for his religious brethren.

§ 4. Notwithstanding the vow of poverty, he may collect and receive alms for the benefit of his parishioners, of Catholic schools and pious institutions connected with the parish, and administer and distribute such alms according to his own judgment and the intention of the giver, under the supervision, however, of the superior. But to receive, retain, collect, and administer alms intended for the building, maintenance, restoration, and ornamentation of the parochial church appertains to the religious superiors if the church belongs to the religious community; otherwise to the Ordinary.

This last clause of § 4 seems impractical, and, in many cases, we fear, will prove unfeasible. Besides, it would throw an unbearable burden on religious superiors who have many parochial churches. Furthermore it may cause troubles with regard to trustees and parishioners, who are entitled to know how the money is spent. Lastly, can. 533, § 1, n. 4, requires a separate account for parish money and religious money. All this would seem to demand a host of officials in the convent itself.

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It is an entirely new regulation which has yet to stand the test of experience.

THEIR RELATION TO THE ORDINARY

CAN. 631

§ 1. Idem parochus vel vicarius religiosus, licet ministerium exerceat in domo seu loco ubi maiores Superiores religiosi ordinariam sedem habent, subest immediate omnimodae iurisdictioni, visitationi et correctioni Ordinarii loci, non secus ac parochi saeculares, regulari observantia unice excepta.

§ 2. Ordinarius loci, ubi eum suo muneri defecisse compererit, opportuna decreta condere ac meritas in eum poenas statuere potest; in quo nihilominus Ordinarii facultates minime privativae sunt, sed Superior ius cumulativum cum ipso habet, ita tamen ut, si aliter a Superiore, aliter ab Ordinario decerni contingat, decretum Ordinarii praevalere debeat.

§ 3. Quod attinet ad parochi vel vicarii religiosi remotionem e paroecia, servetur praescriptum can. 454, § 5; et quod ad bona temporalia, praescriptum can. 533, § 1, n. 4, et can. 535, § 3, n. 2.

§ 1. Religious pastors or assistants, although exercising the sacred ministry in the house or place where the higher superiors of the institute have their habitual residence, are immediately subject, in all matters concerning their pastoral charge, to the jurisdiction, visitation, and correction of the Ordinary of the diocese, just like secular pastors, with the sole exception of the regular discipline.

§ 2. If a religious pastor or vicar neglects his duties, the Ordinary of the diocese may issue opportune orders and inflict merited penalties. However, he may not pro-

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ceed by himself alone, but must proceed in union with the religious superior; if the decisions of the latter conflict with those of the Ordinary, the latter's decree must prevail.

§ 3. Concerning the removal of a religious pastor or assistant, can. 454, § 5, must be observed, and as to the temporalities, can. 533, § 1, n. 4, and can. 535, § 3, n. 2.

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TITLE XIV

TRANSFER TO ANOTHER RELIGIOUS INSTITUTE

(*Transitus ad aliam Religionem*)

CAN. 632

Religiosus nequit ad aliam religionem, etiam strictiorem, vel e monasterio sui iuris ad aliud transire sine auctoritate Apostolicae Sedis.

No religious can, without authorization from the Holy See, pass to another institute, even stricter, or from one independent monastery to another.

This is now the general rule, based partly on the old law. For the rest, this whole Title is entirely new, as the lack of quotations in Card. Gasparri's edition plainly indicates. Hence the commentator, according to can. 6, must interpret the law according to the wording of the text itself, and only where a doubt arises, may he resort to the old law.

The Council of Trent [1] forbade the passing of religious from a stricter to a laxer order. A laxer order or congregation was one which prescribed fewer external austerities (fasting, abstinence, vigils, silence, labor). The Carthusians were and are looked upon as the strictest. A transition to a stricter order, if done from zeal to lead a more perfect life, and with the permission of the superior, could formerly be effected without the interposition of the Apostolic See.[2] Now, however, no change is al-

1 Sess. 25, c. 19 de reg.

2 C. 5, X, III, 31.

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lowed without papal permission. Note the term *religio,* which means a society of religious distinct from others, whether an order or a religious congregation. Thus no one is allowed to pass from the Benedictine to the Franciscan order, or from the Sacred Heart Sisters to those of St. Joseph, or from one *autonomous monastery* to another of the same institute. Autonomous monasteries are complete juridical entities, and religious generally make the profession for the monastery, not for the order or congregation. The vow of stability is clearly emphasized. A Jesuit may therefore transfer himself from one province to another, but a Benedictine or Cistercian may not even change his monastery without papal permission. Of course transfer is here understood as implying transfer of the vows made for one monastery to another independent monastery. A temporary though protracted transfer for reason of studies (can. 606), or help, or removing occasions of sin (can. 661, § 2), needs no Apostolic indult. Here again we must add that the faculties formerly granted to the Abbot Primate and abbot presidents are no longer valid. Furthermore, it must be noted that the text, by using the term *religio,* includes diocesan institutes.

CAN. 633

§ 1. Transiens ad aliam religionem novitiatum peragere debet; quo durante, manentibus votis, iura et obligationes particulares, quas in religione derelicta habuit, suspensa manent, et ipse obligatione tenetur Superioribus novae religionis et ipsi novitiorum Magistro parendi etiam ratione voti obedientiae.

§ 2. Si in religione ad quam transiit, professionem non edat, ad pristinam religionem redire debet, nisi interim votorum tempus exspiraverit.

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§ 3. Transiens ad aliud monasterium eiusdem Ordinis nec novitiatum peragit nec novam emittit professionem.

§ 1. He who passes to *another institute,* must make a novitiate, during which the vows remain intact, while the rights and particular obligations which he had in the former institute are suspended, and he is bound to obey the superior of his new institute and the master of novices even by virtue of the vow of obedience. This is the substance of § 1; but what, for instance, if a member of the Minimi, with his vow of perpetual abstinence and fast, enters a less strict order? The text says that "the vows remain intact." We believe, however, that, since the *transiens* has obtained permission from the Holy See, the latter included a dispensation from, or rather suspension of, the obligation of the particular vow, until the novice has made profession. The vows mentioned are chiefly the three principal vows of the religious state. Vows privately made in the former institute may be declared invalid or not binding by the lawful superior of the new institute.[3]

§ 2. If he does not make profession in the new institute, he must return to his old one, unless the term of his vows expire in the interval. The latter clause, of course, holds only in the case of temporary profession; hence, in orders with triennial vows before the solemn vows, and in religious congregations where annual vows are made for a certain term before the perpetual vows are taken. Should the time of temporary profession not have elapsed when he would have to return, he must go back to the former institute, or ask for a rescript of exclaustration until his time expires.

[3] Can. 1312 f.

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§ 3. He who passes to another monastery of the same order makes neither a new novitiate nor a new profession. Note the term *order,* because the text evidently refers to such monasteries as are autonomous (*sui iuris*), and to monastic congregations of the same order. Generally, a retreat of some days is prescribed before incorporation in the new monastery or congregation. Therefore a change from one monastic congregation to another only requires a papal indult, but no new novitiate or new profession is necessary, no matter how different the discipline may be.

CAN. 634

Sollemniter professus aut professus a votis simplicibus perpetuis, si transierit ad aliam religionem cum votis sollemnibus vel simplicibus perpetuis, post novitiatum, praetermissa professione temporaria, de qua in can. 574, vel admittatur ad professionem sollemnem aut simplicem perpetuam, vel ad pristinam redeat religionem; ius tamen est Superiori eum probandi diutius, sed non ultra annum ab expleto novitiatu.

If a person who has made profession of solemn or of simple perpetual vows joins another institute with solemn vows or with simple perpetual vows, he must, after the novitiate, omit the temporary profession spoken of in can. 574, and make profession of solemn vows or of simple perpetual vows, according to the institute, or he must return to the former institute. The Superior, however, has the right to prolong the period of probation, but not beyond one year after the completion of the novitiate.

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CAN. 635

Transeuntes ad aliud monasterium eiusdem religionis a die transitus, ad aliam vero religionem ab edita nova professione:

1.° Amittunt omnia iura et obligationes prioris religionis vel monasterii et alterius iura et officia suscipiunt;

2.° Religio vel monasterium *a quo* bona servat, quae ipsius religiosi ratione iam ei quaesita fuerunt; quod spectat ad dotem eiusve fructus et alia bona personalia, si qua habeat religiosus, servandum praescriptum, can. 551, § 2; demum nova religio ius habet pro novitiatus tempore ad iustam retributionem, si eidem locus sit ad normam can. 570, § 1.

Those who pass to another monastery of the same institute, from the day of transition, but if to another institute, from the day of their new profession:

1.° Lose all the rights and obligations of their former institute or monastery and assume all the rights and duties of their new institute or monastery;

2.° Abdicate, in favor of the monastery or institute which they leave, the *property* that they may have acquired as religious; thus all books, chattels, donations or legacies already received and appropriated by the former institute or monastery belong to it. As to the *dowry* and its interest and other personal property of the religious, if he had such, only the interest of the dowry due during the novitiate goes to the new institute during the term of the novitiate, whereas the dowry itself passes to the new institute only after profession. If a Sister passes from one convent of the same institute to another, her entire dowry passes to the latter on the day of her transfer. Besides, if the constitutions or mutual agree-

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ment permit compensation for board and habit, the same must be made for the time of the novitiate.

Personal belongings are manuscripts, works of art, devotional articles, clothing. These go with the person. Besides, any fortune or inheritance falling to the religious after the day of his passing from one monastery to another of the same order, or from the day of profession in a new institute, belongs to the latter. Hence title deeds, notes, etc., not cashed or used, must be handed over by the former institute or house to the latter.

As to the *dowry,* a distinction was formerly made. If the monastery or institute from which a transfer was made, was the cause of the religious taking leave, it was bound to restore the full dowry; but if no cause or fault could be charged, it was only bound to a certain amount of pro rata support.[4]

As to § 1 it may not be amiss to observe the following: since the Code simply states that the rights and duties of the new monastery are assumed, it is evident that no restriction as to these rights can be validly made as a quasi-condition of admittance, if for instance active and passive voice should be surrendered. Besides the Code makes no reference to rule or constitutions, and therefore should these permit such restrictions, they are simply out of force.

CAN. 636

Sollemnitas votorum in eo qui legitime secundum superiores canones vota simplicia in Congregatione religiosa nuncupat, eo ipso exstinguitur, nisi aliud in apostolico indulto expresse caveatur.

The solemnity of the vows of one who, according to the foregoing canons, lawfully makes profession of sim-

4 S. C. EE. et RR., May 30, 1856 (Bizzarri, p. 645 ff.).

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ple vows in a religious congregation, is by that fact abolished, except an apostolic indult expressly determines otherwise. In the light of this canon we believe the interpretation given above of can. 633, § 1, is completely justified.

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TITLE XV

LEAVING THE RELIGIOUS STATE

By leaving the religious state is meant either a lawful or an illicit breaking of the juridical bond by which one is connected with a religious institute, which one entered by profession. Profession, as we have seen, may be either temporary or perpetual, and its effects vary, especially if perpetual profession is at the same time solemn. One may leave the religious state in a perfectly lawful way, or he may forsake it unlawfully. Of all these points our Code treats, beginning with the most lawful one, *i. e.*, by the cessation of the obligation incurred by *temporary profession.*

CAN. 637

Professus a votis temporariis, expleto votorum tempore, libere potest religionem deserere; pariter religio ob iustas ac rationabiles causas eundem potest a renovandis votis temporariis vel ab emittenda professione perpetua excludere, non tamen ratione infirmitatis, nisi certo probetur eam ante professionem fuisse dolose reticitam aut dissimulatam.

One who has made profession of temporary vows may, when the term of the vows has expired, freely leave the institute; likewise, the institute, for just and reasonable motives, can exclude a religious from renewing the temporary vows or from making profession of perpetual vows; not, however, because of ill-health, except it be

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clearly proved that the religious had fraudulently hidden or dissimulated the illness before profession.

From this text it again appears that temporary profession, whether triennial or annual, may truly be called a protracted novitiate; otherwise a religious could not leave the institute after his term has expired. Formerly, *i. e.*, up to a few years ago, such a conception of the simple profession never occurred to anyone. What is said in the second clause concerning the *institute* itself, that it may refuse to admit a religious to solemn or perpetual vows, is based on the same idea. Non-admittance is only a milder form of telling a religious to break off his relations. But as the vow is not yet solved, the legislator requires *reasons*. Such would be palpable signs of the lack of a religious vocation, mental debility, protracted absence from the services of the community, etc. *Infirmity* or ill-health is not considered a lawful reason. A decision of the S. C. of Bishops and Regulars [1] says that if a sickly disposition should have existed prior to profession, this would be no reason for exclusion; but if the religious himself concealed the state of his health by fraudulent testimonies of a physician, or by his own assertions, this would be a sufficient ground for not admitting him to solemn or perpetual profession. A physician's testimony, accompanied by an affidavit to the effect that the religious had deceived the institution by his assertions, would be legal proof, as would also be the testimony of two witnesses in whose presence the religious before his first profession asserted that he was in good health if it can be proved by a physician's sworn certificate that the illness existed before he entered; for in such a case deceit or fraud is evident. To conceal the true condition of one's health is a merely negative act,

[1] May 13, 1904, O. S. B. (*A. S. S.*, XXXVII, 445).

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whilst to dissimulate it means to use positive means to hide the truth. Both have the same effect, *viz.*, to deceive.

A question may here be asked: A cleric had made profession, Aug. 15, 1915, therefore previously to May 19, 1918, and his vows were considered perpetual on his part. On Aug. 15, 1918, his simple vows would expire. May he apply our canon in his case and leave the religious state? We believe the affirmative answer would be upheld by the Roman Court. For not only did it look upon these simple vows as strictly triennial for at least a few years prior to the Code, which we know from personal experience, but the authentic answers given to several questions lead to that assumption. Thus the answer to the question concerning *sponsalia* and other impediments contracted before the new Code went into force was that betrothal and other impediments already contracted and to be contracted were to be treated according to the existing law.

SECULARIZATION

CAN. 638

Indultum manendi extra claustra, sive temporarium, idest indultum *exclaustrationis,* sive perpetuum, idest indultum *saecularizationis,* sola Sedes Apostolica in religionibus iuris pontificii dare potest; in religionibus iuris dioecesani etiam loci Ordinarius.

The Apostolic See alone can grant an indult, either for temporary absence or perpetual secularization, to members of papal institutes; whilst the Ordinary of the diocese may grant such an indult to members of diocesan institutes.

Temporary absence is called *exclaustratio,* or some-

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times *sæcularisatio ad tempus, i. e.,* permission to stay outside the monastery for one or three years, after the expiration of which the religious could apply for perpetual secularization. Now he may get the latter at once, but he must clearly state in his petition what he wishes. If he is a priest or cleric in higher orders, he must send in the documents of his superior with another from an Ordinary who is willing to receive him into his diocese. Both must be sent to the S. C. of Religious. The reasons for the request (ill-health, necessary support of parents, mental depression, unjust treatment, etc.) must be stated in the petition.

Can. 639

Qui indultum exclaustrationis ab Apostolica Sede impetravit, votis ceterisque suae professionis obligationibus, quae cum suo statu componi possunt, manet obstrictus; exteriorem tamen debet habitus religiosi formam deponere; perdurante tempore indulti caret voce activa et passiva, sed gaudet privilegiis mere spiritualibus suae religionis, et Ordinario territorii ubi commoratur, loco Superiorum propriae religionis, subditui etiam ratione voti obedientiae.

Whoever has obtained from the Holy See the indult of *exclaustration,* remains bound by his vows and the other obligations of his profession compatible with his state. There is no dispensation granted from the observance of the vows, whereas other obligations imposed by the rule or constitutions, for instance, concerning fast and abstinence, discipline or scourging, and other penances, may be dispensed with. As to the habit, the text says that it must not be worn exteriorly, hence an interior sign of it, as, for instance, a small-sized scapular or girdle, is

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not forbidden. As long as the indult lasts the religious has no right to either an active or a passive voice in the institute, and hence could not be lawfully elected to an office without a dispensation. But he enjoys the spiritual favors granted to his institute, especially the indulgences to be gained on certain feast days. Lastly, instead of to the superior, he is subject to the Ordinary of the diocese in which he lives, by virtue of the vow of obedience. Concerning poverty it may be added that he is allowed as much as he needs for his support, but whatever he acquires belongs to the institute. If he wishes to return, the institute must receive him without a new novitiate.

SECULARIZATION PROPER

CAN. 640

§ 1. Qui, impetrato saecularizationis indulto, religionem relinquit:

1.° A sua religione separatur, habitus eiusdem exteriorem formam debet deponere, et in Missa et horis canonicis, in usu et dispensatione Sacramentorum saecularibus assimilatur;

2.° A votis liberatus manet, firmis oneribus ordini maiori adnexis, si in sacris fuerit; non tenetur obligatione horas canonicas vi professionis recitandi nec aliis regulis et constitutionibus adstringitur.

§ 2. Si ex apostolico indulto in religionem rursus recipiatur, novitiatum ac professionem instaurat et locum inter professos obtinet a die novae professionis.

§ 1. When a professed religious, having obtained an indult of secularization, leaves his institute:

1.° He is cut off from his institute and must lay aside the religious habit and, as to Mass and canonical hours, is likened to seculars;

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2.° He is freed from his vows, without prejudice to the obligations attaching to major orders, if he has received them; he is not obliged to the recitation of the canonical hours by virtue of his profession, nor is he bound by other rules and constitutions.

§ 2. If, by virtue of an apostolic indult, he is received again into the institute, he must make a new novitiate and profession, and his place amongst the professed members must be reckoned from the day of his new profession.

All this is new legislation and applies to religious of both sexes. Since a complete separation takes place by secularization, the mutual obligations between the institute and the individual religious cease, as do also the rights. Therefore new by-laws to that effect should be set up in conformity with the Code, especially concerning property and claims to compensation. What the text says concerning the Missal touches especially the Dominicans, who follow a somewhat different way in saying Mass. The rule concerning canonical hours affects all who have a Breviary different from that used by the secular clergy. The vows are now — this is an innovation — completely dissolved for all secularized religious not in higher orders. There is no longer an obligation to observe celibacy or to recite the Breviary, except, of course, when the discharged member is in higher orders.

INCARDINATION VS. SECULARIZATION

CAN. 641

§ 1. Si religiosus in sacris constitutus propriam dioecesim ad normam can. 585 non amiserit, debet, non renovatis votis, vel obtento saecularizationis indulto, ad propriam redire dioecesim et a proprio Ordi-

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nario recipi; si amiserit, nequit extra religionem sacros ordines exercere, donec Episcopum benevolum receptorem invenerit, aut Sedes Apostolica aliter proviserit.

§ 2. Episcopus religiosum recipere potest sive pure et simpliciter, sive pro experimento ad triennium: in priore casu religiosus eo ipso est dioecesi incardinatus; in altero, Episcopus potest probationis tempus prorogare, non ultra tamen aliud triennium; quo etiam transacto, religiosus, nisi antea dimissus fuerit, ipso facto dioecesi incardinatus manet.

§ 1. A religious in higher orders, who, having made only temporary vows, has not been excardinated from his own diocese, must return to that diocese and be received by his Ordinary, in case he has not renewed his temporary vows or obtained an indult of secularization. If, having made perpetual vows, he has been excardinated, he may not exercise the sacred orders outside his institute until a benevolent Ordinary receives him into his diocese or the Apostolic See otherwise provides for him.

The last sentence is taken from "*Auctis Admodum,*" Nov. 4, 1892, which also threatens the penalty of suspension for those who leave the monastery before having been received into a diocese or otherwise provided with a sufficient patrimony. However, this penalty is not mentioned in the Code and therefore abolished. But the condition of having first found a bishop remains, unless the Apostolic See makes different provision in its indult, as it sometimes does when the secularized religious has a sufficient patrimony and therefore need not resort to means unbecoming to his state.

§ 2. The bishop may receive a secularized religious

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either unconditionally or on trial. If unconditionally, the religious is by that fact incardinated in the diocese; if on trial for three years, the trial may be protracted for three years more, hence the whole term of trial may last six years, but no longer; at the expiration of that term the religious becomes *ipso facto* incardinated, unless he was dismissed before.

This law is very opportune and does away with the uncertainties apt to befall secularized religious. However, it is a new law which went into effect May 19, 1918, and is not retroactive. A bishop may now give a secularized religious a three or six years' trial and after that the religious is *ipso facto* incardinated, unless the bishop previously dismisses him from the diocese.

SECULARIZED RELIGIOUS PROHIBITED FROM HOLDING CERTAIN OFFICES

CAN. 642

§ 1. Quilibet professus, ad saeculum regressus, licet valeat, ad normam can. 641, sacros ordines exercere, prohibetur tamen sine novo et speciali Sanctae Sedis indulto:

1.° Quolibet beneficio in basilicis maioribus vel minoribus, et in ecclesiis cathedralibus;

2.° Quolibet magisterio et officio in Seminariis maioribus et minoribus seu collegiis, in quibus clerici educantur, itemque in Universitatibus et Institutis, quae privilegio apostolico gaudent conferendi gradus academicos;

3.° Quocunque officio vel munere in Curiis episcopalibus et in religiosis domibus sive virorum sive mulierum, etiamsi agatur de Congregationibus dioecesanis.

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§ 2. Haec valent quoque de iis qui vota temporaria, vel iuramentum perseverantiae, vel peculiares quasdam promissiones ad normam suarum constitutionum ediderunt et ab eisdem dispensati fuerunt, si per sex integros annos eisdem ligati fuerint.

§ 1. A professed who leaves his institute may exercise the sacred orders in accordance with can. 641, but unless he receives a new and special indult to that effect from the Holy See:

1.° He may not hold any ecclesiastical benefice in a major or minor basilica or cathedral. This means that no canonicate or prebend of any kind can be given to him. If benefice is taken as synonymous with *office,* a secularized religious is also debarred from the offices of pastor or assistant at a cathedral church. However, *salvo meliori iudicio,* since penalties are odious, we believe that *benefice* must be taken in the strict sense, and excludes our cathedral churches, though it must be confessed that the intention of the law would also affect cathedral churches of our country.

2.° He is not allowed to accept the office of teacher or official in clerical seminaries, higher or lower (petit seminaries) in which clergymen are educated or in Catholic universities or institutions endowed with the right of conferring academic degrees (*e. g.,* the Catholic University of America, St. Vincent's Seminary, Beatty, Pa.).

3.° Neither may he hold any office or charge in an episcopal court (chancellor, examiner, etc.), or in religious houses of men or women (as confessor or chaplain), although these may be diocesan institutions.

§ 2. These regulations apply also to those who pronounced only temporary vows, or took the oath of perseverance, or made other promises according to their con-

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stitutions, if they are dispensed from them, provided, however, that they have lived under these obligations for a period of at least six years. From this it follows that a novice who left his institute before making his profession, or after his temporary profession expired, does not fall under these rather severe restrictions.[2] For the latter was not dispensed, but free to leave (can. 637), whilst a novice needed no dispensation, had taken no vows and made no promises. Wherefore the beginning of § 1, "*Quilibet professus, ad saeculum regressus,*" although somewhat general, must be interpreted according to § 2.

COMPENSATION

CAN. 643

§ 1. Qui e religione, expleto votorum temporariorum tempore aut obtento saecularizationis indulto, egrediantur vel ex eadem fuerint dimissi, nihil possunt repetere ob quamlibet operam religioni praestitam.

§ 2. Si tamen religiosa sine dote recepta fuerit nec ex propriis bonis sibimet providere valeat, religio ex caritate eidem dare debet ea quae requiruntur ut modo tuto ac convenienti domum redeat, ac providere ut, naturali aequitate servata, per aliquod tempus, mutuo consensu vel in casu dissensus ab Ordinario loci determinandum, honeste vivere possit.

§ 1. Whoever leaves his institute, whether at the expiration of the term of temporary vows or by virtue of an indult of secularization, or whoever has been dismissed, cannot seek compensation for the services rendered by him to the institute.

§ 2. In the case of a female religious who has been re-

2 The S. C. Rel. (June 15, 1909) made these regulations to protect the religious state.

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ceived without a dowry and cannot provide for herself out of her own resources, the institute should, in charity give her what is necessary for her to return safely and becomingly to her home, and provide her for a certain period with the means, to be determined by mutual agreement or, in case of disagreement, by the local Ordinary, of an honest livelihood in accordance with natural equity. Natural equity must take into consideration the usefulness of the member as well as the material condition in which she finds herself at the moment of leaving. Note the phrase, "*ex caritate*," as an act of charity, not justice. Hence a member will appeal in vain to the civil court if this canon is properly incorporated in the by-laws.[3]

APOSTATES AND FUGITIVES

CAN. 644

§ 1. Apostata a religione dicitur professus a votis perpetuis sive sollemnibus sive simplicibus qui e domo religiosa illegitime egreditur cum animo non redeundi, vel qui, etsi legitime egressus, non redit eo animo ut religiosae obedientiae sese subtrahat.

§ 2. Malitiosus animus, de quo in § 1, iure praesumitur, si religiosus intra mensem nec reversus fuerit nec Superiori animum redeundi manifestaverit.

§ 3. Fugitivus est qui, sine Superiorum licentia, domum religiosam deserit cum animo ad religionem redeundi.

§ 1. An apostate from religion is one who, having made profession of perpetual vows, whether solemn or simple, unlawfully leaves the religious house with the

3 Cfr. Zollmann, *American Civil Church Law*, p. 80 ff.

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intention of not returning or who, with the intention of withdrawing himself from religious obedience, though he has lawfully left the house, does not return to it.

§ 2. The perverse intention mentioned in § 1, is legally presumed when the religious has not returned within a month nor manifested to his superior his intention of returning.

It is *illegal* for a religious to leave the monastery without the permission of the superior, whether he lays aside his habit or not, provided he is determined not to return. This intention is not present if he leaves the monastery with the purpose of seeking a higher superior to demand redress for supposedly unjust treatment by his own superior.[4] If, however, he transfers himself to another religious institute without a papal indult, he is considered an apostate, because he wishes to withdraw himself from the obedience due to the superior into whose hands or for whose house he has made profession.[5]

The Code most reasonably gives *one month* for deliberation. After the lapse of that term the religious who refuses to return is presumed to be an apostate. But this *presumption* is only *de iure* and may be shattered by ordinary proofs. Thus, for instance, if the religious could prove by one trustworthy eye-witness that he wrote to the superior and the letter was lost, the presumption would cease; or if the superior misplaced or neglected to open the letter, and would find or open it later, presumption would be null, and the religious could not be called an apostate. Thus, also, if the religious was prevented by some accident from writing or returning home, he would not be an apostate.

4 This is common teaching; cfr. Piatus M., I, 196.

5 Sixtus V, *"Cum de omnibus,"* Oct. 21, 1588; *"Ad Romanam,"* Oct. 21, 1589.

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§ 3. A *fugitive* is one who, without the permission of his superiors, deserts a religious house with the intention of returning to the institute. Here, too, a perverse intention must be supposed, consisting in the will and desire of getting rid of the obligation of religious obedience. To go away for fun or in a roaming spirit would be merely a stealthy withdrawal.[6] Neither must he be considered a fugitive who dwells with persons who know him well and have no suspicion of his irregular leave.[7] The Code does not say how long a time must elapse until a religious is to be regarded as a fugitive. This point may be determined by the constitutions or by custom. In houses where the religious may be absent for several days without suspicion or attention, it would be unreasonable to be hasty in branding one as a fugitive. Here again it must be stated that every religious has the right to seek a higher superior to obtain relief from injustice.[8]

OBLIGATIONS OF APOSTATES AND FUGITIVES

CAN. 645

§ 1. Apostata et fugitivus ab obligatione regulae et votorum minime solvuntur et debent sine mora ad religionem redire.

§ 2. Superiores debent eos sollicite requirere, et ipsos, si vera poenitentia acti redeant, suscipere; reditum vero monialis apostatae vel fugitivae caute curet loci Ordinarius, et, si agatur de monasterio exempto, etiam Superior regularis.

§ 1. Neither an apostate nor a fugitive is freed from the obligation of his rule and vows, and must without delay return to his institute.

6 Piatus M., I, p. 205.
7 Sixtus V, "*Cum de omnibus*," § 20.
8 Santi-Leitner, III, 31, n. 45 (Vol. III, p. 313).

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§ 2. The superiors must seek them with solicitude, and receive them, if they return repentent; but as to apostate or fugitive nuns, the local Ordinary shall prudently see to their return, and the regular superior also, in the case of an exempt monastery.

A decree of the S. C. of Bishops and Regulars [9] says that apostates and fugitives who repair to a convent of other regulars or religious, must be returned by the superiors of that convent, and that deserters must return under the penalties threatened for apostates. The penalties against apostates and fugitives are stated in can. 2385 f., *infra.*

Apostates in the strict sense of the word are subject to excommunication, reserved to the higher superior if the institute is exempt, or to the Ordinary of the diocese in which they live. However, in the former case any priest with ordinary faculties may absolve them (can. 519). If they are reserved to the Ordinary, the confessor must have faculties from the same, which are also granted to the canon penitentiary (can. 401).

Fugitives are deprived of any office they may hold and suspended if they are clerics in higher orders. This suspension is reserved to the higher superiors.

Should an apostate religious die outside his monastery — concerning confession note that all reservations cease *in articulo mortis* — his so-called property formerly was held to belong to the *Camera Apostolica.*[10] Now-a-days the civil courts would probably decide in favor of the religious institute or of the heirs, if the latter would claim the property.

9 Aug. 11, 1758 (Bizzarri, *l. c.*, p. 330). This decision proves the correctness of our interpretation as to the unlawfulness of an arbitrary transfer to another institute; cfr. also cc. 7, 24, X, III, 31.

10 Piatus M., I, 204.

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TITLE XVI

THE DISMISSAL OF RELIGIOUS

After mentioning legal and illegal egress from a religious institute, the Code draws attention to the part which the institute itself may take in dismissing members who are no longer regarded as desirable. Every society must have ways and means for expelling unfit members. The Code begins by mentioning three facts which entail *ipso facto* dismissal.

CAN. 646

§ 1. Ipso facto habendi sunt tanquam legitime dimissi religiosi:

1.° Publici apostatae a fide catholica;

2.° Religiosus, qui fugam arripuerit cum muliere; aut religiosa quae cum viro;

3.° Attentantes aut contrahentes matrimonium aut etiam vinculum, ut aiunt, civile.

§ 2. In his casibus sufficit ut Superior maior cum suo Capitulo vel Consilio ad normam constitutionum emittat declarationem facti; curet autem probationes facti collectas in domus regestis asservare.

§ 1. The following religious are *ipso facto* regarded as lawfully dismissed:

1.° Religious who have publicly apostatized from the Catholic faith;

2.° A religious who has run away with a person of the opposite sex;

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3.° Religious who attempt or contract marriage, even civil marriage.

Apostates from the Catholic faith are those who renounce Catholic doctrine or morality. Hence if a religious would openly deny even one article of faith, he would be an apostate, the same if he became a Mohammedan, or Buddhist, or Brahman, etc., or joined a heretical sect, or became a "free-thinker," for it hardly seems possible that any one could combine this state of mind with the *obsequium fidei* — due submission to the faith.[1] But, as stated, the defection must be public, *i. e.*, either by public profession, or by evidence obtained from official sources.

Regarding n. 2, note that the intention of marrying each other is not required. *Marriage* is considered in n. 3. Those are said to *attempt matrimony* who cannot contract a valid (even though "purely civil") marriage under the law of the Church.[2]

In all such cases the higher superior, with his chapter or council, according as the constitutions prescribe, should make a declaration of the fact and preserve the documentary proofs thereof in the archives of the house. They are often needed later, especially if the apostate religious should attempt a trial. The higher superior is the one who, according to the constitutions, has the right to dismiss. The constitutions must also determine whether the superior must call the whole chapter, or the counsellors only.

1 Avanzini, *Comment. in "Apostolicae Sedis,"* 1883, p. 4 ff.

2 A civil marriage is one contracted before the officials of the state.

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CHAPTER I

THE DISMISSAL OF RELIGIOUS WITH TEMPORARY VOWS

CAN. 647

§ 1. Professum a votis temporariis sive in Ordinibus sive in Congregationibus iuris pontificii dimittere potest supremus religionis Moderator vel Abbas monasterii sui iuris cum consensu sui Consilii per secreta suffragia manifestato, vel, si agatur de monialibus, Ordinarius loci et, si monasterium sit regularibus obnoxium, Superior regularis, postquam monasterii Antistita cum suo Consilio fidem de causis scripto fecerit; in Congregationibus vero iuris dioecesani, Ordinarius loci in quo religiosa domus sita est, qui tamen iure suo ne utatur Moderatoribus insciis vel dissentientibus.

§ 2. Ii omnes, graviter eorum onerata conscientia, religiosum dimittere nequeunt, nisi servatis quae sequuntur:

1.° Causae dimissionis debent esse graves;

2.° Possunt se habere sive ex parte religionis sive ex parte religosi. Defectus spiritus religiosi qui aliis scandalo sit, est sufficiens dimissionis causa, si repetita monitio una cum salutari poenitentia incassum cesserit, non vero infirma valetudo, nisi certo constet eam ante professionem fuisse dolose reticitam aut dissimulatam;

3.° Licet Superiori dimittenti certo innotescere debeant, non est tamen necesse ut formali iudicio com-

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probentur. At religioso semper manifestari debent, data eidem plena respondendi licentia; eiusque responsiones Superiori dimittenti fideliter subiiciantur;

4.° Contra dimissionis decretum est religioso facultas recurrendi ad Sedem Apostolicam; et pendente recursu, dimissio nullum habet iuridicum effectum;

5.° Si de mulieribus agatur, servari debet praescriptum can. 643, § 2.

§ 1 determines who are the superiors who may dismiss religious with temporary vows.

(1) In *orders and congregations with papal approval* this right belongs to the *superior general,* in autonomous monasteries, to the *abbot;* but the general as well as the abbot can only proceed with the *consent of the counsellors,* which must be given by secret ballot. Note the term "consent," which binds the superior under pain of acting invalidly.

(2) If a *nun* is to be dismissed, the *Ordinary* may dismiss her after the superioress with her counsellors has given a written attestation of the motives for the dismissal; if the convent is subject to regulars, the *regular prelate* may also dismiss her. The declaration of 1858 permits the general to subdelegate the business of dismissal to at least three prudent and honest religious for distant provinces.[1] This may still be admitted, according to Regula Juris, n. 68: "What one is permitted to do himself, he may do through others." The Code does not exclude this assumption, but rather favors it (see can. 668).

(3) In *diocesan congregations* the right of dismissing a Sister belongs to the *Ordinary* in whose diocese the

1 S. C. super Statu Regul., Junc 12, 1858, n. IV (Bizzarri, *l. c.*, p. 856).

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house is located. However, he should not act without the knowledge of the superioress or against her just opposition. Such an arbitrary procedure would tend to relax discipline and undermine the authority of the superioress.

§ 2. These superiors and Ordinaries can dismiss a religious only on the following conditions, the observance of which constitutes for them a grave obligation in conscience:

1.° The *motives* for the dismissal must be *grave;*

2.° These motives may be either on the side of the institute or on the part of the religious. Thus a scandalous lack of the religious spirit would be a sufficient reason. A religious who, though often admonished, and even punished, refuses to mend his ways, may be dismissed. But ill-health, unless fraudulently concealed or dissimulated before profession, would not be a sufficient motive for dismissal.

3.° Although the superior who is entitled to dismiss a religious must be aware and certain of the motives, it is *not* necessary that they be proved by a *judicial* process, *i. e.,* no witnesses, summonses, judge, plaintiff, and sentence are required; not even written documents. However, says the Code, the motives must be made known to the religious, and full liberty to reply given him; and his replies must be faithfully submitted to the superior effecting the dismissal.

4.° The religious has the right to appeal against the decree of dismissal to the Holy See, *i. e.,* the S. Congregation of Religious; and pending the appeal, which should, of course, be notified to the superior, the dismissal has no juridical effect. This is a recourse or appeal *in suspensivo.*

5.° In the case of religious women, can. 643, § 2, concerning provision, must be observed.

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EFFECTS OF DISMISSAL

CAN. 648

Religiosus dimissus ad normam can. 647 ipso facto solvitur ab omnibus votis religiosis, salvis oneribus ordini maiori adnexis, si sit in sacris, et firmo praescripto can. 641, § 1, 642; clericus autem in minoribus ordinibus constitutus eo ipso redactus est in statum laicalem.

A religious (with temporary vows) dismissed according to can. 647 is *ipso facto* freed from all his religious vows, without prejudice to the obligations attaching to major orders (celibacy and the Breviary) if he has received them. A religious in higher orders who is dismissed by his superiors must return to his own diocese and obey the prescriptions of can. 642. A cleric in minor orders simply returns to the lay state.

Here a doubt occurs because of the wording of can. 642, § 2, where those who have made profession of temporary vows are laid under said restr ictions only in case they have been professed for six years. Are they obliged to the rule of said canon if dismissed before six years have elapsed? We believe they are, because it is not a mere voluntary dispensation, but a forced dispensation by reason of dismissal, which the legislator wishes to punish more severely. But we state this opinion with all due reserve.

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CHAPTER II

DISMISSAL OF RELIGIOUS WITH PERPETUAL VOWS FROM A NON-EXEMPT CLERICAL OR LAY INSTITUTE

CAN. 649

In virorum religionibus clericalibus non exemptis et laicalibus, ut professus a votis perpetuis dimitti possit, praecedant necesse est tria delicta cum duplici monitione ac defectu emendationis ad normam can. 656–662.

The dismissal of a member who has made profession of perpetual vows in a non-exempt clerical or in a lay institute is effected in pretty much the same way as in an exempt clerical institute. The member to be dismissed must have been convicted of at least three offences; he must have been admonished twice and proved incorrigible. These points are further developed in can. 656–662.

CAN. 650

§ 1. Haec si constiterint, supremus religionis Moderator cum suo Consilio, perpensis omnibus facti adiunctis, deliberet num locus sit dimissioni.

§ 2. Si maior suffragiorum numerus pro dimissione steterit;

1.° In religione iuris dioecesani res tota deferatur ad Ordinarium loci in quo religiosa professi domus sita est, cuius est dimissionem pro suo prudenti arbitrio decernere ad normam can. 647;

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2.° In religione iuris pontificii ipse supremus religionis Moderator dimissionis decretum ferat; quod tamen ut suum sortiatur effectum, debet a Sede Apostolica confirmari.

§ 3. Religioso ius est suas rationes libere exponendi; eiusque responsiones in actis fideliter referendae sunt.

When these facts (*i. e.*, the three offences, two admonitions and incorrigibility) are ascertained, the superior general of the institute with his council, having considered all the circumstances, shall deliberate whether the case be one for dismissal.

If the majority of the votes are for dismissal:

1.° In *diocesan institutes,* the whole matter must be referred to the Ordinary, in whose diocese the religious house of the professed is located, and it rests with him to decide on the dismissal according to his discretion, conformably to the terms of can. 647;

2.° In the case of *papal institutes* the superior general issues the decree of dismissal; but to become effective it must be ratified by the Apostolic See. This latter text is taken from "*Conditae*" (II, 1), which says that the superior general, in dismissing professed members, must follow the rules of the institute and the pontifical decrees. But these constitutions should now be modelled upon the new law.

§ 3. The religious has the right to freely expose his reasons, and his replies must be conscientiously reported in the acts, which are to be forwarded to the S. Congregation of Religious. In order to obtain this result, it will be best to make an abstract of the papers proving the offences, admonitions, and reasons stated by the religious and hand it over to the religious himself for his signature.

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CAN. 651

§ 1. Etiam ad dimittendas religiosas professas a votis perpetuis sive sollemnibus sive simplicibus exiguntur graves causae exteriores una cum incorrigibilitate, experimento prius habito ita ut spes resipiscentiae evanuerit, iudicio Antistitae.

§ 2. Praescriptum can. 650, § 3 etiam in religiosarum dimissione servandum est.

Also for the dismissal of *religious women* who have made profession of perpetual vows, whether solemn or simple, grave external reasons are required, together with incorrigibility, experience having proved, in the judgment of the superioress, that there is no hope of amendment. The Sister, too, according to can. 650, § 3, must be allowed to defend herself, and her reasons must be faithfully inserted in the documents to be sent to Rome.

CAN. 652

§ 1. Si agatur de religiosis iuris dioecesani, Ordinarii loci in quo sita est sororis professae domus, est causas dimissionis expendere et decretum dimissionis ferre.

§ 2. Si de monialibus, Ordinarius loci omnia acta et documenta transmittat ad Sacram Congregationem cum suo et Superioris regularis voto, si monasterium regularibus sit subiectum.

§ 3. Si de aliis religiosis iuris pontificii, suprema religionis Moderatrix rem totam ad Sacram Congregationem pariter deferat cum omnibus actis et documentis; Sacra autem Congregatio tum in hoc tum in praecedenti casu quod magis expedire censuerit, decernet, firmo praescripto can. 643, § 2.

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§ 1. In the case of *diocesan institutes* the Ordinary in whose diocese the house of the professed Sister is located, must weigh the motives for and issue the decree of dismissal.

§ 2. If there be question of *nuns* with solemn vows, the local Ordinary shall transmit to the S. Congregation of Religious all the acts and documents with a statement of his own judgment and that of the regular superior if the monastery be subject to regulars.

§ 3. For dismissing members of a *papal institute*, the superioress general likewise shall transmit to the S. Congregation the whole matter with all the acts and documents, but without expressing her own opinion; whereupon the S. Congregation shall decide the case, without prejudice to can. 643, § 2, which guarantees a decent material provision.

CAN. 653

In casu gravis scandali exterioris vel gravissimi nocumenti communitati imminentis, religiosus statim potest a Superiore maiore cum consensu sui Consilii vel etiam, si periculum sit in mora et tempus non adsit adeundi Superiorem maiorem, a Superiore locali cum consensu sui Consilii et Ordinarii loci, ad saeculum remitti, habitu religioso illico deposito, ita tamen ut res per ipsum Ordinarium aut per Superiorem maiorem, si adsit, Sanctæ Sedis iudicio sine mora subiiciatur.

In the case of grave external scandal or of very serious imminent injury to the community, the religious may be dismissed immediately by the higher superior with the consent of his council, or even by the local superior with the consent of his council and of the local Ordinary if

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there be danger in delay and time does not admit of recourse to the higher superior; the religious must immediately put off the religious habit and the whole matter must, without delay, be referred to the Holy See (S. C. Rel.) either by the Ordinary or by the higher superior, if he be present.

Note the gradation of *grave scandal* and very serious imminent injury to the community. The scandal must be external, *i. e.*, known to outsiders, *e. g.*, the surrounding parish or municipality, and deserving of the name according to sound moral principles. Gossip or mere prejudice is not scandal. Neither is there real scandal if the fact is not notorious,[1] *i. e.*, known to more than two or three persons. A *very serious injury* would threaten a community if a member had misappropriated large sums of money or proved a stumbling-block to other members by seduction or violent outbursts of temper, or caused suspicion of disloyalty [2] by foolish utterances or actions or political intrigues.

The term *consent* supposes strict balloting and involves the obligation on the part of the superior to abide by the vote of the majority. In case of a tie, for instance, two against two, his own vote would be decisive.

1 Cfr. can. 2197.

2 A disloyal citizen can hardly be a good religious, because he is lacking in obedience to the natural law.

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CHAPTER III

THE JUDICIAL PROCESS FOR THE DISMISSAL OF RELIGIOUS WITH PERPETUAL VOWS IN EXEMPT CLERICAL INSTITUTES

CAN. 654

Vir professus a votis sollemnibus aut a votis simplicibus perpetuis in religione clericali exempta ne dimittatur, nisi processu instituto, salvo praescripto can. 646, 668, et revocato quolibet contrario privilegio.

After stating the rules for dismissing members who have made profession of temporary vows only, whether in orders or congregations, and for dismissing members with perpetual vows in non-exempt institutes, including nuns with solemn vows, the Code now proceeds to establish fixed rules for the dismissal of another class of religious, *viz.*, members of male institutes with a clerical character, which belong to the category of exempt religious. These institutes, permitting their members to make profession of perpetual vows, occupy a higher place in the hierarchic order, and being by reason of exemption withdrawn from the jurisdiction of the Ordinary, demand special consideration. Note the term *exempt*, which comprises not only orders of regulars proper, but all clerical institutes endowed with exemption by virtue of a papal indult. Hence the Passionists, the Redemptoists, the Missionaries of the Sacred Heart of Mary are included, whereas all female orders or congregations, although they may enjoy exemption, are excluded. A

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doubt arises as to laybrothers of exempt institutes; for they belong to such and yet are not of the clerical order proper. This doubt can only be solved by the authentic interpreters. Can. 654 says: No male religious, who has made profession of perpetual vows, whether solemn or simple, in an exempt clerical institute, may be dismissed except upon a *canonical trial,* every privilege to the contrary being revoked, save only the case stated in can. 646 and 668. What a canonical trial means the following canons explain. The legislator *revokes* each and every *privilege* which would render this law ineffective. Hence if any order or exempt congregation has obtained a privilege previous to May 19, 1918, concerning dismissal of perpetually professed members without canonical trial, that privilege is now invalid. The Code excepts only two cases from this general rule, *viz.:* the one mentioned in can. 646, which requires no trial, but only a declaratory sentence; and the case of grave external scandal or very serious injury threatening the community. With these exceptions in view the legislator proceeds to outline the canonical trial. A trial requires a judge, a plaintiff, and a defendant, and, in criminal cases, also a crime that is prosecuted. The canon immediately following determines who is the *judge* in such trials.

CAN. 655

§ 1. Ad sententiam dimissionis ferendam competens est supremus religionis vel monasticae Congregationis Moderator cum suo Consilio seu Capitulo, quod quatuor saltem religiosis constet; si qui deficiant, eorum loco totidem religiosos eligat praeses de consensu aliorum qui cum ipso tribunal collegiale constituant.

§ 2. Praeses de aliorum consensu promotorem iustitiae nominet ad normam can. 1589, § 2.

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In centralized organizations the *superior general* is the competent judge who issues the decree of dismissal; in monastic congregations the *abbot president* is the judge, but both the general and the abbot must have a council or chapter consisting of at least four religious whom they are obliged to consult. In case one or the other of these counsellors be absent, the president may, with the consent of the others, select *ad hoc* other religious, to form the collegiate tribunal. The president with the consent of the other counsellors must appoint a *promotor iustitiae* according to can. 1589, § 2.

Pope Urban VIII, in 1624, outlined the legal procedure to be taken in case of the expulsion or dismissal (which latter term is used exclusively in our Code) of religious. But, as the decree of the S. C. Rel., of May 16, 1911, stated, these formalities could not always be observed, and hence had to be reduced to what is a *summary proceeding*, which contains the essential elements of an ecclesiastical trial without the accidental features that might delay prompt action. It is this summary trial which we find embodied in the Code, following the instruction of May 16, 1911. The latter, therefore, must form the basis of interpretation.

The *persons constituting the tribunal* are the superior general with at least four "definers" or counsellors. The abbot president takes the place of the judge in monastic congregations. But he too must have at least four counsellors. Hence let it be understood once for all that *all monastic congregations must at their general chapter elect counsellors.* These counsellors are not to be the abbots of the single monasteries, but religious who dwell with the abbot president and form a regular or collegiate tribunal with him. The counsellors of the monastery whose abbot acts as president for a certain term, gen-

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erally three or six years, are not the counsellors of the congregation, nor can they pretend to act as such. Only in case the one or other of the duly elected counsellors is absent, or missing, or dead, may the abbot president appoint other religious in their stead. But in doing so he must have the *consent,* to be given by ballot, of the remaining counsellors, *i. e.,* those who constitute the tribunal. This is a point which should be clearly embodied in the constitutions, and no abbot is allowed to set it aside. The decree of the S. C. Rel., May 16, 1911, adds that if an abbey is not affiliated with any congregation, recourse must in each single case be had to the Holy See. This should remind all superiors of the importance of the enactment stated above.

But the Code also insists upon appointing a prosecuting attorney or *promotor iustitiae.* He is, according to § 2 of our canon, to be nominated by the superior general or the abbot president "with the consent of the others." Who are these others? According to § 1 they would be the counsellors of the regular tribunal, and this explanation may be accepted if the attorney is chosen for each single case of dismissal. However, the decree of the S. C. of Rel., quoted above, would have him elected by the general chapter. And it is certainly more in conformity with the intention of the legislator that his office be permanent or at least for a determined period or term. Hence he, too, would have to be elected by the general chapter. He must be a *religious* of the same order or congregation, says the decree quoted, and his functions are to defend justice and law: "*pro iuris et legis tutela.*"

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REQUISITES OF A TRIAL

CAN. 656

Ad processum instruendum deveniri nequit nisi praecesserint:

1.° Gravia delicta externa sive contra ius commune sive contra speciale religiosorum ius;

2.° Monitiones;

3.° Defectus emendationis.

No judicial proceedings may be begun unless preceded by:

1.° Grave external offences either against the common law or against the special law of religious;

2.° Admonitions;

3.° Failure to amend.

CAN. 657

Delicta debent esse saltem eiusdem speciei, vel, si diversae, talia ut simul sumpta manifestent perversam voluntatem in malo pervicacem, aut unum tantum permanens, quod ex repetitis monitionibus virtualiter triplex fiat.

The offences committed must be at least three of the same species or, if they are of different species, of such a nature that when taken together they manifest the perversity of the will resolved on evil, or only one continuous offence which, from repeated admonitions, has virtually become threefold.

A grave external offence presupposes a public violation of some important law, either of the common law of the Church, in which case it comprises the whole range of the Penal Code (Book V); or of the particular statutory law set up by the respective institute. The essential fea-

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ture of a *delictum* or crime is that it be externally manifest and cause injury to society at large or to the religious community.[1] Thus not to wear the religious habit is against the common law;[2] entering saloons without necessity is against the general law of the church,[3] etc., etc. The special laws of each religious institute are laid down in the respective constitutions, which differ in different orders. A common feature of all, we believe, is the prohibition of stubborn resistance to the injunctions of a superior when he commands in accordance with the rule and constitutions. Thus a Benedictine would act against his special laws by absenting himself without a sufficient reason from choir-service. A mendicant would transgress his rule if, without reason, he would refuse to go begging as enjoined by the rule. A member of a teaching order would transgress if he would refuse to teach.

These offences, the Code says, must be grave and external, *i. e.*, such as constitute a grievous sin, and be perpetrated notoriously. For we believe we are justified if we take *external* as synonymous with *notorious*. Notorious, according to the Code, is an act which cannot be concealed by any tergiversation or contrivance and excused by no pretext of law or right.[4] However, notoriety, as shall be seen from can. 658, may be effected by still other means, though even these suppose a certain measure of public knowledge.

The Code distinguishes (a) *Offences of the same species,* three in number, for instance, drunkenness committed on three different occasions; this is the numerical

1 In secular law "a crime or misdeamor is defined by Blackstone to be an act committed or omitted in violation of a public law, either forbidding or commanding it." Bishop, *Commentaries on the Criminal Law,* ed. 6, Boston, 1877, § 32.

2 Can. 596, can. 136.

3 Can. 138.

4 Can. 2197.

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distinction; (b) *Specifically different offences,* for instance, absence from choir, outbursts of ill-temper, refusal to accept appropriate penances, which, taken together, show a lack of good will and no hope of amendment; (c) *One continuous offence, e. g.,* familiarity proscribed by the constitutions; but this must be, as it were, split into three numerically distinct offences by the canonical admonition. Of these the Code speaks in the following canons, 658–661.

CANONICAL ADMONITIONS

CAN. 658

§ 1. Ad monitionem faciendam necesse est ut aut delictum sit notorium aut de eodem constet ex rei confessione extraiudiciali vel ex aliis sufficientibus probationibus quas praevia inquisitio suppeditaverit.

§ 2. In inquisitione peragenda serventur, congrua congruis referendo, praescripta can. 1939 seqq.

CAN. 659

Monitio fieri debet ad immediato Superiore maiori per se vel per alium de eius mandato; sed Superior mandatum ne det, nisi praevia informatione facti ad normam can. 658, § 1; datum vero mandatum pro prima monitione valeat etiam pro altera.

CAN. 660

Duae debent esse monitiones, scilicet singulae pro singulis duobus primis delictis; in delictis autem continuatis seu permanentibus intercedat necesse est inter primam et alteram monitionem saltem trium dierum integrum spatium.

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CAN. 661

§ 1. Monitionibus Superior addat opportunas exhortationes et correptiones, praescriptis insuper poenitentiis aliisque remediis poenalibus, quae apta censeantur ad emendationem rei et scandali reparationem.

§ 2. Praeterea tenetur Superior reum ab occasionibus relabendi removere etiam per translationem, si opus fuerit, ad aliam domum, ubi facilior sit vigilantia et remotior delinquendi occasio.

§ 3. Singulis monitionibus adiiciatur dimissionis comminatio.

Can. 658 enjoins superiors not to proceed to canonical admonition unless the offence be notorious or manifest either from the extra-judicial confession of the culprit or from other sufficient proofs furnished by previous investigation. This investigation must be conducted according to the prescriptions of can. 1939–1946. The substance of these prescriptions is: a religious should be appointed to make the investigation; he is bound to strict secrecy and exhorted not to believe hostile denunciations, or to accept anonymous information or such offered by untrustworthy persons; he may secretly and confidentially employ helpers and must report the result to the superior, together with his own opinion. A sufficient proof, according to a decree of May 16, 1911, would be the testimony of two sworn witnesses. Authentic statements by a civil court would also be admitted.

Can. 659 says that the canonical admonition must be given by the immediate higher superior personally or by another acting on his mandate. Hence the provincial should give the admonition, or the local superior in virtue of a special mandate or commission of the provincial. But this commission must not be given by the

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latter until he has obtained information on the facts, according to can. 658, § 1. The mandate given for the first admonition avails also for the second.

Can. 660 says that at least two admonitions must be given: one for each of the first two offences; but in the case of continuous or permanent offences, an interval of at least three whole days must elapse between the first and second admonition.

Can. 661 provides that (§ 1) the superior shall add to his admonitions opportune exhortations and corrections, besides imposing penances and other penal remedies,— for instance, retreats, removal from office,— which are calculated to procure the amendment of the culprit and the reparation of the scandal.

The superior is also bound (§ 2) to remove the culprit from the occasions of relapse, even to the extent of transferring him, if necessary, to another house, where he may be more easily watched and the occasion of offending is more remote.

Lastly (§ 3) each admonition must be accompanied by the threat of expulsion.

LACK OF AMENDMENT

CAN. 662

Religiosus censetur se non emendasse, si post secundam monitionem novum delictum commiserit vel in eodem permanenter perstiterit; post ultimam monitionem sex saltem dies erit expectandum, antequam ad ulteriora progressus fiat.

The religious is considered not to have amended if, after the second admonition, he commits a new offence or perseveres in the old one; after the last admonition, at least six days must elapse before further steps be taken.

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CAN. 663

Immediatus Superior maior, postquam monitiones et correctiones incassum cesserint, omnia acta et documenta diligenter colligat et ad supremum Moderatorem transmittat; hic autem ea tradere debet promotori iustitiae, qui ea examinet et suas conclusiones proponat.

After the admonitions and corrections have proved inefficacious, the immediate higher superior shall carefully collect all the materials and documents and send the same to the superior general, who shall deliver them to the prosecuting attorney, who shall examine them and propose his deductions. We say, "deductions," for *conclusion* would mean the end of the allegations or proofs together with a renunciation of further investigation,[5] which cannot be the meaning here. The prosecuting attorney is simply to deduce from the materials submitted some opinion and submit the same.[6]

CAN. 664

§ 1. Si promotor iustitiae, cui fas est etiam ulteriores inquisitiones, quas opportunas iudicaverit peragere, accusationem proponat, instruatur processus, servatis praescriptis canonum in Parte Prima Libri Quarti, congrua congruis referendo.

§ 2. Ex processu constare debet de delictis patratis, de praemissa duplici monitione et de defectu emendationis.

After the prosecuting attorney, who may demand further investigations to be made if he deems fit, has formu-

5 Cfr. Reiffenstuel, II, 19, n. 159.

6 It is evident that the abbot president must not send the material to the Abbot Primate, because the former is the supreme superior in monastic congregations; besides the Abbot Primate has no council or chapter.

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lated the accusation, the *regular trial may begin.* In this trial, the Code says, the prescriptions of the first part of Book IV (concerning ecclesiastical procedure) must be observed. These are briefly: that the judge be competent, that the plaintiff (who is generally the institute itself) be duly represented and follow the rules prescribed, that the witnesses be beyond suspicion, that the summons be made according to the established rules, that the admonition be served in a proper way, that the necessary time be granted for defence, that exceptions and appeals be admitted, that the sentence be issued properly. All this, of course, requires a knowledge of Canon Law. The trial itself, says § 2 of our canon, must make it evident that the offences were really committed, that the two canonical admonitions were duly given, and that the culprit did not amend his conduct. These are the principal points to which the prosecuting attorney should devote his attention. If one of these cannot be proved, the trial comes to naught.

SENTENCE OF THE TRIBUNAL

CAN. 665

Tribunal, diligenter perpensis allegationibus tum promotoris iustitiae tum rei, si quidem iudicaverit satis probata esse ea de quibus in can. 664, §2, sententiam dimissionis pronuntiet.

After the tribunal has carefully weighed the allegations or pleas of both the prosecuting attorney and the defendant, it may pronounce sentence of dismissal, provided it has found the three points mentioned in can. 664, § 2, sufficiently proved. The sentence must be pronounced by the judge, *i. e.*, the superior general or the abbot president, who must be morally certain of the truth

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regarding all three points.[7] The sentence is called definitive because the end of the trial (*viz.*, dismissal) is attained.

RATIFICATION OF THE SENTENCE

CAN. 666

Sententia exsecutioni mandari nequit, nisi fuerit a Sacra Congregatione confirmata; ad quam tribunalis praeses et sententiam et omnia acta processus quamprimum transmittere curabit.

The sentence pronounced by the tribunal shall take effect only after it has been ratified by the S. Congregation of Religious, to which all the *acta* as well as the sentence itself must be forwarded by the president of the tribunal. Note that the S. Congregation will handle no case unless at least a preliminary attempt has been made by the religious tribunal to bring forward material enough for a decision. Hence it would be useless to refer a case to the S. Congregation without papers and a previous sentence, simply to shirk the obligation of a trial. Of course, if a dispensation is demanded, the case may go immediately to the S. Congregation.

DELEGATION OF TRIAL

CAN. 667

Pro dissitis regionibus etiam in casibus ordinariis supremi Moderatores cum consensu sui Consilii seu Capituli possunt dimittendi facultatem demandare probis ac prudentibus religiosis, qui saltem tres esse debent, firmo praescripto can. 663–666.

For *distant provinces* the superior general may, even

7 Cfr. can. 1868 ff.

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in ordinary cases, with the consent of his council or chapter, delegate the power of dismissal to trustworthy and prudent religious, who must be at least three in number and follow the prescriptions of can. 663–666. It is generally understood that the *dissitae regiones* are those beyond the Atlantic Ocean, but even Great Britain is, or was formerly, considered a distant and remote country.[8]

CAN. 668

In casu, de quo in can. 653, religiosus statim potest a Superiore maiore, vel si periculum sit in mora et tempus non adsit recurrendi ad Superiorem maiorem, a Superiore quoque locali, cum consensu sui Consilii, ad saeculum remitti, habitu religioso illico deposito; religioso autem dimisso, statim processus, si nondum fuerit institutus, instituatur ad normam canonum qui praecedunt.

This canon is a rehearsal of can. 653, with the exception of the last clause: after the religious has been dismissed, a trial (if it had not yet begun) must be started according to the preceding canons.

8 Whether the abbots presidents may delegate the power of dismissal to other religious is not plainly stated in the text. However, considering the great distances in our countries, we believe that, at least in extraordinary cases, as the S. C. Super Statu Regul., June 12, 1858, n. IV (Bizzarri, *l. c.*, p. 856) says, delegation would be admissible and certainly valid.

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CHAPTER IV

DISMISSED RELIGIOUS WITH PERPETUAL VOWS

CAN. 669

§ 1. Professus qui vota perpetua emisit, a religione dimissus, votis religiosis manet adstrictus, salvis constitutionibus aut Sedis Apostolicae indultis quae aliud ferant.

§ 2. Si clericus est in minoribus ordinibus constitutus, eo ipso reducitur ad statum laicalem.

A dismissed professed religious remains bound by his religious vows, unless the constitutions or a papal indult determine otherwise. A clergyman in minor orders is, by dismissal, reduced to the lay state.

CAN. 670

Clericus in sacris qui aliquod delictum commisit de quo in can. 646, aut dimissus est ob delictum quod iure communi punitur infamia iuris vel depositione vel degradatione, perpetuo prohibetur deferre habitum ecclesiasticum.

A cleric in higher orders, who has publicly apostatized from the Catholic faith, or run away with a woman, or attempted marriage, is forever debarred from wearing the ecclesiastical garb. The same punishment follows him if he is dismissed from his institute on account of a crime which in common law is qualified as infamous, or punished with deposition or degradation.

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In these two canons the Code states the general penalties for dismissed religious. Note the title of the chapter: it embraces all religious who have made profession of perpetual vows, because the legislator does not distinguish between clerical and non-clerical, exempt and non-exempt religious. Only the constitutions [1] or a papal indult may absolve them from the obligation of observing the vows. Hence a dismissed religious must observe the *vow of poverty* as far as his condition permits. What he acquires really belongs to the religious community. Here the civil law might interfere, unless the by-laws fix the point. As to the *vow of chastity,* the difference between simple and solemn vows is unchanged, that is to say, the former do not debar valid marriage, whereas solemn vows render an attempted marriage invalid. The *vow of obedience* to the religious superior also remains in force as do the special vows of the institute. However, many reliable authors — the Code does not oppose their opinion — declare such religious free from the obligation of the Breviary and fasts, etc.[2]

Can. 670 singles out the case of a religious cleric in higher orders — those in minor orders, dealt with in can. 669, § 2, lose their clerical rank — who has committed one of the offences mentioned in can. 646, or a crime which is punishable by infamy, whether inflicted by law, or *ipso facto* (see Book V).[3] Another class of crimes is that which the law expressly punishes with degradation [4] or deposition.[5] Notice that infamy by law here mentioned is infamy branded as such by ecclesiastical, not

1 This concerns members of the Society of Jesus with simple vows: Greg. XIII, "*Ascendente Domino,*" § 7.

2 Piatus M., I, p. 223.

3 Can. 2320, 2343, § 1, n. 2; § 2, n. 2; 2351, § 2; 2356; 2357, § 1.

4 Can. 2314, § 1, n. 3; 2343, § 1, n. 3; 2354, § 2; 2368, § 1; 2388, § 1.

5 Can. 2314, § 1, n. 2; 2320, § 2; 2353, § 2; 2379; 2394 n. 2; 2401.

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civil, law. Some crimes, such as larceny, forgery, perjury, are also declared infamous crimes by our civil laws.[6] On the other hand, the differing views as to the solubility of marriage may cause a difference of procedure between Church and State, although the latter looks upon polygamy as infamous at least by statutory law.

STATUS OF DISMISSED RELIGIOUS

CAN. 671

Si vero dimittatur ob delicta minora iis de quibus in can. 670:

1.° Ipso facto suspensus manet, donec a Sancta Sede absolutionem obtinuerit;

2.° Sacra Congregatio, si id expedire iudicaverit, dimisso praecipiat ut, habitu cleri saecularis indutus, commoretur in certa dioecesi, indicatis Ordinario causis ob quas dimissus fuit;

3.° Si dimissus praecepto de quo n. 2 non paruerit, religio ad nihil tenetur, et dimissus eo ipso privatus est iure deferendi habitum ecclesiasticum;

4.° Ordinarius dioecesis pro eius commoratione designatae, religiosum in domum poenitentiae mittat, cel eum committat curae et vigilantiae pii ac prudentis sacerdotis; et si religiosus non paruerit, servetur praescriptum n. 3;

5.° Religio, per manus Ordinarii loci commorationis, caritativum subsidium dimisso suppeditet pro necessariis ad vitae sustentationem, nisi ipse aliunde sibimet providere valeat;

6.° Si dimissus vitae rationem ecclesiastico viro dignam non agat, transacto anno aut etiam prius, iudicio Ordinarii, privetur caritativo subsidio, eiiciatur e

6 Bishop, *Criminal Law*, 1877, I, § 974; § 502.

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domo poenitentiae eique auferatur ius deferendi habitum ecclesiasticum ab ipso Ordinario, qui statim mittere curet opportunam relationem tum ad Sedem Apostolicam tum ad religonem;

7.° Si vero dimissus praedicto tempore tam laudabiliter se gesserit ut merito haberi possit vere emendatus, Ordinarius eius preces apud Sanctam Sedem commendabit pro absolutione a censura suspensionis, et, ea obtenta, eidem in sua dioecesi permittat, adhibitis opportunis cautelis et limitationibus, Missae celebrationem et etiam, pro suo arbitrio et prudentia, aliud sacrum ministerium, unde honeste vivere queat; quo in casu religio caritativum subsidium intermittere potest. Quod si agatur de diacono aut subdiacono, res ad Sanctam Sedem deferatur.

The legislator now determines the status of one who, having pronounced perpetual vows, is dismissed on account of a lesser offence, *i. e.*, one not mentioned in can. 646, nor entailing infamy, degradation, or deposition. Such a religious (1) remains *suspended* until he has obtained absolution from the Holy See. This absolution must be asked from the S. Congregation of Religious, as the following number insinuates. (2) The S. Congregation may command the religious to stay in a *certain diocese* and indicate to the Ordinary of the same the reasons for which the religious was dismissed. (3) If the *dismissed does not abide by the injunction* just named, the institute is under no further obligation towards him, and the culprit is deprived of the right of wearing the ecclesiastical garb. Formerly it was believed that a religious properly dismissed could claim no support from his former institute. The Code humanely provides that, as long as he abides by the injunction of the S. Congre-

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gation, he is entitled to the necessary means of subsistence from his institute, as is evident from n. 5. (4) The Ordinary in whose diocese the dismissed dwells for the time being, shall either send him to a *house of penance* or entrust him to the care and supervision of a pious and prudent priest; if the religious does not heed the Ordinary's command, the rule under n. 3 takes effect. (5) The *institute* shall grant, through the Ordinary in whose diocese the dismissed religious lives, the *necessary livelihood,* unless he possesses other means of subsistence. Therefore a religious with simple vows, who retains the right to own property and is blessed with earthly goods, must provide for himself. Besides, it is evident that, in case one is admitted to the sacred ministry, he does not need this charitable subsidy from the religious institute (n. 7). The intention of the legislator is evidently to keep dismissed religious from engaging in a sordid occupation or begging. (6) If the dismissed *religious leads a life not conformable to the ecclesiastical state,* the Ordinary shall, after one year, or even sooner if he deems it opportune, deprive him of the charitable support granted by his former institute, remove him from the house of penance, and deprive him of the right of wearing the ecclesiastical garb. He should report the case immediately to the Holy See and also inform the religious institute. (7) *If,* however, *the conduct* of the expelled religious has *been praiseworthy* for a whole year, so that he may be considered as having amended his life, the Ordinary may petition to have him absolved from suspension, and, if absolution has been obtained, permit him to say Mass under certain precautions and restrictions, *e. g.,* on certain days only, and in private oratories, in the presence of trustworthy persons, etc. He may then also be admitted to other functions of the sacred ministry, in

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order to gain a livelihood, and in that case the charitable subsidy[7] from the religious institute may cease. As to deacons or subdeacons, the matter must be referred to the Holy See.

OBLIGATIONS OF DISMISSED RELIGIOUS

CAN. 672

§ 1. Dimissus, votis in religione emissis non solutus, tenetur ad claustra redire; et si argumenta plenae emendationis per triennium dederit, religio tenetur eum recipere; quod si graves obstent rationes sive ex parte religionis sive ex parte religiosi, res iudicio Sedis Apostolicae subiiciatur.

§ 2. Quoties vero vota in religione emissa cessaverint, si dimissus episcopum benevolum receptorem invenerit, sub eius iurisdictione et speciali vigilantia maneat, servato praescripto can. 642; secus res ad Sanctam Sedem deferatur.

The dismissed religious is not free from the obligations of his vows (whether the three substantial or special vows),[8] and as these obligations cannot be fully complied with in the world, he is bound to return to the monastery. The latter, on the other hand, on account of the existence of a bilateral contract, is obliged to receive him back if he gives signs of complete emendation. Should serious reasons, either on the part of the institute or of the expelled member, militate against his being received back, the matter may be submitted to the decision of the Holy See. Such *reasons* according to canonists would

7 Note that the text always speaks of a "charitable subsidy," from which we may conclude that there is no question of a strict right enforcible by civil authority.

8 Such a special vow is that of the Jesuits to go on missions and that of the Minimi to observe perpetual abstinence.

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be: scandal to innocent souls, grave detriment to the good standing of the institute resulting from a grievous crime committed by the religious after his dismissal, or an immoral life led by him and witnessed by trustworthy persons, or an incurable contagious disease.[9]

If the vows have ceased to be effective, through a dispensation granted by the Holy See or by virtue of the constitutions, as is the case with the simple vows of the Jesuits, the dismissed religious may apply to a bishop to be received into his diocese. If he is received, he must live under the jurisdiction and special supervision of the Ordinary, without prejudice to the restrictions of can. 642; otherwise the matter must be referred to the S. Congregation of Religious.

9 Piatus M., I, p. 224.

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TITLE XVII

SOCIETIES OF MEN OR WOMEN LIVING IN A COMMUNITY WITHOUT VOWS

DIFFERENT KINDS OF COMMUNITIES

CAN. 673

§ 1. Societas sive virorum sive mulierum, in qua sodales vivendi rationem religiosorum imitantur in communi degentes sub regimine Superiorum secundum probatas constitutiones, sed tribus consuetis votis publicis non obstringuntur, non est proprie religio, nec eius sodales nomine religiosorum proprie designantur.

§ 2. Huiusmodi societas est clericalis vel laicalis, iuris pontificii vel dioecesani ad normam can. 488, nn. 3, 4.

Every society, whether of men or women, whose members imitate the manner of life of religious by living in community under the government of superiors according to approved constitutions, but without being bound by the usual three vows, is not properly a religious institute, nor are its members properly called religious. Such a society is clerical or lay and must be acknowledged either by the Holy See or by the Ordinary, and therefore be either a papal or a diocesan foundation. The most prominent societies of this class are the Lazarists or

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Missionaries of St. Vincent de Paul, the Oratorians of St. Philip Neri, and the Fathers of the Precious Blood.[1]

ESTABLISHMENT AND SUPPRESSION

CAN. 674

Circa erectionem et suppressionem societatis eiusque provinciarum vel domorum, eadem valent quae de Congregationibus religiosis constituta sunt.

As to the erection and suppression of such an approved society and its provinces or houses, the same laws apply as are laid down for religious congregations.

GOVERNMENT

CAN. 675

Regimen determinatur in uniuscuiusque societatis constitutionibus; sed in omnibus serventur, congrua congruis referendo, can. 499–530.

The government of every such society is determined by its constitutions, but, preserving due proportions, canons 499–530 must be observed by all. The general rule is that they are subject to the Ordinary in whatever pertains to the care of souls, whereas in the administration of their own property, in the internal government of their institutes, choice of confessors and chaplains the societies of men at least enjoy independence. However, the following canon must also be considered.

1 Their institute was recognized and the Constitutions were approved by the S. C. EE. et RR., Dec. 17, 1841. The constitutions contain the "general rule" and a special American observance. They, too, must now accommodate themselves, not to the "*Auctis Admodum*," but to the new Code.

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ADMINISTRATION OF PROPERTY

CAN. 676

§ 1. Societas eiusque provinciae et domus capaces sunt acquirendi et possidendi bona temporalia.

§ 2. Administratio bonorum regitur praescripto can. 532–537.

§ 3. Quidquid sodalibus obvenit intuitu societatis, eidem acquiritur; cetera bona sodales secundum constitutiones retinent, acquirunt et administrant.

Every society, and its provinces and houses, are capable of acquiring and possessing property. The administration of the property is regulated by canons 532–537. Whatever property the members acquire with a view to the society belongs to it; as to other property, the members retain, acquire, and administer it according to the constitutions.

ADMISSION

CAN. 677

In admittendis candidatis serventur constitutiones, salvo praescripto can. 542.

For the admission of candidates the constitutions are to be observed, without prejudice to the prescriptions of can. 542.

STUDIES

CAN. 678

In iis quae ad studiorum rationem et ad suscipiendos ordines pertinent, sodales iisdem legibus tenentur ac saeculares clerici, salvis pecularibus praescriptionibus a Sancta Sede datis.

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In matters pertaining to studies and the reception of orders, the members are governed by the same laws as secular clerics, without prejudice to the particular prescriptions given by the Holy See. Cfr. can. 1365 ff., 995 ff.

DUTIES

CAN. 679

§ 1. Sodales societatis, praeter obligationes quibus, uti sodales, obnoxii sunt secundum constitutiones, tenentur communibus clericorum obligationibus, nisi ex natura rei vel ex sermonis contextu aliud constet, pariterque stare debent praescriptis can. 595–612, nisi constitutiones aliud ferant.

§ 2. Clausuram servent ad normam constitutionum sub Ordinarii loci vigilantia.

The members of a society, besides the obligations to which the constitutions bind them as members, are bound by the common obligation of clerics, except it appears otherwise from the nature of the case or from the context. They shall observe the law of enclosure (set forth in can. 595–612) according to the terms of their constitutions, under the supervision of the local Ordinary.

PRIVILEGES

CAN. 680

Iidem, etiam laici, gaudent clericorum privilegiis, de quibus in can. 119–123, aliisque societati directe concessis, non autem privilegiis religiosorum sine speciali indulto.

The members, even lay members, of such societies, enjoy the privileges of clerics enumerated in can. 119–

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123, and other privileges accorded directly to the society, but not the privileges of religious, without a special indult.

LEAVING A SOCIETY

CAN. 681

Praeter proprias cuiusque societatis constitutiones, circa transitum ad aliam societatem vel ad aliquam religionem aut circa sodalium exitum a societate etiam iuris pontificii, serventur, congrua congruis referendo, praescripta can. 632–635, 645; circa eorum dimissionem, praescripta can. 646–672.

Besides the constitutions proper to each society concerning the passing to another society or to some institute, or the departure of members from a society, even though it be approved by the Holy See, the prescriptions of can. 632–635 and 645 are to be observed, due proportion being maintained; and as to their dismissal, the prescriptions of canons 646–672 are to be followed.

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PART III

THE LAITY

After determining the distinction between clergy and laity, and establishing the hierarchic order in its general and special functions and degrees, the Code lays down rules for a state which in its essence is neither hierarchic nor clerical, yet partakes more of the clerical than of the lay state. This is the large body of religious of whom this volume has so far treated. Now the legislator turns to a still larger class of members, who form the great bulk of the Church established by Christ, *viz.*, the *laity*, more especially as united or organized into confraternities and pious unions. This at first sight seems like slurring the lay state as such, but the slur is only apparent, for the entire third book is devoted to the reception of the Sacraments, the feasts and fasts, ecclesiastical teaching and other matters preëminently intended for the laity.

CAN. 682

Laici ius habent recipiendi a clero, ad normam ecclesiasticae disciplinae, spiritualia bona et potissimum adiumenta ad salutem necessaria.

As far as ecclesiastical discipline permits, laymen are entitled to receive from the clergy spiritual benefits, especially the means necessary for salvation. The reason for this general principle lies partly in the fact that laymen

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belong to the Church and must therefore be sanctified, taught, and governed, partly in the fact that the Sacraments are instituted for the salvation of men, and lastly that the clergy is the custodian and dispenser of the treasures of grace. The phrase, "*ad normam ecclesiasticae disciplinae*" means that although all Catholics are entitled to the spiritual benefits, yet certain rules must be observed in the reception and distribution of them. Thus only actual and faithful members are in a condition to receive the spiritual bounties offered by the Church, whereas unworthy and disloyal members are debarred from certain benefits either for a time, or until they have complied with the conditions imposed. From this point of view it will be readily understood that the Sacraments especially may be given only to such members as are neither excommunicated nor unworthy to receive them. Besides, it is a general principle that those who have not been in actual communion with the Church during life shall not be in communion with her after death.[1] This reasonable rule debars certain unfaithful members from Christian burial, as will be seen in Bk. III, Title XII. Lastly, it must be remembered that the right to receive spiritual favors entails the duty to honor and support those by whom these favors are dispensed. This duty not only implies proper material support, but assistance in the administration of church property, as far as the sacred canons permit laymen to share therein as trustees, administrators, tutors, etc. Benedict XIV enjoins especially missionaries and pastors generally to provide for the spiritual welfare of the sick and poor, and to visit them in their distress and need without distinction of person or sex.[2] This precept needs no emphasizing,

1 C. 1, C. 24, q. 2; c. 12, X, III, 28.

2 "*Omnium sollicitudinum*," Sept. 12, 1744, § 14.

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since it is but a practical application of Christ's teaching.[3] Above all, the means necessary for salvation must be supplied to all. These are primarily the so-called Sacraments of the dead (Baptism and Confession) and secondarily the other Sacraments as far as they are intended for all. For two of them, Holy Orders and Matrimony, are intended merely for society as such, but not for each individual member. So much about spiritual benefits, omitting the sacramentals, which are not necessary for salvation. Since there is an essential hierarchic difference between laity and clergy, it is but meet that this distinction should also appear outwardly. Hence the following canon:

CAN. 683

Non licet laicis habitum clericalem deferre, nisi agatur vel de Seminaricrum alumnis aliisque adspirantibus ad ordines de quibus in can. 972, § 2, vel de laicis, servitio ecclesiae legitime addictis, dum intra eandem ecclesiam sunt aut extra ipsam in aliquo ministerio ecclesiastico partem habent.

With the exception of seminarists and others aspiring to holy orders (even if they do not live in a theological seminary; can. 972), laymen are not allowed to wear the clerical garb, unless they are legitimately engaged in the service of the Church, in which case they may wear the ecclesiastical garb in church and also outside of it, when taking part in ecclesiastical functions. The clerical garb consists of the cassock and the so-called Roman collar. In Rome and in Italy generally, as elsewhere, the students of petits seminaires usually wear a cossack. This practice the Code permits. It also allows sextons or sacristans, singers, beadles (sometimes called

[3] Matt. 9, 12 f.; 28, 19.

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"Schweizers"), or ushers to wear their distinctive insignia in church as well as outside of it when they take part in ecclesiastical functions, for instance, processions, dedications, and perhaps also in schools if the function has an ecclesiastical character. Outside these places and ceremonies lay people are not allowed to wear the ecclesiastical garb. There is not much danger of transgression in this country. However, we sometimes hear of bogus priests and even prelates, and hence the warning is opportune even here. The prohibition is based upon the *privilegium canonis* and on that of ecclesiastical immunity formerly accorded to the clergy, when scoundrels like the roaming deacons (*diaconi selvaggi*) often abused the clerical dress.

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TITLE XVIII

ASSOCIATIONS OF THE FAITHFUL IN GENERAL

We live in an age of organizations, though it would be wrong to imagine that societies were unknown to former ages. On the contrary, even the Middle Ages had their guilds and confraternities, some of which have left traces of their noble deeds. "Nobles, priests, religious, clerks, sons of the soil who labored at various manual works lived then so to say in common, and they are found continually together in all their daily occupations," says Cardinal Gasquet,[1] and quotes a sentence from Toulmin Smith to the effect that guilds are older than kings in England.[2] Fraternities are as old as the Church. The first Christians, according to the Acts of the Apostles, held everything in common and prayed in common.[3] The *collegium tenuiorum* and the corporation of the *fossores* or grave diggers are well known. We may safely say that the Church has always fostered pious unions and confraternities, as long as they kept within proper limits and acknowledged ecclesiastical authority.

The lack of spiritual guidance or of acknowledgment of ecclesiastical authority has caused no little disturbance in the camps of the Christian Socialists, as the unions or federations of workingmen in Germany have

1 Card. Gasquet, *The Eve of the Reformation*, 1901, p. 309 (Ch. XI).

2 Id., *Parish Life in Mediaeval England*, 1906, p. 253; cfr. also *Translations and Reprints from the Original Sources of European History*, University of Pa., 1902, Vol. II, No. 1, p. 11 ff.

3 Acts 2, 44 ff.; 4, 32 ff.

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proved.[4] The democratic-idealistic movement in France, known by the name of *Sillon,* also seemed to endanger the progress of true democracy and Catholicity and was therefore disowned by Pius X.[5] Besides social or charitable unions, the Church recommends especially confraternities for young people based on supernatural principles,[6] *i. e.,* the teachings of the Gospel. Two rules should always be observed by laymen in founding pious societies: a specific good work to be undertaken and respect for ecclesiastical authority. If these two essentials are properly safeguarded, the Church will favor a society, whereas if they are not, she will disapprove or merely tolerate.

How much influence may be permitted to laymen in ecclesiastical affairs is a difficult and delicate question, the solution of which depends on the kind of work in hand as well as on individual prudence and zeal. What may be becoming, or even necessary, in one country may be inadvisable in another, where circumstances are different.

Can. 684

Fideles laude digni sunt, si sua dent nomina associationibus ab Ecclesia erectis vel saltem commendatis; caveant autem ab associationibus secretis, damnatis, seditiosis, suspectis aut quae studeant sese a legitima Ecclesiae vigilantia subducere.

The faithful who enrol in societies organized, or at least recommended, by the Church are worthy of praise; but they should beware of entering secret, condemned, seditious or suspect societies, or such as strive to withdraw themselves from the vigilance of the Church.

4 *Ep. Pii X ad Card. Fischer* (*A. Ap. S.*, III, 18 f.) etc.

5 Aug. 25, 1910 (*A. Ap. S.*, II, 607 ff.).

6 Letter of Card. Merry del Val to Mons. Bougonier, Nov. 19, 1912 (*A. Ap. S.*, IV, 714 f.).

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There are societies for every need in the Catholic Church, but not all are organized by her,— in fact very few. Most were established privately and their constitutions had first to be examined and their work tested. As soon as a society is approved by the Church, the latter may be truly said to have given it her sanction and authority. The Society of St. Vincent de Paul, the Association for Christian Doctrine, the Peter Claver Sodality, and many others may be said to have been organized by the Church. Recommendation in a lesser degree involves a judgment — though not an infallible one — as to a society's soundness. Many such recommendations may be read in the *Acta Apostolicae Sedis,* especially under Pius X, who fully realized the usefulness of Catholic associations.

On the other hand there are societies which the Church disapproves. Five different kinds of them are mentioned in our canon, although we would not assert that the lines are sharply drawn. By *secret societies* are meant principally the *Freemasons.* All their societies or lodges are forbidden, but not all are condemned in the same degree. For condemnation means prohibition or proscription enforced by penal sanction, and is generally made by name. Many ecclesiastical documents, especially the constitutions of Clement XII, "*In eminenti,*" April 28, 1738, and of Benedict XIV, "*Providas,*" March 18, 1731, give the reasons why Freemasons are condemned. These reasons are: because they espouse the principle of indifferentism in religion, envelop themselves in secrecy confirmed by terrible oaths, show repugnance and disobedience not only to ecclesiastical, but also to civil law, and, lastly, because they are shunned and abhorred by good and prudent men. It may be true, as often stated, that the lower degrees are not aware of

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the real tendencies of the craft as manifested in the higher degrees. But this fact does not lessen the danger. It is safe to say that all secret societies are forbidden; some of them are also condemned for reasons which the student of Freemasonry will easily perceive.[7] *Condemned* are societies which aim at the ruin of Church or State, whether their oath be secret or not (S. O., Aug. 5, 1846). Some (the *Independent Order of Good Templars,* the *Odd Fellows,* the *Sons of Temperance,* and the *Knights of Pythias*) have been nominally forbidden,[8] though the Holy Office would not precisely state whether the members incur censure. To enter such a lodge would be a grievous sin, especially since our Code declares that those who enrol in a Masonic sect are excommunicated.[9] Members who would sustain a great loss if they left one of these societies, on account of insurance, may obtain permission to remain in the lodge, provided they entered it *bona fide,* abstain from participation in any ritualistic ceremony, give no scandal, and suffer no spiritual loss.[10]

Seditious, though not secret societies are the radical Socialists, Communists, Nihilists, and Anarchists, who aim at overthrowing all authority, and subverting the family and property rights.[11]

Questionable are all those societies whose moral and religious principles give rise to doubts as to their sound-

7 Cfr. Arthur Preuss, *A Study in American Freemasonry* (Based upon American Masonic Standard Works), 3rd edition, St. Louis, Mo., 1914.

8 S. O., Aug. 9, 1893; Aug. 20, 1894; Jan., 1896. S. O., May 10, 1884 (*Coll. P. F.*, n. 1615); Aug. 1, 1855 (*Coll. cit.*, n. 1116) S. C. P. F., Sept. 24, 1867 (*Coll. cit.*, n. 1320).

9 Can. 2335.

10 Putzer, *Comment. in Facult. Apost.*, ed. 4, 1897, p. 235 f.

11 Leo XIII, "*Quod apostolici muneris,*" Dec. 28, 1878. Seditious are also certain societies formed for political purposes, though they may bear a literary title.

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ness. Such a one was the *Sillon* in France; such are the societies *which seek to withdraw themselves from the authority of the Church*, no matter how well-meaning they may be. Interconfessional associations are almost compelled to shirk the restraints imposed by ecclesiastical authority.

OBJECTS OF CHRISTIAN ASSOCIATIONS

CAN. 685

Associationes distinctae a religionibus vel societatibus de quibus in can. 487–681, ab Ecclesia constitui possunt vel ad perfectiorem vitam christianam inter socios promovendam, vel ad aliqua pietatis aut caritatis opera exercenda, vel denique ad incrementum publici cultus.

After drawing the line between forbidden and recommended societies, the Code explains for what ends or purposes Catholic societies may be established. Apart from religious institutes and societies dealt with in can. 487–681, the Church permits the establishment of societies for a threefold purpose:

(a) To assist the members to promote a more perfect Christian life (*e. g.*, Tertiaries, etc.);

(b) To encourage works of piety or charity (*e. g.*, confraternities);

(c) To promote public worship (*e. g.*, Eucharistic societies, societies for ecclesiastical music and song, altar societies, societies of acolytes and sextons, etc.).

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AUTHORITY FOR ESTABLISHING SOCIETIES

CAN. 686

§ 1. Nulla in Ecclesia recognoscitur associatio quae a legitima auctoritate ecclesiastica erecta vel saltem approbata non fuerit.

§ 2. Associationes erigere vel approbare pertinet, praeter Romanum Pontificem, ad loci Ordinarium, exceptis illis quarum instituendarum ius, apostolico ex privilegio, aliis reservatum est.

§ 3. Licet privilegium concessum probetur, semper tamen, nisi aliud in ipso privilegio cautum sit, requiritur ad validitatem erectionis consensus Ordinarii loci scripto datus; consensus tamen ab Ordinario praestitus pro erectione domus religiosae valet etiam pro erigenda in eadem domo vel ecclesia ei adnexa associatione, quae non sit constituta ad modum organici corporis et illius religionis sit propria.

§ 4. Vicarius Generalis ex solo mandato generali, et Vicarius Capitularis nequeunt associationes erigere aut consensum praebere pro earum erectione aut aggregatione.

§ 5. Erectionis litterae ab iis qui ex privilegio apostolico associationem erigunt, gratis concedantur, sola excepta taxa pro expensis necessariis.

§ 1. The Church gives her recognition to no society which has not been organized, or at least approved of, by the legitimate ecclesiastical authority.

§ 2. To erect or approve societies belongs, aside from the Roman Pontiff, to the Ordinary of the diocese, with the exception of those whose institution is by Apostolic concession reserved to others.

§ 3. Even in case a concession has been granted, the

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written consent of the Ordinary is required for the valid foundation of a society, unless the contrary is explicitly stated in the concession. The permission of the Ordinary to erect a religious house includes permission to establish in this house or the adjacent church any society that may be customary with the religious institute in question, even though it may not form part and parcel of the institute itself.

§ 4. In virtue of their usual powers, neither a vicar general nor a vicar capitular enjoys the right of establishing any society or of granting the required consent to one already established.

§ 5. With the exception of a nominal fee to cover the necessary expenses, letters of foundation are to be granted gratis.

ECCLESIASTICAL SANCTION

CAN. 687

Ad normam can. 100, tunc tantum fidelium associationes iuridicam in Ecclesia personam acquirunt, cum a legitimo Superiore ecclesiastico formale obtinuerunt erectionis decretum.

In accordance with can. 100, associations of the faithful acquire official recognition as juridical persons only when they have obtained a formal decree of establishment from the competent ecclesiastical superior. This decree is issued in the form of a simple rescript. The time from which the recognition is to be dated, is the date of execution, if an executor is chosen; or let us rather say, the date on which the decree reaches those who asked for it. Before that time members cannot validly be enrolled. Note that the question here is of ecclesiastical acknowledgment only; civil recognition depends entirely on the secular authorities.

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TITLE TO BE CHOSEN

CAN. 688

Associatio titulum seu nomen ne assumat quod levitatem aut absonam novitatem sapiat, vel speciem devotionis a Sede Apostolica non probatam exprimat.

No society is permitted to choose for itself any name that savors of levity or novelty, or is connected with any devotion discountenanced by the Holy See.

STATUTES

CAN. 689

§ 1. Quaelibet associatio sua statuta habeat, a Sede Apostolica vel ab Ordinario loci examinata et approbata.

§ 2. Statuta quae non sint confirmata a Sede Apostolica, moderationi et correctioni Ordinarii loci semper subiecta manent.

§ 1. Every society shall have its own statutes, which are to be examined and approved by the Apostolic See or by the Ordinary of the diocese.

§ 2. Statutes which have not been approved by the Apostolic See always remain subject to modification and correction by the diocesan Ordinary.

AUTHORITY OF THE ORDINARY

CAN. 690

§ 1. Omnes associationes, etiam ab Apostolica Sede erectae, nisi speciale obstet privilegium, iurisdictioni subsunt et vigilantiae Ordinarii loci, qui ad normas sacrorum canonum eas invisendi ius habet et munus.

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§ 2. Associationes tamen, quae vi privilegii apotolici a religiosis exemptis in suis ecclesiis institutae sunt, Ordinariis locorum fas non est visitare quod attinet ad ea quae internam disciplinam seu spiritualem associationis directionem spectant.

§ 1. All societies, even those erected by the Apostolic See, unless they enjoy a special privilege to the contrary, are subject to the authority of the Ordinary, who has the right and duty to watch over them according to the prescriptions of the sacred canons.

§ 2. It is not permissible, however, for diocesan Ordinaries to meddle in the internal discipline or spiritual direction of societies which exempt religious institutes have erected in their churches by virtue of an apostolic privilege.

TEMPORALITIES

CAN. 691

§ 1. Associatio legitime erecta, nisi aliud expresse cautum sit, bona temporalia possidere et administrare potest sub auctoritate Ordinarii loci, cui rationem administrationis saltem quotannis reddere debet, ad normam can. 1525, minime vero parochi, licet in eius territorio erecta sit, nisi aliud Ordinarius ipse statuerit.

§ 2. Potest, ad normam statutorum, oblationes recipere, et receptas erogare ad pios ipsius associationis usus, salva semper offerentium voluntate.

§ 3. Nulli associationi eleemosynas colligere licet, nisi id aut statuta permittant, aut necessitas postulet, et loci Ordinarii consensus accedat ac servetur forma ab eodem praescripta.

§ 4. Ad eleemosynas extra territorium colligendas uniuscuiusque Ordinarii venia, scripto data, requiritur.

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§ 5. Oblationum quoque ac eleemosynarum fidelis erogationis rationem associatio reddat Ordinario loci.

§ 1. A society legitimately established may possess and administer temporalities under the direction of the local Ordinary, unless the contrary is expressly stated in the letters of approbation. It must render an account of its property at least annually to the Ordinary, conformably to the prescriptions of can. 1525, but it is not in this regard subject to the parish priest in whose territory it exists, unless the Ordinary legislates otherwise.

§ 2. Such a society may accept donations according to the tenor of its statutes, and use them for any good purpose, with due regard, of course, paid to the will of the donors.

§ 3. No society is allowed to seek alms unless either its statutes permit or necessity demands, and then only with the consent of the Ordinary and in the way prescribed by him.

§ 4. For soliciting alms elsewhere than within their own territory, the written permission of the respective Ordinary is required.

§ 5. The society must render an account to the local Ordinary of the alms and other offerings received.

RIGHTS AND PRIVILEGES OF MEMBERS

CAN. 692

Ad fruendum associationis iuribus, privilegiis, indulgentiis, aliisque gratiis spiritualibus, necesse est et sufficit ut quis in eam valide receptus sit, secundum propria associationis statuta et ab ea legitime non expulsus.

To enjoy the rights, privileges, indulgences, and other spiritual favors accruing to a society, it is required and

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sufficient for one to be validly received into the same, according to the statutes, and not expelled from it.

QUALIFICATIONS FOR MEMBERSHIP

CAN. 693

§ 1. Acatholici et damnatae sectae adscripti aut censura notorie irretiti et in genere publici peccatores valide recipi nequeunt.

§ 2. Eadem persona potest adscribi pluribus associationibus, salvo praescripto can. 705.

§ 3. Absentes ne adscribantur associationibus ad modum organici corporis constitutis; praesentes autem, nonnisi scientes ac volentes adscribi possunt.

§ 4. Salvo praescripto can. 704, religiosi possunt piis associationibus nomen dare, exceptis iis quarum leges, Superiorum iudicio, cum observantia regulae et constitutionum conciliari nequeant.

§ 1. Non-Catholics and members of a condemned sect, those laboring under notorious censure, *i. e.*, one they cannot hide by any artifice, and, in general, public sinners, cannot be validly received.

§ 2. Without prejudice to can. 705, one and the same person may be enrolled in several societies. The exception regards Tertiaries of religious orders, who may not belong to several orders without a special indult; thus, for instance, an oblate of St. Benedict may not at the same time be a Franciscan tertiary.

§ 3. Absent persons may not be enrolled as full-fledged members of a society; those who are present may be received only with their knowledge and consent.

§ 4. Without prejudice to can. 704, religious may join pious associations, except those whose laws, in the judgment of the superior, cannot be reconciled with the rule

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and constitutions. Can. 704 forbids professed religious to become tertiaries of any order.

FORM OF RECEPTION

CAN. 694

§ 1. Receptio fiat ad normam iuris ac statutorum uniuscuiusque associationis.

§ 2. Ut autem de receptione constet, inscriptio in albo associationis fieri omnino debet; imo haec inscriptio, si associatio in personam moralem erecta fuerit, est ad validitatem necessaria.

§ 1. Reception into any society must be effected according to the laws and statutes of the same.

§ 2. To insure certainty in the matter of reception, the name of each member must be inscribed on the roster of the society; if the society enjoys the status of a *persona moralis,* registration is necessary for validity.

NO SPECIAL RECOMPENSE

CAN. 695

Occasione receptionis in associationem nihil directe vel indirecte exigatur, praeter id quod in statutis legitime approbatis designatum sit, aut ab Ordinario loci, ratione specialium circumstantiarum, expresse permissum in associationis favorem.

On the occasion of reception into a society no fee may be exacted beyond that determined in the lawfully approved statutes, or what the Ordinary of the diocese, by reason of special circumstances, has expressly permitted in favor of the society.

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DISMISSAL

CAN. 696

§ 1. Nemo, legitime adscriptus, ab associatione dimittatur, nisi iusta de causa ad normam statutorum.

§ 2. Qui in casum inciderint, de quo in can. 693, § 1, expungantur, praemissa monitione, servatis propriis statutis et salvo iure recursus ad Ordinarium.

§ 3. Etiamsi in statutis nihil expresse caveatur, etiam loci Ordinarius quod ad omnes associationes, et Superior religiosus quod ad associationes ex apostolico indulto a religiosis erectas attinet, possunt socios dimittere.

§ 1. No one who has been lawfully enrolled in a society, may be dismissed from the same, except for a just cause, according to the statutes.

§ 2. Whoever falls under can. 693, § 1, may be expelled after due warning, with due regard to the respective statutes and without prejudice to the right of appeal to the Ordinary.

§ 3. Even though nothing be expressly stated in the statutes, the Ordinary of the diocese may dismiss any member of any society. The religious superior enjoys the same right in respect to societies erected by his subjects in virtue of an Apostolic indult.

MEETINGS AND OFFICERS

CAN. 697

§ 1. Associationes legitime erectae ius habent, ad normam statutorum et sacrorum canonum, celebrandi comitia, edendi peculiares normas quae ipsum sodali-

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tium respiciant, eligendi administratores bonorum, officiales et ministros, firmo praescripto can. 715.

§ 2. In iis quae convocationem ad comitia et electiones respiciunt, serventur ius commune, quod prostat in can. 161–182 et statuta iuri communi non contraria.

§ 1. Societies legitimately established enjoy the right, according to the rules laid down in their statutes and in the sacred canons, of convoking meetings, promulgating special by-laws pertaining to their society, electing administrators for their property, and other officials necessary for the well-being of the society. Can. 715 must not be overlooked in this connection.

§ 2. In all meetings and elections the common law, as outlined in can. 161–182, must be observed, as well as the statutes not opposed to the common law.

MODERATOR AND CHAPLAIN

CAN. 698

§ 1. Nisi privilegium apostolicum aliud expresse caveat, nominatio moderatoris et cappellani pertinet ad loci Ordinarium in associationibus ab ipso vel ab Apostolica Sede erectis aut approbatis, et in associationibus a religiosis vi apostolici privilegii erectis extra proprias ecclesias; in associationibus vero erectis a religiosis in propriis ecclesiis requiritur tantum Ordinarii loci consensus, si a Superiore moderator et cappellanus e clero saeculari eligantur.

§ 2. Moderator et cappellanus possunt, durante munere, benedicere associationis habitum seu insignia, scapularia, etc., eaque adscribendis imponere; quod vero ad conciones attinet, serventur praescripta can. 1337–1342.

§ 3. Moderatorem et cappellanum revocare ex iusta

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causa possunt qui illos nominaverunt eorumque successores vel Superiores.

§ 4. Idem potest esse moderator et cappellanus.

§ 1. Unless an apostolic privilege provides otherwise, the appointment of a moderator and chaplain belongs to the Ordinary in societies established or approved either by himself or by the Apostolic See and in societies erected by religious outside their own churches by virtue of an Apostolic privilege; but in societies established by religious in their own churches, the consent of the Ordinary only is required in case the moderator and the chaplain are appointed by the religious Superior from among the secular clergy.

§ 2. During their term of office, the moderator and the chaplain are empowered to bless the habit or insignia, scapulars, etc., of the society and to invest candidates with them; regarding sermons, canons 1337–1342 are to be observed.

§ 3. Those who possess the power of nominating moderators and chaplains, as also their successors or Superiors, can revoke the nomination for a just cause.

§ 4. One and the same person may act as moderator and chaplain.

SUPPRESSION OF SOCIETIES

CAN. 699

§ 1. Ob graves causas et salvo iure recursus ad Apostolicam Sedem, potest loci Ordinarius supprimere non solum associationem a se vel a decessoribus suis erectam, sed etiam associationem ex apostolico indulto a religiosis erectam de consensu Ordinarii loci.

§ 2. Associationes vero ab ipsa Apostolica Sede erectae nonnisi ab eadem supprimi possunt.

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§ 1. For grave reasons, and with due regard to the right of recourse to the Holy See, the local Ordinary may suppress not only a society established by himself or his predecessors, but also a society erected by religious in virtue of an apostolic indult requiring the consent of the Ordinary.

§ 2. Societies erected by the Holy See itself can be suppressed only by the same.

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TITLE XIX

ASSOCIATIONS OF THE FAITHFUL IN PARTICULAR

DIFFERENT KINDS OF ASSOCIATIONS

CAN. 700

Triplex distinguitur in Ecclesia associationum species: *tertii Ordines saeculares, confraternitates, piae uniones.*

There are three kinds of associations in the Church: secular tertiaries, confraternities, pious unions.

PRECEDENCE

CAN. 701

§ 1. Inter pias laicorum associationes, ordo praecedentiae est qui sequitur, firmo praescripto can. 106, nn. 5, 6:

1.° Tertii Ordines;

2.° Archiconfraternitates;

3.° Confraternitates;

4.° Piae uniones primariae;

5.° Aliae piae uniones.

§ 2. Confraternitas sanctissimi Sacramenti, si agatur de processione in qua defertur sanctissimum Sacramentum, praecedit ipsis archiconfraternitatibus.

§ 3. Omnes autem tunc solummodo ius praecedentiae habent, cum collegialiter incedunt sub propria cruce vel vexillo et cum habitu seu insignibus associationis.

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§ 1. Without prejudice to the regulations laid down in can. 106, nn. 5 and 6, the order of precedence among pious lay associations is the following:

First — Tertiary Orders;

Second — Archconfraternities;

Third — Confraternities;

Fourth — Primary organizations for pious purposes;

Fifth — Other organizations for pious purposes.

§ 2. In processions in which the Blessed Sacrament is carried, the Confraternity of the Blessed Sacrament enjoys the right of preceding even the Archconfraternities.

§ 3. The right of precedence belongs to these organizations only when they march in a body under their own cross or banner and with the garb or insignia of their society.

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CHAPTER I

SECULAR TERTIARIES

CAN. 702

§ 1. Tertiarii saeculares sunt qui in saeculo, sub moderatione alicuius Ordinis, secundum eiusdem spiritum, ad christianam perfectionem contendere nituntur, modo saeculari vitae consentaneo, secundum regulas ab Apostolica Sede pro ipsis approbatas.

§ 2. Si tertius saecularis Ordo in plures associationes dividatur, harum quaelibet legitime constituta dicitur *sodalitas tertiariorum.*

§ 1. Secular Tertiaries are those who live in the world under the direction of an Order, and endeavor to attain Christian perfection according to its spirit, in a manner compatible with secular life. They have a moderator of the same order and rules approved by the Apostolic See.

§ 2. If the secular Tertiaries of any Order are divided into several bodies, each of them is called a sodality of Tertiaries.

The first category of Catholic associations is that of the Tertiaries, a name derived from the organization formed by St. Francis of Assisi, most probably in 1221, near Portiuncula,[1] as an order of penitents. However, though the widespread influence of this particular organization is due to the founder of the Franciscans, similar institutes had been in existence before the XIth century. The Clunians admitted laymen to a share in their

1 Cfr. *Cath. Encycl.*, XIV, 641.

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spiritual benefits. In the diocese of Treves, in the well-known abbey of Prüm (erected in the eighth century in honor of our Holy Redeemer), Abbot Stephen (988–1000) "instituted a confraternity in honor of St. Benedict in which many noble men were enrolled."[2] This, perhaps, is one of the first instances where the Oblates of St. Benedict are referred to as a fraternity or sodality. The eleventh century produced the *Oblates of St. Benedict,* who have been reorganized by Leo XIII.[3] The Order of St. Dominic and the Carmelites (1273) followed this example and admitted seculars among their Tertiaries. But, as we have said, the best known organization of this kind is that of the Tertiaries of St. Francis. Note that, although they are called an Order of Tertiaries, they cannot be properly styled religious. On the other hand these societies of Tertiaries are more than confraternities or sodalities, and the rules of confraternities do not simply apply to them.[4] The division into sodalities of which can. 702, § 2, speaks, is made for the sake of facilitating administration, but each sodality must be affiliated with the Order of Secular Tertiaries or it can have no legal standing in the Church.

POWERS OF SUPERIORS AND OF THE ORDINARY

CAN. 703

§ 1. Firmo privilegio nonnullis Ordinibus concesso, nulla religio potest tertium Ordinem sibi adiungere.

§ 2. Dato etiam apostolico privilegio, Superiores religiosi possunt quidem personas particulares tertio Ordini adscribere, sed nequeunt sodalitatem tertiario-

2 Schorn, *Eiflia Sacra,* 1889, II, p. 351.

3 Cfr. *Statutes and Prayers for the Oblates of St. Benedict,* Conception, Mo., 1917.

4 Cfr. Beringer, *Die Ablässe,* 1906 (ed. 13), p. 200 f.

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rum valide erigere sine consensu Ordinarii loci, ad norman can. 686, § 3.

§ 3. Nec sodalitatibus a se erectis possunt concedere usum particularium vestium, in publicis sacris functionibus deferendarum, sine speciali eiusdem Ordinarii licentia.

§ 1. With the exception of such Orders as have been accorded the privilege, no religious institute is allowed to establish a Third Order. Hence only *orders of regulars,* but no congregations, even though exempt, may establish a third order of their own, and even these orders need a *special privilege* to that effect.

§ 2. Although religious superiors may enroll particular persons as Tertiaries, they may not validly establish a sodality of Tertiaries, although their order has an apostolic privilege to that effect, without the approval of the diocesan ordinary, according to can. 686, § 3.

§ 3. Neither are they permitted to allow the sodalities which they — the religious superiors — have erected, to wear a special garb at public sacred functions without the special permission of the Ordinary. This special garb must not be confounded with the insignia of the Tertiaries, which consist of a scapular of smaller size and a girdle of hemp or wool, which they may wear at processions without special permission.[5]

RELIGIOUS CANNOT BE TERTIARIES

CAN. 704

§ 1. Qui vota nuncupavit vel in perpetuum vel ad tempus in aliqua religione, nequit simul ad ullum ter-

5 "*Veste uniformi induti, vulgo sacco*"; S. C. E. et RR., April 6, 1900; Beringer, *l. c.*, p. 800, p. 805 f.; a *sacco* means a sack or dress covering the whole body, even the face, such as some confraternities wear in Rome at funerals.

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tium Ordinem pertinere, etsi eidem antea fuerit adscriptus.

§ 2. Si solutus a votis ad saeculum redierit, antiqua adscriptio reviviscit.

§ 1. Whosoever has pronounced vows, whether perpetual or temporal, in any religious institute cannot simultaneously belong to any Third Order, even though he was once enrolled in such a one.

§ 2. If one is freed from his vows and returns to the world, his former status as Tertiary revives.

Note the term "has pronounced." It means that a novice enjoys the privileges of a Tertiary during his novitiate (S. C. Indulg., Jan. 31, 1893). This canon binds *all* Tertiaries and the Oblates of St. Benedict (S. C. Indulg., Jan. 15, 1895).

NO ONE MAY BE A TERTIARY IN TWO ORDERS

Can. 705

Nulla tertiariorum sodalitas, sine apostolico indulto, adscribere potest sodales alius tertii Ordinis in eodem remanentes; singulis tamen sodalibus licet iusta de causa transire sive ab alio ad alium tertium Ordinem, sive ab alia ad aliam sodalitatem eiusdem tertii Ordinis.

No sodality of Tertiaries is allowed, without an Apostolic indult, to enroll members of another Third Order; for a just cause, however, it is permissible for Tertiaries to transfer themselves either to a different Third Order, or to a different sodality of the same Third Order.

This rule dates back to Jan. 31, 1893, but has retroactive force, as the S. C. Indulg. declared, June 21, 1893. Therefore, as a rule, no one may belong to two different orders as a Tertiary. Nor is there any necessity for this,

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as the purposes of all third Orders are practically about the same.

PROCESSIONS

CAN. 706

Publicis processionibus, funeribus aliisque ecclesiasticis functionibus tertiarii possunt, sed non tenentur, collegialiter interesse; at si intersint, cum suis insignibus sub cruce propria incedant necesse est.

At public processions, funerals, and other ecclesiastical functions Tertiaries may, but are not obliged to, attend in a body. If present in a body, they must march under their own cross and wear their proper insignia.

If the first Order, for instance, of the Franciscans march in procession, their Tertiaries may march under the same cross (S. Rit. C., June 30, 1905).

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CHAPTER II

CONFRATERNITIES AND PIOUS ORGANIZATIONS

CAN. 707

§ 1. Associationes fidelium quae ad exercitium alicuius operis pietatis aut caritatis erectae sunt, nomine veniunt *piarum unionum;* quae, si ad modum organici corporis sint constitutae, sodalitia audiunt.

§ 2. Sodalitia vero in incrementum quoque publici cultus erecta, speciali nomine *confraternitates* appellantur.

§ 1. Associations of the faithful founded to further some work of piety or charity, are known as pious organizations; if they enjoy a quasi-corporate status, they are called brotherhoods (*sodalitia*).

§ 2. Brotherhoods that have for their object the enhancement of public worship are called confraternities.

Such confraternities may be traced to the fourth century. But the climax of the guild and fraternity movement was witnessed in the XIIIth century, when the *Gonfalieri,* or banner-bearers, were founded and recommended by the Church.[1] The most renowned confraternities to-day are those of the Holy Rosary and the Scapular.

ESTABLISHMENT

CAN. 708

Confraternitates nonnisi **per formale erectionis decretum constitui** possunt; **pro piis autem unionibus**

1 Cfr. Beringer, *l. c.*, p. 514.

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sufficit Ordinarii approbatio, qua obtenta, ipsae, licet morales personae non sint, capaces tamen sunt obtinendi gratias spirituales ac praesertim indulgentias.

Confraternities may be established only by a formal decree of erection; but for pious organizations, the approbation of the Ordinary suffices, though it does not constitute them moral persons, but enables them to gain spiritual favors, especially indulgences. The S. C. of Indulgences (Jan. 8, 1861) issued two formularies, one for confraternities erected by religious superiors, the other for archconfraternities established by an apostolic indult.[2] These formularies are based on the Constitution of Clement VIII, "*Quaecumque*," Dec. 7, 1604.

SACRED FUNCTIONS

CAN. 709

§ 1. Confratres nequeunt sacris functionibus operam praestare, nisi confraternitatis habitum seu insignia deferant.

§ 2. Mulieres confraternitatibus adscribi tantum possunt ad lucrandas indulgentias et gratias spirituales confratribus concessas.

§ 1. Male members are not allowed to take part officially in any sacred function, unless vested in the garb or insignia of their confraternity.

§ 2. *Women* can be enrolled in confraternities only to gain indulgences and other spiritual favors granted to the members.

The S. C. of Indulg. wishes that the male members should wear the special garb of the fraternity, but this is not a condition strictly required for gaining the indulgences.[3]

2 *Ibid.*, p. 538 ff.

3 Beringer, *l. c.*, p. 572.

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TITLE OF ASSOCIATIONS

CAN. 710

Titulus seu nomen confraternitatis vel piae unionis desumatur vel a Dei attributis, vel a christianae religionis mysteriis, vel a festis Domini et Beatae Virginis Mariae, vel a Sanctis, vel a pio opere ipsius sodalitii.

The title or name of a confraternity or pious organization is to be taken from the attributes of God, or the mysteries of the Christian religion, or the feasts of our Lord and His Blessed Mother, or from the Saints, or from the specific work of piety pursued by the brotherhood.

SEVERAL ASSOCIATIONS

CAN. 711

§ 1. Plures confraternitates vel piae uniones eiusdem tituli ac instituti, nisi id eis specialiter concessum sit aut iure cautum, ne erigantur neve approbentur in eodem loco; si vero agatur de magnis civitatibus, id licet, dummodo inter ipsas intercedat conveniens, iudicio Ordinarii loci, distantia.

§ 2. Curent locorum Ordinarii ut in qualibet paroecia instituantur confraternitates sanctissimi Sacramenti, ac doctrinae christianae; quae, legitime erectae, ipso iure aggregatae sunt eisdem Archiconfraternitatibus in Urbe a Cardinale Urbis Vicario erectis.

§ 1. Unless the contrary be specially conceded or provided for by law, several confraternities or pious organizations bearing the same name, or founded under the same auspices, may not be erected or approved in the same place. In large cities, however, this may be done,

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provided a sufficient distance intervenes between the respective confraternities according to the good judgment of the Ordinary.

§ 2. It is the duty of the diocesan Ordinaries to see to it that the confraternities of the Blessed Sacrament and of Christian Doctrine be established in every parish. Once legitimately erected, these confraternities are *ipso iure* aggregated to the Archconfraternities of the same name established by the Cardinal Vicar in the city of Rome.

Pius V[4] as well as Benedict XIV,[5] and again Pius X, insisted upon religious instruction to be imparted by laymen well versed in Christian doctrine. The Confraternity of the Blessed Sacrament was founded in Rome in 1538, and exceedingly favored by the Pontiffs.[6] Both are warmly recommended to the Ordinaries. Among students, the Sodality of the Blessed Virgin has justly been favored and produced splendid results.[7]

ESTABLISHMENT

CAN. 712

§ 1. Confraternitates vel piae uniones ne erigantur, nisi in ecclesia aut oratorio publico vel saltem semipublico.

§ 2. Ne instituantur, sine Capituli consensu, in ecclesia cathedrali aut collegiali.

§ 3. In ecclesiis vel oratoriis religiosarum Ordinarius loci permittere potest erectionem associationis mulierum tantum, aut piae unionis quae nonnisi precationibus incumbat et gratiarum dumtaxat spiritualium communicatione gaudeat.

4 "*Ex debito*," Oct. 6, 1571, § 2.
5 "*Etsi minime*," Feb. 7, 1742, § 7.
6 Beringer, *l. c.*, p. 593.
7 Cfr. Elder Mullan, S. J., *The Sodality of Our Lady Studied in the Documents*, New York, 1912 (a very thorough work).

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§ 1. Confraternities or pious organizations may be erected only in public or semi-public churches or oratories.

§ 2. They cannot be established in cathedral or collegiate churches without the consent of the chapter.

§ 3. In churches or oratories of religious women, the diocesan Ordinary is allowed to erect associations for women only, or pious organizations, the scope of which is to gain spiritual favors by means of the apostolate of prayer.

Leo XIII, July 7, 1883, granted permission to erect confraternities of the Sacred Heart of Jesus for the conversion of sinners in such oratories, and this privilege is now extended to all societies engaged in the work defined above, not only to the alumnae of female religious institutes, but also to other lay persons of both sexes.[8]

RELIGIOUS SUPERIORS

CAN. 713

§ 1. Religiosi cum confraternitatibus piisve unionibus a se erectis possunt et debent communicare omnes et solas gratias spirituales, quae in facultatibus a Sede Apostolica receptis specifice et nominatim communicabiles declarentur, eaeque in actu erectionis manifestandae sunt singulis, servato praescripto can. 919.

§ 2. Confraternitatibus, ab iisdem erectis, non licet vestem propriam seu insignia, quae in publicis processionibus aliisque sacris functionibus deferenda sunt, assumere sine speciali Ordinarii loci licentia.

8 Beringer, *l. c.*, p. 593; Mullan, *l. c.* n. 1925; sodalities of the Bl. Virgin for women only may be erected in the chapels of Sisters if the Ordinary permits them, Mullan, *l. c.*, n. 1932; even sodalities or pious organizations of both sexes the Ordinary could permit according to S. C. EE. et RR., Jan. 18, 1907, Mullan, *l. c.*, n. 1933.

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§ 1. Religious who have erected Confraternities or organizations for pious purposes, can and should impart to them all and only those spiritual favors that have been explicitly specified as communicable in the faculties received from the Apostolic See. Without prejudice to can. 919, said favors shall be communicated to all sodalities in the act of erection.

§ 2. Without the special permission of the diocesan Ordinary it is not permissible for confraternities to assume a garb or insignia to be worn in public processions or at other sacred functions. The indulgences are not given by the fact of erection, but communicated by the Apostolic See. But as soon as the superiors have obtained the necessary faculties, they must communicate the spiritual favors in detail to their respective confraternities as soon as these are erected. In doing this they must follow the rules imposed by the Apostolic See, otherwise the favors are null and void.[9] As to the dress, it is hardly necessary to add that the *sacci* or sacks seen in Rome are not worn in our country.

CHANGE OF DRESS

CAN. 714

Confraternitas proprium habitum vel insignia, sine licentia Ordinarii loci, ne dimittat neve immutet.

No Confraternity is allowed to abolish or modify its garb or insignia without the permission of the diocesan Ordinary.

POWER OF THE ORDINARY

CAN. 715

§ 1. Comitiis confraternitatum, etsi in regularium

[9] Beringer, *l. c.*, p. 535.

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ecclesiis et oratoriis celebrandis, per se vel per delegatum praeesse sine iure tamen suffragii, dignos et idoneos officiales et ministros electos confirmare, indignos vel non idoneos respuere aut removere, statuta aliasve normas, nisi a Sede Apostolica approbatae fuerint, corrigere et approbare, pertinet ad loci Ordinarium.

§ 2. De comitiorum extraordinariorum celebratione confraternitas Ordinarium loci eiusve delegatum tempestive praemoneat; secus Ordinario ius est comitia impediendi vel eorum decreta penitus infirmandi.

§ 1. It pertains to the diocesan Ordinary to preside, either personally or by proxy, at the meetings of confraternities, even those held in the churches and oratories of regulars, to confirm the election of worthy and capable officials, to reject or remove unworthy ones, and to amend and approve statutes and norms that have not the formal sanction of the Holy See. However, the Ordinary has not the right of suffrage at these meetings.

§ 2. Confraternities shall in due time notify the Ordinary or his delegate of any extraordinary meeting; if they fail to do so, the Ordinary may impede such meetings or annul their decrees.

PARISH RIGHTS

Can. 716

§ 1. Confraternitates et piae uniones, in propriis ecclesiis erectae, functiones non paroeciales, servatis servandis, independenter a parocho exercere possunt, dummodo ministerio paroeciali in paroeciali ecclesia non noceant.

§ 2. Idem servetur etiam in casu quo paroecia erecta sit in ipsa confraternitatis ecclesia.

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§ 3. In dubio utrum functiones confraternitatis vel piae unionis noceant, necne, ministerio paroeciali, ad Ordinarium loci spectat ius decidendi, itemque statuendi practicas normas servandas.

§ 1. Confraternities and pious organizations having their own churches, may exercise non-parochial functions,[10] *servatis servandis,* independently of the parish priest, provided the parochial ministry does not suffer any injury.

§ 2. The same holds good in cases where the parish as such is erected in the church of a confraternity.

§ 3. In case of doubt whether the functions of a confraternity or pious organization injure the parochial ministry, the diocesan Ordinary is to decide and lay down practical rules for guidance.

CAN. 717

§ 1. Si in ecclesiis non suis erectae sint, proprias functiones ecclesiasticas in sacello tantum vel altari, in quo sunt erectae, peragere possunt ad norman can. 716 et peculiarium statutorum.

§ 2. Patrimonium confraternitatis et piae unionis, quae erecta sit in ecclesia non sua, aut cuius ecclesia sit simul ecclesia paroecialis, debet esse separatum a bonis fabricae vel communitatis.

§ 1. If established in churches not their own, confraternities may perform their proper ecclesiastical functions only in a chapel or at an altar specially designated

10 Parochial functions are only those strictly defined in can. 462; in these the director and members are not allowed to participate or meddle, cf. Mullan, n. 260, n. 967; but besides these associations are dependent on the parish priest if the confraternity is erected in the parish church, Mullan, *l. c.*, n. 948, as can. 717 insinuates.

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for their services according to the prescriptions of can. 716 and the statutes.

§ 2. The property of any confraternity or pious organization established in a church not its own, or in a church which serves at the same time as parochial church, must be kept separate from the rest.

PROCESSIONS

CAN. 718

Confraternitates processionibus consuetis et aliis, quas Ordinarius loci indixerit, tenentur collegialiter cum propriis insignibus et sub proprio vexillo interesse, nisi Ordinarius aliud praescripserit.

Unless the local Ordinary determines otherwise, confraternities are obliged to take part in a body in the usual processions, and others ordered by the Ordinary. They march under their own cross and wear their proper insignia.[11]

HEADQUARTERS

CAN. 719

§ 1. De Ordinarii loci consensu confraternitas vel pia unio de alia ad aliam sedem transferri potest, nisi iure aut statutis a Sede Apostolica probatis translatio prohibeatur.

§ 2. Quoties agatur de transferenda confraternitate vel pia unione alicui religioni reservata, Superioris consensus est requirendus.

§ 1. With the consent of the diocesan Ordinary, any confraternity or pious organization may transfer its quar-

11 "In solemn processions, in which the pastor usually takes part, the confraternity can have its chaplain at its head, apart from the pastor." Mullan, *l. c.*, n. 267.

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ters from one place to another, unless such transfer is prohibited either by law or by statutes that have been approved by the Holy See.

§ 2. Whenever there is question of transferring a confraternity or pious organization that belongs to a definite religious institute, the consent of the respective superior is required.

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CHAPTER III

ARCHCONFRATERNITIES AND PRIMARY ORGANIZATIONS

CAN. 720

Sodalitia quae iure pollent alias eiusdem speciei associationes sibi aggregandi, *archisodalitia*, vel *archiconfraternitates*, vel piae uniones, congregationes, societates *primariae* appellantur.

Brotherhoods that are empowered by law to affiliate to themselves other associations of the same nature, are termed archconfraternities or archbrotherhoods, or pious organizations, congregations, societies of primary rank.

AGGREGATION

CAN. 721

§ 1. Nulla associatio potest sine apostolico indulto alias sibi valide aggregare.

§ 2. Archiconfraternitas vel primaria unio eas tantum potest confraternitates vel pias uniones sibi aggregare, quae sint eiusdem tituli ac finis, nisi indultum apostolicum aliud ferat.

§ 1. No association can validly affiliate to itself other associations without an apostolic indult.

§ 2. Unless an apostolic indult grants larger powers, archconfraternities or organizations of primary rank are allowed to affiliate with themselves only those confraternities or pious organizations whose title and purpose is the same as their own.

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COMMUNICATION OF SPIRITUAL FAVORS

CAN. 722

§ 1. Per aggregationem communicantur omnes indulgentiae, privilegia et aliae gratiae spirituales communicabiles quae associationi aggreganti directe et nominatim a Sede Apostolica concessae fuerint vel in posterum concedantur, nisi aliud in indulto apostolico caveatur.

§ 2. Ex hac communicatione nullum ius associatio aggregans acquirit supra aggregatam.

§ 1. By affiliation, confraternities and pious organizations share equally in all the indulgences, privileges, and other communicable spiritual favors that have been or will be conceded by the Apostolic See to the archconfraternity or pious organization, provided the contrary is not stated in an apostolic indult.

§ 2. The affiliating society does not acquire any right over the affiliated by virtue of this communication of privileges.

Communication of privileges between confraternities is entirely excluded. Only directly granted favors may be communicated to affiliated organizations.

CONDITIONS FOR AFFILIATION

CAN. 723

Ad aggregationis validitatem requiritur ut:

1.° Associatio iam fuerit canonice erecta nec alii archiconfraternitati vel primariae unioni aggregata;

2.° Fiat de consensu Ordinarii loci scriptis dato una cum eius litteris testimonialibus;

3.° Indulgentiae, privilegia et aliae gratiae spirituales quae per aggregationem communicantur,

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enumerentur in elencho, ab Ordinario loci in quo archiconfraternitas sita est, recognito et societati aggregatae tradendo;

4.° Aggregatio fiat formula in statutis praescripta et in perpetuum;

5.° Litterae aggregationis expediantur gratis omnino et nulla prorsus mercede etiam sponte oblata, exceptis necessariis expensis.

Valid affiliation requires: (1) that the association be canonically erected and not affiliated to any other archconfraternity or primary pious organization; (2) that it is done with the written approval of the diocesan Ordinary and with testimonial letters from him; (3) that the indulgences, privileges and other spiritual favors communicated be enumerated in writing, the list to be inspected by the Ordinary of the diocese in which the archconfraternity exists, and forwarded to the affiliated society;[1] (4) that the affiliation be made according to the form prescribed in the statutes and forever;[2] (5) that, excepting unavoidable expenses, the letters of affiliation be expedited gratis and without recompense, even if such be freely offered.

TRANSFER OF ARCHCONFRATERNITIES

CAN. 724

Archiconfraternitas vel primaria unio de alia ad aliam sedem nonnisi ab Apostolica Sede transferri potest.

Archconfraternities or primary organizations can be

1 The superior of the primary society is not allowed to withold some indulgences and privileges, but must communicate all he has. Mullan, *l. c.*, n. 151.

2 This is generally called diploma and must be placed in the church or sacristy.

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transferred from one place to another only by the Apostolic See.

CAN. 725

Titulus *archisodalitii* vel *archiconfraternitatis vel unionis primariae*, etiam honoris tantum causa, potest associationi ab una Sede Apostolica concedi.

The titles "Archconfraternity," "Archbrotherhood," "Primary Organization," may, even as honorary titles, be granted only by the Apostolic See.

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APPENDIX

Questions to be Answered in the Quinquennial Report of Religious Superiors (can. 510) [1]

1. Has the congregation obtained the decree of approbation or encouragement, and when was it granted by the Holy See?
2. What is the end or particular scope of the institute?
3. Has the name which the institute took in the beginning, or the scope or habit of the Sisters, undergone any change afterwards, and by what authority?
4. How many members have received the habit since the beginning, or at least in the last twenty years?
5. How many members have left the institute since the beginning, or at least in the last twenty years, and when, whether during the novitiate, after the temporary profession, or after having taken perpetual vows? Have there been any fugitives, and how many?
6. When was the last report sent to the Holy See?

I. About Persons

(a) *About Postulants*

7. How many new members have been received since the last report?
8. Did all of them bring the proper testimonials?
9. Have any special efforts been purposely made to draw members, and especially have the Superiors availed themselves of the newspapers for this purpose?
10. How often and for what impediments or obstacles was a dispensation required, and by what ecclesiastical Superior was it granted?
11. In which house and for how long did postulants or candidates dwell?

[1] Translation substantially from Bastien-Lanslots, *op. cit.*, Appendix.

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(b) *About Novices*

12. How many houses are there with a novitiate, and was each one founded with the sanction of the Holy See?

13. How many novices have received the habit of the institute since the last report?

14. How many novices are there at present?

15. Are the novices kept apart from the professed Sisters, according to law?

16. Has each of them a complete copy of the constitutions?

17. Have all of them before profession spent a whole and continuous year in the novitiate house under the care of the mistress of novices?

18. Has the time of the novitiate, as established by the constitutions, ever been extended or shortened, and by what authority?

19. Have the novices applied themselves during the first year of the novitiate to works of piety, or have they been put to other work, and to what kind of work?

20. Have the novices been sent to other houses in the second year of the novitiate, where two years are prescribed?

21. Has the Bishop or his delegate made the required examination of candidates before they took the habit or made their first profession?

(c) *About Professed Sisters*

22. How many members are there at present in the congregation: (a) with temporary vows; (b) with perpetual vows?

23. Have the temporary vows always been renewed at the proper time?

24. Have the members been admitted to take perpetual vows at the expiration of the period of temporary vows?

25. How many professed Sisters or novices have died since the last report?

(d) *About Sisters who have left or have been dismissed*

26. How many members have left the institute since the last report? (a) of the novices; (b) of professed Sisters with temporary vows; (c) of professed Sisters with perpetual vows.

27. Have the rules regarding the dismissal of members, as laid down in the constitutions, been always observed?

28. Has a dispensation from the vows always been obtained in cases of dismissal, and from what ecclesiastical Superior?

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29. Has, in cases of dismissal of Sisters with perpetual vows, the confirmation of the Holy See always been obtained?

30. Has the entire dowry, however invested, and the furniture they brought, in its present condition been returned to those leaving for any reason whatever?

31. Have those who have left the institute, having no property of their own, been provided with sufficient funds for their safe and decent return to their families?

II. About Property

(a) *About Houses*

32. How many houses does the institute possess, and in which dioceses are they located? Has the institute any provinces, and if so, how many?

33. Have any new houses been opened since the last report, and if so, how many? Has the proper authorization been obtained for all, and has the mode of procedure prescribed by the constitutions been followed?

34. How many members of the different classes are there in each house, and in what works have they been employed (in case the institute has charge of different works)?

35. Has any house been suppressed since the last report, and by what authority?

36. Has each member her own cell, or at least her own bed in the common dormitory, properly separated from the others?

37. Has a place been set aside with all necessary conveniences for the care of the sick?

38. Has a sufficient number of rooms been set aside, as should be, for the reception of guests, apart from the community rooms?

39. Has the dwelling of the chaplain or of the confessor a separate entrance, and has it any communication with that of the Sisters?

(b) *About Finances*

40. What has been the yearly income and expenditure since the last report; (a) of the institute in general, and (b) of each house in particular?

41. Has the institute or any individual house acquired, since the last report, any movable or immovable property, and what is its value?

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42. Has the money always been invested profitably, yet honestly and safely?

43. Has there been any loss or damage since the last report; if so, how much and from what cause?

44. Has any immovable or very expensive movable property been alienated, to what value and by what authority?

45. Has any part of the capital been spent?

46. Are there any debts on the property in common, or on any house in particular, and to what amount?

47. Has any new indebtedness been incurred since the last report; if so, how much and by what authority?

48. Has each house a procurator or treasurer other than the local superiors and the treasurer general?

49. Have the procurators, general and local, given a report of their administration at stated times, and have these reports been examined and approved?

50. Are there any lawsuits pending about the property?

51. Has each house a safe closed with three keys, and are the laws bearing on the subject observed?

52. Have money or other valuable been accepted from lay people for safe keeping, and on what conditions?

53. Have the dowries of the Sisters been invested safely and profitably, according to Canon Law? Has any part of them been used; if so, how much, in what manner, and by whose authority?

54. Are any pious legacies or foundations in the institute, either for Masses to be offered or for works of charity; if so, which are they?

55. Have the obligations been faithfully carried out?

56. Has the principal of those foundations been duly invested, and is there an entirely separate account kept of them?

57. Has an account of these foundations been rendered to the Bishop, according to the constitution "*Conditae*"?

58. How much of the favorable balance of each house has been turned into the common treasury at the end of each year?

59. Have all contributed their share willingly or unwillingly?

60. Have the superior or treasurer any money of which they can freely dispose, even for the welfare of the institute, without rendering an account of it?

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III. About Discipline

61. Are the spiritual exercises carefully performed in each house, as prescribed for each day, month, year, or other times?

62. Do all the members hear Mass daily?

63. Can all members be present at the common exercises, and are those who must occasionally be absent from the one or the other on account of domestic work, given time to perform them privately afterwards?

64. Is the decree "*Quemadmodum*" observed, (a) with regard to the manifestation of conscience; (b) with regard to sacramental confession? Is the decree "*Sacra Tridentina Synodus*" concerning Holy Communion observed, and are both decrees read in public at stated times in the vernacular?

65. Is the ordinary confessor changed every three years or confirmed by lawful authority?

66. Are the prescriptions concerning the enclosure in that part of the house especially reserved for the religious faithfully carried out?

67. Are the religious frequently given the privilege of the parlor, and are the constitutions on that point observed?

68. Do the superiors always give a companion to Sisters leaving the house?

69. Are catechetical instructions given, as also pious exhortations to the lay-sisters, to the pupils, to the servants and others living in the house, how and at what times?

70. Are writings on piety, religion, etc., even for the exclusive use of the community, ever printed without the consent of the Bishop?

71. Do the members use any books and which, either ancient or modern, even written by hand, edited with the permission only of the Superiors of the congregation?

About the Observance of Certain Special Laws

72. Are all the regulations concerning the general chapter faithfully carried out: (a) in regard to the letters of convocation; (b) in regard to the election of delegates; (c) in regard to the election of tellers and of a secretary; (d) in regard to the election of the superior general; (e) in regard to the election of general councillors, treasurer, and secretary?

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73. Has perfect freedom been given to the members for writing and for receiving letters which are exempted from the inspection of superiors?

74. Has the law concerning the changes of superiors after a certain lapse of time been faithfully observed? Have any dispensations been obtained from the law, how many and for whom?

75. Have the general and provincial superiors rightly performed the prescribed visitation of the houses?

76. Have the superior general and the provincial and local superiors called their councils at fixed times to treat of the business of the congregation, of the province or of the house?

77. Has due liberty been given to the councillors in these deliberations?

78. Have the elections of the general chapter been made freely and according to the laws?

79. Have the superiors with the required motherly care supplied all necessaries to the members, especially with regard to food and clothing? Are there any among the members who procure these things for themselves from outsiders?

80. Is the number of Sisters in any place so inadequate that they are overburdened with work to the serious detriment of their health?

81. Is due provision made for the comfort of the sick, and are their corporal and spiritual needs charitably attended to?

82. Have the pontifical decrees been publicly read at the appointed times?

About the Works of the Congregation

83. How many persons or classes of persons have been benefited by the works to which the religious devote themselves according to the scope of the institute?

84. If the number of such persons has decreased since the last report, give the reasons.

85. For congregations which collect from door to door:

(a) Do the constitutions clearly and certainly authorize them to collect from door to door?

(b) Has the decree "*Singulari,*" of March 27, 1906, been inserted in the constitutions?

(c) Is this decree faithfully observed in all its details?

86. Have the Sisters in their houses any hostelries or hos-

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pitals for all classes of persons, even of the other sex, and if so, with whose permission and with what safeguards?

87. Have the Sisters taken upon themselves the care of the domestic department in seminaries, colleges, and other houses of ecclesiastics, and to what extent?

88. Do the Sisters practice any works of charity (such as taking care of infants, of confinement and surgical cases) which appear improper to virgins consecrated to God and wearing the religious habit?

89. Have the Sisters who wait on the sick in their homes always used the precautions prescribed by the constitutions?

90. Have the superiors ever allowed Sisters to dwell in the houses of lay people and for how long?

91. Has, since the last report, any new work, or kind of work been added to those already existing, and by what authority?

92. Have any abuses crept into the congregation, or into individual houses, and of what nature?

93. Are there any troubles or difficulties existing, (a) with the ordinaries, (b) with the confessors, (c) with the chaplains?

It is evident that this questionnaire is not to be answered by all alike. Besides, it may be reasonably expected that the S. Cong. of Religious will modify and shorten it according to the Code. As it is now, it might prove irksome to the superiors who have to answer all those detailed questions.

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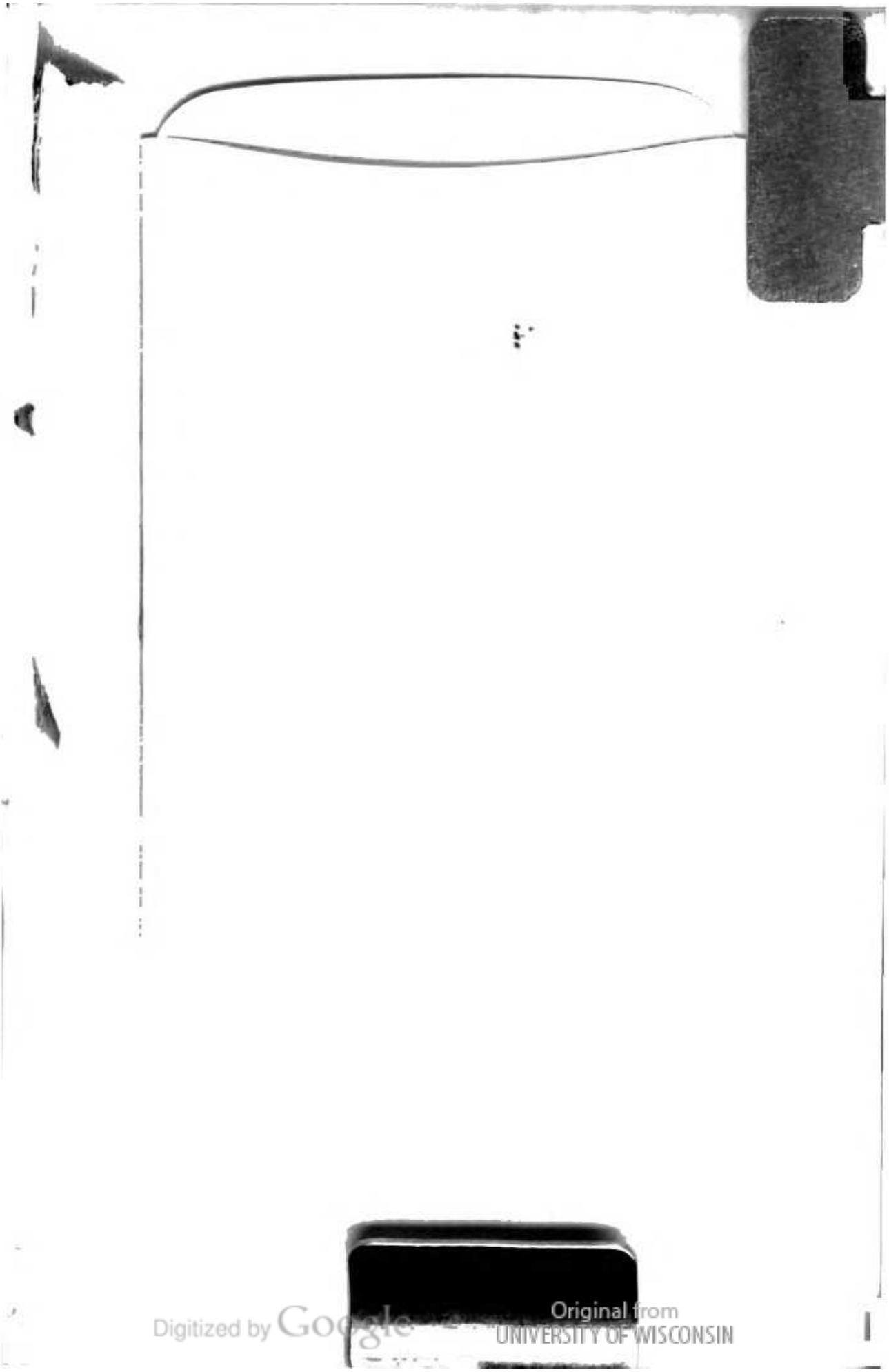




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By THE REV. P. CHAS. AUGUSTINE, O.S.B., D.D.
Professor of Canon Law

BOOK III

De Rebus, or Administrative Law

VOLUME IV

On the Sacraments (Except Matrimony) and Sacramentals

(Can. 726-1011, 1144-1153)

SECOND, REVISED EDITION

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AND
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THE NEW CODE OF CANON LAW

BOOK III

ECCLESIASTICAL THINGS

PRELIMINARY REMARKS

The third book of the Code treats of "things" *(de rebus)*. The provisions which it embodies may be called *administrative law,* because the "things" comprised therein together form the object of ecclesiastical administration, either in the merely spirtual or the mixed domain. Besides, since *a potiori fit denominatio,* and the Sacraments constitute the most important part of this Book, the sacred ministry of the Church here becomes most conspicuous. But even mixed things, such as benefices and temporalities, must be assigned to the administrative section. One doubt only, at least for a moment, arose in our mind, *viz.,* concerning the *magisterium ecclesiasticum,* whether it has found its proper place. However, we must admit that the place for it was properly chosen. For although the teaching office may be reckoned among the personal rights of jurisdiction, yet, considering its objects (such as the censorship of books, seminaries, and schools), it is manifest that these fall under the heading of *res.* The Code, therefore, in Book III, treats in 827 canons of the following subjects:

Part I. Sacraments and Sacramentals.
Part II. Sacred Places and Times.
Part III. Divine Worship.
Part IV. The *Magisterium Ecclesiasticum.*
Part V. Ecclesiastical Benefices.
Part VI. Church Property.

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THINGS IN GENERAL

CAN. 726

Res de quibus in hoc libro agitur quaeque totidem media sunt ad Ecclesiae finem consequendum, aliae sunt spirituales, aliae temporales, aliae mixtae.

The things of which this book treats, and which are as many means by which the Church attains her end, are either spiritual, or temporal, or mixed. *The end of the Church* is foremost and above all spiritual. But since the society founded by Christ is visible, and a moral or artificial person with corporate rights, the Church as such, as well as her members, cannot abstract from temporal or bodily things. The very notion of a sacrament, a thing sacred *par excellence,* implies a visible sign, which presupposes an inherent right to the appropriation and use of such material things as are necessary for the proper and divinely established administration of these visible signs. Furthermore divine worship requires buildings and ground on which to erect them, as well as sacred furniture to be used for the divine service. Moreover, the ministers of the Church are entitled to a decent support. Lastly, charitable institutions, which are the natural offspring of the Church, require material aid and subsidy. All of which goes to show that many objects or things, no matter how temporal or material they may appear, become hallowed by the use to which they are put in the Church, who, as it were, transfers them into a higher sphere.

But it must never be lost sight of that temporal things claimed by the Church are but means to realize the end for which she has been founded *(media sunt ad Ecclesiae finem consequendum),* and consequently are

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not sought by her for their own sake, but only as far as her end requires. The scope of these requirements, needless to say, is wide, and the needs are enormous, especially now-a-days, when Christian charity is overwhelmed with all sorts of demands.

The Code treats of three kinds of things: spiritual, temporal, and mixed.

First, let us answer the question, what is a thing, a *res?*

The reader may remember that the division adopted by the Code rests on the old trilogy: *personae, res, actiones.* After having treated of the rights and duties as annexed to the *persons* of men, the legislator now inquires into the objects of right or law *(obiecta iuris),* leaving actions to be dealt with in the last two books, in connection with the penal code.

A *thing (res)* is an object that exists outside, though it may be strictly connected with, a person, and is perceived by the senses. When we say "perceived by the senses," this phrase must be understood in the way a human being reasons. There are *corporeal* things, i. e., such as affect the senses, and *incorporeal* things, which are not the object of sensation and can neither be seen nor handled, as, for instance, a hereditary right, an advowson, a usufruct.[1] The latter, in some way, are objects of sensation, else they would not be mentioned in the law.

The Roman law[2] took cognizance of divine things *(res divini iuris),* and things appertaining to men *(res humani iuris).* The divine things it divided into *res sacrae,* places or objects set apart and solemnly conse-

1 L. 1, Dig. 1, 8; Blackstone-Cooley, *Commentaries on the Law of England,* Chicago, 1879, Vol. 1, § 17.

2 Dig. *l. c.;* Ramsay-Lanciani, *Manual of Roman Antiquities,* 1901, p. 300.

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crated to the gods by a deliberate act of the State, such as groves, altars, chapels, temples; and *res religiosae sive sanctae,* places or objects which acquired a sacred character from the purposes to which they were applied, such as sepulchres and the walls of a fortified city.

Our Code adopts a somewhat different division, though the distinction of the Roman law is still apparent. But one thing is certain: all "things" dealt with here are ecclesiastical *(res ecclesiasticae).* The division adopted may be illustrated by the subjoined diagram:

Res ecclesiasticae { 1. *spirituales* { a) *stricte spirituales*; b) *sacrae*; c) *religiosae* } 2. *temporales* 3. *mixtae* }

1. *Spiritual things,* in the strictest sense, are such as directly refer to the salvation of souls and their supernatural end, such as, *e. g.,* the Sacraments, the sacramentals, prayer, fasts and feasts, indulgences, ecclesiastical offices.

Res sacrae are things made sacred by a special dedication, blessing, or consecration, such as churches, cemeteries, sacred vessels,[3] etc.

Res religiosae are things connected with the religious life or such as bear a religious character without a special blessing or consecration, for instance, religious houses, hospitals, etc.

2. *Temporal things* are such as are employed for the temporal support of the Church and her ministers, or for other necessities, for instance, dowries, funds, salaries, collections, subscriptions, etc.[4]

3. *Res mixtae* are such things as combine a temporal

[3] See can. 1154; can. 1497.

[4] Cfr. Devoti, *Institut. Canonic.,* l. iv, Leodii, 1874, t. i, p. 308 f.

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with either the strictly spiritual or the sacred or religious character, as, *e. g.,* ecclesiastical benefices and the *ius patronatus,* also churches and sacred vessels in so far as a distinction may be made between the consecration or blessing and the material value of the consecrated or blessed object. All these things, then, in so far as they fall under ecclesiastical jurisdiction, form the subject-matter of the third book.

SIMONY

CAN. 727

§ 1. Studiosa voluntas emendi vel vendendi pro pretio temporali rem intrinsece spiritualem, ex. gr., Sacramenta, ecclesiasticam iurisdictionem, consecrationem, indulgentias, etc., vel rem temporalem rei spirituali adnexam ita ut res temporalis sine spirituali nullo modo esse possit, ex. gr., beneficium ecclesiasticum, etc., aut res spiritualis sit obiectum, etsi partiale, contractus, ex. gr., consecratio in calicis consecrati venditione, est simonia iuris divini.

§ 2. Dare vero res temporales spirituali adnexas pro temporalibus spirituali adnexis, vel res spirituales pro spiritualibus, vel etiam temporales pro temporalibus, si id ob periculum irreverentiae erga res spirituales ab Ecclesia prohibeatur, est simonia iuris ecclesiastici.

CAN. 728

Cum de simonia agitur, emptio-venditio, permutatio, etc., late accipiendae sunt pro qualibet conventione, licet ad effectum non deducta, etiam tacita, in qua scilicet animus simoniacus expresse non manifestetur, sed ex circumstantiis colligatur.

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Can. 727, § 1, *defines simony iuris divini* as a deliberate eagerness to buy or sell for a temporal price anything either intrinsically spiritual, or temporal with a spiritual thing attached to it in such a way that the temporal without the spiritual object could not exist at all, or the spiritual object itself, though only in a partial way, is intended in the bargain.

1. *Studiosa voluntas,* or the deliberate will externally manifested, here implies not only the essential malice of a sin against the virtue of religion, but also the juridical element of external manifestation. For, as the Gloss[5] says, unless simony is external, it can be neither proved nor punished. Hence merely *mental simony,* if it is not manifested in any shape or form, does not enter the canonical realm. Different from this is the state of mind which prompts one to give or offer something temporal, not as a real price, but as a motive for attaining or causing something spiritual, or if the spiritual is given by way of gratuitous compensation, or *vice versa.*[6] This may happen when a gift is presented under the pretext of just remuneration, although the real motive is to obtain a spiritual favor, and *vice versa.*[7] However, if there is no intention to commit simony, and the sentiment of gratitude prevails, no simony can be construed.

Another kind of simony is called *conventional,* namely, when a pact intervenes, although the object of the simoniacal contract has not yet been delivered, or delivered only by one of the parties. Simony is *real* not only when a formal agreement has been made, but when

5 Ad. c. 1, C. 1, q. 1, *s. v.* "*Quidam.*" The malice consists in this that a spiritual thing is treated as if it were menial and entirely dependent on man's will, and not on God's grace and power. Cfr. St. Thom., i–ii, q. 100, a. 1.

6 *Prop. damn. ab Innoc. XI,* n. 45 (Denzinger, *Enchiridion,* n. 1062).

7 Layman, *Theologia Moralis,* l. iv, tr. 10, c. 8, n. 66.

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the object of that agreement has been delivered by both parties.

Confidential simony is that committed by the resignation of a benefice without regard to the ecclesiastical law.

2. The next element of simony is *sale or purchase.* Hence there must be a contract as understood by common law or custom. Can. 728 says:

When there is question of simony, purchase, sale, and other similar terms must be taken in a wide sense as signifying any stipulation, even though not fulfilled, and made only in a tacit manner, i. e., one in which the simoniacal intention was not explicitly manifested, but could be gathered from the circumstances of the case. Hence the stipulation required to render a transaction simoniacal may be any kind of onerous contract, sale or exchange, bailment, hiring, borrowing, or debt.[8] It is not required that the pact be *carried into effect.* Therefore if one would promise to give $1000 for a certain ecclesiastical office, for instance, a pastorship, he would be guilty of simony. Lastly, the agreement may be only *tacit, i. e.,* without a written or oral understanding as to the sort of benefit, whether spiritual or temporal. All that is required by law is a probable conjecture as to the simoniacal intention *(ex circumstantiis colligatur).* Such conjectures[9] may be based on the quality of the person who gives or receives, the quantity of the gift, and the time. Thus a poor person who gives a large sum to a prelate in order to obtain a spiritual favor, may justly be suspected of acting from a wrong motive, whereas a rich person need not be suspected,

8 One of the four species of *contractus innominatus: do ut des, facio ut facias, do ut facias, facio ut des.* Cfr. Engel, V. 3, n. 4.

9 Cfr. c. 18, X, V, 3 de simonia; Suarez, *De Relig.* l. iv, *de sim.*, c. 36, n. 12 (ed. Paris, 1859, t. 13, 843 f.).

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because he or she may intend merely to make a present. Besides, the persons who give and those who take may be bound by friendship, blood-relationship, etc.,— reasons which would make simony a rather remote motive. Again, the reputation of giver and recipient must be taken into consideration.

The *quantity* of the gift must also be weighed. A large and disproportionate sum might cause suspicion, whereas an insignificant sum would not. The proportion between the price paid and the spiritual benefit received may also be indicative of the underlying intention. Consumable gifts (eatables, etc.) are not to be reckoned. Lastly, the *time* may offer a basis for conjecture. If the price is offered long before or after the spiritual benefit is bestowed, simony can not easily be presumed. The circumstances of the person should also be taken into account,— whether he is in need or not, etc. At any rate, some sort of agreement must be made, and consequently presents made out of liberality, pious donations, or charitable subsidies cannot be branded as simoniacal.[10]

3. *The temporal price* is generally comprised by the threefold kind mentioned in the Decree of Gratian:[11]

(a) *Munus a manu,* or pecuniary advantage, which comprises money and other movable as well as immovable things, the remission of debt, easements, etc.;

(b) *Munus a lingua,* which implies recommendations, praise, adulation, flattery, of a kind which is a matter of stipulation and procures a benefit;

(c) *Munus ab obsequio,* which involves service of any kind, either habitual or actual, not due by reason of mutual obligation, hire or pay, but rendered with respect to a spiritual favor, for instance, an office. Here again

10 Cfr. cc. 3, 18, 34, X, V, 3; Layman, *l. c.*, n. 8.

11 C. 114, C. 1, q. 1; c. 8, C. 1, q. 3.

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it must be noticed that free and voluntary service, rendered, *e. g.*, by a friend or relative to a Cardinal or Bishop, though in the hope of obtaining a spiritual benefice, is not simony. Of course, there may be room for suspicion in such cases.

It may not be amiss to state that there is no simony involved if parents or ecclesiastical superiors promise talented boys a collegiate or seminary course, in order to induce them to embrace the ecclesiastical state, or if parents promise their children some temporal benefit to induce them to frequent the Sacraments. There is no real compact or mutual stipulation between the parties.[12]

4. Finally, the *spiritual element* must be considered. Our Code mentions two kinds of spiritual things: — such as are intrinsically spiritual, and such as are annexed to something spiritual.

(a) *Intrinsically spiritual* things, the Code says, by way of example, are the Sacraments, ecclesiastical jurisdiction, consecration, indulgences, etc. Hence to administer the Sacraments for the sake of money would be an act of simony.[13] Thus also the administration of the sacramentals for filthy lucre's sake would be simoniacal. The same must be said concerning acts of jurisdiction, absolution, delegation, grant of faculties,[14] if performed solely for a material reward. As to consecration, it is well known that the bishop is not allowed to charge anything, either for the sacred chrism or for consecration. But compensation for expenses is not forbidden.[15] Selling indulgences is simony in the truest sense of the word, but no simony is implied if a contribution is demanded in

12 Layman, *l. c.*, n. 11.
13 Cfr. C. 1, q. 1; X, V, 3 *passim*.
14 C. 14, X, V, 3.
15 C. 22, C. 1, q. 1; c. 21, X, V, 3.

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the shape of an alms, as a requisite for gaining an indulgence.[16]

Simony is committed by *religious* if they charge a price for admittance to the religious state, because the latter is something intrinsically spiritual.[17] But dowries, victuals or compensation cannot be looked upon as a price for entering, but are necessary means of support. Intrinsically spiritual is the act of *preaching the word of God* and *teaching the catechism,* and hence to receive a temporal remuneration for performing these functions would be simony, according to S. Thomas.[18] However, preachers and teachers may lawfully be paid for administering their office.

These are the chief intrinsically spiritual things, i. e., such as are spiritual by their very nature and purpose, as well as by their divine origin.

(b) There are, besides, certain *temporal things* distinguished by a spiritual character attached to them *(res temporalis rei spirituali adnexa).* The Code speaks of a twofold connection of the temporal with the spiritual:

(1) That which is necessary to make the thing what it is supposed to be, for the one supposes the other. This is the case in all ecclesiastical benefices, pensions, and in fact all religious things. Hence the adage, *"Beneficium propter officium,"* which means that the material element necessarily presupposes the spiritual. This is what the authors[19] call subsequent or consequent connection.

(2) The other connection is present when the *spiritual character or thing is the object, though only partial, of the contract.* This is what is styled antecedent connec-

16 Layman, *l. c.,* n. 40.
17 Cfr. cc. 8, 19, 30, X, V, 3.
18 *Summa Theol.,* II–II, q. 100, a. 3, ad. 2; Suarez, *l. c.,* c. 18, n. 22 f.
19 S. Thom. II–II, q. 100, a. 4; Suarez, *l. c.,* c. 13.

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tion, for instance, the consecration in the sale of a consecrated chalice. For the chalice is made and is such before it receives any consecration, and therefore the material element exists prior to the spiritual. Note, however, the wording of the Code: the spiritual must be intended in the bargain; in other words, *because* it is a consecrated chalice, I buy or sell it. Since consecration is intended *in recto,* and is something essentially spiritual, therefore the bargain is an act of simony *iuris divini.* On the other hand, as shall be seen in Can. 730, even a consecrated chalice may be bought or sold. The same rule is to be applied not only to consecrated vessels, but also to churches, oratories, cemeteries and blessed graves. It matters little whether the spiritual element is of strictly divine origin or of ecclesiastical institution, so long as it is spiritual in itself and attached to the temporal element by the lawful authority. The hieratic or sanctifying element is essentially spiritual or divine by reason of the divine power of the Church.

§ *2 of Can. 727* provides that it is simony *iuris eccl*ē*siastici* to give temporal objects annexed to spiritual for other objects annexed to spiritual, or spiritual objects for spiritual objects, or temporal objects for temporal objects, when forbidden by the Church on account of the danger of irreverence for spiritual things. This law is evidently new, as the lack of quotations proves; but the matter itself is old.

First note the term *dare,* to give, which, as the particle *pro* indicates, here means to exchange. The exchange must be of the same objects, *e. g.,* if you exchange one set of holy oils for another set of holy oils; or one consecrated chalice for another; or one Mass for another; or if you preach for another who says Mass in your place; or exchange one piece of church property

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for another. But as there seems to be no sinful agreement in these cases, what is it that renders the act simoniacal? It is the express prohibition of the Church. Yet, as Suarez [20] appropriately says, this would not be sufficient; therefore another reason is added by the Code: *ob periculum irreverentiae,*— because these acts, though not evil in themselves, concern sacred things and may lead to irreverence. In order to remove this danger, the Church, by positive legislation, prohibits even such acts as are not in themselves sinful. This is especially the case in the exchange of ecclesiastical benefices and in selling holy oils or minor church offices.[21]

PENALTIES AGAINST SIMONY

CAN. 729

Firmis poenis in simoniacos iure statutis, contractus ipse simoniacus et, si simonia committatur circa beneficia, officia, dignitates, subsequens provisio omni vi caret, licet simonia a tertia persona commissa fuerit, etiam inscio proviso, dummodo hoc non fiat in fraudem eiusdem provisi aut eo contradicente. Quare:

1.° Ante quamlibet iudicis sententiam res simoniace data et accepta, si restitutionis sit capax nec obstet reverentia rei spirituali debita, restitui debet, et beneficium, officium, dignitas dimitti;

2.° Simoniace provisus non facit fructus suos; quod si eos bona fide perceperit, prudentiae iudicis vel Ordinarii permittitur fructus perceptos ex toto vel ex parte eidem condonare.

Apart from the penalties established by law (see Book V, Canons 2371, 2392), every simoniacal stipulation is

20 *De Rel.*, l. IV, de simi., c. 7.
21 Cfr. c. 8, C. 1, q. 3; c. 8, X, V, 3; Ferraris, *Prompta Bibliotheca, s. v.* "*Simonia,*" n. 6.

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null and void, and simony committed in connection with benefices, offices, and dignities renders the appointments null and void, even though the simoniacal act was perpetrated without the knowledge of the beneficiary, by a third person, provided, however, it was not done in order to defraud the one thus provided, or against his protest. Therefore:

1.° Prior to any judicial sentence the thing simoniacally given and received must be restored, if restitution is possible and feasible without irreverence to the spiritual object, and the benefice, office or dignity must be surrendered;

2.° The beneficiary of a simoniacal transaction cannot receive the revenues of his benefice, but if he has accepted them in good faith, it is left to the discretion of the judge or Ordinary to condone the income thus received, either totally, or in part.

Since no other penalties are now in force except those mentioned by the Code,[22] the penalties of simony are:

(a) Those mentioned in can. 2371, 2392.

(b) The simoniacal contract is null and void. This occurs in resignations of office, as stated in can. 185. Furthermore *no simoniacal stipulation is binding in the ecclesiastical court and in the court of conscience.* Hence, if one has given a sum of money to a bishop in order to obtain a certain ecclesiastical office, the contract, even though made in writing, would be devoid of judicial force. A simoniacal compact obliges neither in the *forum externum* nor in the *forum internum.*

A reasonable doubt may be entertained with regard to *entering religion.* The act is complete only after profession has been made, and hence one may ask: Is the profession invalid? The Code does not give a direct

[22] Cfr. can. 6, 5°.

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answer to this question, nor do the Decretals [23] insinuate or the authors [24] assert its invalidity.

As to *indulgences* it has been decreed [25] that all objects endowed with indulgences must be delivered to the faithful gratis; if anything is demanded for them, no matter under what pretext, whether by way of price, exchange, gift, or alms, the indulgences are *eo ipso* lost. *Simple blessings,* without indulgences, are not subject to this decree, so far as we know. We may add that the Sacraments are valid, even though administered simoniacally, for the Code only says that the contract, not the thing stipulated therein, is invalid. Thus the blessing remains, though the Church, by positive law, exempts indulgences from the effect of a simoniacal act. The same must be held as to *acts of jurisdiction* tainted by simony; they are valid unless special provision is made to the contrary.

(c) Such provisions are here made concerning *benefices,* offices, and dignities. Benefices are accurately defined in can. 1409. Offices have been described in can. 145. By dignities are understood here, we think, not only those mentioned in can. 394 (diocesan chapters), but all which combine jurisdiction with preëminence, such as a prelacy, to which class belong bishops and abbots as well as the *superiores maiores* of religious communities. The text says that if simony is committed in connection with these benefices (presentation, appointment, election, postulation, nomination, etc.), the *subsequent provision is null and void.*[26]

(d) This penalty follows even if the simoniacal act was

23 Cfr. cc. 8, 19, 30, X, V, 3.

24 Cfr. Ferraris, *Prompta Bibliotheca, s. v. "Simonia,"* art. 1, n. 7.

25 S. C. Indulg., July 16, 1887, ad 3 (*A. S. S.*, t. 20, 63 f.).

26 Cfr. c. 12, X, I, 6; c. un. X, III, 12; cc. 2, 11, 12, 13, X, V, 3; c. 2, Extrav. Comm., V, 1; Paul IV, *"Inter caeteras,"* Nov. 27, 1557; Pius V, *"Cum primum,"* April 1, 1566; *"Intolerabilis,"* June 1, 1569.

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committed by a *third person.* Hence if a relative or friend endeavors to put a person into office, or to obtain a dignity for him, the appointment, if made, is void, no matter whether the person thus appointed had knowledge of the simoniacal act or not.[27] The case is different, however, if the appointee protested against the simony, or if a third person committed the crime to prevent one from getting the office *(ex odio).*[28]

A *moral and juridical consequence* of this penalty is that the thing simoniacally given and accepted must be restored, provided, of course, restitution is possible. A Sacrament administered simoniacally cannot be returned, but the administrator must restore the price received to the person who has paid it.[29] An act of jurisdiction, if validly performed, cannot be "restored." Nor, according to the text, is restitution required or admissible if it involves *irreverence* to some spiritual thing. This would be the case if sacred relics, *Agnus Deis,* blessed objects or consecrated vessels had passed through irreverent hands and been sold, as happened not infrequently in the ninth century.

In making restitution the rules of justice and equity must be conscientiously observed. Thus a consideration for the bodily or physical exertion made in imparting spiritual things, *v. g.,* in the administration of a Sacrament, preaching, etc., may be deducted from the amount to be restored.

As to *benefices, offices and dignities,* the text says that persons simoniacally in possession of them must be *dismissed* at once.[30] Dismissal is not resignation, and there-

27 Cfr. cc. 25, 33, X, V, 3.

28 Cfr. c. 27, X, V, 3: *per fraudem — in dispendium — malitiose* — hence envy may prompt a competitor or enemy to act simoniacally, in order to damage the other.

29 C. 115, C. 1, q. 1; c. 23, X, V, 3.

4 Suarez, *l. c.,* n. 15.

30 C. 27, X, V, 3 and the Con-

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fore no right, or compensation, or consideration can be claimed in such a case. Both restitution and dismissal must be completed before any declaratory or condemnatory sentence, because the law itself declares such simoniacal transactions null and void.[31]

The second consequence, that a simoniacally provided person *cannot claim any revenues,* is perfectly logical; not having the right claimed, he cannot appropriate the object of that right.[32]

It may be added that these penalties and their consequences follow real simony only; almost all canonists exempt mental and conventional simony from these penalties.[33] As to confidential simony, which is committed in benefices, we shall recur to it under that heading.

WHEN THERE IS NO SIMONY

CAN. 730

Non habetur simonia cum temporale datur non pro re spirituali, sed eius occasione ex iusto titulo a sacris canonibus vel a legitima consuetudine recognito; item cum datur res temporalis pro re temporali, quae tanquam subiectum habeat adnexum aliquid spirituale, ex. gr., calix consecratus, dummodo pretium non augeatur propter adnexam rem spiritualem.

Here the Code considers two cases which apparently constitute simony, yet do not.

1. *There is no simony if a temporal object is given, not as an equivalent for a spiritual thing, but on the occasion thereof, for a reason acknowledged as just by*

stitutions of Pius V, already quoted.

31 C. 8, X, I, 35; c. 41, X, V, 3.

32 C. 115, C. 1, q. 1; c. 23, X, V, 3.

33 Cf. Layman, *l. c.*, n. 68; Ferraris, *l. c.*, art. 3, n. 1 ff.

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either canon law or custom. Under this heading falls the necessary and decent support of the clergy who administer spiritual things unto the faithful and receive temporal things in return. Natural justice dictates that the laborer is worthy of his hire, and that one who works and occupies himself for another should receive his due. There is no simony here because the salary is not given as a temporal equivalent for the spiritual office and there is no equalization or proportion intended between the two.[34]

Canons who come to choir because of the daily distributions which are established by law precisely as an inducement, do not commit simony; unless indeed, as St. Thomas says, they purposely exclude every other intention.[35]

Mass stipends do not involve simony because they are not given as a price for the holy Sacrifice, or for the intrinsic or concomitant labor involved in saying Mass, but merely as an alms intended to contribute to the necessary support of the sacred ministers.[36]

Legacies and foundations are not simoniacal because, partly, they bear the character of benefices, and partly involve a merely material obligation not intrinsically connected with the spiritual character, and partly partake of the nature of Masses or salaries.[37]

From this it may also be seen that clergymen may, without danger of committing simony, treat with bishop or congregation for a just and sufficient support.[38]

There is no simony committed if something is demanded for a plot or lot in a cemetery, for the purpose

34 Layman, *l. c.*, n. 60.
35 *Quaest. Quodlib.*, 8, q. 6.
36 Cfr. *prop. dam. Wicliff.*, n. 25 (Denzinger, n. 501).
37 Suarez, *l. c.*, c. 39, n. 17.
38 Cfr. c. 11, X, III, 5; Layman, *l. c.*, n. 15.

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of meeting the necessary expenses of maintenance. To sell the right of burial in consecrated ground, of course, would be simony.[39]

Taxes established according to the rules of justice and custom are not simoniacal.[40]

2. *There is no simony involved when a temporal object is given for another temporal object which has some spiritual benefit attached to it,* as, for instance, a consecrated chalice, provided, however, that the price be not raised on account of the spiritual benefit. The reason for this ruling lies in the fact that the connection between the spiritual benefit and the material is antecedent, and not intrinsically necessary, whilst, on the other hand, the material and workmanship of the object has a price. Hence churches, sacred vessels, and vestments may be materially valued, provided the consecration or blessing attached to them is not prized, nor the price augmented on account of the spiritual benefit.[41]

39 C. 15, X, III, 28; c. 41, X, V, 3.

40 S. C. C., June 10, 1896 (*Coll. P. F.*, n. 1939).

41 Layman, *l. c.*, n. 37; Suarez, *l. c.*, c. 14, n. 12.

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PART I

THE SACRAMENTS

ADMINISTRATION AND RECEPTION

CAN. 731

§ 1. Cum omnia Sacramenta Novae Legis, a Christo Domino Nostro instituta, sint praecipua sanctificationis et salutis media, summa in iis opportune riteque administrandis ac suscipiendis diligentia et reverentia adhibenda est.

§ 2. Vetitum est Sacramenta Ecclesiae ministrare haereticis aut schismaticis, etiam bona fide errantibus eaque petentibus, nisi prius, erroribus reiectis, Ecclesiae reconciliati fuerint.

§ 1. As the Sacraments of the New Law, instituted by Christ our Lord, are the chief means of sanctification and salvation, the greatest care and reverence must be taken that they be suitably and properly administered and received.

The law is concerned mainly with the *administration* of the Sacraments. They must be administered *opportune et rite,* says our canon. *Opportune* refers not only to time and circumstances, but also to worthiness. Hence the minister must beware of two extremes: extreme severity and too great leniency. An instruction of the S. C. de Propaganda Fide [1] enjoins mercy and

1 April 29, 1784 (*Coll.*, n. 569).

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kindness, especially towards the newly converted and those who live in places whither missionaries go but rarely. The clergy, though perhaps compelled to impose a public and protracted penance, should not deprive sinners, if really repentant, of the benefit of absolution, nor refuse them the Holy Eucharist. Besides, a distinction must be made between different crimes and criminals, especially if excommunication is involved, although the latter penalty renders them incapable of receiving the Sacraments. *Excommunicati tolerati* may be treated more leniently than *vitandi*.

Rite signifies, properly speaking, with due regard to the use of the rite prescribed. This point is treated more fully in can. 733. *Rite* may also refer to the *intention* of the minister and the recipient. This, according to the common teaching of theologians and canonists, must be *virtual, i. e.,* one which, though not present here and now, continues to exert its influence by virtue of an intention previously had and never retracted, on the part of the minister. On the part of the recipient, a *habitual* intention, *i. e.,* one that proceeds from the inclination of the mind and routine, but without actual reflection or even with distraction, suffices.[2]

But *rite* may also have another meaning, *viz., without simulation*. Simulation is an act by which one utters the form required over valid matter, but directly excludes the intention of effecting a Sacrament. This is strictly prohibited, and the contrary proposition, "Grave and urgent fear is a reason for simulating the Sacraments," has been formally condemned.[3] Entirely different from

2 Cfr. Devoti, *Institut. Can.*, 1874, Vol. I, p. 319 f.; Lehmkuhl, *Theol. Moralis* II, n. 22; Marc, *Institut. Morales Alphonsianae*, II, 1412 ff.

3 *Prop. dam. ab Innoc. XI*, March 4, 1679, n. 29 (Denzinger, *Enchiridion*, n. 1046).

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fictitious or feigned administration is *dissimulation, i. e.*, the act of pretending to administer the Sacraments, which is rather a concealed refusal, and is not only licit, but at times may be necessary.[4]

On the care and reverence with which the Sacraments must be treated, we shall say what is necessary when dealing with the single Sacraments. The same holds good concerning juridically worthy reception. It must be remembered that we write on *law*.

§ 2 of our canon forbids the administration of the Sacraments to *heretics and schismatics*, even though they may be in good faith and ask for them. It is necessary that they first renounce their errors and become reconciled to the Church.

The penitential canons were rather strict on this subject.[5] Somewhat milder was the later theory as to those who relapsed into heresy and then repented; these were not to be denied penance and the Eucharist.[6]

The rules to be followed are these:

(a) *Before the age of fourteen, heretics and schismatics* must pronounce the profession of faith, but need not formally abjure heresy, provided, of course, they are sufficiently instructed in the Catholic faith. After that age, the profession of faith must be accompanied by abjuration of heresy or schism, otherwise they cannot be admitted to the Sacraments.[7]

(b) It is never permitted to absolve heretics or schismatics, even though they may never have thought of heresy or schism and profess to believe in only one Christian religion, in which they are ready to live and

4 Lehmkuhl, *l. c.*, II, n. 44 f.

5 C. 91, C. 24, q. 1, dictates one year of penance, if administered *nescienter;* ten, or seven, or five years if administered *scienter.*

6 C. 4, 6°, V, 2.

7 S. O., March 8, 1892 (*Coll. P. F.*, n. 2012).

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die.[8] Such are merely material non-Catholics, but they cannot be absolved before making formal abjuration, if they have completed the fourteenth year of age.

(c) Such material heretics or schismatics may not be admitted to the Holy Eucharist, and no Catholic priest can absolve them or permit them to receive the Holy Eucharist in a schismatical temple.[9]

(d) Even in danger of death neither absolution nor the holy Viaticum can be administered to material heretics or schismatics, for instance, in a hospital, unless there is a solid presumption that they are members of the Catholic Church, or if they showed signs of willingness to be reconciled, but always under condition that the danger of scandal be removed.[10]

Of *apostate* Catholics it is required that they abjure their apostasy, and if they survive, they must make a written abjuration before the faithful, or at least permit the confessor to make their abjuration known to the faithful.[11]

(e) If persons who mix up with the faithful in church (soldiers, etc.) are suspected of heresy or schism, the Sacraments may be administered unto them only after they have given proof that they never had fallen away from the faith, or after formal abjuration.[12]

THE THREE SACRAMENTS WHICH CANNOT BE REPEATED

CAN. 732

§ 1. Sacramenta baptismi, confirmationis et ordinis, quae characterem imprimunt, iterari nequeunt.

8 *Ibid.*

9 S. O., Aug. 28, 1669 (*Coll.*, n. 185).

10 S. O., Jan. 13, 1864 (*Coll.*, n. 1246).

11 S. O., July 25, 1630; May 7, 1822 (*Coll.*, nn. 57, 771).

12 S. O., July 30, 1806 (*Coll.*, n. 688).

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§ 2. Si vero prudens dubium exsistat num revera vel num valide collata fuerint, sub conditione iterum conferantur.

The Sacraments of Baptism, Confirmation, and Holy Orders, which imprint a character, cannot be received twice — *i. e.*, absolutely; — but if a prudent doubt exists whether they were in fact, or whether they were validly conferred, they may be repeated.

The general rule is that if the matter and form required for these three sacraments have been properly applied by the respective minister, they are supposed and presumed to have been conferred validly.

As to the *intention* of the minister, all that is necessary is that he intends to do what the Church does, no matter what he may personally think or believe about the Sacraments,[13] and that he connects matter and form in such a way that the form may be referred to the matter and both constitute a specific act.

With regard to *Baptism* it is the rule, always insisted upon by the Roman Congregation, that *each single case must be investigated* when Baptism is to be conferred at all, or conditionally.[14] If there is no doubt that Baptism was never conferred, the Sacrament must be administered absolutely with the usual form: "*Ego te baptizo,*" etc. If the validity of a Baptism administered by non-Catholics is doubtful, the same rule must be followed. The rituals of the resp. sect should be examined and their customs observed, as stated under mixed marriages. Note that conditional Baptism is

13 Cfr. *Decretum pro Armenis;* S. C. P. F., June 23, 1830; S. O., Jan. 30, 1833 (*Coll. P. F.*, nn. 814, 830). The schismatic minister in this case, out of hatred for the Catholic Church, had no intention to baptize the children of Catholic parents, yet did everything correctly according to his own rite.

14 S. O., Nov. 20, 1878 (*Coll.*, n. 1504).

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more easily admissible if no marriage is involved. For here the rule *baptismus est validus in ordine ad matrimonium* does not hold good. Therefore the golden mean must be observed: not too lenient and not too strict.[15] As to the *testimonies* in favor of the fact or validity of Baptism, see can. 779.

Indiscriminate rebaptizing of non-Catholics is not founded on the law,[16] though it may perhaps be called a safe theory, especially in our country, where there are so many sects which have discarded the doctrine that Baptism is necessary for salvation. But this holds good only in cases where no marriage is involved.

It is noteworthy that our Code has no *ruling as to irregularity being incurred by rebaptizing.* Hence this irregularity may now be regarded as abolished.

Concerning *Confirmation* there is not so much necessity or temptation for useless repetition. There are some decisions on this point, which, however, all concern schismatic confirmation. This is intelligible, because most heretical sects have thrown this Sacrament overboard. The general tenor of all the decisions *in casu* is that persons once confirmed by schismatic priests are not to be reconfirmed, unless they intend to receive tonsure and holy orders, or if they themselves or their parents ask for it, in which case Confirmation must be administered secretly and conditionally.[17] One decision, how-

15 S. C. P. F., June 23, 1830 (*Coll.*, n. 814).

16 The instruction just quoted mentions Calvinists, Presbyterians, and Anglicans, and apparently favors the validity of Calvinistic Baptism over that of the Anglicans and Presbyterians, who may therefore be more readily rebaptized.

17 S. O., July 5, 1853 (*Coll. P. F.*, n. 1095). This decision enjoins bishops to inquire whence the converts hail; if from Bulgaria, Cyprus, the Maronites of Mount Lebanon, Italy or the adjoining islands, absolute Confirmation is required; if from Walachia, Moldavia, or Asia, *acquiescent.*— Cfr. also S. O., March 16, 1872; April 2, 1879; January 14, 1885 (*Coll.*, nn. 1381, 1515, 1630).

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ever, says that if Baptism was repeated conditionally, Confirmation should also be administered conditionally, to clergymen as well as laymen. The reason is, not that Confirmation is absolutely necessary, *necessitate medii,* but because the unconfirmed suffer a loss of perfection; although they would not be damned, unless perhaps by reason of contempt.[18]

As to Holy *Orders,* nothing need be said here, except that matter and form must be properly employed lest scruples arise and cases be proposed to the Holy Office, as we read of several.[19] The intention may be defective in the *ordinandus.* This happened in a certain seminarian, who had positively made up his mind not to be ordained, though he permitted the ceremonies to be performed over him. He had to be reordained privately and secretly.

RITES TO BE OBSERVED

CAN. 733

§ 1. In Sacramentis conficiendis, administrandis ac suscipiendis accurate serventur ritus et caeremoniae quae in libris ritualibus ab Ecclesia probatis praecipiuntur.

§ 2. Unusquisque autem ritum suum sequatur, salvo praescripto can. 851, § 2, 866.

In the celebration, administration, and reception of the Sacraments, the rites and ceremonies prescribed in the liturgical books approved by the Church must be accurately observed, and every one must follow his own rite, with due regard to canons 851, § 2, and 866.

18 S. O., June 20, 1866, *ad Gallas,* n. 40 (*Coll.,* n. 1293).

19 S. O., Sept. 7, 1892; Jan. 14, July 6, 1898 (*Coll.,* nn. 1811, 1988, 2008); see can. 1007.

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Conficere sacramentum means to effect or produce a Sacrament, to cause it to exist. As Christ our Lord is the efficient cause of the Sacraments, the word here signifies to produce a sacrament instrumentally, and is applied in its proper sense to the Holy Eucharist alone, because all the other Sacraments are effected or produced when *administered*. What *reception* means requires no explanation.[20]

Rites are the prayers which must be observed in the celebration of Mass and the administration of the Sacraments, or the formulas to be used according to the prescribed rule. *Ceremonies* are the gestures, acts, or bodily movements and signs which accompany the prescribed prayers, or the things over or with which the words are pronounced, such as blessings, lights, incense, vestments, and so forth.

The rites and ceremonies prescribed by the Church must be so observed that nothing is taken, or omitted from, or added to them. For they were introduced into the Church in order that the external worship of God might be performed with due reverence, that the sublime mysteries should appear more venerable, and that the faithful might be edified and their devotion enhanced.[21] This, however, does not mean that common sense or lawful custom [22] must be set aside. All that is necessary is that the essentials be strictly observed. On the other hand, *uniformity of ceremonies* — also among Regulars — is certainly an edifying spectacle. This is easily brought

20 *Trid.*, sess. 212, *de missae sacrif.*, c. 5; S. C. P. F., June 30, 1830 (*Coll.*, n. 817); Van der Stappen, *Sacra Liturgia*, 1898, t. 1, p. 3.

21 S. C. P. F., June 30, 1830 (*l. c.*).

22 Thus the S. Rit. C., Sept. 26, 1868 (*Dec. Auth.*, n. 3185) permitted a stole to be worn while preaching, if "custom permits." Sometimes futile doubts are proposed, especially to the S. Rit. C., whence the famous answer that the S. Congregation was not established for the purpose of fostering scruples.

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about if all use and follow the *liturgical books approved by the Church.* These books, for the *Latin Rite,* are: (1) the *Missal,* which contains the rubrics for the proper celebration of Holy Mass; (2) the *Roman Ritual,* which contains the rites and prayers to be observed in the administration of the Sacraments and at other ecclesiastical functions; and (3) the *Roman Pontifical,* which contains the rites and prayers for episcopal functions. To the Latin Rite also belong the *Ambrosian Liturgy,* which is observed in some churches of the archdiocese of Milan, and the *Mozarabic Liturgy,* now observed only in one chapel of the Metropolitan Church of Toledo.[28]

§ 2 of canon 733 enacts that each one must *follow his own rite.* That the Roman Pontiffs were anxious to preserve the various rites is evident from the variety of Oriental liturgies. A variety of rites is not incompatible with unity of faith, nay it sheds new lustre and majesty upon the Church and proves her readiness to admit reasonable customs. The main *Oriental Liturgies* are:

(1) The *Greek,* based on the so-called liturgies of SS. Basil and John Chrysostom. It has two branches: the *pure Greek,* used at Athens and Constantinople and by Italian Greeks; the *Greek Rumenian,* the *Greek Ruthenian,* the *Greek Bulgarian,* and the *Melchite,* which latter is employed by the Patriarch of Antioch and his suffragans.

(2) The *Syrian,* which is the Syrian translation of the Antiochene and is used by the Syrian Patriarch of Antioch and his suffragans, by the Syro-Chaldæan Patriarch of Babylon and his suffragans, by the Syro-Maronite Patriarch of Antioch, and the adherents of the Malabar or Syro-Sorian Rite.

28 Van der Stappen, *l. c.,* p. 20 f.

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(3) The *Armenian,* chiefly borrowed from the Greek and in use among the Armenians of Cilicia, Alexandria, Artum in Russia, and Lemberg in Galicia.

(4) The *Coptic,* which is in vogue in Egypt (Coptic-Egyptian) and Abyssinia (Coptic-Ethiopian).[24]

Some decisions may here find a place. If *children of both rites are to be baptized* in the same church, the Greek priest may validly baptize his subjects with water blessed according to the Greek rite, nor is he to be molested if he does not use water blessed according to the Latin rite. But the Ordinaries should see to it that baptismal water is kept in all churches blessed according to the Latin rite, and the Latin priests must use this water when baptizing their subjects, except in case of necessity.[25]

An Armenian or a Maronite priest may distribute Holy Communion which has been consecrated in unleavened bread, but he must use the language and ceremonies of his own (Armenian or Maronite) rite.[26] (Cfr. also can. 866.)

Priests of the Oriental Rite must make use of their own formulas and language in *absolving* faithful of the Latin Rite.[27]

THE HOLY OILS

CAN. 734

§ 1. Sacra olea quae quibusdam Sacramentis administrandis inserviunt, debent esse ab Episcopo benedicta feria V *in Coena Domini* proxime superiore; neque adhibeantur vetera, nisi necessitas urgeat.

24 Van der Stappen, *l. c.,* I, 18 f.

25 Benedict XIV, "*Etsi pastoralis,*" May 26, 1742, § II, n. VI.

26 S. C. P. F., April 30, 1866 (*Coll.,* n. 1288); cfr. can. 851, § 2.

27 S. O., Sept. 6, 1865 (*Coll.,* n. 1275). The form of the Greek Rite is either the subjunctive or the optative (*forma deprecatoria*), but never the indicative mood.

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§ 2. Mox deficienti oleo benedicto aliud oleum de olivis non benedictum adiiciatur, etiam iterato, minore tamen copia.

CAN. 735

Parochus olea sacra a suo Ordinario petere debet et in ecclesia in tuta ac decenti custodia sub clavi diligenter asservare; nec ea domi retineat, nisi propter necessitatem aliamve rationabilem causam, accedente Ordinarii licentia.

The Holy Oils to be used in the administration of the Sacraments of Baptism, Confirmation, Extreme Unction, and Holy Orders, must be blessed by the bishop on Holy Thursday of each year, and old ones may not be used except in case of urgent necessity. Should the blessed oil be about to give out, other olive oil that is not blessed may be added, even repeatedly, but in smaller quantities than the holy oil.

Each pastor must ask his Ordinary for the holy oils and keep them in a safe and becoming place under lock and key in church. He may not keep them in his house except in case of necessity, or for some other plausible reason, and only by special consent of the Ordinary.

The custom of *renewing the holy oils* and chrism is ancient, even if we prescind from the spurious document which Gratian[28] (or rather Pseudo-Isidore) ascribes to Pope Fabian (236–250). The text of our canon is taken from the Roman Pontifical and Ritual. Cases in which the use of old oils is permitted, according to Benedict XIV, are: if there be no Catholic bishop near at hand, because priests are not allowed to receive the holy oils from a schismatic bishop; if the distance be so great

[28] C. 18, Dist. 3, *de cons.*; cfr. c. 12, X, III, 1.

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that the oils can not arrive in time; or if there be any other impediment.[29] As to distance, one decision declares that a month's waiting would be sufficient.[30] This may happen in turbulent times, or when a serious strike interrupts communication. In future no special indult[31] is required for using the old oils if the case of necessity is verified. The law itself grants the right.

The renewal of the holy oils must be understood of the *blessing,* not of the oils themselves, as if the oils would have to be of the same year in which the blessing is given. It is the mystery that is to be renewed, not the oil.[32] Should it happen that a priest has not received the holy oils and must administer Baptism, he may use the old oils; he must not omit the anointment in order to supply that ceremony later with the oils recently received.[33]

§ 2 of can. 734 is plain enough. The addition of unblessed olive oil is permitted only in case of necessity. It is not permitted to bless part of the oil on Holy Thursday and mix this with unblessed oil immediately after.[34] The mixture should not exceed the proportion of 3:2, *i. e.,* only one-third of common olive oil may be added.

Can. 735 rules that the pastors must obtain the Holy Oils from *their own Ordinary.* This is an acknowledgment of the Ordinary's jurisdiction and their own dependence and shows the organization of the diocese. The old canons[35] already insisted upon this rule. Benedict XIV enjoined the Greek priests to receive the Holy

29 "*Anno vertente,*" June 19, 1750, § 5.

30 S. C. P. F., July 5, 1841 (*Coll.,* n. 924).

31 S. C. P. F., Sept. 27, 1835 (*Coll.,* n. 840) mentions an indult.

32 S. C. P. F., Aug. 13, 1669 (*Coll.,* n. 183); S. Rit. C., March 22, 1862, ad V (*Dec. Auth.,* n. 3114).

33 S. Rit. C., Sept. 23, 1837 (*Dec. Auth.,* n. 2773).

34 S. Rit. C., Dec. 7, 1844 (*Dec. Auth.,* n. 2882).

35 C. 122, Dist. 4, *de cons.*

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Oils from their own, not from a schismatic, bishop, or from the Latin Ordinary under whose jurisdiction they are placed.[36]

As to the *keeping of the Holy Oils,* in our country the custom of keeping them in the rectory is rather widespread. It is safe to assert, however, that the S. Cong. of Rites would not approve of this custom, except where there are special reasons for it. Such a reason would be great distance between church and parsonage.[37] But the mere fact that the church is separated from the rectory has never been acknowledged as a sufficient reason.[38] The custom, however, is not formally reprobated in our text. If the Holy Oils are kept in the house, it goes without saying that a decent and becoming place must be set aside for the purpose.[39]

NO UNLAWFUL EXACTIONS PERMITTED

CAN. 736

Pro administratione Sacramentorum minister nihil quavis de causa vel occasione sive directe sive indirecte exigat aut petat, praeter oblationes de quibus in can. 1507, § 1.

What is here stated must be taken in the light of what has been said concerning simony, and be compared with can. 1507, § 1, which provides that the stole fees should be regulated by a provincial council or meeting of the bishops, whose enactments are to be submitted to the Holy See. Besides the fees thus established, says the present canon, the minister of a Sacrament is not allowed

36 "*Etsi pastoralis,*" May 26, 1742, § IV.

37 S. Rit. C., Dec. 16, 1826 (*Dec. Auth.*, n. 2650).

38 S. Rit. C., June 23, 1892 (*Dec. Auth.*, n. 3779) and *passim.*

39 S. Rit. C., Dec. 16, 1826 (*Dec. Auth.*, n. 2650).

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to charge or demand anything, for whatever motive or on whatsoever occasion, either directly by exaction, or indirectly by insinuation, for the administration of a Sacrament.

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TITLE I

BAPTISM

CAN. 737

§ 1. Baptismus, Sacramentorum ianua ac fundamentum, omnibus in re vel saltem in voto necessarius ad salutem, valide non confertur, nisi per ablutionem aquae verae et naturalis cum praescripta verborum forma.

§ 2. Cum ministratur servatis omnibus ritibus et caeremoniis quae in ritualibus libris praecipiuntur, appellatur *sollemnis;* secus, *non sollemnis* seu *privatus.*

Baptism is called the *gate to, and the foundation of, the other Sacraments,* because without it no other Sacrament can be validly received. The Church has ever taught that Baptism is absolutely necessary for salvation, — either really or by desire [1] — and that consequently no other sacrament can be validly received without it. Thus ordination would be invalid and imprint no indelible character if the *ordinandus* had not been baptized.[2] This necessity of Baptism is called *necessitas medii,* necessity of means, because without it salvation cannot be obtained. The reason for this absolute necessity [3] lies in the words of Our Lord, John III, 5. Either *in re* or *in voto* signifies that the *baptismus fluminis* or *flaminis* or *sanguinis* is sufficient.

1 C. 3, C. 15, q. 1; cfr. Dist. 4, *de cons.*

2 Cc. 1, 3, X, III, 43.

3 "*Lamentabili,*" July 4, 1907, *prop. damn.*, n. 42.

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Baptism is *validly conferred,* the text further says, by *ablution with true and natural water combined with the prescribed form of words.* Here matter and form are clearly stated. The *matter* is true and natural water.[4] Water is *true* if no doubt exists as to its aqueous quality. A very thin liquor, the sap of trees, water made of rose leaves, etc., would be dubious. *Natural* water is that taken from wells, cisterns, ponds, rivers, or gained from ice, snow, drizzle, also mineral water.[5] Water mixed with ingredients that change its nature cannot be validly used.[6] A mixture of one part of chloride of mercury with two parts of natural water may be validly, and, in case of necessity, especially to spare a mother pains, licitly employed.[7]

The water must be applied in the form of an *ablution,* which is called *the proximate matter.* This is done either by pouring the water over the head or forehead of the one to be baptized, or by immersing him in the water (pond or river), or by sprinkling (*aspersio*) his head. In the Catholic Church pouring (*infusio*) is more common, at least in our country, although immersion and aspersion, too, are perfectly legitimate.[8] The water must touch the skin, not the hair only, of the head. If the head cannot be reached, some other principal part of the body,— chest, neck, hand or arm,— must be touched. In case of extreme necessity a wet sponge or rag may be used.[9]

The essential thing in the application of the matter is

4 *Decretum pro Armen.* (Denzinger, n. 591); *Rit. Rom.,* tit. II, c. 1, n. 3.

5 Cfr. Lehmkuhl, *l. c.,* II, n. 58 f.

6 S. O., Nov. 8, 1770; July 9, 1779 (*Coll.,* nn. 480, 536).

7 S. O., Aug. 21, 1901 (*Coll.,* n. 2121).

8 *Rit. Rom., l. c.* n. 10.

9 S. O., Nov. 8, 1770; July 9, 1779 (*Coll.,* nn. 480, 536); to apply the water in the form of a drink renders baptism invalid; *ibid.*

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that the ablution is verified and signified. This may be done with a greater or lesser quantity of water, though one drop could hardly be said to express ablution.

The *form* of baptism is: "I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost." These words must be pronounced simultaneously with the application of the water, without repetition or mutilation,[10] in the present tense indicative, though the imperative form is also valid; for instance, "*Baptizetur*," or "*Baptizare talis*," or "*Baptizet manus mea in nomine*," etc. But to use the perfect tense in order to signify a present action ("*Baptizatus est talis*") would render the ceremony invalid, unless the minister would not be aware of using the wrong tense, or if the language of the respective nation would permit the use of the perfect tense to signify a present action.[11] Mere slips of the tongue do not render the formula invalid. The forms: "I will administer unto thee the sacrament of baptism of sins in the name, etc.," [12] has been declared invalid. Also the form: "*Ego te lavo nomine Patris, et Primogeniti, et Spiritus Sancti.*" The form: "*Ego te lavo in nomine Patris, et Filii et Spiritus Sancti*," [13] on the contrary, is valid, as is also the form which substitutes for "*Spiritus Sancti*," "*Spiritus boni*" *or* "*sacri.*" [14]

§ 2 defines *solemn* and private or *non-solemn Baptism.* The former is administered with all the rites and ceremonies prescribed in the liturgical books. Where these are not employed, the Baptism is called *private.* The essential form remains the same, but there is a difference

10 *Prop. dam. ab Alex. VIII*, Dec. 7, 1690, n. 27 (Denz., n. 1184).

11 S. O., Sept. 8, 1633; S. C. P. F., March 27, 1631 (*Coll.*, nn. 74, 68).

12 S. O., June 23, 1840 (*Coll.*, n. 901).

13 S. O., Feb. 17, 1897 (*Coll.*, n. 1959).

14 S. O., April 30, 1904 (*Coll.*, n. 2191); for Japanese forms, see *Coll.*, n. 1323.

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in the matter, in as much as for solemn baptism water especially blessed either on Holy Saturday or the Saturday preceding Whitsunday must be used.

Note that if a baptismal font can be kept neither in church nor in a private house, and no baptismal water can be gotten, natural water must be used rather than holy water.[15] Should the baptismal water have become putrid, natural (not holy) water should be used, although Baptism conferred with putrid water would be valid.[16]

[15] S. O., April 6, 1741; S. C. P. F., April 17, 1758 (*Coll.*, nn. 325, 411).

[16] S. O., April 17, 1839 (*Coll.*, n. 885).

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CHAPTER I

THE MINISTER OF BAPTISM

THE ORDINARY MINISTER

CAN. 738

§ 1. Minister ordinarius baptismi sollemnis est sacerdos; sed eius collatio reservatur parocho vel alii sacerdoti de eiusdem parochi vel Ordinarii loci licentia, quae in casu necessitatis legitime praesumitur.

§ 2. Etiam peregrinus a parocho proprio in sua paroecia sollemniter baptizetur, si id facile et sine mora fieri potest; secus peregrinum quilibet parochus in suo territorio potest sollemniter baptizare.

CAN. 739

In alieno territorio nemini licet, sine debita licentia, baptismum sollemnem conferre ne sui quidem loci incolis.

CAN. 740

Ubi paroeciae aut quasi-paroeciae nondum sunt constitutae, statutorum peculiarium et receptarum consuetudinum ratio habenda est, ut constet cuinam sacerdoti, praeter Ordinarium, in universo territorio vel in eius parte ius insit baptizandi.

These three canons treat of the *ordinary minister* of the Sacrament of Baptism. He is, can. 738 says, the

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priest, with regard to solemn Baptism. The reason is that by virtue of ordination the priest has received the power to confer this Sacrament.

But, continues the text, the right of baptizing is reserved to the *pastor* or another priest commissioned either by him or by the local Ordinary. In a case where the canons of a cathedral church had obtained from their Ordinary permission to baptize, the custom was declared legitimate, provided the stole fees were turned over to the Archpriest.[1] The Vicar-General may baptize without the consent of his Ordinary, provided the latter has not limited that power.[2] The Roman Congregations have insisted that Ordinaries should but rarely and only for urgent reasons give permission to priests who are not pastors to baptize,[3] because this is a strictly parochial right. Yet our canon says that in case of necessity *permission may be lawfully presumed.* A case of necessity — not convenience or friendship or relationship — would exist if a child were ill, if the priest visited a mission only at long intervals, if the distance from the parish house amounted to several miles, etc. But attention must be drawn to can. 463, § 3, concerning the duty of refunding the stole fee.

§ 2 concerns the case of *peregrini, i. e.,* persons who reside outside their own domicile or quasi-domicile, without, however, having given it up.[4] Such a person should be solemnly baptized by his own pastor in his own parish, if it can be easily and conveniently done; if not, any other pastor may solemnly baptize such a *peregrinus* in his own parochial district. If the *peregrinus* is a baby,

1 S. Rit. C., May 9, 1606 (*Dec. Auth.,* n. 213).

2 S. Rit. C., April 16, 1639 (*Dec. Auth.,* n. 672).

3 S. C. C., Sept. 27, 1687; Feb. 21, 1888; S. C. EE. et RR., Aug. 21, 1580; Dec. 14, 1604.

4 Can. 91.

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the domicile or quasi-domicile of the father, or in case of an illegitimate or a posthumous child, that of the mother is decisive.[5] Hence a child born outside the parish in which his father or mother have their domicile or quasi-domicile, should be brought to the pastor of the father's or mother's parish, but only in case it can be done easily and without delay. *Easily* may be taken to mean without expense or conveniently. A distance of three leagues, or about thirteen miles, some[6] say, would excuse. However, now-a-days an automobile may easily be had, and travels smoothly, at least over good roads. The physical condition of the child, too, must be considered. *Sine mora,* without delay, must be understood according to can. 770, which says: *quam primum,* as soon as possible.

Can. 739 rules that neither the pastor nor another priest may solemnly baptize, even his own parishioners or subjects, in a *district not his own, unless he has obtained proper permission.* To do so would be setting aside all local organization. Of course the Ordinary and his vicar general may baptize anywhere in the diocese, but if he wishes to baptize one living outside his diocese, he needs the permission of the respective local Ordinary. This permission is required also when one of his diocesan subjects gives birth to a child in another diocese. The same rule applies to pastors and other priests who, when outside their own district, are asked to baptize one belonging to that district by reason of domicile or quasi-domicile.

Can. 740 provides for *parishes or quasi-parishes not yet established.* In such cases special statutes and prevailing customs must be observed, in order to make sure which priest, besides the Ordinary, is entitled to baptize either in the whole territory or in a particular district

[5] Can. 90, § 1.

[6] Lehmkuhl, *l. c.*, II, n. 66.

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thereof. We could find no diocesan regulations[7] on this head by either the Baltimore Councils or any other American council or synod. The text is plain enough, alluding as it does to can. 216 on the establishment of regular parishes or quasi-parishes; where there are no diocesan statutes regulating the matter, custom must be followed, and the custom is that the *sacerdos excurrens* baptizes the children of his station or mission and is entitled to the fees.

But what about *linguistically distinguished parishes?* If the children belong to parents who are members of a, say German or Italian parish, there is no doubt as to the right of the pastor of that parish to baptize them. But there are doubtful cases, such as this: A couple moves into a parish, and before they have decided what parish to join, a baby is born to them. The Italian pastor is asked to baptize the child, because the mother is an Italian and would rather belong to the Italian congregation, whereas the father, though also of Italian descent, cares for no parish at all. In that case, we believe, the Italian pastor would be entitled to baptize the child and keep the fee. The pastor of the English speaking congregation could not claim the mother, nor could he insist upon territorial rights, because we suppose that the Italian parish lies within the limits of the English speaking congregation. But suppose an Italian mother comes to the pastor of a *German* speaking congregation, which is within the boundaries of an English speaking congregation, and begs the German pastor to baptize her child, either because he speaks Italian or is personally known to the family. Is the German pastor bound to refuse her request? We hardly think so, because, by reason of the

7 At least the *Collectio Lacensis*, which we perused, seems to contain no such regulations.

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territory or parochial district, he may claim as much right as the English pastor, and as far as pastoral rights go, he is as much entitled to perform the ceremony as the English pastor. However, if an Italian congregation is near, the English as well as the German pastor should tell the woman to go to the Italian pastor.

What about a *convert* who has been instructed by the pastor of a German congregation? He is an American of other than German ancestry, while his wife belongs to the German nationality. Or perhaps he is not yet married. In both cases we believe that, in justice, the pastor who instructed the convert is also entitled to baptize him, no matter whether he has a wife of German descent or is unmarried, because the pastor of the English speaking congregation cannot claim anyone as his subject before Baptism. This we say conditionally, *i. e.*, provided there are no diocesan regulations or lawful customs to the contrary.

EXTRAORDINARY MINISTERS

CAN. 741

Extraordinarius baptismi sollemnis minister est diaconus; qui tamen sua potestate ne utatur sine loci Ordinarii vel parochi licentia, iusta de causa concedenda, quae, ubi necessitas urgeat, legitime praesumitur.

CAN. 742

§ 1. Baptismus non sollemnis, de quo in can. 759, § 1, potest a quovis ministrari, servata debita materia, forma et intentione; quatenus vero fieri potest, adhibeantur duo testes, vel saltem unus, quibus baptismi collatio probari possit.

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§ 2. Si tamen adsit sacerdos, diacono praeferatur, diaconus subdiacono, clericus laico et vir feminae, nisi pudoris gratia deceat feminam potius quam virum baptizare, vel nisi femina noverit melius formam et modum baptizandi.

§ 3. Patri aut matri suam prolem baptizare non licet, praeterquam in mortis periculo, quando alius praesto non est, qui baptizet.

The deacon is the extraordinary minister of solemn baptism, but he should not use this power without the permission of the local Ordinary or pastor, to be granted for a just reason; in case of necessity this permission may be lawfully presumed.

Hence a deacon, by virtue of his ordination,[8] may employ all the ceremonies and rites prescribed for the administration of Baptism by the Roman Ritual. However, as ecclesiastical legislation[9] has reserved this right to the pastor, the deacon is not the ordinary minister of the Sacrament of Baptism, but needs the permission of the Ordinary in whose diocese, or of the pastor in whose parish, he wishes to baptize. In case of necessity this permission need not be asked for. A case in point occurs in the Decree of Gratian,[10] where the "necessity" arose through absence of, or long distance from, the bishop or priest. The reasons mentioned in can. 738 would also be sufficient.

Can. 742, § 1, rules that, in case of *danger of death, private baptism may be administered by anyone,* provided he or she uses the proper matter and form and has the

8 *Pontif. Rom.*, "*De ordinatione diaconi:*" "*Oportet ergo diaconum . . . baptizare,*" with a reference to Acts VIII, 12.

9 C. 13, Dist. 93; c. 19, Dist. 4, *de cons.*

10 *Ibid.*

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right intention. Wherever possible, two witnesses should be called, or at least one, to testify to the act.

The first part of this paragraph embodies an article of faith,[11] and consequently binds the Greek as well as the Latin Church.[12]

The *rite* to be observed in administering Baptism privately consists in pouring natural water (not blessed) over the head of the subject, simultaneously pronouncing the words: "I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost." The *intention* must be to "do what the Church does," no matter what one may believe about the Church. A superstitious intent or purpose does not necessarily exclude the right intention.[13] In the way described anyone may baptize, but only in *case of necessity*, or danger of death, as can. 759, § 1, explains. The phrase "danger of death" may be taken in a pretty wide sense, for several decisions of the Roman Court have approved the custom of baptizing privately if the missionary is absent for more than eight days,[14] or if there is danger that a baby may be smothered because placed in the same bed with his parents.[15]

§ 2 determines the order of precedence to be followed according to the Roman Ritual.[16] If a priest is present, he should be preferred to a deacon; a deacon to a subdeacon; a clergyman to a layman; a man to a woman (unless decency would demand preference for the woman or unless the woman knows the form and manner of baptizing better than the man).

11 *Trid.*, Sess. 7, can. 4, *de bapt.*

12 Benedict XIV, "*Nuper ad nos*," March 16, 1743, § 6: *Forma professionis Maronitis praescripta.*

13 S. O., Sept. 19, 1671 (*Coll. P. F.*, n. 201). A mother was told by another woman to baptize her child in order to avoid future pregnancy.

14 S. C. P. F., Jan. 16, 1804; Sept. 11, 1841 (*Coll.*, nn. 674, 939).

15 S. C. P. F., Jan. 21, 1788 (*Coll.*, n. 593).

16 Tit. II, c. 1, n. 13.

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A suspended or interdicted priest may never baptize solemnly, but only privately.[17] But since the question here turns about private baptism, even a suspended priest would have to be preferred to a deacon, etc. Schismatic monks may privately baptize only when there is no Catholic person at hand.[18]

§ 3 provides that *father or mother are not allowed to baptize their own child* except there be case of danger of death and no one else is at hand who could baptize *(qui baptizet), i. e.,* who is capable and willing to baptize. Incapable would be, *e. g.,* a bigotted Baptist who does not believe in infant baptism and, moreover, flatly refuses to perform the ceremony.

Can. 743

Curet parochus ut fideles, praesertim obstetrices, medici et chirurgi, rectum baptizandi modum pro casu necessitatis probe ediscant.

The pastor shall take care that the faithful, especially midwives, physicians, and surgeons, are thoroughly instructed in the manner of administering Baptism in cases of emergency.[19] For this purpose some special lectures would be helpful. The subject may also be mentioned at retreats.

BAPTISM OF ADULTS

Can. 744

Adultorum baptismus, ubi commode fieri possit, ad loci Ordinarium deferatur, ut, si voluerit, ab eo vel ab eius delegato sollemnius conferatur.

17 S. C. P. F., Jan. 21, 1789 (*Coll.*, n. 598).

18 S. O., Aug. 20, 1671 (*Coll.*, n. 198).

19 S. C. P. F., Sept. 11, 1841 (*Coll.*, n. 939): especially intelligent laymen and catechists.

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When adults are to be baptized, the local Ordinary should be notified, if it can be done conveniently, in order that, if he so desires, he himself or a priest delegated by him may administer the Sacrament more solemnly. No strict obligation can be read into this canon, as is evident from the term *deferatur* as well as from the subjunctive form employed.

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CHAPTER II

THE SUBJECT OF BAPTISM

CAN. 745

§ 1. Subiectum capax baptismi est omnis et solus homo viator, nondum baptizatus.

§ 2. Cum agitur de baptismo:

1.° Parvulorum seu infantium nomine veniunt, ad normam can. 88, § 3, qui nondum rationis usum adepti sunt, eisdemque accensentur amentes ab infantia, in quavis aetate constituti;

2.° Adulti autem censentur, qui rationis usu fruuntur, idque satis est ut suo quisque animi motu baptismum petat et ad illum admittatur.

Three conditions are required for the valid reception of Baptism: the subject must be a human being living and in the wayfaring state, and not previously baptized *(nondum baptizatus)*. If these three conditions are verified, it matters nothing whether the subject be male or female, white, black or red, young or old, rich or poor, high or low *(omnis homo)*. The reason is the absolute necessity of Baptism for wiping away original sin.[1] The limitation expressed in "*solus*" is based upon the same doctrine, but has a wider scope, inasmuch as there may be a doubt concerning deformed or doubtful human creatures, as will be seen in the following.

1 C. 3, Majores, X, III, 42; *Trid.*, sess. 5, can. 3, *de peccato orig.*; sess. 7, can. 12 f., *de baptismo.*

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§ 2 of can. 745 says that with *regard to Baptism, parvuli* or *infantes* (infants) are those who have not yet attained the use of reason,[2] and also those who have been insane from infancy, of whatsoever age they may be; whereas the term *adulti* (adults) comprises all who enjoy the use of reason; which qualification is sufficient to enable them to ask for Baptism of their own accord and to be admitted to it. *Infancy,* as a rule, is completed after the seventh year has been reached.[3] However this age limit must not be urged with regard to Baptism. It is no more than a guiding norm which permits presuming the use of reason. If this is attained earlier the child may be baptized even against the will of his parents.[4] If, on the other hand, the use of reason has not been attained after the seventh year, the subject must be treated as an infant. Generally speaking, however, the use of reason may be presumed after the seventh year unless certain signs point to its absence or there is at least room for a solid doubt.

On the same level with infants are those who have been *insane from infancy* (see canon 754). Medical authorities[5] say that insanity is a common condition, but it has not been satisfactorily defined. It supposes an appreciable unsoundness of the will, memory, and understanding, or of any one or two of these faculties. Where shall the line be drawn between the weak but responsible will and the insane will? What degree of opacity between intellect and cosmos separates the ignorant man from the lunatic? The extremes of both sanity and insanity are readily recognizable, but the intermediate de-

2 Can. 88, § 3.

3 S. O. Sept. 3, 1877; S. C. P. F., March 3, 1703 (*Coll.*, nn. 1480, 255).

4 Benedict XIV, "*Postremo mense,*" Feb. 28, 1747, n. 32.

5 Cfr. O'Malley-Walsh, *Essays in Pastoral Medicine,* 1911, pp. 106, 212 ff.

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grees are often hard to perceive. There is no rule that may be applied to all cases; each must be diagnosed from its peculiar symptoms. The symptoms of idiopathic insanity — a phrase which medical men use to conceal their ignorance of the cause of the disease — are not readily recognizable unless looked for especially. Besides almost any form of mania is likely to recur. We are told that among a thousand cases of acute mania only one was observed in which the symptoms did not recur. These professional statements may give the priest a hint as to the treatment of such unfortunate patients. Concerning Baptism we shall see under can. 754 an Instruction of the S. C. Propaganda, which is in keeping with these statements.

Adults is here simply used to designate those who enjoy the actual and habitual use of reason, without regard to a fixed age limit. All such persons, if they ask for Baptism of their own accord, may be baptized, even against the will of their parents, because the divine does not depend on the human law.[6]

THE WAYFARING STATE

CAN. 746

§ 1. Nemo in utero matris clausus baptizetur, donec probabilis spes sit ut rite editus baptizari possit.

§ 2. Si infans caput emiserit et periculum mortis immineat, baptizetur in capite; nec postea, si vivus evaserit, est iterum sub conditione baptizandus.

§ 3. Si aliud membrum emiserit, in illo, si periculum immineat, baptizetur sub conditione; at tunc, si natus vixerit, est rursus sub conditione baptizandus.

§ 4. Si mater praegnans mortua fuerit, fetus ab iis

[6] Benedict XIV, "*Postremo mense*," n. 32.

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ad quos spectat extractus, si certo vivat, baptizetur absolute; si dubie, sub conditione.

§ 5. Fetus, in utero baptizatus, post ortum denuo sub conditione baptizari debet.

CAN. 747

Curandum ut omnes fetus abortivi, quovis tempore editi, si certo vivant, baptizentur absolute; si dubie, sub conditione.

CAN. 748

Monstra et ostenta semper baptizentur saltem sub conditione; in dubio autem unusne an plures sint homines, unus absolute baptizetur, ceteri sub conditione.

One essential condition for the administration of Baptism is that the subject be born,[7] not only conceived, *i. e.*, an individual subsisting by itself and no longer *enclosed in the womb.* No one enclosed in the maternal womb can be baptized, as long as there is a probable hope that he may be properly brought forth and then baptized. The decisions referred to by Cardinal Gasparri merely state that a baby, no part of whose body has been brought forth, and which was conditionally baptized with a syringe, must be rebaptized conditionally.[8] There is no word about *rite editus,* but about "*reserato materni uteri ostio,*" in which case conditional Baptism would have to be conferred.

§ 2 says that if the infant puts forth his head, he may

[7] John 3, 5: "*nisi quis renatus fuerit.*"

[8] S. C. C., July 12, 1797, referred to by S. C. C., March 16, 1897, reads: "*Servetur decretum S. C. Concilii diei 12 Julii 1794, viz: Si reserato materni uteri ostio, infans cujus corpusculi nulla pars adhuc in lucem prodivit, per siphunculum piaculari lavacro sub conditione fuerit tinctus, postquam ille natus fuerit, Baptismus erit sub conditione iterandus.*" (Cfr. *Coll. P. F.*, n. 1962).

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be baptized on the head, and shall not be rebaptized conditionally if he survives.

§ 3 provides that if he puts forth some other limb than the head, he may be conditionally baptized on this limb if there be danger; but in that case he must be rebaptized conditionally if he survives.

According to § 4, if a mother dies in pregnancy, the fetus, after being extracted by those who are obliged to perform that act, should be baptized absolutely if certainly alive, conditionally if there are only doubtful signs of life.

§ 5 declares that a fetus baptized in the mother's womb must be rebaptized conditionally after birth.

The last two sections call for some medico-pastoral remarks. The duration of pregnancy, from the fertilization of the ovum to full-term delivery is 280 days. This period is divided either into 10 months of twenty-eight days each — a lunar month — or into nine calendar months. During the first week the ovum remains in the Fallopian tube. Having entered the upper part of the tube and become impregnated, it slowly moves down, meanwhile beginning a process of repeated division or cleavage, known as the "*segmentation of the ovum.*" After the sixth week the name *fetus* is applied to what was before called *embryo,* because after the sixth week the form is distinctly human. The greatest danger of miscarriage occurs at three months. In the course of the fourth month the sex can readily be distinguished. A fetus born at the termination of the sixth month may breathe feebly, but will die within a few hours.[9] When does animation take place? At the moment when the

[9] Crusius, A. M., M. D., *The Antikamnia Foetation and Parturition Chart;* Kirke, *Handbook of Physiology,* 8th Am. edit., 1914, p. 747 f.

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pronucleus of the spermatozoon fuses with the pronucleus of the ovum in the Fallopian tube and makes the segmentation nucleus, the soul of the child enters, and personality exists as absolutely as it does after birth.[10] This, as we have said above, happens during the first week of pregnancy. It may be added that the fact that a fetus does not breathe is no proof it is dead. It is not unusual for a full-term child not to breathe for an hour or longer after birth.[11] These are valuable hints for those concerned. Who are they? After the mother's death, when the Cæsarean section is not only permissible, but required in order to baptize the child or fetus, a surgeon is to be called in to perform the operation. He should not be easily believed if he asserts that the child is dead. In that case any one else who has the skill and courage to extract the fetus may be invited, provided it is not against the law.[12] Whether the fetus is *certainly alive* can be discovered by diagnosis in the earlier stages of pregnancy, and by breathing in the later stages, although, as stated above, non-breathing is not an absolute proof of death. At any rate, as long as putrefaction has not set in, conditional baptism is to be administered.

We have deliberately abstained from passing judgment on the vexed question of the licitness of the Cæsarian section, as § 4 of can. 746 simply takes for granted the fact of the mother's death, and therefore leaves the controversy *in statu quo*.[13]

Can. 747 declares that all abortive human fetuses, if certainly alive, should be baptized absolutely; if it is doubtful whether they are alive or dead, Baptism should be administered conditionally.

10 O'Malley-Walsh, *l. c.*, p. 3.
11 *Ibid.*, p. 11.
12 Lehmkuhl, *l. c.*, II, n. 75.
13 Cfr. *Am. Eccl. Rev.*, Vol. 9; Lehmkuhl, *l. c.*, I, n. 844, 849; O'Malley-Walsh, *l. c.*, p. 11.

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Can. 748 lays down the rule concerning the treatment of *monsters, i. e.,* misshaped human terata or products of erroneous development. Of such there are various kinds. Some of the autositic monstra show a strong resemblance to lower animals, but there is no record that could claim to be scientific of a hybrid between a human being and a lower animal. The omphalisitic single monsters are either dead when born, or die as soon as the placental circulation is cut off. The composite monsters, or species of twins, have various types according to the various combinations of the limbs: double-faced, double-headed, two-armed, etc.[14]

Such *monstra,* says the text, should always be baptized, at least conditionally. When there is doubt whether there are one or several persons, one must be baptized absolutely, the others conditionally.

There is no difficulty as to hermaphrodites, because sex does not affect the validity of Baptism.

CAN. 749

Infantes expositi et inventi nisi, re diligenter investigata, de eorum baptismo constet, sub conditione baptizentur.

Infants that have been abandoned and found should be baptized conditionally, unless careful research makes it evident that the Sacrament has already been administered to them. One trustworthy witness, man or woman, especially the baptized subject himself, is sufficient to give evidence of Baptism having been conferred.[15] A slip of paper appended to the neck of the child is not

14 O'Malley-Walsh, *l. c.*, p. 69 ff.

15 S. C. C., Dec. 18, 1723; Jan. 15, 1724; Benedict XIV, "*Postremo mense,*" Feb. 28, 1747, n. 31.

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sufficient proof if the writer is unknown or hidden,[16] and when there is no other evidence, conditional baptism must be administered.

CHILDREN OF INFIDELS

CAN. 750

§ 1. Infans infidelium, etiam invitis parentibus, licite baptizatur, cum in eo versatur vitae discrimine, ut prudenter praevideatur moriturus, antequam usum rationis attingat.

§ 2. Extra mortis periculum, dummodo catholicae eius educationi cautum sit, licite baptizatur:

1.° Si parentes vel tutores, aut saltem unus eorum, consentiant;

2.° Si parentes, idest pater, mater, avus, avia, vel tutores desint, aut ius in eum amiserint, vel illud exercere nullo pacto queant.

The Church has always insisted upon the necessity of Baptism and the fulfillment of the baptismal vows, which require an education that is in keeping with the principles of the Christian religion. On the other hand she wishes to uphold and recognize the natural rights of parents, and hence she does not permit Baptism to be indiscriminately administered to infants.

§ 1 of our canon repeats what Benedict XIV pointed out so clearly, that the children of infidels may *be lawfully baptized against the will of their parents only when they are in danger of death.* This danger must be such that there is little or no hope of their surviving to the age of discretion. Thus a nurse may baptize the dying child of Hebrew parents, a missionary acting as a physi-

[16] S. O., Jan. 5, 1724 (*Coll. P. F.*, n. 299).

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cian may baptize a child in the same condition.[17] If the illness is so grave that the physician judges the child will not live, there is sufficient reason for administering Baptism. On the other hand, the Holy Office has decided that a great mortality among children,— as in China, where two-thirds die from various causes — does not warrant the administration of Baptism, unless the children can be withdrawn from parental control.[18]

§ 2 rules that, even *when there is no danger of death,* children of infidels may be lawfully baptized, provided their Catholic education is guaranteed, in the following two cases:

(1) If the parents or guardians, or at least one of them, consent to the baptism; (2) If there are no parents, *i. e.,* no father, mother, grandfather, grandmother, or guardians, or if they have forfeited the right to keep the child or are unable to exercise that right.

This rule is taken in the main from Benedict XIV's Constitution, "*Postremo mense,*" of Feb. 20, 1747. It is based upon the *favor fidei,* which dictates that the supernatural right should prevail[19] over the natural. Hence if one of the parents consents, Baptism may be lawfully administered.

The same rule applies to *guardians,* because the parental power is supposed to devolve[20] upon them. However it is a necessary condition that the children be brought up in the Catholic religion, and that the hope of Christian education be well-founded.[21] The Holy Office decided that the children of the nomadic tribe of the Goayiros

17 S. O., July 18, 1894 (*Coll. P. F.*, n. 1877).

18 S. O., July 6, 1898; July 22, 1840; May 4, 1853; S. C. P. F., Jan. 13, 1783 (*Coll.*, nn. 2007, 902, 1090, 558).

19 Benedict XIV, *l. c.*, n. 16.

20 *Ibid.*, n. 14.

21 S. O., Feb. 13, 1867 (*Coll.*, n. 1302).

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(Colombia) might be baptized if there were any hope that they would be instructed in the Catholic religion [22] later on, or a well-founded expectation that the parents, who had expressed the desire of Baptism, would afterwards receive it.[23]

When Catholic godparents offer a child of infidel parents for Baptism, the Sacrament can be administered only if there is a solid hope that he will receive a Christian education.[24] How, if the grandparents give this promise? These are expressly mentioned under n. 2, but not under n. 1. Benedict XIV vindicated this right to the grandfather and grandmother if the parents were unwilling. But we hardly think that the legislator wishes to extend it to the grandparents when the parents are opposed to the child's Baptism, else the grandparents would be mentioned also under n. 1. N. 2 obviously supposes that there are neither parents, nor grandparents, nor guardians, or else that they have *forfeited their claim to the child*. This happens when children are exposed or forsaken by inhuman parents, who by such conduct lose their rights. Vagrant or rambling children should not, as a rule, be baptized without the consent of their parents.[25] The parents' right in the matter is practically lost when they are unable to claim it, *e. g.*, on account of insanity, utter destitution [26] or imprisonment for life.

22 S. O., Sept. 6, 1899 (*Coll.*, n. 2068).

23 S. O., Dec. 11, 1850, n. 4 (*Coll.*, n. 1054).

24 S. O., Nov. 29, 1764 (*Coll.*, n. 457).

25 Benedict XIV, *l. c.*, n. 9 f.

26 S. C. P. F., April 17, 1777 (*Coll.*, n. 522, n. VII, VIII).

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CHILDREN OF NON-CATHOLICS

CAN. 751

Circa baptismum infantium duorum haereticorum aut schismaticorum, aut duorum catholicorum qui in apostasiam vel haeresim vel schisma prolapsi sint, generatim serventur normae in superiore canone constitutae.

The same general rules apply to the children of heretics, schismatics, and fallen-away Catholics, on account of the danger of perversion and profanation,[27] which is almost certain if both parents are non-Catholics. Hence if parents, relatives or friends should offer for Baptism a child that belongs to heretics, schismatics or apostate Catholics, the priest must gently but firmly decline to baptize it, unless he is morally certain that it will be educated in the Catholic religion,[28] for instance, in a Catholic college or academy, or by Catholic relatives. Concerning the children of apostates the Holy Office has decided [29] that Baptism may be administered to them only if there is a well-founded hope that they will be separated from their unworthy progenitors and entrusted to Catholics, as to which probability the minister must inquire. If one of the parents is a Catholic and the other a Protestant, the Catholic party must be seriously admonished to tell the non-Catholic that Baptism was conferred and the child must be given a Catholic education.[30] When

27 S. O., Jan. 21, 1767 (*Coll.*, n. 465): "*cum manifesto profanationis periculo.*"

28 S. O., March 6, 1844, Americ. Sept. (*Coll.*, n. 986); Aug. 26, 1885 (*Coll.*, n. 1643). If the parents refuse to assume any obligation to that effect, Baptism may not be administered.

29 Jan. 28, 1637 (*Coll.*, n. 90).

30 S. O., Nov. 29, 1672; Nov. 18, 1745 (*Coll.*, nn. 205, 353); Benedict XIV, "*Inter omnigenas,*" Feb. 2, 1744.

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children of non-Catholic parents are baptized at home, no ceremonies are to be used.[31]

BAPTISM OF ADULTS

CAN. 752

§ 1. Adultus, nisi sciens et volens probeque instructus, ne baptizetur; insuper admonendus ut de peccatis suis doleat.

§ 2. In mortis autem periculo, si nequeat in praecipuis fidei mysteriis diligentius instrui, satis est, ad baptismum conferendum, ut aliquo modo ostendat se eisdem assentire serioque promittat se christianae religionis mandata servaturum.

§ 3. Quod si baptismum ne petere quidem queat, sed vel antea vel in praesenti statu manifestaverit aliquo probabili modo intentionem illum suscipiendi, baptizandus est sub conditione; si deinde convaluerit et dubium de valore baptismi collati permaneat, sub conditione baptismus rursus conferatur.

Adults who are physically and mentally normal, cannot be baptized except with their own knowledge and free will and after having been duly instructed and exhorted to be sorry for their sins. This law is based upon the necessity of coöperation in the work of salvation.[32] The Popes have frequently admonished missionaries to instruct candidates before Baptism, if need be by native ministers, and not to admit anyone to this Sacrament unless he were well instructed and imbued with Christian manners.[33] This rule applies to all, including negroes and

31 S. O., Jan. 21, 1767 (*Coll.*, n. 465).

32 *Trid.*, sess. 6, *de justif.*, c. 6; sess. 14, *de poenit.*, c. 1.

33 Alexander VII, "*Sacrosancti*," Jan. 18, 1658; Clement IX, "*In excelsa*," Sept. 13, 1669; Clement XII, "*Compertum*," Aug. 24,

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other infidels who are capable of embracing the Christian religion. No one is to be baptized or abandoned after Baptism has been administered before he knows the truths necessary for salvation.[34] Old people whose memory is failing may be baptized if they give assurance of their belief and profess it.[35] Savages and nomads may be baptized if their mode of life does not conflict with religion or morality.[36] Deaf-mutes may be baptized if they give some signs of religious knowledge.[37] Now-a-days there are adequate means of instructing these unfortunates, and conclusive methods of ascertaining a person's religious training.

Concerning the *extent of this instruction*, the Roman Ritual [38] demands that neophytes "be carefully instructed in the Christian faith and holy manners." By *Christian faith* are to be understood the principal mysteries, *i. e.*, those which must be believed *necessitate medii, viz.:* the Blessed Trinity and the Incarnation. Express belief in our Lord Jesus Christ is specifically mentioned in one decision of the Holy Office.[39] The *Apostles' Creed*, which is enjoined in an Instruction of the S. C. Prop. Fide,[40] contains the principal mysteries of the faith. The Holy Office (*l. c.*) also urges instruction regarding the Holy Eucharist, unless the priest deems it better, for a prudent motive, to postpone this truth till after Baptism. Furthermore the "*Our Father*," the effects of Baptism, and the acts of faith, hope, and charity, are to be incul-

1734; "*Concredita Nobis*," May 13, 1739; Benedict XIV, "*Omnium sollicitudinum*," Sept. 12, 1744; S. C. P. F., Sept. 12, 1645 (*Coll.*, nn. 129, 187, 347, 114).

34 S. O., March 20, 1686 (*Coll.*, n. 230).

35 S. O., March 8, 1770, n. 2 (*Coll.*, n. 477).

36 S. O., Sept. 18, 1850 (*Coll.*, n. 1050).

37 S. O., Dec. 11, 1850 (*Coll.*, n. 1054).

38 Tit. II, c. 3, n. 1.

39 S. O., May 10, 1703, ad 2; Jan. 25, 1703 (*Coll.*, nn. 256, 254).

40 Oct. 18, 1883 (*Coll.*, n. 1606, n. XVII).

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cated, and an act of contrition, or at least attrition, is required.[41]

Concerning *Christian morality* the aforesaid decision of the Holy Office insists upon all the divine precepts which, according to the Instruction of the S. C. Prop. mentioned, are included in the Decalogue. The last-named Instruction also demands the teaching of the precepts of the Church.[42] This insistence may cause some embarrassment, especially in cases of polygamy. For if one has many wives, he must dismiss all but the one with whom he has contracted a valid marriage. If he married all at one time, either as wives or concubines, he must dismiss all except one, with whom he must contract anew by renewing the matrimonial consent.[43] A girl of Catholic parents who is engaged to a pagan cannot be baptized unless she is ready to break off the engagement if no dispensation can be obtained.[44] Girls not yet betrothed to pagans may, however, be baptized,[45] even though there is danger that they will marry gentiles.

§ 2 of our canon deals with the Baptism of *adults in danger of death.* Such as cannot be carefully instructed in the principal mysteries of the faith, may be baptized if in any shape or form they show their readiness to assent to the truths of the Catholic religion and promise to observe its precepts. A noteworthy Instruction of the Holy Office[46] says, that adults in danger of

41 S. C. P. F., *ibid.*; S. O., May 10, 1703, ad 5 (*Coll.*, n. 256).

42 S. C. P. F., Oct. 18, 1883; another instruction, Sept. 12, 1645 (*Coll.*, n. 114) prescribes that they be enlightened on idol and devil worship, the cult of ancestors, the necessity of restitution, the abuse of opium, and polygamy.

43 S. O., May 10, 1703, ad 6 (*Coll.*, n. 256).

44 S. O., June 12, 1769 (*Coll.*, n. 472).

45 S. O., June 20, 1866, ad 10 (*Coll.*, n. 1293). These rules must evidently be applied to concubinage and other scandalous conduct, until signs of repentance are given and a promise of reform is made.

46 S. O., Aug. 3, 1860 (*Coll.*, n. 1198).

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death may be baptized if they have faith, repentance, and the intention of receiving the Sacrament. Faith and repentance alone are necessary for the licit administration of Baptism, whilst an (at least habitual) intention is required for its valid administration. Hence, in case of doubt as to whether a dying person is sufficiently instructed in the mysteries of the faith, or whether he has the required attrition, the Sacrament may be administered absolutely; but if there is a doubt as to the intention, Baptism must be given conditionally. Concerning doubts as to sufficient instruction, or faith, or repentance, or amendment of life, the Holy Office [47] has declared that if the priest is morally certain that the patient answers his questions only to avoid contradicting his interrogator, or to please him, Baptism may not licitly be administered even *sub conditione*. But if the priest is morally certain of the patient's belief and the seriousness of his repentance, Baptism must be administered absolutely. In case of prudent doubt, when no time is left for further instruction, Baptism must be given conditionally. Signs (*e. g.* nodding of the head) or a simple "yes" are sufficient, especially if the patient had expressed a desire of being baptized before the danger of death supervened.[48] Old people who have given up the practice of idolatry and are in danger of death may be licitly baptized, even though their defective memory will not permit of proper instruction.[49]

From this may be easily understood the rule laid down in § 3, that if an adult can no longer ask for Baptism, but has, either previously or in his present state, in some probable way expressed his intention of receiving *Bap-*

47 S. O., May 10, 1703, ad 1 (*Coll.*, n. 256).

48 S. O., Sept., 1850; March 8, 1770 (*Coll.*, nn. 1050, 477).

49 S. O., Dec. 11, 1850, ad 2 (*Coll.*, n. 1054).

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tism, the Sacrament should be administered conditionally. If he recovers and there is a doubt as to the validity of the Baptism conferred, he must be rebaptized conditionally, *i. e.*, the minister must use some such words as: "If thou art capable, *i. e.*, if sincerely thou wilt be baptized, I baptize thee in the name, etc."

When baptisms thus conditionally administered are to be investigated, inquiry must be made regarding the presence of the right intention, of faith, and attrition. If all three of these dispositions were wanting, Baptism must be conferred absolutely; if there is doubt, the subject must be rebaptized conditionally.[50]

DISPOSITION FOR BAPTISM

CAN. 753

§ 1. Tam sacerdotem qui adultos baptizaturus est, quam ipsos adultos qui sani sint, decet esse ieiunos.

§ 2. Nisi graves urgentesque causae obsint, adultus baptizatus statim Missae sacrificio assistat et sacram communionem percipiat.

It is becoming that a priest who baptizes an adult, as well as the adult himself, if he be in good physical condition, should be fasting.[51] This condition supposes that Baptism of adults should, if possible and convenient, be administered in the morning, as § 2 confirms when it says that, except when grave and urgent reasons excuse, the baptized adult should immediately assist at the Holy Sacrifice of the Mass and receive Communion.[52]

50 S. O., Aug. 3, 1860; March 30, 1898, ad 3 (*Coll.*, nn. 1198, 1993).

51 *Rit. Rom.*, tit. II, c. 3, nn. 8, 9.

52 *Ibid.*, tit. II, c. 4, n. 51 (Pustet's ed., 1913, p. 37): "*Si hora congruens fuerit, celebratur Missa, cui neophyti intersunt, et SSm. Eucharistiam suscipiunt.*" But no grievous obligation can be read into either this text or the Code. Custom may dispense from the obligation here inculcated.

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BAPTISM OF INSANE PERSONS

CAN. 754

§ 1. Amentes et furiosi ne baptizentur, nisi tales a nativitate vel ante adeptum rationis usum fuerint; et tunc baptizandi sunt ut infantes.

§ 2. Si autem dilucida habeant intervalla, dum mentis compotes sunt, baptizentur, si velint.

§ 3. Baptizentur quoque, imminente periculo mortis, si, antequam insanirent, suscipiendi baptismi desiderium ostenderint.

§ 4. Qui lethargo aut phrenesi laborat, vigilans tantum et volens baptizetur; at si periculum mortis impendeat, servetur praescriptum § 3.

Insane persons and *maniacs* should not be baptized unless they have been so afflicted from birth or before they attained the use of reason, in which case they are to be baptized like infants.

If they have lucid intervals, they may, if they wish, be baptized in the course of one of these intervals, *i. e.*, while they enjoy the possession of reason.

They may also be baptized when in imminent danger of death, if they have expressed a desire for Baptism before they became insane.

Amentes is a general name for every form of insanity, mild or severe, temporary or permanent. *Furiosi*, properly speaking, are such as are frantic or violent, while *amentes* may be merely suffering from melancholia. "Originally, of course, mania meant any form of madness. Then it became gradually limited to those forms of insanity which differ from melancholia. Now it has come to mean an acute attack of mental exaltation.[53] § 3

[53] O'Malley-Walsh, *l. c.*, p. 222.

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of our canon embraces all kinds of habitual madness. The insane, as St. Thomas says,[54] must be treated like infants because they are in the same state of danger. Therefore, when a physician says there is no hope of recovery, they must be baptized like children — *formâ parvulorum* — provided they were born in this condition or at least have suffered from the disease since their infancy,[55] *i. e.*, in round figures, before the seventh year of age, which limit admits of presumption.

Besides *amentia* proper there may be distinguished different degrees of mental dullness or feebleness, which may exist in an almost normally developed body. An adult who is incapable of distinguishing between good and evil must be treated like an infant, but may be baptized only in case of danger. When he is in no danger further development should be awaited, because such persons often outgrow their mental debility. A weak-minded adult who is capable of forming moral judgments must be treated like any normal person. When there is doubt as to a person's mental condition, the priest may judge in favor of Baptism.[56]

§ 2 says that insane adults who enjoy occasional lucid intervals, may be baptized during one of these, if they so desire. When in that state of mind they are supposed to possess will-power. However, too rigid a rule should not be applied to such unfortunates on account of the freakish nature of the malady.

§ 3 needs no explanation, except the remark that the intention of receiving Baptism is supposed to have been expressed before, and not retracted after melancholia or mania set in.[57]

54 *Summa Theol.*, III, q. 68, a. 12 (suppl.).

55 S. C. P. F., April, 1777, ad I, 1 (*Coll.*, n. 522).

56 *Ibid.*, n. II.

57 C. 3, X, III, 42; Benedict XIV, "*Postremo mense*," n. 46.

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§ 4 mentions two diseases: *lethargia* and *phrenesis*. The former is the sleeping sickness prevalent around Lake Victoria, in Africa,[58] and elsewhere. It is often fatal. *Phrenesis* (phrenitis) is brain fever or wild delirium (frenzy). Persons suffering from these diseases may be baptized only when they are awake and desire to receive the Sacrament, except when in danger of death; then they may be baptized even when not awake, provided only that they expressed a desire for Baptism before the attack.[59]

58 It is caused by the Tsetse fly; see *Scientific American Supplement*, Aug. 16, 1913, p. 104 ff. A similar disease (hook-worm) has lately stirred the medical authorities in our own country.

59 C. 3, X, III, 42; *Rit. Rom.*, tit. II, c. 3, nn. 11–13.

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CHAPTER III

RITES AND CEREMONIES OF BAPTISM

CAN. 755

§ 1. Baptismus sollemniter conferatur, salvo praescripto can. 759.

§ 2. Loci Ordinarius potest gravi et rationabili de causa indulgere ut caeremoniae praescriptae pro baptismo infantium adhibeantur in baptismo adultorum.

Baptism should be solemnly administered in all cases except the one mentioned in can. 759. But the local Ordinary may, for weighty and plausible reasons, permit the ceremonies prescribed for infant Baptism to be used in the Baptism of adults.

The Popes and the Roman Congregations have always enjoined the use of solemn ceremonies in the administration of Baptism because it would betray grievous negligence to omit the ancient and imposing rites of this Sacrament without cause.[1] For weighty reasons, however, Paul III granted to the missionaries of the West Indies permission to shorten the baptismal ceremonies, *e. g.*, because of too great fatigue or lack of time.[2] Leo XIII, in 1897, gave to the Ordinaries of Latin America the faculty of using the short or infant formula.[3] Furthermore it has been a custom, at least tolerated, in our country to use the short formula also at baptisms of

1 Benedict XIV, "*Inter omnigenas*," Feb. 2, 1744, n. 19: "*Ne leves sint aut inanes causae pro omittendis caeremoniis praescriptis.*"

2 "*Altitudo*," June 1, 1537.

3 "*Trans Oceanum*," April 18, 1897, n. VI.

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adults. Now the legislator grants the Ordinaries power by law to employ this form whenever there is a grave and solid reason. Long-standing custom may be called such a reason.[4] Ordinarily the long formula must be used in baptizing adults, *i. e.*, all who have attained the use of reason, even if baptism is conferred at home,[5] provided there is no danger of death. A grave reason would be, as stated above, fatigue or lack of time, or great anxiety, especially on the part of scrupulous persons.

RITE

CAN. 756

§ 1. Proles ritu parentum baptizari debet.

§ 2. Si alter parentum pertineat ad ritum latinum, alter ad orientalem, proles ritu patris baptizetur, nisi aliud iure speciali cautum sit.

§ 3. Si unus tantum sit catholicus, proles huius ritu baptizanda est.

This canon merely applies can. 98 to the particular case of Baptism. Children must be baptized according to the rite of the parents, either Latin or Oriental. If one of the parents belongs to the Latin and the other to the Oriental rite, the rite of the father is decisive, unless a special law provides otherwise, but if only one of the parties is Catholic, the child must be baptized according to the rite of the Catholic party.

This, in substance, has been the Roman practice since Benedict XIV laid down with great prudence and justice

4 It would not be amiss if synodal or provincial statutes would insert this permission.

5 S. Rit. C., Jan. 17, 23, 1914 (*A. Ap. S.*, VI, 32, 75). The archbishop of Paris had obtained permission to baptize boy neophytes who were admitted to Catholic schools with the short formula. S. O., May 19, 1879 (*Coll. P. F.*, n. 1520).

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the rules here codified.[6] A special provision was made by S. C. Prop. Fide[7] for the ecclesiastical province of Leopolis (Lemberg). We do not know of any special provisions having been made for the United States,[8] wherefore the general law must be followed here.

BAPTISMAL WATER

CAN. 757

§ 1. In baptismo sollemni adhibenda est aqua ad hoc benedicta.

§ 2. Si aqua benedicta in baptisterio adeo sit imminuta, ut minus videatur sufficere, alia non benedicta admisceatur, etiam iterato, minore tamen copia.

§ 3. Si vero corrupta fuerit, aut effluxerit, aut quovis modo defecerit, parochus in fontem, bene mundatum ac nitidum, recentem aquam infundat ac proprio ritu in suis liturgicis libris praescripto benedicat.

§ 1. In administering *solemn Baptism* water especially blessed for the purpose must be used. This is the so-called *baptismal water,* which is blessed with special ceremonies on Holy Saturday and the Vigil of Pentecost. It should be kept in a neat and clean font, and the remainder poured into the *sacrarium* (waste-hole) when new water has been blessed.[9] Of course, Baptism would be valid even if other water were used.[10] Where there is danger that the baptismal font may be profaned, the baptismal water may be kept in any decent movable vessel.[11] In one case the Holy Office allowed the use of common

6 *"Etsi pastoralis,"* May 26, 1742, § II, nn. VI, VIII; *"Demandatam,"* Dec. 24, 1743, § 3.

7 Oct. 6, 1863 (*Coll.*, n. 1243).

8 S. C. P. F., April 11, 1894, ruled as per above text; the decrees on the Ruthenians offer nothing special.

9 Rit. Rom., tit. II, c. 1, n. 4.

10 S. O., April 6, 1741 (*Coll.*, n. 325).

11 S. C. P. F., Feb. 23, 1660 (*Coll.*, n. 139).

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instead of baptismal water because the people whom the missionaries had been sent to baptize held the superstitious belief that the baptismal water was the cause of their children's death.[12]

Water for baptismal purposes must be blessed not only on Holy Saturday, but also on the Vigil of Pentecost, and the custom, no matter how inveterate, of blessing water on Holy Saturday only has been condemned as an *abuse*.[13]

Should it happen that the Holy Oils do not arrive in time for the blessing on Holy Saturday, they may be privately and separately poured into the blessed water when they are received.[14] If for some reason the Holy Oils can not be blessed or obtained in any year, the Holy Oils blessed the previous year may be used for the blessing of the baptismal font; in that case the baptismal water thus blessed with the old Oils should not be poured into the *sacrarium* when the new Oils arrive.[15] The following decision may be quoted as useful: A bishop requested that the priests of his diocese be permitted to use the Holy Oils blessed the year before, because their presence was needed in their parishes at the time when the Holy Oils were ready for delivery. The S. Congregation answered that each pastor should send a priest or cleric (if possible *in sacris*) to fetch the Holy Oils, and if this should prove impossible, the pastor or another priest in his name might bless the baptismal font without the Holy Oils, which should be poured into the water privately and separately afterwards. If it became nec-

12 S. O., May 14, 1851 (*Coll.*, n. 1060).

13 S. Rit. C., Dec. 7, 1844; April 13, 1874 (*Dec. Auth.*, nn. 2878, 3331).

14 S. Rit. C., April 12, 1755, ad 3 (*Dec. Auth.*, n. 2436). If the new oils arrive in time, these, not the old ones, must be used; S. Rit. C., April 19, 1890 (*Dec. Auth.*, n. 3724).

15 S. Rit. C., Sept. 23, 1837 (*Dec. Auth.*, n. 2773); the occasion of this *dubium* and its answer were the troublesome times in Spain; the ruling may be applied to Mexico.

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essary meanwhile to administer Baptism, the old oils might be used for the solemn blessing of the water.[16]

§ 2. If the water in the baptismal font is so diminished that it appears to be insufficient for baptizing, ordinary water may be mixed with it again and again, but in steadily decreasing proportion.

§ 3. If the baptismal water becomes putrid (rotten) or runs out of the font, or disappears in some other way, the pastor shall cleanse the font and pour new water into it, which he shall bless with the proper rite as prescribed in the liturgical books. The formula for the blessing of baptismal water — which is permitted only in case of necessity [17]— will be found in the Roman Ritual.[18] We may add that, in case this blessing can not be performed, and no other baptismal water is available, natural water (not holy water) should be used for baptizing.[19]

METHOD OF BAPTIZING

CAN. 758

Licet baptismus conferri valide possit aut per infusionem, aut per immersionem, aut per aspersionem, primus tamen vel secundus modus, aut mixtus ex utroque, qui magis sit in usu, retineatur, secundum probatos diversarum Ecclesiarum rituales libros.

Baptism may be validly conferred by infusion, (pouring water over the head), by immersion, and by aspersion (or sprinkling). Where infusion, or immersion, or a combination of both methods is customary, the one most

16 S. Rit. C., Jan. 31, 1896 (*Dec. Auth.*, n. 3879).

17 S. O., Jan. 30, 1765 (*Coll.*, n. 459).

18 *Rit. Rom.*, tit. 2, c. 7 (ed. Pustet, 1913, p. 59 ff).

19 S. O., April 17, 1839; June 20, 1883 (*Coll.*, nn. 889, 1598).

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commonly used should be retained, according to the approved rituals of the different churches.

These three methods or rites of baptizing are thus "canonized" by the Church, though immersion and aspersion are more ancient than infusion, which came into use only in the thirteenth century. The Greek Church still practices immersion and aspersion, whereas in the Latin Church infusion is more common.[20] The essential feature of all three methods is that the act of ablution be duly expressed, and hence, if possible, the water should flow.[21] This symbolism, however, may also be expressed by the use of a wet sponge or rag.[22]

A very doubtful, nay invalid manner was used by a certain pastor who was accustomed to baptize children by dipping his thumb into the baptismal water and anointing (!) the forehead of the child — *per modum unctionis* — with the thumb. The Holy Office declared that all who had been thus baptized should be rebaptized with water and the prescribed formula, but without other ceremonies, and that the bishop should take care to ascertain who of them had been promoted to sacred orders.[23]

PRIVATE BAPTISM

CAN. 759

§ 1. In mortis periculo baptismum privatim conferre licet; et, si conferatur a ministro qui nec sacerdos sit nec diaconus, ea tantum ponantur, quae sunt ad baptismi validitatem necessaria; si a sacerdote vel dia-

20 Benedict XIV, "*Etsi pastoralis*," May 26, 1742, § II, n. II; S. O., June 14, 1741 (*Coll.*, n. 326). *Infusio* should rather be called *affusio* or pouring on.

21 S. O., Nov. 8, 1770; July 9, 1779 (*Coll.*, nn. 480, 536).

22 S. O. Nov. 8, 1770; S. C. P. F., Jan. 21, 1789 (*Coll.*, nn. 480, 597).

23 S. O., Dec. 14, 1898 (*Coll.*, n. 2028): "*Sñs adprobarit.*"

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cono, serventur quoque, si tempus adsit, caeremoniae quae baptismum sequuntur.

§ 2. Extra mortis periculum baptismum privatum loci Ordinarius permittere nequit, nisi agatur de haereticis qui in adulta aetate sub conditione baptizentur.

§ 3. Caeremoniae autem quae in baptismi collatione praetermissae quavis ratione fuerint, quamprimum in ecclesia suppleantur; nisi in casu de quo in § 2.

In *danger of death* Baptism may be privately administered. Two different cases are distinguished:

§ 1. If the Sacrament is conferred privately by one who is *neither a priest nor a deacon,* then no ceremonies or rites should be used, but only what strictly belongs to validity. In that case the person baptizing takes natural (not holy) water, pours it over the head of the one to be baptized,— whether once or three times does not matter [24]— and says: "I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost." (2) If the person who baptizes privately, for instance, at the home of the person baptized, is a *priest or a deacon,* he must administer the Sacrament with the prescribed ceremonies and rites, unless there should be no time to apply all the ceremonies, or the parents would stubbornly oppose them, or the Holy Oils, chrism or salt could not conveniently be had. In these cases the priest or deacon would be permitted to omit the ceremonies.[25] Otherwise there is a grave obligation to apply them even if Baptism is conferred privately.[26]

Hence § 2 rules that, outside the case of danger of death, the *Ordinary may not permit* private baptism to

24 *Rit. Rom.*, tit. II, c. 2, n. 28.
25 S. C. P. F., Aug. 30, 1775; Jan. 21, 1789, ad 1 (*Coll.*, nn. 510, 598).
26 S. O., Feb. 28, 1663; Nov. 8, 1770; Sept. 5, 1877 (*Coll.*, nn. 151, 480, 1480).

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be conferred, except on non-Catholic adults who are baptized conditionally. This explains the serious obligation spoken of in the preceding section. The text does not limit the episcopal permission to individual cases, and hence Ordinaries may impart this faculty habitually.

§ 3. The ceremonies omitted for any reason in the administration of Baptism must as soon as possible be supplied in church, except in the case mentioned in can. 759, § 2. These supplementary ceremonies must be gone through in the church or oratory, to which the infant must be brought as soon as time and occasion are favorable.[27] It is hardly necessary to add that this is a grievous obligation, from which only the reason mentioned under § 2 excuses.[28] It is becoming that the ceremonies be supplied before sacramental confession, if this should be required.[29] When it is necessary to omit anything in private Baptism, all the ceremonies preceding the act of Baptism should be left out and no anointment with the Holy Oils (O. C.) performed,[30] because all these things must be supplied according to the form prescribed in the Ritual.[31]

Can. 760

Cum baptismus sub conditione iteratur, caeremoniae, si quidem in priore baptismo omissae fuerunt, suppleantur, salvo praescripto can. 759, § 3; sin autem in priore baptismo adhibitae sunt, repeti in altero aut omitti possunt.

If Baptism is repeated *sub conditione,* the ceremonies

27 S. C. P. F., Aug. 30, 1775; Nov. 28, 1785 (*Coll.*, nn. 570, 582).

28 Benedict XIV, "*Inter omnigenas,*" Feb. 2, 1744, § 19.

29 S. C. P. F., July 19, 1838 (*Coll.*, n. 871).

30 S. Rit. C., Sept. 23, 1820 (*Dec. Auth.*, n. 2607).

31 *Rit. Rom.*, tit. II, c. 5 (ed. Pustet, 1913, p. 38 ff.).

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must be supplied if they were omitted in the former Baptism, except in the case of adult non-Catholics (can. 759, § 2); but if the ceremonies were used in the first baptism, they may or may not be repeated in the second. A curious case was decided by the Holy Office.[32] In 1681 Scottish Protestants approached a priest with the request either to be rebaptized or at least to have the ceremonies repeated, because they were harassed by demons and felt relieved by conditional Baptism or the use of the customary baptismal ceremonies. The Holy Office allowed the practice, especially for non-Catholics, provided that conditional baptism was not administered for futile reasons. Concerning *parvuli* or infants of non-Catholics who are to be rebaptized conditionally, the Holy Office informed[33] the Bishop of Nottingham that such conditional baptism *in casu* should be administered secretly, but with the ceremonies prescribed in the Ritual.

As to adults, can. 759 § 2, says the ceremonies may be omitted or applied *ad libitum*. If applied, the ceremonies prescribed *pro adultorum baptisma* must be used,[34] unless, of course, where can. 755, § 2, may be made use of.

CHRISTIAN NAMES

CAN. 761

Curent parochi ut ei qui baptizatur, christianum imponatur nomen; quod si id consequi non poterunt, nomini a parentibus imposito addant nomen alicuius Sancti et in libro baptizatorum utrumque nomen perscribant.

32 S. O., Sept. 17, 1681 (*Coll.*, n. 225).

33 S. O., April 2, 1879 (*Coll.*, n. 1516).

34 S. Rit. C., Aug. 27, 1836 (*Dec Auth.*, n. 2743).

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Pastors should see to it that a Christian name is given to all whom they baptize. If they can not obtain this, they shall add to the name given by the parents the name of some saint and enter both in the baptismal record.

The Church has always insisted[35] upon this pious custom, and priests must now obey the law and may no longer be accused of "cranky notions" when they do so. The name of his patron saint should remind the faithful Catholic of the example he is to imitate and of the protection he may expect through the intercession of the patron.[36]

Here we may describe the *manner of receiving non-Catholics into the Church,* according to the instruction given to the Bishop of Philadelphia, July 20, 1859:

1. When Baptism is to be conferred *absolutely,* no abjuration of heresy or absolution is required, because Baptism wipes out all sins.

2. When Baptism is to be administered *conditionally,* the *modus procedendi* is as follows:

a) Abjuration of heresy or profession of faith;

b) Conditional Baptism;

c) Sacramental confession with conditional absolution.

The instruction adds the formula of abjuration and advises the clergy to comply with the wish of converts who desire to have the Catholic ceremonies supplied.[37]

35 Clement XII, "*Compertum,*" Aug. 24, 1734, ad II, dub.; Benedict XIV, "*Inter omnigenas,*" Feb. 2, 1744, § 3. Pagan names are to be excluded entirely.

36 S. C. Sacr., March 13, 1910, ad 9, n. 1 (*A. Ap. S.,* II, 195).

37 *Coll. P. F.,* n. 1178.

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CHAPTER IV

GODPARENTS OR SPONSORS

CAN. 762

§ 1. Ex vetustissimo Ecclesiae more nemo sollemniter baptizetur, nisi suum habeat, quatenus fieri possit, patrinum.

§ 2. Etiam in baptismo privato patrinus, si facile haberi queat, adhibeatur; si non interfuerit, adhibeatur in supplendis baptismi caeremoniis, sed hoc in casu nullam contrahit spiritualem cognationem.

That the custom of having sponsors at solemn baptism is very ancient is borne out by historical documents.[1] The name *sponsores* occurs in Tertullian's treatise on Baptism.[2] Other names, used especially in connection with spiritual relationship, were *compatres or commatres spirituales,*[3] and *patrini.* They were employed not only at the Baptism of grown persons, but also of children when infant baptism became more general in the fifth century, as may be seen from synodal acts. Monks and nuns were forbidden to act as godfathers and godmothers.[4] The reason for this prohibition is not far to seek. Their secluded life seemed to debar them from assuming the duties of sponsors, which are to instruct the godchildren and to exhort them to lead a Christian life, especially if the parents should die or neglect their

1 Cfr. Martène, *De Antiq. Eccl. Ritibus,* l. I, c. 1, art. 16, n. 11.
2 Cap. 18 (Migne 1, col. 1221).
3 *Archiv für K.-R.,* 1906, 688 ff.
4 C. 104, Dist. 4, *de cons.*

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obligations.[5] It must be added, however, that the authentic collections contain no text forbidding religious to become godparents. Our Code has a mitigated prohibition to that effect.

§ 1, then, enjoins the observance of the venerable custom of having godparents at solemn baptism, if possible.[6] If sponsors, as described in the Code, cannot be had, except with difficulty, Baptism may be conferred without them;[7] but if religious are present, they may and should be admitted as sponsors.[8]

§ 2. Also at *private* Baptism a sponsor should be employed if possible; if none was present, one should be called when the ceremonies are supplied; but in that case no spiritual relationship is contracted, and therefore relatives, too, may be admitted.[9]

SPONSORS AT CONDITIONAL BAPTISM

CAN. 763

§ 1. Cum baptismus iteratur sub conditione, idem patrinus, quatenus fieri possit, adhibeatur, qui in priore baptismo forte adfuit; extra hunc casum in baptismo conditionato patrinus non est necessarius.

§ 2. Iterato baptismo sub conditione, neque patrinus qui priori baptismo adfuit, neque qui posteriori, cognationem spiritualem contrahit, nisi idem patrinus in utroque baptismo adhibitus fuerit.

When Baptism is repeated *sub conditione,* if possible the same sponsor should be employed who was present

5 S. Thomas, *S. Th.*, III, q. 68, a. 7; S. O., Dec. 9, 1745 (*Coll.*, n. 355).

6 *Trid.*, sess. 24, c. 2, *de ref.*

7 S. C. P. F., April 1, 1816, Louisville, Ky. (*Coll.*, n. 709).

8 S. Rit. C., Feb. 15, 1887 (*Coll.*, n. 1667).

9 S. C. P. F., Sept. 11, 1779 (*Coll.*, n. 537).

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the first time; but if this is not possible — and it would not be possible if he had not the qualities negatively described in can. 765 — no sponsor is required for conditional Baptism. No spiritual relationship is contracted, unless the same qualified sponsor acts as such on both occasions.

NUMBER OF SPONSORS

CAN. 764

Patrinus unus tantum, licet diversi sexus a baptizando, vel ad summum unus et una adhibeantur.

There should be only one sponsor, but he may be of different sex than the one to be baptized; at most two may be employed, *viz.*, a man and a woman. This ruling[10] is evidently inspired by the desire to diminish spiritual relationship, which seems to have been the delight of older canonists and glossators.

REQUISITES OF LEGAL SPONSORSHIP

CAN. 765

Ut quis sit patrinus, oportet:

1.° Sit baptizatus, rationis usum assecutus et intentionem habeat id munus gerendi;

2.° Ad nullam pertineat haereticam aut schismaticam sectam, nec sententia condemnatoria vel declaratoria sit excommunicatus aut infamis infamia iuris aut exclusus ab actibus legitimis, nec sit clericus depositus vel degradatus;

3.° Nec sit pater vel mater vel coniux baptizandi;

10 Cc. 100 f., Dist. 4, *de cons.*; c. 3, X, IV, 3; *Trid.*, sess. 24, c. 2, *de ref.*

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4.° Ab ipso baptizando eiusve parentibus vel tutoribus aut, his deficientibus, a ministro sit designatus;

5.° Baptizandum in actu baptismi per se vel per procuratorem physice teneat aut tangat vel statim levet seu suscipiat de sacro fonte aut de manibus baptizantis.

We call the following legal requisites, because the term "valid" hardly covers them all:

(1) The sponsor must be baptized, have attained the age of discretion, and have the intention of taking the office of sponsor upon himself.

(2) He or she must belong to no heretical or schismatical sect, nor be excommunicated by either a condemnatory or a declaratory sentence, nor be infamous by law, nor be excluded from legal acts, nor be a deposed or degraded clergyman.

(3) He or she must be neither the father nor the mother nor the consort of the one to be baptized.

(4) He or she must be appointed either by the one to be baptized, or by the latter's parents or guardians, or, if these (three classes) be wanting, by the minister of the Sacrament.

(5) The sponsor must either personally or by proxy take upon himself the sponsorship by a physical act indicative of sponsorship according to custom.

Concerning n. 1, it is evident that sponsorship must be a human act, and as Christian Baptism is implied, it is required, besides, that the sponsor be himself initiated, *i. e.*, a member, like in any knighthood or society.

With regard to *heretics or schismatics* it has been the constant and uniform practice of the Church to refuse to admit as sponsors all persons who are not of the faith, since a sponsor assumes the duty of instructing his

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godchild in Christian doctrine.[11] It makes no difference whether such persons appear themselves or are represented by a Catholic proxy.[12] Neither is friendship, or blood relationship, or any other natural tie sufficient to break these rules.[13] From the fact that a notoriously censured Catholic may legally be a sponsor, it has been inferred that a non-Catholic might just as well be admitted. This conclusion is not justified[14] because of the implied office of teaching and of the position the Church has always maintained towards heresy and schism.

The code also draws a distinction between a condemned or declared *excommunicatus* and one notoriously excommunicated, as per can. 766, n. 2. By committing a crime to which the Code attaches the penalty of excommunication, one may be notoriously excommunicated, though no judge has declared him such or condemned him to that penalty.

What *legitimate acts* (not actions) are, is stated under can. 2256; one of them is precisely that of acting as sponsor.

No. 3 excludes *father and mother and consort* (husband or wife) of the one to be baptized from sponsorship. If any of these persons should act as sponsors, no spiritual relationship is contracted.[15]

No. 4 rules that *appointment* or designation is required for sponsorship. This must be made before Baptism. *Post factum* approval or ratification is insufficient, though

11 S. O., Oct. 14, 1676; Dec. 9, 1745; Jan. 1763; S. C. P. F., Sept. 8, 1869, n. 47 (*Coll.*, nn. 211, 355, 447, 1346); the admission of such persons is styled *abusus*.

12 S. O., June 30, July 7, 1864; Jan. 3. 1871 (*Coll.*, nn. 1257, 1362).

13 S. O., Oct. 14, 1676 (*Coll.*, n. 211).

14 S. O., May 3, 1893 (*Coll.*, n. 1831).

15 S. O., Sept. 15, 1869 (*Coll.*, n. 1347). This holds even if they have become sponsors by fraud or out of levity, and hence they neither lose the right to demand or the duty to render the *debitum coniugale*.

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the parents may presume consent. The reason for this law is that the sponsor must have the formal intention and will to accept and perform the duties attached to sponsorship.[16]

No. 5 speaks of a *physical* act and enumerates four terms, which are used to signify sponsorship, *viz.: tenere, i. e.,* to hold the child in the act of Baptism, when the water is poured on the head; *tangere,* to touch the child on the arm or any part of the body whilst another holds it over the baptismal font; *levare,* which is derived from immersion, and means to lift or raise out of the water, lake or pond; *suscipere,* to receive from the baptismal font or the hands of the minister. Concerning *tenere,* to hold, a decision has been given to the effect that it is sufficient that the sponsor put his or her arm in that of the person who holds the child, or touch that person, *v. g.,* nurse or midwife, and accompany him or her to the baptismal font. It is not required that the sponsor personally offer the child for Baptism.[17] Whence it may be concluded that mediate physical contact is sufficient.

All the above-mentioned acts may be performed by *proxy.* The proxy must come in physical touch with the subject. Whilst there are decisions debarring non-Catholics from acting as sponsors, either personally or through a Catholic proctor, we can find no decision excluding them from acting as proctors for Catholic sponsors. However, as can. 2256, 2°, excludes them from legal acts, even those peculiar to a procurator, it would not be safe to employ them in Baptism. This does not mean, of course, that a non-Catholic may not act as a mere witness or nominal sponsor together with a Catholic sponsor.[18]

16 S. O., Sept. 15, 1869 (*Coll.,* n. 1347); cfr. can. 1079.

17 S. C. P. F., Jan. 21, 1856 (*Coll.,* n. 1119).

18 The baptizing minister in such cases should gently insinuate that only the Catholic party is sponsor. S. O., Jan., 1763 (*Coll.,* n. 447).

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CAN. 766

Ut autem quis licite patrinus admittatur, oportet:

1.° Decimum quartum suae aetatis annum attigerit, nisi aliud iusta de causa ministro videatur;

2.° Non sit propter notorium delictum excommunicatus vel exclusus ab actibus legitimis vel infamis infamia iuris, quin tamen sententia intercesserit, nec sit interdictus aut alias publice criminosus vel infamis infamia facti;

3.° Fidei rudimenta noverit;

4.° In nulla religione sit novitius vel professus, nisi necessitas urgeat et expressa habeatur venia Superioris saltem localis:

5.° In sacris ordinibus non sit constitutus, nisi accedat expressa Ordinarii proprii licentia.

That one may be *licitly* admitted to sponsorship, it is required:

1°. That the sponsor have *reached* (not completed) the *fourteenth year of age,* unless the minister, for a just cause, sees fit to admit a younger person. A just cause may be the moral or intellectual qualities of the person admitted; local or rather climatic conditions (in Southern countries maturity sets in sooner); family traditions, or particular circumstances.

2°. That the sponsor be not *excommunicated* for a notorious crime; or excluded from legal acts; or rendered infamous by law, without a sentence having been issued to that effect; or interdicted; or a public criminal; or infamous in fact. Evidently the Code wishes to debar from sponsorship all whose moral character and reputation do not guarantee fitness to raise a Catholic child, which, as sponsor, one would be expected to do in case of

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necessity. Besides, sponsorship is an honor and should not be conferred on unworthy persons. The former reason is alleged in an instruction of the Holy Office with regard to *Freemasons*. These, if their membership in the Order is notorious, are not to be admitted as sponsors.[19] The other points noted in the text must be interpreted according to Book V. Stress is to be laid on notoriety, as the text itself explains.

3°. That the sponsor know the *rudiments of faith*, which requirement is as stringent for sponsors as for adults who desire to be baptized (see can. 752).

4°. That the sponsor be neither a *novice* nor a *professed member* of any *religious institute*. However, in urgent cases, and with the express (not presumed) permission of at least the local superior, religious may be admitted to sponsorship.[20] An urgent case would be if Baptism would otherwise have to be conferred without sponsors.[21] In hospitals and other asylums Sisters are sometimes called upon to act as sponsors; they may do so with the permission of the superioress.

5°. That the sponsor be not a *cleric in higher orders*, for such may act as sponsors only with the express permission of the Ordinary. This includes subdeacons. An Ordinary, whether bishop or prelate regular, may grant himself permission, and therefore act as sponsor without consulting any one else.

19 S. O., July 5, 1878, *ad ordin. Brasil.* (*Coll.*, n. 1495).

20 Cfr. c. 8, C. 16, q. 1; c. 103 f., Dist. 4, *de cons.*

21 S. Rit. C., Feb. 15, 1887 (*Coll. P. F.*, n. 1667). Custom might also be alleged. Thus it is customary that the Abbot of Engelberg, Switzerland, acts as godfather to every firstborn boy in the village, and the S. Cong. did not wish to abolish this custom.

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CAN. 767

In dubio utrum quis valide vel licite admitti possit, necne, ad patrini munus, parochus, si tempus suppetat, consulat Ordinarium.

When in doubt as to whether any one may be legally or licitly admitted to sponsorship, the pastor should consult the Ordinary if time permits.

SPIRITUAL RELATIONSHIP

CAN. 768

Ex baptismo spiritualem cognationem contrahunt tantum cum baptizato baptizans et patrinus.

Spiritual relationship is contracted only between the minister and the one baptized, and between the sponsor and his godchild. Of this more under can. 1079.

DUTIES OF SPONSORS

CAN. 769

Patrinorum est, ex suscepto munere, spiritualem filium perpetuo sibi commendatum habere, atque in iis quae ad christianae vitae institutionem spectant, curare diligenter ut ille talem in tota vita se praebeat, qualem futurum sollemni caeremonia spoponderunt.

It is the duty of godparents, arising from sponsorship, to regard their spiritual children as their perpetual charges and to instruct them carefully in the obligations of the Christian life, in order that they may prove themselves such as they solemnly promised by their baptismal vows to be. The obligation exists even if the

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sponsors think they are not bound by it. It binds chiefly when the parents neglect their duty.[22]

22 S. O., Dec. 9, 1745 (*Coll.*, n. 355): "*Aliud est quod patrini non curent, aliud quod non teneantur curare. Tenentur etiam hodie ad id praestandum, si carnales parentes id facere negligant, uti docet D. Thomas, III, q. 67, a. 8.*"

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CHAPTER V

TIME AND PLACE OF BAPTISM

CAN. 770

Infantes quamprimum baptizentur; et parochi ac concionatores frequenter fideles de hac gravi eorum obligatione commoneant.

CAN. 771

Baptismus privatus, urgente necessitate, quovis tempore et loco administrandus est.

The first of these two canons confirms the old practice of having *infants baptized as soon as possible*. To admonish the faithful of their *grave obligation* to comply with this law is the office of pastors and preachers.

Private baptism, according to can. 771, in case of urgent necessity may be administered at *any time and in any place.*

The reason for the important law embodied in can. 770 is the necessity of Baptism for eternal salvation. Leo XIII justly called the practice of delaying Baptism a detestable and impious abuse.[1] An instruction of the Holy Office enjoined the Coptic missionaries to tell mothers that they are guilty of cruelty to their offspring if they delay Baptism for fear of temporal death while exposing them to eternal death.[2] The term *quamprimum,* as soon as possible, is assumed to signify three, or, at

1 "*Gratae,*" July 22, 1899 (*Coll. P. F.*, n. 2060).

2 S. O., June 14, 1741 (*Coll.*, n. 326).

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most, eight days from the birth of the child.[3] An *urgens necessitas* would exist, *e. g.*, a) if the distance from church were great,[4] say more than three leagues; b) if the parents stubbornly objected to having the child brought to church. In these and similar cases private baptism without ceremonies and rites may be administered, but the latter must be supplied when the parents give their consent or the child can be brought to church.[5] When a child is so feeble that there is danger of death, the midwife may baptize him, provided the danger is quite positive.[6]

When Baptism, private or solemn, is administered *at home,* the faithful should be instructed that it is valid and not a mere ceremony.[7]

SOLEMN BAPTISM

CAN. 772

Etiam sollemnis baptismus qualibet die administrari potest; decet tamen adultorum baptismum, secundum antiquissimum Ecclesiae ritum, conferri, si fieri commode queat, in pervigilio Paschatis et Pentecostes, praecipue in metropolitanis aut cathedralibus ecclesiis.

Solemn Baptism, too, may be administered at any time; but it is becoming, if it can be done conveniently, that *adults* be baptized on the vigils of *Easter and Pentecost,* according to the ancient liturgies, especially in metropolitan and cathedral churches.

3 S. C. P. F., Sept. 11, 1841 (*Coll.*, n. 939).

4 S. C. P. F., Nov. 28, 1785 (*Coll.*, n. 582).

5 S. C. P. F., Aug. 30, 1775 (*Coll.*, n. 510).

6 S. C. P. F., Sept. 11, 1779; S. O., Jan. 11, 1899 (*Coll.*, nn. 537, 2033).

7 This was the idea of the Nestorians; S. C. P. F., July 31, 1902 (*Coll.*, n. 2149).

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The ancient custom was vindicated by Pope Siricius (384–398) and has been observed from time immemorial,[8] more especially with regard to grown persons, who were first received into the ranks of the catechumens and had to undergo a long trial and pass the *scrutinia* in Lent. On Holy Saturday they were mustered and marched into the baptistery, whilst the faithful in church attended the reading of the prophecies.[9] That the ceremony was impressive and an occasion of joy for the bishop goes without saying. The Church, in her truly conservative spirit, wishes to preserve the old tradition as much as modern circumstances permit. But, as the text says, according to the ancient ritual,[10] this custom should be observed only when *adults* are to be baptized, because it might be dangerous and fatiguing to delay Baptism or to attend such an extended ceremony for children.[11]

PLACE OF BAPTISM

CAN. 773

Proprius baptismi sollemnis administrandi locus est baptisterium in ecclesia vel oratorio publico.

The *proper place* for administering solemn baptism is the baptistery of a church or public oratory. The *sacristy* is *not* the proper place, unless there be a reasonable cause for using it. This cause must be submitted to the Ordinary.[12] A valid reason would be repair work going on in church, and, we believe, coldness of the

8 Cfr. cc. 11, 15, Dist. 4, *de cons.*

9 This is the origin of those prophecies being read in church.

10 Tit. II, c. 1, n. 27; c. 3, nn. 4–6.

11 The provincial Synod of Benevento, 1693, held by the later Benedict XIII, allowed children to wait fourteen days; tit. 36, c. 8 (*Coll. Lac.*, I, 70).

12 S. Rit. C., March 14, 1861, ad IX (*Dec. Auth.*, n. 3104).

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church on a winter day when the whole church cannot be heated on account of a baptism occurring on a week-day.

Solemn Baptism may not be administered in the private oratories (for an exception see can. 776, § 1, 1°) of private persons.[13] Neither are semi-public oratories, for instance, Sisters' chapels or hospital oratories, the proper place to baptize, because the text plainly says "*public oratories.*"

Baptism may, by way of exception, be conferred at a special altar, on account of a particular devotion to the Saint to whom the altar is dedicated;[14] but this altar must be *in the church,* not in a private chapel or semi-public oratory.

A BAPTISMAL FONT IN EVERY PARISH CHURCH

CAN. 774

§ 1. Quaelibet paroecialis ecclesia, revocato ac reprobato quovis contrario statuto vel privilegio vel consuetudine, baptismalem habeat fontem, salvo legitimo iure cumulativo aliis ecclesiis iam quaesito.

§ 2. Loci Ordinarius potest pro fidelium commoditate permittere vel iubere ut fons baptismalis ponatur etiam in alia ecclesia vel publico oratorio intra paroeciae fines.

The characteristic sign of a parish church has always been the baptismal font, though some canonists thought it was not essential to a parish church.[15]

13 C. un., Clem. III, 15; Benedict XIV, "*Magno cum,*" *June 2,* 1751, § 19; *Rit. Rom.,* tit. II, c. 1, nn. 28, 30; c. 3, n. 7.

14 S. Rit. C., Sept 1, 1888 (*Dec. Auth.,* n. 3695); with the approval of the Ordinary.

15 Cfr. S. C., EE. et RR., June 9, 1848 (Bizzarri, *Coll.,* p. 562 f.).

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§ 1 of our canon revokes and reprobates every statute, custom or privilege which would prevent the *erection of a baptismal font in every parish church,* and commands that every parish church should have its own baptismal font.[16] This, of course, implies that the blessing of the baptismal water on the vigils of Easter and Pentecost must be performed in each and every parish church according to the Roman Ritual. The pastor is not allowed to put this ceremony off to another day.[17] From the above rule it follows that if a cathedral church is not a parish church, it is not entitled to a baptismal font,[18] unless, of course, the bishop should make use of § 2, can. 774. But the Ordinary is not empowered to erect in a cathedral church which is not a parish church a temporary baptismal font, or to allow a portable font and bless water without the mixture of the Holy Oils, for the two Saturdays mentioned.[19]

The meaning of the clause: "with due regard to the legitimate cumulative right acquired by another church" (*salvo legitimo iure cumulativo aliis ecclesiis iam quaesito*) may be illustrated by quoting a decision of the S. Rit. C. In the diocese of Spalato, Dalmatia, the baptismal font was blessed only in the cathedral, pro-cathedral, collegiate and in some principal parochial churches; the other churches got their baptismal water from the former. The S. Congregation decided that this custom was no longer to be tolerated, with due regard, however, to the special and determined rights of the mother churches. The churches which received their baptismal water from the others were most probably daughters or branches.[20]

16 S. C. C., Feb. 10, 1748, denied the right of having a baptismal font to a collegiate church (Richter, *Trid.*, p. 118, n. 12).

17 S. Rit. C., Jan. 13, 1899 (*Dec. Auth.*, n. 4005).

18 S. Rit. C., Aug. 31, 1872 (*Dec. Auth.*, n. 3272).

19 S. Rit. C., Jan. 13, 1899 (*Dec. Auth.*, n. 4005).

20 S. Rit. C., June 7, 1892 (*Dec. Auth.*, n. 3776).

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What the special rights of the mother churches were is not stated in the decision. They probably consisted in a certain deference or respect which took the form of a tithe or tribute, or perhaps mere precedence.[21] Sometimes, in such cases, express stipulations existed, allowing the parishioners of the branch churches to bring their children to the mother church for Baptism.[22]

In our country no such rights should be reserved because it would only cause confusion and curtail parochial rights.

§ 2 rules that the local Ordinary may, for the convenience of the faithful, permit or command that another baptismal font be placed in some other church or public oratory within the boundaries of a parish. This new [23] law gives the Ordinary the right of erecting baptismal fonts in other than parish churches, *e. g.*, public oratories or chapels of ease, but not in semi-public or private oratories. This will be very convenient for missionary stations or missions attached to a quasi-mother church. It seems logical that the blessing of the baptismal font on the vigils of Easter and Pentecost should be performed in these churches or public oratories.[24] Yet the wording *ponatur,* be placed, would seem to admit of another practice, *viz.:* that of receiving the baptismal water from the parish church and putting it in the baptismal font. We believe this practice could not be called unlawful.[25]

21 S. C. C., Aug. 3, Dec. 14, 1748 (Richter, *Trid.*, p. 118, n. 10).

22 S. C. C., June 22, 1720 (Richter. *l. c.*, n. 11).

23 S. C. C., Aug. 17, 1626; Sept. 22, 1742 (Richter, *Trid.*, n. 8) would not permit this, but rather recommends the erection of a new parish.

24 S. Rit. C., June 7, 1892 (*Dec. Auth.*, n. 3776) would seem to favor this assumption.

25 S. C. P. F., Sept., 1779; Aug. 23, 1852 (*Coll.*, nn. 537, 1079).

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CAN. 775

Si ad ecclesiam paroecialem, aut ad aliam quae iure fontis gaudeat, baptizandus, propter locorum distantiam aliave adiuncta, sine gravi incommodo aut periculo, accedere aut transferri nequeat, baptismus sollemnis a parocho conferri potest et debet in proxima ecclesia aut oratorio publico intra paroeciae fines, licet haec baptismali fonte careant.

The Church to-day is even more condescending than formerly, and permits the administration of solemn Baptism in *any church or public oratory* situated within the parish boundaries, *even though it be destitute of a baptismal font.* However, there must be a reason for making use of this permission. A sufficient reason is if the one to be baptized, whether infant or adult, cannot, *without great inconvenience or danger,* be brought or go to a church which has a baptismal font, whether it be a parish or some other church. In that case the *parish priest* may and should confer Baptism in the nearest church or public oratory within the parish boundaries. A serious *inconvenience* may arise from distance, or expense, or a contagious disease.

SOLEMN BAPTISM IN PRIVATE HOUSES

CAN. 776

§ 1. In domibus autem privatis baptismus sollemnis administrari non debet, nisi hisce in adiunctis:

1.° Si baptizandi sint filii aut nepotes eorum qui supremum actu tenent populorum principatum vel ius habent succedendi in thronum, quoties isti id rite poposcerint;

2.° Si loci Ordinarius, pro suo prudenti arbitrio et

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conscientia, iusta ac rationabili de causa, in casu aliquo extraordinario id concedendum censuerit.

§ 2. In memoratis casibus baptismus conferendus est in sacello domus aut saltem in alio decenti loco, et aqua baptismali de more benedicta.

§ 1. Solemn Baptism may not be administered in private houses except in the following circumstances—apart from cases of necessity [26]:

1°. If those to be baptized are the sons or grandsons of actual *rulers,* or of their prospective successors to the throne. If this privilege is desired, petition must be made for it either directly to the Ordinary, or to the parish priest, both of whom are entitled to perform the rite;

2°. If the local Ordinary, after prudent and conscientious deliberation, judges that there is a just and plausible cause for granting the permission in some extraordinary case. Such cases would be: if Catholics would demand to have their children baptized in the house of a *Catholic consul,* which may happen among foreigners; [27] if the distance from the church would be very considerable, say ten geographical miles.[28] But solemn baptism may never be administered in the houses of non-Catholics, not even in case of necessity or danger of death.[29]

§ 2 enjoins the minister to confer baptism, in the cases mentioned under § 1, in the oratory or some other decent place, and with baptismal water, *i. e.,* water blessed on the vigils of Easter and Pentecost, or accord-

[26] S. C. Sacr., Dec. 23, 1912 (*A. Ap. S.,* IV, 725).

[27] S. O., Jan., 1763 (*Coll.,* n. 447). This may certainly be extended to the palaces of Catholic ambassadors who enjoy exterioriality and immunity, whilst the consuls are destitute of these privileges; cfr. Westlake, *International Law,* P. I, Peace, 1910, p. 288 f.

[28] S. Rit. C., Feb. 10, 1871, ad III (*Dec. Auth.,* n. 3234).

[29] S. O., Jan. 21, 1767 (*Coll.,* n. 465).

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ing to the formula prescribed for supplementing it when the supply is exhausted; — except, of course, in urgent cases, which admit of the shortest possible form.[30]

30 S. Rit. C., Jan. 17, 1914 (*A. Ap. S.*, VI, 32); *Rit. Rom.*, tit. II, c. 1, n. 29; c. 7 (ed. Pustet, 1913, p. 59).

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CHAPTER VI

BAPTISMAL RECORD AND PROOF

CAN. 777

§ 1. Parochi debent nomina baptizatorum, mentione facta de ministro, parentibus ac patrinis, de loco ac die collati baptismi, in baptismali libro sedulo et sine ulla mora referre.

§ 2. Ubi vero de illegitimis filiis agatur, matris nomen est inserendum, si publice eius maternitas constet, vel ipsa sponte sua scripto vel coram duobus testibus id petat; item nomen patris, dummodo ipse sponte sua a parocho vel scripto vel coram duobus testibus id requirat, vel ex publico authentico documento sit notus; in ceteris casibus inscribatur natus tanquam filius patris ignoti vel ignotorum parentum.

CAN. 778

Si baptismus nec a proprio parocho nec eo praesente administratus fuerit, minister de ipso collato quamprimum proprium ratione domicilii parochum baptizati certiorem reddat.

Parish priests must enter in the baptismal record the names of the baptized, the minister, the parents and godparents, the place and date of Baptism. This record must be made carefully and without delay.

In the case of an *illegitimate* child the *mother's name* must be put down if she is publicly known to be the

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mother, or if, of her own accord, she demands it in writing or before two witnesses. The name of the father must be recorded only if he, of his own accord, demands it of the pastor either in writing or in the presence of two witnesses, or if he is known to be the child's father by an authentic public document. In all other cases the *one baptized* must be recorded as the offspring of an unknown father or unknown parents.

If the Baptism was not administered by the pastor, nor in his presence, the minister shall notify the pastor as soon as possible of the fact. It is hardly necessary to call attention to the *grave obligation* of keeping proper baptismal records, on which authentic testimonies depend.[1] Benedict XIV called upon the Ordinaries to examine the baptismal records at each canonical visit.[2] The Code enjoins recording *without delay* (*sine mora*), which means the same day the Baptism was conferred, unless the book were not at hand, as may happen with missionaries, who cannot carry the baptismal books from place to place. The term *sedulo* (diligently) includes whatever is necessary for clear, legible, and neat bookkeeping. The priest should if necessary, keep a separate record for children of another, (for instance, the Ruthenian) rite.[3]

PROOF OF BAPTISM

CAN. 779

Ad collatum baptismum comprobandum, si nemini fiat praeiudicium, satis est unus testis omni exceptione maior, vel ipsius baptizati iusiurandum, si ipse in adulta aetate baptismum receperit.

1 *Trid.*, sess. 24, c. 2, *de ref. mat.*; S. O., Dec. 9, 1745 (*Coll.*, n. 345). Instr. S. C. P. F., June 25, 1791 (*Coll.*, n. 605).

2 "*Firmandis*," Nov. 6, 1744, § 9.

3 S. C. P. F., Oct. 6, 1863, C. a. (*Coll.*, n. 1241): *in libro separato.*

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If no prejudice is involved to a third person, one absolutely trustworthy witness is sufficient to prove that Baptism was conferred; the sworn statement of the one baptized is also admissible, if baptism was conferred on him as an adult. The reason why one witness suffices must be sought in the danger of incurring ecclesiastical penalties if one should baptize a child against the will of the parents. Hence no one is supposed to testify against himself, and therefore his testimony is admitted.[4] Thus the statement of a catechist, if he has a good reputation, would be sufficient.[5] We also think that a physician's or midwife's testimony may be admitted under the same condition.

The text says, *if no prejudice arises to a third person.* When a material advantage, for instance, a legacy, or a spiritual benefit (preferment) would be involved against the claim of another, two witnesses would be required. The statement of the baptized subject is admitted and affords full proof only if it is given under oath and the Baptism was conferred after the subject had attained the age of discretion (about the seventh year). No distinction is made between the testimonies of men and women.[6]

4 Benedict XIV, "*Postremo mense,*" Feb. 28, 1747, n. 31; cc. 110, 112, 113, Dist. 4, *de cons;* Glossa ad c. 51, X, II, 20, *s. v.* "*nisi iuratus.*"

5 S. C. P. F., Sept. 8, 1869 (*Coll.*, n. 1346).

6 Benedict XIV, "*Postremo mense,*" nn. 35, 31, 55.

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TITLE II

CONFIRMATION

MATTER AND FORM

CAN. 780

Sacramentum confirmationis conferri debet per manus impositionem cum unctione chrismatis in fronte et per verba in pontificalibus libris ab Ecclesia probatis praescripta.

CAN. 781

§ 1. Chrisma, in sacramento confirmationis adhibendum, debet esse ab Episcopo consecratum, etiamsi sacramentum a presbytero, ex iure vel ex apostolico indulto, ministretur.

§ 2. Unctio autem ne fiat aliquo instrumento, sed ipsa ministri manu capiti confirmandi rite imposita.

The Sacrament of Confirmation must be administered by laying on hands, and anointing the forehead with chrism, and pronouncing the words prescribed in the pontifical books approved by the Church.

The *chrism* to be used in the administration of this Sacrament must be blessed by a bishop, even though a priest may administer it, either by law or in virtue of an apostolic indult.

The *anointing* is not to be performed with an instrument, but with the minister's hand, placed upon the head of the subject to be confirmed.

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The Sacrament of strength or of zeal is distinct from Baptism, the indelible character of which it enlarges or deepens. Confirmation confers a grace distinct from the baptismal grace. It is pre-eminently the Sacrament of the Holy Ghost.[1] Being essentially distinguished from the Sacrament of Baptism, it requires a distinct matter and form.

1. The *remote matter* is *chrism,* which is composed of balsam and olive oil. The latter is essential for the validity of the Sacrament. Balsam, too, must be said to belong to the essence of the matter, at least according to the Decree for the Armenians and the ancient Greek Euchologia.[2] The validity of the matter is, however, not affected by mingling other aromatics with the balsam.[3] The blessing or *consecration* of the matter must be performed by a bishop. Whether a priest, with the permission of the Pope, could consecrate chrism is a speculative question. The affirmative view is certainly tenable.[4] Licit administration requires that the consecration be performed by a *Catholic* bishop, and hence priests are never allowed to receive chrism from a heretical or schismatic bishop.[5] The *vicar-general,* although he may be a bishop, cannot lawfully bless the chrism.[6] Lastly, the chrism must be blessed the same year in which it is used, counting from Holy Thursday to Holy Thursday. It is not allowed to use chrism blessed the year before, except in case of necessity.[7]

1 Trid., sess. 7, c. 1, *de sacram. in genere;* cc. 1, 2, *de confirm.; Professio fidei Waldensibus praescripta; Decretum pro Arm.* (Denzinger, nn. 370, 592); Pius X, *Syllabus,* 1907, n. 44.

2 Benedict XIV, "*Ex quo,*" March 1, 1756, § 49; the testimonies of the early Church see in M. O'Dwyer, *Confirmation,* 1915, p. 49 ff.

3 Benedict XIV, *l. c.*

4 Benedict XIV, *De Syn. Dioec.,* VIII, 1, 4.

5 S. C. P. F., May 4, 1774 (*Coll.,* n. 553).

6 Benedict XIV, *De Syn. Dioec.,* II, 8, 2–7.

7 Benedict XIV, "*Anno vertente,* June 19, 1750, § 5.

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The *proximate matter of Confirmation is the anointing.* This is done by placing three or four fingers upon the forehead and using the thumb dipped in the holy chrism to anoint the same. The sign of the cross in the act of anointing is essential.[8]

§ 2, of can. 781 strictly forbids the use of any instrument (brush or cotton) in the act of Confirmation. The Holy Office has declared that the use of an instrument endangers the validity of the Sacrament and ordered secret and conditional repetition of Confirmation *in casu.*[9]

The *form* is that prescribed by the Roman Pontifical: "*Signo te signo crucis, et confirmo te chrismate salutis, in nomine Patris et Filii et Spiritus Sancti,*" the act of pronouncing the three Holy Names being accompanied by the triple sign of the cross.[10]

8 S. Rit. C., May 7, 1853, ad II (*Dec. Auth.*, n. 3012).

9 S. O., Jan. 14, 1885 (*Coll.*, n. 1630).

10 S. Rit. C., May 7, 1853 (*l. c.*). However the *triple* sign of the cross is not required for validity.

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CHAPTER I

THE MINISTER OF CONFIRMATION

CAN. 782

§ 1. Ordinarius confirmationis minister est solus Episcopus.

§ 2. Extraordinarius minister est presbyter, cui vel iure communi vel peculiari Sedis Apostolicae indulto ea facultas concessa sit.

§ 3. Hac facultate ipso iure gaudent, praeter S. R. E. Cardinales ad normam can 239, § 1, n. 23, Abbas vel Praelatus *nullius,* Vicarius et Praefectus Apostolicus, qui tamen ea valide uti nequeunt, nisi intra fines sui territorii et durante munere tantum.

§ 4. Presbyter latini ritus cui, vi indulti, haec facultas competat, confirmationem valide confert solis fidelibus sui ritus, nisi in indulto aliud expresse cautum fuerit.

§ 5. Nefas est presbyteris ritus orientalis, qui facultate vel privilegio gaudent confirmationem una cum baptismo infantibus sui ritus conferendi, eandem ministrare infantibus latini ritus.

§ 1 and 2.— The ordinary minister of Confirmation is the bishop, but a priest may act as extraordinary minister if he has received this power either by law or by a special indult of the Apostolic See.

The *bishop and he alone* is the ordinary minister of Confirmation in the Latin Church. The Greek Church

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permits priests to confer Confirmation immediately after Baptism. St. Gregory the Great, upon the remonstrances of the Sardinians, allowed priests to confirm where no bishops were available;[1] but this concession was a unique one in the Occidental Church, whereas the Eastern Church with the permission, and we dare say, approval, of the Apostolic See, retained the custom mentioned.

Even a *heretical or schismatic* bishop can confirm validly. This at least we would infer from certain decisions of the Holy Office, though they mention only Confirmation conferred by a *schismatic priest;* for all of them seem to admit at least the conditional validity of Confirmation administered by such a priest. Only when there were among the *confirmandi* some who wished to be promoted to tonsure or sacred Orders, was the repetition of Confirmation imposed, "conditionally and secretly."[2]

The text adds that a *simple priest* may administer the Sacrament of Confirmation, provided he has *received that faculty* either by law or by a special indult of the Apostolic See. Who receive that faculty by *law* is stated in § 3. They are the *Cardinals* of the Holy Roman Church, according to the privileges enumerated under can. 239, § 1, n. 23. Cardinals, therefore, may administer Confirmation anywhere and to anyone, for no distinction is made in the text. The only obligation mentioned is that they record the fact in the book especially reserved for recording Confirmations (can. 798). Others who may administer the Sacrament of Confirmation by law are *abbots nullius or prelates nullius, vicars Apostolic* and *prefects Apostolic.* But these three kinds of ecclesiastics

1 Cfr. Reg. Greg. M., ed. Ewald-Hartmann, 1891, Vol. I, 241, 261 (Sept. 593, May 594).

2 S. O., July 5, 1853; March 16, 1872; April 2, 1879; Jan. 14, 1885 (*Coll. P. F.*, nn. 1095, 1381, 1515, 1630).

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can make *valid use* of this faculty only *within the boundaries of their own territory and during their term of office.* Hence, for instance, the Vicar-Apostolic of North Carolina may administer Confirmation validly only within his own territory. On the other hand, he may, within that territory also *confirm validly* such as are not his subjects by reason either of domicile or quasi-domicile, and may *licitly* confirm subjects of other dioceses if they show a letter of permission or other testimony from their own bishop or parish priest.[3] By a *special indult* the Guardian (O. F. M.) of the Holy Sepulchre at Jerusalem may confirm persons of the Latin Rite if no bishop of that rite residing in his own territory is at hand.[4]

The faculty to confirm is sometimes granted also to *missionaries* who preside over vast provinces. Thus it was given for China and Chile.[5] The condition is always added that they must use chrism blessed by a Catholic bishop.[6] In the instruction which they receive together with the faculty, it is also added that whenever they administer this Sacrament they must mention the special faculty in virtue of which they do so. But this is not required for the validity of the act.[7]

Vicars Apostolic have this faculty by law, yet their *pro-vicars,* during a vacancy, cannot confirm in virtue of their office, much less delegate other missionaries to administer Confirmation. Any attempt to do so would be invalid, and the Sacrament would have to be re-administered.[8] The very same decision, however, says that the

[3] S. C. EE. et RR., March 30, 1855 (Bizzarri, *Collectanea,* p. 637 f.); Dec. 11, 1897; can. 784.

[4] Benedict XIV, "*Cum ad,*" Jan. 9, 1741; "*Demandatam,*" Dec. 24, 1743, § 14.

[5] S. C. P. F., July 29, 1841; March 4, 1903 (*Coll.,* nn. 933, 2161).

[6] S. C. P. F., May 4, 1774 (*Coll.,* n. 503).

[7] S. C. P. F., Sept. 11, 1841 (*Coll.,* n. 940).

[8] S. C. P. F., Sept. 12, 1821 (*Coll.,* n. 766). This must, *a fortiori,* be applied to pro-prefects.

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Pontiff may grant the faculty of delegating others. The faculty of subdelegating a priest (*"benevisum sacerdotem"*) was given to the bishop of Concepcion, Chile.[9] A decision of the S. C. Propaganda, with the special approval of the Sovereign Pontiff granted the faculty of administering Confirmation to the *Superior internus,* or the *vicar general,* or the *Vicar Apostolic-elect* while not yet consecrated; this faculty included the power of subdelegating a priest of the vacant vicariate or diocese for giving Confirmation.[10] Now a Vicar-Apostolic-elect, who has received his letters of appointment, according to can. 294, § 2, may administer Confirmation, and therefore no longer needs a special faculty for this purpose.

§ 4. *A priest of the Latin rite,* who enjoys this faculty by virtue of an indult, can administer Confirmation *validly only to the faithful of his own rite,* unless the indult expressly grants him larger powers.

§ 5. *Priests of the Oriental rite* who are entitled by virtue either of a faculty or of a privilege tc confirm children of their own rite immediately after Baptism, may not lawfully confer Confirmation on children of the Latin rite.

§ 4 is taken from an Instruction of the Propaganda, issued in 1774, and extended in 1888 by the Holy Office to all priests who have the Apostolic indult for administering Confirmation. But nothing is said therein of the validity or invalidity of Confirmation administered by a Latin priest to a person of the Greek rite. The S. Congregation desired information to be gathered with regard to the following points: To what Oriental rite the *confirmandi* belonged; by whom they were confirmed, whether by their own bishop or by priests of their own

[9] S. O., March 4, 1903 (*Coll.*, n.2161).
[10] July 29, 1841 (*Coll.*, n. 933).

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nation; whether they asked for Confirmation of their own accord; whether they could conveniently receive the Sacrament from their own bishops; whether, finally, Confirmation was to be administered in a diocese where there resides an Oriental bishop who is the Ordinary of the *confirmandus*.[11] Our text briefly declares that Confirmation can not be validly administered by a priest of the Latin rite to a Catholic, whether infant or adult, of an Oriental rite.

§ 5 *strictly forbids* Oriental priests to confirm infants of the Latin rite; that Confirmation thus unlawfully administered would be invalid, cannot be inferred either from the text itself or from the quotation given in Cardinal Gasparri's edition. On the contrary, the validity seems to be assured. *Nefas* is a strong term, but it cannot be stretched so as to involve invalidity.

Ruthenian priests of the Oriental rite would incur suspension *a divinis ipso facto*,[12] but this supposes only an illicit, not an invalid act. When the question was proposed to Rome, whether Oriental priests who are authorized to baptize babies of the Latin rite, may also administer Confirmation to the same, the answer was, *negative et ad mentem*. The mind of the Apostolic See was that the Oriental bishops should restrain their priests from such unlawful administration, which had been often and strictly forbidden by the Holy See. To the further question whether Confirmation thus administered should be conditionally repeated, the answer was, *non expedire*, except in the case of those who are to be promoted to tonsure or sacred orders, and then only conditionally and secretly.[13] Whether the priests of the *Greek-Ruthenian*

11 S. C. P. F., May 4, 1774 (*Coll.*, n. 503).

12 S. C. P. F., July 5, 1886 ad 1 (*Coll.*, n. 1660).

13 S. O., Jan. 14, 1885 (*Coll.*, n. 1630).

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rite residing in the *United States* can validly administer Confirmation to the faithful of their own rite, seems doubtful. The decree "*Ea semper*" of Pius X[14] expressly denies the validity of such a Confirmation. The decree of Aug. 17, 1914, does not touch this subject, nor is there any such clause to be found in the decree of Aug. 18, 1913, for the Ruthenian Bishop in Canada. Hence we hesitate to deny the validity, as the later decree contains nothing to the effect.[15] The *Greek priests of Italy* were "expressly forbidden" (*expresse interdictum*) to administer Confirmation even to the infants of their own rite, as this power was reserved to the bishops of the Latin rite, under whose jurisdiction they lived.[16]

This, then, is the canonical status of the minister of Confirmation. The underlying theological question is a rather vexed one and would demand a more elaborate investigation. For the question would have to be solved: Does the power of conferring Confirmation emanate from the power of Holy Orders, or from jurisdiction? What does the priest receive by delegation? Is it a new power of Order, or is it power of jurisdiction? It cannot be an extension of the priestly character, making it episcopal for the time, because the episcopal character is conferred by ordination, not by a mere papal letter.[17] Benedict XIV, who devoted much study to this controversy,[18] supposes tacit or express reservation or limitation of the power of confirming made by the Apostolic See in favor of bishops, and continues: Although to confirm is an act of the episcopal order, the validity of which does not depend on the will of the Pontiff, yet to delegate to a

14 June 14, 1907, art. 4.

15 *Am. Eccl. Rev.*, Vol. 37, 516 ff.; Vol. 51, 586 ff.; Vol. 49, 593 ff.

16 Benedict XIV, "*Etsi pastoralis*," May 26, 1742, § III, 1.

17 O'Dwyer, *l. c.*, p. 65 f.

18 Cfr. *De Syn. Dioec.*, l. VII, 8, 7; IDEM, "*Ex tuis precibus*," Nov. 16, 1748, § 9 to Abbot Engelbert of Kempten, who received the faculty of confirming his own subjects and those of the abbey church.

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simple priest the power of performing such an act belongs to jurisdiction rather than to order. The jurisdiction of the bishop is subject to the Supreme Pontiff in such a manner that the latter may, by his authority and command, limit or take it away for a just reason. This, he says, is clearly the opinion of St. Thomas, who says that, as far as the real body of Christ (*viz.*, the Holy Eucharist) is concerned, priests have equal power with bishops, whereas in regard to His mystic body bishops are superior to priests; and since the plenitude of power resides in the Supreme Pontiff, he may confer a power belonging to a higher rank on clergymen of inferior rank.[19] It would be difficult to assign the time when such a reservation of power was made concerning the Greek priests. With regard to the Latin clergy Benedict XIV could point to the letter of Innocent I (401–417) to Decentius of Gubbio. But as Gregory I reversed that general prohibition, it seems more natural to assume that the limitation or withdrawal of this restriction[20] was first introduced by custom and only at a later time determined by positive law for the Western Church, while in the Eastern Church, where children were confirmed immediately after baptism, no limitation was made, except in regard to subjects of the Latin rite. If it be asked, What does the delegation by the Pope to a simple priest of the power of conferring Confirmation imply? we answer: Not the conferring of a special dignity,[21] but merely an extension of the power, or faculty, or authority[22] of confirming. This delegation, however, is

19 Lib. IV, Dist. 7, q. 3, art. 1, gla. 3; *Summa Theol.*, III, q. 72, art. 11.

20 O'Dwyer, *l. c.*, p. 172.

21 Thus Lehmkuhl, *Theol. Moral.*, II, n. 99. But this is hard to understand, because dignity results primarily from jurisdiction, and therefore the highest dignity is that of the Pope, in whom resides the plenitude of power, which chiefly indicates and signifies jurisdiction.

22 All these terms occur in the documents.

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limited either *territorially,* as for vicars-Apostolic, prefects Apostolic, prelates *nullius,* or *personally* as regards Latin priests with respect to persons of the Oriental Rite. If a curious reader would ask: Whence the difference? we should answer: The powers given to bishops and priests up to the beginning of the third century were not precisely determined, as the example of the *chorepiscopi* shows. The final answer, of course, must be sought in the theory of St. Thomas, that the power of confirming concerns the mystic rather than the real body of Christ, in other words, is directly connected with jurisdiction and rests fundamentally on the power of the priesthood. To us no other solution seems acceptable, especially in consideration of the fact that Rome has granted to bishops the faculty of subdelegating or delegating any priest they choose to administer Confirmation.

THE BISHOP'S POWER

CAN. 783

§ 1. Episcopus in sua dioecesi hoc sacramentum etiam extraneis legitime ministrat, nisi obstet expressa proprii eorum Ordinarii prohibitio.

§ 2. In aliena dioecesi indiget licentia Ordinarii loci saltem rationabiliter praesumpta, nisi agatur de propriis subditis quibus confirmationem conferat privatim ac sine baculo et mitra.

§ 1. A bishop may lawfully administer the sacrament of Confirmation in his own diocese, even to such as are not his subjects, unless their Ordinary has issued a special prohibition to the contrary.

§ 2. To confirm in a strange diocese he needs the at least reasonably presumed permission of the local Ordi-

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nary, unless he confirms his own subjects, in which case he is not allowed to use the pastoral staff or mitre.

Staff and mitre are the insignia of pontifical jurisdiction which no bishop may employ in another bishop's diocese without the other's permission.[23] The Vicar-Capitular must ask a bishop to confer Confirmation. This would offer an occasion for a presumed permission, *viz.*, if the administrator would call on a bishop to confer orders on the clerics of a vacant diocese, the bishop thus called for ordination could also licitly confirm. Absence and sickness would also be presumed reasons. If, however, a bishop would publicly declare that he would confirm only his own subjects to the exclusion of strangers in or outside his diocese, Confirmation bestowed on such non-subjects who presented themselves stealthily would be invalid.[24]

It may be added that a metropolitan is not entitled to administer Confirmation in the dioceses of his suffragan bishops without their special permission.[25]

Can. 784

Presbytero quoque licet, si apostolico locali privilegio sit munitus, in designato sibi territorio confirmare etiam extraneos, nisi id ipsorum Ordinarii expresse vetuerint.

A priest who has an Apostolic local privilege empowering him to administer Confirmation may licitly confirm subjects not his own in the territory assigned to him,

23 S. Rit. C., April 14, 1877 (*Dec. Auth.*, n. 3416); S. C. C., Aug. 2, 1596.

24 S. C. EE. et RR., Aug., 1682 (Ferraris, *Prompta Bibliotheca, s. v.* "*Confirmatio,*" art. II, n. 14), because of lack of the necessary intention the S. Cong. decided negatively.

25 S. C. EE. et RR., April 18, 1599 (Ferraris, *l. c.*, art. II, n. 9).

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provided the Ordinaries of the respective *confirmandi* have not expressly forbidden it. Hence, as already stated, such priests should procure testimonial letters from the Ordinaries whose subjects they confirm.[26] Note the words, "*locali privilegio.*" A local privilege is an indult given for a certain territory or district, whether large or small. Sometimes such a privilege is attached not to a territory, but to persons. Thus, for instance, an abbot received from Pope Benedict XIV the privilege to confer Confirmation on "the subjects of the aforesaid abbey and on the parishioners of the abbey-church." This was a personal privilege, restricted to the persons named and could not validly be extended to others who were not subject to the abbot.[27]

DUTY OF THE BISHOP

CAN. 785

§ 1. Episcopus obligatione tenetur sacramentum hoc subditis rite et rationabiliter petentibus conferendi, praesertim tempore visitationis dioecesis.

§ 2. Eadem obligatione tenetur presbyter, privilegio apostolico donatus, erga illos quorum in favorem est concessa facultas.

§ 3. Ordinarius, legitima causa impeditus aut potestate confirmandi carens, debet, quoad fieri possit, saltem intra quodlibet quinquennium providere ut suis subditis hoc sacramentum administretur.

§ 4. Si graviter neglexerit sacramentum confirmationis suis subditis per se vel per alium ministrare, servetur praescriptum can. 274, n. 4.

26 S. C. EE. et RR., March 30, 1855 (Bizzarri, *Collectanea*, p. 636 f.).

27 "*Suprema*," April 26, 1749, § 3.

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Every *bishop* is in duty bound to administer this Sacrament to those of his subjects who becomingly and reasonably ask for it, especially at the time of the canonical visitation. *Priests* who are endowed with an Apostolic privilege have the same duty towards those in whose favor the faculty was granted. This canon must be compared with Canons 786–788, which deal with the *subject* of Confirmation. Those ask for Confirmation "*rite et rationabiliter*" who are endowed with the qualities mentioned in said canons; for duty and right are correlative terms.

The question whether a bishop or priest who is empowered to administer Confirmation is bound in conscience to confirm such as suffer from a *contagious disease,* was answered by Benedict XIV, who says it would be difficult to prove such an obligation, since this sacrament is not absolutely necessary for salvation, and the example of St. Charles Borromeo was a heroic one, from which no strict obligation can be deduced. But he adds that if Confirmation were administered to such unfortunates, there would be no reason for using an instrument, brush, sponge or cotton, because the act is very short.[28]

The *time* for administering Confirmation is the canonical visitation, on which occasion the bishop is obliged to confirm.[29]

§ 3 says that an Ordinary who is lawfully prevented from, or does not enjoy the power of, administering Confirmation, should, as far as possible, take care that this Sacrament is conferred at least every *five years.* Should he, continues § 4, grievously neglect this duty of confirming his subjects, either personally or through another, the

[28] *De Syn. Dioec.*, XIII, 19, nn. 6, 12.

[29] S. C. C., July 18, 1699 (Richter, *Trid.*, p. 47, n. 3). Of course, if no one asks for Confirmation, or if Confirmation was administered a short time before, there would be no obligation.

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metropolitan should see to it that this matter is attended to and inform the Holy See. *Legitimate causes* preventing a bishop from administering Confirmation within the term of five years, would be protracted illness, exile, and detention by higher superiors. The vicar-capitular has not the power to confirm, but should invite an outside bishop if this Sacrament has not been administered in the diocese for a long time.[30] If grievous neglect has crept into a suffragan's diocese, the ***metropolitan*** may compel or admonish the Ordinary of the same to comply with the law, but he may not administer Confirmation without the suffragan's permission because this case is not mentioned among those in which the metropolitan is authorized to supply the negligence of his suffragans.[31] However, if the canonical visitation would, upon request of the Holy See, be performed by the archbishop, we believe that Confirmation would also be mentioned in the *causa probata.*

30 S. Rit. C., April, 1877 (*Dec. Auth.*, n. 3416).

31 Barbosa, *De Officio et Potestate Episcopi*, P. I., tit. 4, nn. 12, 43; glossa ad c. 2, Clem. V, 7, *s. v.* "*Etiam celebrare.*"

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CHAPTER II

THE SUBJECT OF CONFIRMATION

CAN. 786

Aquis baptismi non ablutus valide confirmari nequit; praeterea, ut quis licite et fructuose confirmetur, debet esse in statu gratiae constitutus et, si usu rationis polleat, sufficienter instructus.

CAN. 787

Quanquam hoc sacramentum non est de necessitate medii ad salutem, nemini tamen licet, oblata occasione, illud negligere; imo parochi curent ut fideles ad illud opportuno tempore accedant.

CAN. 788

Licet sacramenti confirmationis administratio convenienter in Ecclesia Latina differatur ad septimum circiter aetatis annum, nihilominus etiam antea conferri potest, si infans in mortis periculo sit constitutus, vel ministro id expedire ob iustas et graves causas videatur.

CAN. 789

Confirmandi, si plures sint, adsint primae manuum impositioni seu extensioni, nec nisi expleto ritu discedant.

The first of these four canons embodies a deduction from can. 737, § 1, which calls Baptism the door to the

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other Sacraments. *One who is not yet baptized cannot be validly confirmed* because he is not yet initiated into the Christian mysteries or incorporated in the mystic body of Christ, which initiation or incorporation confers the right to receive the other Sacraments. Besides, in order to *receive this Sacrament licitly and profitably, one must be in the state of grace.* For though the indelible character is impressed even if one is not in the state of sanctifying grace, the sacramental grace, or, as a text of the *Decretum Gratiani* says, the sevenfold grace of the Holy Ghost with the plenitude of holiness and knowledge and strength does not descend in Confirmation if this Sacrament is received in the state of mortal sin.[1] Besides, *one who has attained the age of discretion must be sufficiently instructed* in the more important truths of faith as well as the nature and efficacy of Confirmation. The *confirmandus* should know the difference between Baptism and Confirmation, which resembles the difference between generation and growth and the distinction between enrolling in the army of Christ and training for active service.[2] Should it happen that an adult, especially an elderly person, has not even the intention of receiving strength for his soul through Confirmation, the Sacrament should not be administered.[3]

Can. 787 says that Confirmation is *relatively*, not *absolutely necessary* for salvation, and therefore must not be neglected. A canon of Gratian[4] declares that no one is a Christian unless he has been confirmed by the bishop

1 C. 5, Dist. 5, *de cons.* Hence confession should precede Confirmation; cfr. *Pontificale Rom.*, tit. *De Confirmandis;* S. O., Dec. 11, 1850 (*Coll.*, n. 1054). As soon as the *obex* (state of grievous sin) is removed, the sacramental grace revives.

2 Benedict XIV, "*Etsi minime,*" Feb. 7, 1742, § 9; "*Eo quamvis tempore,* May 4, 1745, § 6.

3 S. O., April 10, 1860 (*Coll.*, n. 1213).

4 C. 6, Dist. 5, *de cons.*

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with chrism. This is an exaggeration, but it indicates the danger to which, in the opinion of the early Church, one exposed himself by wilfully neglecting this great Sacrament. Those who were suspected of being imbued with the errors of Wiclif and Huss were asked whether they believed that one who spurned the Sacrament of Confirmation committed a grievous sin.[5] Our text says that, although this Sacrament is not absolutely necessary for salvation, no one may *lawfully neglect to receive it* if offered the opportunity.[6] For this reason *pastors* should take care that the faithful receive Confirmation at the proper time. An Instruction of the S. C. Propaganda enjoined the missionaries of Mesopotamia to instruct the Nestorians, bishops as well as priests, to receive this Sacrament.[7] Every pastor is in duty bound to teach the faithful under his care not only the necessity of this Sacrament, but also how to receive it worthily.

Can. 788 mentions the custom of the Latin Church, which differs from that of the Greek, to defer Confirmation to the age of discretion, *i. e.*, about the seventh year.[8] This *custom,* the text says, is quite proper, but the Sacrament may be administered at an earlier age if the child is in danger of death or the minister judges that there are other just and weighty reasons. Such reasons would be, *e. g.*, great distance preventing one from reaching a place within the time limit of five years,— surely a rare thing.[9]

It may not be amiss to add what Lehmkuhl says,[10] that

5 Prop. 19 (Denzinger, n. 563).

6 Benedict XIV, "*Etsi pastoralis,*" May 26, 1742, § III, 4: "*Gravis peccati reatu teneri.*"

7 Instr., July 31, 1902 (*Coll.*, n. 2149).

8 Benedict XIV, '*Eo quamvis tempore,*" May 4, 1745, § 6: "*Allatae sunt,*" July 26, 1755, § 22.

9 S. O., Dec. 11, 1850, n. 12 (*Coll.*, n. 1054); S. C. C., March 12, April 23, 1774 (Richter, *Trid.*, p. 47, n. 1).

10 *Theol. Moral.*, II, n. 100.

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if the bishop would be obliged to administer Confirmation to the dying, he would have to do so to all or none, else there would be partiality and scandal; and if he had to confer the Sacrament on all the sick, there would be a great burden thrown upon him. An Oriental priest who enjoys the faculty of administering Confirmation together with Baptism may apply this faculty not only to his own people, but also to Catholics of another rite, provided the tacit privilege of administering both Sacraments is in vogue in that rite.[11]

Can. 789 provides that the *confirmandi,* if there are a number of them, should be *present at the first imposition* or extension of the hands, and not leave before the whole rite or ceremony is completed.[12] This is not, however, a condition affecting validity.[13]

11 S. O., April 22, 1896 (*Coll.*, n. 1926).

12 *Pontificale Rom.*, tit. *De Confirmandis.*

13 S. O., April 17, 1872 (*Coll.*, n. 1383).

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CHAPTER III

TIME AND PLACE OF ADMINISTERING CONFIRMATION

CAN. 790

Hoc sacramentum quovis tempore conferri potest; maxime autem decet illud administrari in hebdomada Pentecostes.

CAN. 791

Licet proprius confirmationis administrandae locus ecclesia sit, ex causa tamen quam minister iustam ac rationabilem iudicaverit, potest hoc sacramentum in quolibet alio decenti loco conferri.

CAN. 792

Episcopo ius est intra fines suae dioecesis confirmationem administrandi in locis quoque exemptis.

This Sacrament may be conferred at any time, but it is most fittingly administered in the week after Pentecost. Whilst the Cardinal Vicar of Rome or his *vicegerente* may administer this Sacrament on any day or at any time in the Lateran Basilica, the Cardinal Archpriest of the Vatican Basilica may do so only during the Octave of the Feast of SS. Peter and Paul in St. Peter's.[1] The text designates the Octave of Pentecost as the most appropriate season. This praiseworthy custom may be conveniently observed especially in cathedral churches.

1 Benedict XIV, "*Ad honorandum*," March 27, 1752, § 11.

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Can. 791. Although the *proper place* for administering confirmation is the *church,* it may also be conferred in any other decent place, provided the minister has a just and plausible reason for so doing. Hence Confirmation may be administered in any private or semi-public oratory, and even in private houses if they are neat and properly kept; also, during the time of an interdict, in an interdicted place.[2]

Can. 792. Every bishop has the right to administer Confirmation within the *boundaries of his diocese also in exempt places.* When certain exempt regulars, insisting on their privileges, contended that the bishop was not entitled to administer Confirmation in their (parochial or non-parochial) churches, the S. Congregation decided in favor of the bishop, and Benedict XIV fully ratified the respective decisions.[3]

When confirming the bishop may make use of throne and baldachino and pontifical regalia.

Exempt places here are monasteries, convents, academies, colleges, churches and chapels (such as are *pleno iure* incorporated) of exempt religious, or other exempt persons; but *not* the exempt territories of prelates or abbots *nullius,* because these prelates are entitled to administer Confirmation in their own districts.

2 C. 43, X, V, 39; c. 19, 6°, V, 11.
3 "*Firmandis,*" Nov. 6, 1744, § 6.

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CHAPTER IV

SPONSORS

CAN. 793

Ex vetustissimo Ecclesiae more, ut in baptismo, ita etiam in confirmatione adhibendus est patrinus, si haberi possit.

CAN. 794

§ 1. Patrinus unum tantum confirmandum aut duos praesentet, nisi aliud iusta de causa ministro videatur.

§ 2. Unus quoque pro singulis confirmandis sit patrinus.

A most ancient ecclesiastical custom demands that, as at Baptism, so also at Confirmation, a sponsor be employed if possible. He should not stand for more than one or two *confirmandi,* unless the minister deems it prudent to deviate from that rule for a just cause. Each *confirmandus* should have but one sponsor.

The custom of employing sponsors at Confirmation would be very venerable indeed if a certain text of Gratian[1] could be ascribed to Pope Hyginus (136–140). Doubtless the practice was universal at the beginning of the Middle Ages. Ancient also is the custom that one sponsor, either a man or a woman,[2] stands for each *confirmandus.* That at least one sponsor should be employed at Confirmation is a grave obligation, unless weighty and

1 C. 100, Dist. 4, *de cons.* 2 C. 100 f., *ibid.*

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urgent reasons excuse.[3] But the Roman Court will not, — except for reasons of strict necessity (*praecisa necessitas*) — tolerate the custom that one man stands for all the *confirmandi,* and one woman for all the *confirmandae.*

It is left to the minister of Confirmation to decide whether there is such a strict necessity.[4] If only Sisters are at hand, they may be employed as sponsors for the *confirmandae.*[5] Now-a-days when spiritual relationship is no longer contracted as an impediment to marriage, the necessity of using only one sponsor for a whole class of males and females respectively seems to have abated. On the other hand, the rule that each *confirmandus* should have but one sponsor must be obeyed.[6]

REQUISITES OF SPONSORSHIP

CAN. 795

Ut quis sit patrinus, oportet:

1.° Sit ipse quoque confirmatus, rationis usum assecutus et intentionem habeat id munus gerendi;

2.° Nulli haereticae aut schismaticae sectae sit adscriptus, nec ulla ex poenis de quibus in can. 765, n. 2 per sententiam declaratoriam aut condemnatoriam notatus;

3.° Non sit pater, mater, coniux confirmandi;

4.° A confirmando eiusve parentibus vel tutoribus vel, hi si desint aut renuant, a ministro vel a parocho sit designatus;

[3] S. O., Dec. 11, 1850; Sept. 5, 1877; S. C. P. F., May 4, 1774 (*Coll.*, n. 1054, 1480, 503).

[4] S. O., Nov. 20, 1873 (*Coll.*, n. 1408); S. C. C., June 14, July 12, 1823 (Richter, *Trid.*, p. 47, n. 2).

[5] S. Rit. C., Feb. 15, 1887 (*Dec. Auth.*, n. 3670); these religious, however, should have the permission of their superiors and Ordinary. S. O., Sept. 3, 1871 (*Coll.*, n. 198).

[6] C. 3, 6° IV, 3; S. O., Nov. 26, 1873 (*Coll* n. 1408).

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5.° Confirmandum in ipso confirmationis actu per se vel per procuratorem physice tangat.

To be able to serve as sponsor:

1.° One must be confirmed, have the use of reason and the intention to assume the office of sponsor.

2.° He or she must belong to no heretical or schismatic sect, nor be under any of the penalties mentioned in can. 765, n. 2.

3.° He or she must be neither the father nor the mother nor the consort of the one to be confirmed.

4.° He must be appointed sponsor either by the *confirmandus,* his parents or guardians, or, if these should fail or refuse to appoint a sponsor, he is to be designated by the minister or pastor.

5.° The sponsor must physically touch the *confirmandus* in the act of confirmation, either personally or by proxy.

It is unnecessary to dwell on these requisites, which are about the same as explained under can. 765. The *act* the sponsor is called upon to perform is sometimes called *ligare,* to bind,[7] because he was supposed to tie a band around the forehead of the *confirmandus* after he had been anointed with chrism. However the proper *act of sponsorship* is laying the right hand on the right shoulder of the *confirmandus.* It is not necessary to put one's foot upon that of the godchild.[8] The act may be done *by proxy,* says the text. Thus, if the bishop who confirms a child wishes to be at the same time his godfather, he must appoint another to represent him, not confirm

7 Hence the verse: *"Ligans, ligatus, ligatique parentes,"* which expresses the relationship between the sponsor, the god-child, and the latter's parents.

8 S. Rit. C., Sept. 20, 1749, ad 6 (*Dec. Auth.,* n. 2404).

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him with one hand, and hold him with the other.[9] It may be added that the custom of choosing the name of a Saint other than the baptismal one at Confirmation is permissible, but by no means necessary.[10]

REQUISITES OF LICIT SPONSORSHIP

CAN. 796

Ut quis licite ad patrini munus admittatur, oportet:

1.° Sit alius a patrino baptismi, nisi rationabilis causa, iudicio ministri, aliud suadeat, aut statim post baptismum legitime confirmatio conferatur;

2.° Sit eiusdem sexus ac confirmandus, nisi aliud ministro in casibus particularibus ex rationabili causa videatur;

3.° Serventur praeterea praescripta can. 766.

To be licitly admitted to sponsorship at Confirmation:

1.° One must be different from the baptismal sponsor, unless there be a plausible reason to disregard this rule, or Confirmation is legitimately administered immediately after Baptism.

2.° The sponsor must be of the same sex as the one to be confirmed, unless the minister has a good reason to depart from this regulation in an individual case.

3.° The other rules mentioned in can. 766 must be observed.

What was said under can. 766 will suffice on this subject. Let us cite one decision of the S. C. C. Certain pastors having complained to the bishop that they had vainly endeavored to eradicate the custom of having the

9 This seems to have been the custom in a certain diocese; S. Rit. C., June 14, 1873, ad III (*Dec. Auth.*, n. 3305).

10 S. Rit. C., Sept. 20, 1749, ad 7 (*Dec. Auth.* n. 2404).

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same sponsors at Baptism and Confirmation, the bishop thought it best to tolerate the same. But the S. Congregation decided that, though it may be tolerated, this custom should be gradually abolished.[11] A plausible reason for which a man might be permitted to act as sponsor for a girl would be a special blood relationship, a happy coincidence, or the desire of the bishop to act by proxy as sponsor for a girl or young lady.[12]

SPIRITUAL RELATIONSHIP

CAP. 797

Etiam ex valida confirmatione oritur inter confirmatum et patrinum cognatio spiritualis, ex qua patrinus obligatione tenetur confirmatum perpetuo sibi commendatum habendi eiusque christianam educationem curandi.

Validly conferred Confirmation entails a spiritual relationship between the confirmed person and the sponsor, in virtue of which the latter is obliged to take a special and perpetual interest in the welfare of his godchild and to see to it that he or she receives a Christian education. However, according to can. 1079, this spiritual relationship no longer constitutes a matrimonial impediment and is therefore restricted to the merely spiritual part of education in case the parents fail to do their duty. That godparents, if able, may and should assist their spiritual children in case of need is a dictate of natural reason.[13]

11 S. C. C., Feb. 16, 1884 (*Coll. P. F.*, n. 1612).

12 This seems implied in the decision of the S. Rit. C., June 14, 1873, ad III (*Dec. Auth.*, n. 3305).

13 "*Sibi commendatum habere*" signifies a kind of protectorship, which must be understood according to the rules of charity. It is true charity, such as preached by Christ and His Church, yet often neglected, and now-a-days almost unknown, or at least not practised.

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CHAPTER V

RECORD AND PROOF OF CONFIRMATION

RECORD

CAN. 798

Nomina ministri, confirmatorum, parentum et patrinorum, diem ac locum confirmationis parochus inscribat in peculiari libro, praeter adnotationem in libro baptizatorum de qua in can. 470, § 2.

CAN. 799

Si proprius confirmati parochus praesens non fuerit, de collata confirmatione minister vel per se ipse vel per alium quamprimum eundem certiorem faciat.

The *Rituale Romanum*[1] prescribes that a Confirmation record be kept in *every church* in which this Sacrament is administered. This book, according to our canon, must contain the names of the minister, of the persons confirmed and their parents and sponsors, as well as the date of Confirmation. All these entries must be made by the pastor in a book specially set apart for the recording of Confirmations. Besides, he must also enter every Confirmation in the baptismal record.

Can. 799 enacts that if the *parochus proprius* of the *confirmatus* was not present at the Confirmation, he

1 Tit. X, c. 2, prescribes five books: for Baptisms, Confirmations, Marriages, Census, and Deaths. For the form of entering Confirmations see c. 4 (ed. Pustet, 1913, p. 328 f.).

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should be informed as soon as possible of the fact by the minister or by some other person.

PROOF

CAN. 800

Ad collatam confirmationem probandam, modo nemini fiat praeiudicium, satis est unus testis omni exceptione maior, vel ipsius confirmati iusiurandum, nisi confirmatus fuerit in infantili aetate.

When no prejudice to others is involved, *one trustworthy witness* is sufficient to prove the fact of Confirmation. Thus the testimony of the official or authentic record kept in the diocesan archives would be entirely sufficient, as also the pastor's testimony, given under his signature and seal. Besides, says the text, the *sworn statement* of the one who was confirmed must be admitted as proof, unless he received the Sacrament before he reached the age of discretion.

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TITLE III

THE HOLY EUCHARIST

CAN. 801

In sanctissima Eucharistia sub speciebus panis et vini ipsemet Christus Dominus continetur, offertur, sumitur.

In the most Holy Eucharist Christ the Lord Himself is contained, offered, and received, under the species of bread and wine. This is an article of faith and as such properly belongs to dogmatic theology. The Real Presence of Christ in the Eucharist has been the belief of the Catholic Church for nineteen hundred years, despite all calumnies, assaults, and blasphemies. The Code, according to the twofold aspect of this holy Sacrament, *in fieri* and *in facto esse,* treats of the Holy Eucharist as a Sacrifice and as a Sacrament instituted for the spiritual life of the faithful.

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CHAPTER I

THE HOLY SACRIFICE OF THE MASS

The seven Sacraments are intended for all the faithful, and the ancient adage: *"Sacramenta propter homines"* holds true with regard to all, at least in general. But the membership of the Church is essentially distinguished into clergy and laity, and hence the Church that sanctifies is distinct from the one that is sanctified (*ecclesia sanctificans et sanctificata*). This fact is most conspicuous in the Holy Eucharist, particularly in the Sacrifice of the Mass, where the hieratic character of the priesthood appears most obviously. Hence the Code naturally treats first of

ARTICLE I

THE CELEBRANT OF THE MASS

CAN. 802

Potestatem offerendi Missae sacrificium habent soli sacerdotes.

Priests alone have the power of offering the Sacrifice of the Mass.

It is not necessary to enter into the controversy regarding the universal priesthood of all the faithful.[1] The distinction between clergy and laity rests on a firm biblical and traditional basis. Only those may offer up gifts and sacrifices who are called by God and validly or-

1 I Pet. II, 9 is abused or wrongly interpreted.

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dained,[2] and the fiction of an assembly of predestined or an invisible congregation has never had a place in the Church of Christ.[3] The phrase *soli sacerdotes* excludes the inferior clergy as well as laymen, who, should they attempt to say Mass sacrilegiously, would not only act invalidly, but also incur severe penalties.[4]

CONCELEBRATING FORBIDDEN

CAN. 803

Non licet pluribus sacerdotibus concelebrare, praeterquam in Missa ordinationis presbyterorum et in Missa consecrationis Episcoporum secundum Pontificale Romanum.

Concelebrating takes place if two or more priests consecrate the same bread and wine or, as at the consecration of bishops, two hosts and the same wine in one chalice. It is, therefore, *not a mere recital* of the same prayers in general, and of the formula of consecration in particular, but a distinct rite,[5] which was once common in both East and West and is still in vogue in the Orient in cities where there is but one church. All the priests gather around the bishop, with whom they recite the prayers of the Mass and receive the Holy Eucharist under both species.[6] In the Latin Church concelebration is allowed and prescribed only at the *ordination of priests and the consecration of bishops according to the Roman Pontifical.*[7] Under Innocent III (1198–1216) concelebration was cus-

2 Heb. V, 1.

3 Cf. *Trid.*, sess. 22, *De Sacrificio Missae*, c. 1, 2; can. 2; sess. 23, *De Ordine*, c. 1.

4 The penalty is excommunication *speciali modo* reserved to the Holy See, Can. 2322.

5 Benedict XIV, *De Sacrificio Missae*, l. III, c. 16, n. 5.

6 *Ibid.*, n. 1; *Cath. Encycl.*, Vol. IV, 190, *s. v.* "Concelebration."

7 Tit. *De Ordinibus Conferendis;* tit. *De Ordinatione Presbyteri;* tit. *De Consecratione Electi in Episcopum.*

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tomary on higher feasts, but now it is forbidden in the Latin Church (this canon does not concern the Oriental Rite) [8] except on the two occasions mentioned.

Benedict XIV gives some practical hints for newly ordained priests how to concelebrate with the bishop. He says that the Roman Pontifical prescribes that the bishop should recite the words of consecration "*slowly and in a rather loud voice*" so that the neomysts may follow, and adds that the latter should have the intention of consecrating the same bread and wine together with the bishop. This is sufficient, and they need not worry about the difficulties proposed by some authors. Those difficulties are absurd because the bishop is the main consecrator and the priests merely concur in the act as accessories; the form they employ is morally one with the form pronounced by the bishop, and consequently, even though they finish the words of consecration a little before or after the bishop, the consecration is valid.[9] The same Pontiff, who was a great canonist, also says that there is no reason for depriving a priest thus celebrating with his bishop of the right of accepting a stipend.[10]

THE CELEBRET

CAN. 804

§ 1. Sacerdos extraneus ecclesiae in qua celebrare postulat, exhibens authenticas et adhuc validas litteras commendatitias sui Ordinarii, si sit saecularis, vel sui Superioris, si religosus, vel Sacrae Congregationis pro Ecclesia Orientali, si sit ritus orientalis, ad Missae celebrationem admittatur, nisi interim aliquid eum com-

8 Benedict XIV, "*Allatae sunt,*" July 26, 1755, § 38.

9 *De Sacrificio Missae,* l. III, c. 16, n. 7.

10 *Ibid.,* n. 10.

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misisse constet, cur a Missae celebratione repelli debeat.

§ 2. Si iis litteris careat, sed rectori ecclesiae de eius probitate apprime constet, poterit admitti; si vero rectori sit ignotus, admitti adhuc potest semel vel bis, dummodo, ecclesiastica veste indutus, nihil ex celebratione ab ecclesia in qua litat, quovis titulo, percipiat, et nomen, officium suamque dioecesim in peculiari libro signet.

§ 3. Peculiares hac de re normae, salvis huius canonis praescriptis, ab Ordinario loci datae, servandae sunt ab omnibus, etiam religiosis exemptis, nisi agatur de admittendis ad celebrandum religiosis in ecclesia suae religionis.

The Council of Chalcedon, A. D. 451, forbade clergymen to minister in a strange district without letters of recommendation.[11] The Decretals demanded that the testimonies of five bishops should be asked of a clergyman who came from across the sea or was otherwise entirely unknown.[12] This is now reduced to what we call *celebret* or *pastor bonus* or *litterae commendatitiae,* which are given for the secular clergy by the Ordinary and for the religious by the religious superior. The *celebret* merely attests the bearer's rank in the hierarchy and his freedom from ecclesiastical censure. It must be *per se* demanded from any priest who wishes to celebrate in a church not his own (*extraneus ecclesiae*). If he belongs to the *Oriental rite,* he must show letters from the S. Congregation for the Oriental Church. This rule, we suppose, applies only when a priest of the Oriental rite wishes to say Mass in a church of a different rite and diocese, otherwise it would be difficult to understand

11 Cf. c. 7, Dist. 71.

12 C. 7, 1, X, I, 22.

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why priests of the Oriental Rite are treated more rigorously than others. The S. C. Propaganda only demands letters given by the respective bishop, or vicar, or prefect Apostolic.[13] Priests who come from an Eastern province to our country need letters from the S. Congregation for the Oriental Church. This was already laid down in the canons on incardination.[14]

Concerning *Ruthenian Priests* in the U. S. and Canada it seems that the *celebret* given them by the respective Ordinary or Ruthenian bishop suffices; at least this may be concluded from art. II of the decree of the S. C. Propaganda, Aug. 17, 1914, which says that the Ruthenian bishop may not grant permission to say Mass or perform sacred functions to a strange priest who was neither called by him or sent by the S. Congregation. A priest who was properly admitted by the Ruthenian Bishop, therefore, is under his jurisdiction in everything and needs a *celebret* only from him. This interpretation is not opposed to § I of can. 304, because the Ruthenian bishop is under the immediate jurisdiction of the Holy See.[15]

Secular priests receive their *celebret* either from the diocesan chancery or the vicar-general.[16].

Religious, of whatever denomination, with simple and solemn profession, must obtain a *celebret* from their own superiors.[17]

13 April 20, 1873 (*Coll.*, n. 1400).

14 The documents concerning the Ruthenian Rite in the *Amer. Ecc. Rev.*: — Pius X, "*Ea semper*," June 14, 1907 (Vol. 37, 513 ff.); Letter of the Apost. Delegate, Aug. 25, 1913 (Vol. 49, 473 f.); Decree of S. C. P. F., Aug. 18, 1913, for Canada (Vol. 49, 593 ff.); Decree of S. C. P. F., Aug. 17, 1914, for the U. S. (Vol. 51, 586 ff.)

15 S. C. P. F., Aug. 17, 1914, art. 2 (*Amer. Eccl. Rev.*, 51, 587).

16 Cf. Benedict XIV, *Inst.*, 34, § 1, where he says that even rural deans may issue such a document. This may be accepted if the Ordinary grants him such power, otherwise the text excludes deans.

17 Cf. Benedict XIV, "*Apostolicum Ministerium*," May 30, 1753, § 6: "*Quam Grave*," Aug. 2, 1757.

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Members of societies without vows, or only the one or other vow, who are not religious in the proper sense, must have a *celebret* from the local Ordinary.

A *celebret* is *authentic* if it is signed and sealed by the Ordinary or religious superior. All such are presumed to be genuine until the contrary is proved.[18] How long they remain valid, *adhuc validae litterae,* is not stated in our text. However, *celebrets* are generally issued for one year, but the Ordinary or superior may lengthen or shorten the term. A canonical impediment may be contracted within three or six months.[19] Hence the clause: "*unless it has become known in the meantime* that the bearer *has committed an act which would render it necessary to debar him from saying Mass.*" Where this is the case, a priest should be refused permission to say Mass in spite of a *celebret.* Thus if the rector of the church where the priest desires to say Mass knows of a suspension or ecclesiastical penalty or irregularity incurred by that priest, he would have to refuse him permission. But he could not make use of knowledge acquired in confession.[20] This is expressed in the words, *commisisse constet,* which imply proof to be brought.

§ 2. If a priest *has no celebret,* either because he has forgotten or lost it, but is known to the rector of the Church where he wishes to say Mass as a priest in good standing, he may be permitted to say Mass. Even if a priest is unknown to the rector, he may be permitted to say Mass once or twice, provided he is *dressed in the ecclesiastical garb,* accepts nothing for saying Mass from the church in which he celebrates, and duly enters his

§ 12, which mentions only regulars, but *a fortiori* includes all other religious.

18 Can. 1813 f.

19 Can. 994, § 1.

20 S. O., Nov. 18, 1682, *prop. proscripta* (Denzinger, n. 1087).

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name, office and diocese in the book kept for that purpose.

This is a reminder that the ecclesiastical dress should be worn when demanding permission to celebrate Mass. The ecclesiastical dress here primarily means the cassock, but it may also signify the ecclesiastical travelling suit, inclusive of the Roman collar. A cassock may be had in the sacristy of almost any church.

§ 3. Any *special diocesan statutes* concerning this matter, which are in keeping with the present law, *must be observed by all,* including exempt religious, unless they wish to say Mass in a church of their own institute. This section extends to all religious, properly so-called, the privilege of saying Mass in a church of their own order or congregation without being bound by diocesan rules, which was formerly a prerogative of exempt religious only.[21] But if a religious wishes to say Mass in a church in charge of secular priests, or of religious of a different order or congregation, he is bound not only by the general law of the Church, but also by the particular laws of the diocese.[22] It is evident that the religious superior of the church where the religious wishes to say Mass is entitled to demand the *celebret.*[23]

THE OBLIGATION OF SAYING MASS

CAN. 805

Sacerdotes omnes obligatione tenentur Sacrum litandi pluries per annum; curet autem Episcopus vel Superior religiosus ut iidem saltem singulis diebus dominicis aliisque festis de praecepto divinis operentur.

21 S. C. C., July 27, 1626; S. C. P. F., July 28, 1626 (*Coll.*, n. 25).
22 S. O., Aug. 11, 1649 (*Coll.*, n. 118); Benedict XIV, "*Quam grave,*" Aug. 2, 1757, § 12.
23 S. O., *l. c.*

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All priests are obliged to say Mass several times a year. But the bishop as well as the religious superior ought to see to it that the priests subject to their jurisdiction celebrate the Sacred Mysteries at least on all Sundays and holy-days of obligation.

Innocent III complains woefully of some prelates who would not celebrate Holy Mass even four times a year.[24] His complaint led canonists and theologians to speculate how many Masses a priest would have to say every year to avoid grievous sin; for no canonical penalty is mentioned in Pope Innocent's canon. Benedict XIV did not settle the question, though as private author he held that it would be more in conformity with the decrees of Trent if priests said Mass on Sundays and holy-days of obligation, and whenever the Holy Viaticum had to be administered to a sick person.[25] The same Pontiff held that a superior may command his subjects to say Mass,[26] which no doubt is true if there be any outward reason for giving such a command, for instance, Mass for the community, or in time of calamity. But it would certainly exceed the power of a bishop or religious superior to command his subjects to say Mass every day. No canonist or theologian has ever defended such a universal and constant obligation.

Note that our text speaks only of *priests as such*. The case is different if the obligation of saying Mass arises from reasons of office or benefice. But not even pastors or beneficiaries can be obliged to say Mass every day.[27]

24 C. 9, X, III, 41. If we press the words of St. Thomas, *Sent.*, IV, dist. 13, qu. 1, art. 2; *Summa*, III, q. 82, art. 10, three times: Christmas, Easter and Pentecost, would be sufficient.

25 *De Sacrificio Missae*, l. III, c. 1.

26 *De Sacrificio Missae*, l. III, c. 1, n. 8. The Carthusians said Mass only on Sundays. *Ib.*, l. III, c. 2, n. 5.

27 S. C. C., Sept. 18, 1683; Benedict XIV, *De Sacrificio Missae*, l. III, c. 3, n. 7 f.

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BINATING

CAN. 806

§ 1. Excepto die Nativitatis Domini et die Commemorationis omnium fidelium defunctorum, quibus facultas est ter offerendi Eucharisticum Sacrificium, non licet sacerdoti plures in die celebrare Missas, nisi ex apostolico indulto aut potestate facta a loci Ordinario.

§ 2. Hanc tamen facultatem impertiri nequit Ordinarius, nisi cum, prudenti ipsius iudicio, propter penuriam sacerdotum die festo de praecepto notabilis fidelium pars Missae adstare non possit; non est autem in eius potestate plures quam duas Missas eidem sacerdoti permittere.

With the exception of Christmas and all Souls' Day, on which every priest may, if he wishes, say three Masses, *no priest is allowed to say more than one Mass a day* unless a papal indult or faculty from the Ordinary permits him to do so.

The Ordinary cannot grant this faculty unless he prudently judges that there is such a lack of priests as to leave a considerable number of the faithful without Mass on a holyday of obligation.

No Ordinary can give permission to a priest to say more than two Masses on one day.

Alexander II (1061–73) gives the reasons for this prohibition. "It is no small thing," he says, "to say Mass, and happy is he who says one Mass worthily." To say several Masses a day for the sake of gain or to be flattered by the worldly, he adds, is to merit damnation.[28]

28 C. 53, Dist. 1, *de cons.*: "*Qui vero pro pecuniis aut adulationibus saecularium una die praesumunt plures Missas non aestimo evadere damnationem.*" Cfr. c. 12, X, III, 41.

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The custom of saying three Masses on Christmas is very old, as St. Gregory's homily for that feastday proves, and was acknowledged as lawful by the Decretals, which also permit the celebration of more than one Mass in case of necessity.[29]

The custom of saying three Masses on All Souls' Day was observed in Valencia and Catalonia since the pontificate of Julius III (1550–55), and Benedict XIV extended the privilege to the entire Spanish Kingdom and to Portugal.[30] His successor in the see of Bologna and St. Peter's Chair, our Holy Father Benedict XV, has now granted the same privilege to all priests of the universal Church [31] and embodied it in the Code. Priests who say three Masses on All Souls' Day may receive a stipend for one of them, but one of the two others must be applied *pro defunctis* and the other according to the intention of the Sovereign Pontiff. A priest who sings or says the conventual Mass may afterwards say two other Masses.[32]

There is no obligation of saying three Masses on *Christmas Day*. A priest may say one or two according to his good pleasure.[33] But if he says only one or two Masses he should say the Mass which corresponds to the hour of the day, *viz.*, the midnight Mass, about midnight, the second, about daybreak, and the last, after dawn.[34] Those who have obtained a papal indult to say the Mass *de Beata* on account of poor eyesight are not allowed to

29 C. 3, X, III, 41. The custom is ascribed to Pope Telesphorus (125–136?).

30 Benedict XIV, *De Sacr. Missae*, l. III. c. 4, nn. 9 ff.; "*Quod expensis*," Aug. 26, 1748. The Greek liturgies do not mention three Masses; Benedict XIV, "*In superiori*," Dec. 29, 1755, § 2.

31 Benedict XV, "*Incruentum*," Aug. 10, 1915; S. R. I. C., Aug. 11, 1915 (*A. Ap. S.*, VII, 401, 422).

32 S. Rit. C., Aug. 11, 1888 (*Dec. Auth.*, n. 3692).

33 S. Rit. C., June 19, 1875 (*Dec. Auth.*, n. 3355).

34 S. Rit. C., June 19, 1875, Feb. 13, 1892, ad XXI. (*Dec. Auth.*, nn. 3354, 3767).

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say three Masses on Christmas Day, but only one.[35] The prayers prescribed by Leo XIII and Pius X to be recited after Low Masses need not be said after each of these three Masses, if the priest does not leave the altar.[36]

These, then, are the two occasions on which each priest is allowed to say several Masses. The general rule is that only one Mass be said each day, unless a papal indult has been obtained or the Ordinary has given permission to binate. A *papal indult* is required if the Ordinary is not entitled to grant the faculty of binating. Thus a papal indult would be necessary for cloistered nuns who wish to have two Masses[37] and also for having two Masses said in a private Oratory, of which more anon.[38]

The *Ordinary* may grant — and this is now a power given by law, and not a mere faculty — permission to binate, if the conditions set forth in can. 806, § 2, are verified. These are (a) lack of priests, (b) convenience of the people, (c) a holyday of obligation.

(1) The *penuria sacerdotum,* or lack of priests, must be such that there is no other priest who could conveniently say the second Mass. There may perhaps be traveling priests,[39] but unknown or of uncertain standing or physical condition, in which case they must be looked upon as not present. On the other hand, if a priest is present who is still fasting and able to say Mass, he may be compelled by the Ordinary to say Mass in order to prevent bination. But in that case the pastor must furnish a stipend, and if he cannot do so, the people are

35 S. Rit. C., April 11, 1840; April 28, 1866; (*Dec. Auth.*, 2802, 3146).

36 S. Rit. C., April 30, 1889 (*Dec. Auth.*, n. 3705).

37 Cfr. Prümmer, O. P., *Manuale Theol. Moralis*, 1915, Vol. III, p. 200.

38 S. C. P. F., May 24, 1870, n. 6 (*Coll.*, n. 1352).

39 Such was the case in a parish of Barcelona, a summer resort, where *sacerdotes ambulantes* were to be found, but sometimes they would come late, and sometimes not at all. Wherefore the S. C. C. (July 23, 1892) reasonably did not count them. (*A. S. S.*, 25, 182 ff.)

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obliged to supply the deficiency, and if they are too poor, the Ordinary must procure the means.[40] Where there are sufficient priests bination is not permitted, because the case of necessity[41] is not verified, and other priests, as Benedict XIV says,[42] are bound to the people by virtue of sacred orders.

(2) The *convenience* or *necessity* of the people. Convenience it is to be understood relatively to the place or number of the faithful who would be deprived of Mass. For bination is permitted for the benefit of those who assist at, not of those who say, Mass. The favor is conditioned by *distance* or insufficiency of room, or the convenience of the people. Thus if a priest has to attend two parishes or missions, which are about half a league or two miles apart from each other, this circumstance suffices to permit bination.[43] The *size of the church* is also to be considered. If the parish is large and the church building comparatively small, there is sufficient reason for binating.[44] The *convenience of the people,* which falls under the heading of necessity established by law, but is included in the power of the Ordinary, chiefly depends on the number of the faithful. Our text says, "*notabilis fidelium pars.*" What is "a considerable part of a congregation"? Benedict XIV once explained this term as meaning *plures,*[45] or several. But no general rule can be deduced from the various decisions of the Roman Congregations. Sometimes fifteen or twenty persons were considered insufficient to permit bination, whereas on other occasions it was left to the

40 Benedict XIV, "*Declarasti,*" Mar. 16, 1746; S. C. P. F., May 24, 1870 n. 9 (*Coll.*, n. 1352).

41 C. 3, X, III, 41.

42 "*Declarasti*"; S. C. C., May 10, 1897 (*Anal. Eccl.*, t. V, 452).

43 S. C. P. F., May 24, 1870, n. 14 f. (*Coll.*, n. 1352).

44 *Ib.*, n. 10; Benedict XIV, "*Declarasti.*"

45 "*Apostolicum ministerium,*" May 30, 1753, § 11.

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"charity and conscience of the Prefect Apostolic" to grant the faculty of binating when only ten or fifteen servants (*servi*, slaves) were present. Hence no precise number can be laid down. But it is undoubtedly the mind of the Church that, on the one hand, there must be a real necessity and, on the other, the Ordinary should not be too scrupulous about granting the faculty, but provide for the spiritual welfare of the faithful, so that all may be enabled to comply easily with the precept of hearing Mass.[46] It follows that in large congregations with a small number of priests each may say two Masses on Sundays and holydays of obligation, in order to accommodate the people, some of whom have to stay at home until the others return from church, and so forth.

(3) The faculty of binating, being granted for reasons of necessity and convenience, *cannot be made use of except on Sundays and holydays of obligation.* Therefore bination on suppressed feasts is not permitted.[47] Nor can the Ordinary grant the faculty for merely devotional purposes, for instance, on the First Friday. The Holy Office has declined to permit bination two or three times a year to satisfy the pious desires of neophytes to receive Holy Communion, considering all the circumstances of time and person in Corea, a missionary country.[48] Such a permission would not lie within the power of the Ordinary, but would need an Apostolic indult.

Permission is never given to say more than two Masses.

The text says that the Ordinary grants the faculty, which signifies that he should grant it to all pastors or curates who may need it. Suppose a pastor or assistant has not received this faculty, and of two priests who are

46 S. C. P. F., May 24, 1870, n. 18.

47 *Ibid.*, n. 5.

48 S. O., June 20, 1860, ad 2 (*Coll.*, n. 1194).

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wont to say one Mass each on holydays of obligation, one is taken ill suddenly, and there is no time left to consult the Ordinary: may the priest who is well say two Masses? Yes, he not only may but should say both Masses,[49] and afterwards notify the Ordinary. But what if the priest has *broken the fast?* May he then, in order to avoid scandal, say a second Mass? *Negative,* says the Holy Office.[50]

In order to prevent as much as possible the danger of violating the fast, the S. C. Prop. has issued an instruction bearing on bination. One section concerns bination in different churches, while the other touches bination in the same church.

(a) After having consumed *(sorbeat)* the sacred blood, the celebrant places the chalice upon the corporal and covers it with the pall. Thereupon he recites the prayer, "*Quod ore sumpsimus.*" Then he washes his fingers in a special bowl, meanwhile reciting the "*Corpus tuum.*" After that he removes the pall from the chalice, covers it with the purificator, paten, pall and velum, and continues the Mass. After the last gospel he stands in the middle of the altar and uncovers the chalice in order to see whether a drop of the sacred Blood has gathered in the chalice.[51] If this is the case, he consumes it, then pours as much water into the chalice as there was wine, rinses the chalice, and pours the water into a special vessel, cleanses the chalice, covers it, and leaves the altar. The "ablution" may be preserved for the next day or

49 S. C. C., Feb. 3, 1884 (*Coll. P. F.*, n. 1611). This decision was rendered in a case where bination took place in two parishes or congregations, but by analogy it may safely be applied to our case.

50 S. O., Dec. 2, 1874 (*Coll.*, n. 1425). Concerning the stipends, see can. 824.

51 The Instruction says: This must not be omitted, because the sacrifice morally continues, and as long as some species of wine is present, it must by divine precept be accepted.

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absorbed in cotton and burned or poured into the *sacrarium.*

(b) If he says the *second Mass in the same church,* the priest, after having carefully sipped the sacred Blood in the first Mass, shall leave the chalice covered with the pall upon the altar and recite the "*Quod ore.*" Then he shall wash his fingers in a special bowl, say the "*Corpus tuum,*" and cover the chalice with the velum, leaving it on the corporal. After Mass he shall carry the chalice into the sacristy, if there is one,[52] place it in a closed cupboard, and leave it there until the second Mass. At the Offertory of the second Mass he shall not remove the chalice from the corporal at the oblation of the bread, nor clean it with the purificator, nor wipe off the drops of wine inside the chalice, but take care, in pouring the wine into the chalice, that no drops adhere to the inside of the chalice.

MORAL DISPOSITION OF THE PRIEST

CAN. 807

Sacerdos sibi conscius peccati mortalis, quantumvis se contritum existimet, sine praemissa sacramentali confessione Missam celebrare ne audeat; quod si, deficiente copia confessarii et urgente necessitate, elicito tamen perfectae contritionis actu, celebraverit, quamprimum confiteatur.

What this canon prescribes concerning the state of grace required in the celebrant is the ancient doctrine of the Church,[53] and the teaching of moralists.[54] The Code

[52] If there is no sacristy, the chalice may be left on the altar. This is generally done, and we believe may be continued even if there is a sacristy, if the church is safe, and no irreverence to be feared.

[53] C. 7, X, III, 41; *Trid.*, sess. 13, c. 7, *de Euch.*

[54] Cfr. Lehmkuhl, *Theol. Moral.*,

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follows the same teaching when it further says if no *copia confessarii* is at hand and the celebration of Mass is urgent, the priest should make an act of perfect contrition and say Mass, then go to confession as soon as possible, *i. e.,* in about three days. The term *"quam-primum"* indicates not a mere counsel, but a precept,[55] provided, of course, there be a *copia confessarii.*

THE OBLIGATION OF FASTING BEFORE MASS

CAN. 808

Sacerdoti celebrare ne liceat, nisi ieiunio naturali a media nocte servato.

A priest is not allowed to celebrate Mass unless he has observed the natural fast from midnight on.

The *natural fast* before Mass was prescribed by the ancient Church,[56] and the African synods (not without reason, as some of St. Augustine's sermons testify), were very strict in enforcing this ecclesiastical law. The prohibition comprises the taking of anything that is swallowed in the form of nutritive and digestive food or drink, but not what enters the stomach by way of saliva or breathing.[57] Thus if a drop of water is mingled with the sputum when one cleanses his mouth or teeth, the law is not violated. Smoking, nay even chewing tobacco, if nothing is swallowed *per modum cibi voluntarii,* does not prevent one from saying Mass.[58] Pumping out the

II, n. 153; Marc, *Institutiones Morales Alphonsianae,* ed. 9, n. 1547 ff.; Prümmer, *Manuale Theol. Moralis,* 1915, III, n. 194.

55 Propp. 38, 39 dam. ab Alex. VII, March 18, 1666 (Denzinger, n. 1009 f.).

56 C. 49, Dist. 1, *de consec.;* c. 16, C. 7, q. 1.

57 Cfr. Lehmkuhl, *l. c.,* II, n. 160; Prümmer, *l. c.,* III, n. 199.

58 Benedict XIV, *De Sacrificio Missae,* Appendix IX, where the development of that custom is traced from being laid under excommunication until it was declared not unbecoming.

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stomach, although some water may be absorbed at first but is again given up, would not interfere with saying Mass.[59]

As to the *time* note that *midnight* is the starting point. Can. 33, as explained in Vol. I, pp. 177 f., permits us to follow any time, local, mean, or legal, and even where the public clock or time assumed by local custom is generally followed, there is no obligation to abide by it.[60] When several clocks or watches show a difference, one may securely follow the rules of probabilism.[61]

APPLICATION OF THE MASS

CAN. 809

Integrum est Missam applicare pro quibusvis tum vivis, tum etiam defunctis purgatorio igne admissa expiantibus, salvo praescripto can. 2262, § 2, n. 2.

A priest may apply the Mass for the living as well as the dead who expiate their faults in purgatory, with the exception of those mentioned in can. 2262, § 2, n. 2. What the priest is here said to apply is the so-called *fructus specialis or ministerialis, i. e.,* the special fruit or benefit of the Mass offered in the name of Christ and of the Church for a determined end or person. Besides the general blessing which accrues to the Church and the world at large, and besides the personal benefit which the priest derives from the Holy Sacrifice of the Mass, there is a special fruit which he may apply *ad libitum.* It is like a special prayer, which is more efficacious than a general prayer, and receives a particular value from

59 Prümmer, *l. c.*, n. 199.

60 S. Poenit., June 18, 1873 (*A. S. S.*, V, 399); Nov. 29, 1882 (*Coll. P. F.*, n. 1580).

61 Lehmkuhl, II, n. 159. There is no "havoc" to be feared, as a somewhat confused critic observed concerning our interpretation of can. 33, if we follow the sound rules of interpretation and probabilism.

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the efficacy of the unbloody Sacrifice itself.[62] Now it has been the constant and perpetual teaching of the Church that the unbloody Sacrifice of the altar benefits not only men living in this world, but also alleviates the sufferings of the souls in purgatory.[63] This it does not only by the general intention of the Church, but still more efficaciously by the application of the *special fruit* of the Mass by the sacrificing priest.[64]

The Code says that this fruit, whether expiatory or impetratory, may be applied (1) to the *living,* with the restriction mentioned in can. 2262, where the consequences of excommunication are set forth, among which is privation of spiritual favors and graces. Said canon says that the priest may, if no scandal is given, say Mass privately for an excommunicated person; but if the latter is *vitandus,* only for his conversion.

The question naturally arises whether Mass may be applied to *non-Catholics,* either Protestants or schismatics. This question reduces itself to another, *viz.:* whether Protestants and schismatics are *vitandi* or not. It cannot be doubted that, if they are formal heretics who pertinaciously deny an article of faith, they are excommunicated, but [65] they would be *vitandi* only if nominally excommunicated by the Apostolic See, publicly denounced as excommunicated, and expressly designated as *vitandi.*[66] This is not the case with ordinary Protestants or schismatics, though the latter are dealt with more severely, to

62 Lehmkuhl, *l. c.,* II, n. 173.

63 *Trid.,* sess. 22, c. 2, *De Sacrif. Missae,* can. 3; sess. 25, *de Purgat.; Decretum Unionis Graec.,* July 6, 1439 (Denzinger, n. 588); Benedict XV, "*Incruentum,*" Aug. 10, 1915 (*A. Ap. S.,* VII, 401):

64 Pius VI, "*Auctorem fidei,*" Aug. 28, 1794, prop. 30 (Denzinger n. 1393); cfr. Pohle-Preuss *The Sacraments,* 1916, II, p. 392.

65 S. O., July 25, 1865 (*Coll.,* n. 1274).

66 Can. 2258; the only exception to this general rule is the case mentioned in can. 2343, when one maliciously lays hands on the person of the Roman Pontiff.

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judge from a decision of the Holy Office,[67] which says, in reply to the question whether a priest may say Mass for, and receive a stipend from, a Greek schismatic, that this is not allowed unless it is manifest that the stipend is offered for his conversion. This decision is reversed by the Code, which clearly says that, unless he is a *vitandus,* Mass may be offered for him. Therefore, a priest may say Mass privately for any living non-Catholic as long as he does not give scandal, *e. g.,* by announcing the fact publicly. But he is not allowed to sing High Mass for any non-Catholic, except for actual rulers, in which case the welfare of the country is the main purpose of the solemnity.[68]

The next question is whether Mass may be offered for *infidels, i. e.,* unbaptized persons, such as Jews, Turks, etc. The answer is yes, because, on the one hand, they are not excommunicated, never having belonged to the Church, and, on the other, there is no positive prohibition rendering such application unlawful.[69] But the same decision of the Holy Office from which this statement is taken also admonishes priests to scrutinize the purpose for which infidels, especially Mohammedans, offer a Mass stipend. If their intention is evil, or superstitious, or erroneous, the priest should not accept the stipend unless he can correct their error or at least tell them that he will offer the Mass according to the will of God. There is no superstition if they ask for a Mass in order to be freed from sickness, or prison, or capital punishment.[70] Nor was it considered to be superstitious if Christian Chinese made the offering called Phan-huong-hoa, which is a

67 S. O., April 19, 1837 (*Coll.*, n. 858).

68 Cfr. Gasparri, *De Ssma Euch.*, 1897, n. 483; Aichner, *Compendium Iuris Eccl.*, § 51, 2.

69 S. O., July 12, 1865; S. C. P. F., March 11, 1848 (*Coll.*, nn. 1274, 1028); Gasparri, *l. c.*, n. 486.

70 S. C. P. F., March 11, 1848 (*Coll.*, n. 1028).

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burnt offering for the dead made by a last will, because thereby the Christians intended to have Masses said for their deceased relatives.[71] All superstitions or erroneous intentions must be discountenanced when non-Catholics offer a Mass stipend, because to let them go unchallenged would be tantamount to fostering or spreading superstition.[72]

(2) Concerning the *dead,* the general principle applies that with those with whom we have associated when living we may also associate when dead.[73] Hence for those who have died in union with the Church any kind of Mass, low or high, private or public, may be applied. On the other hand all those to whom ecclesiastical burial is denied are also deprived of the funeral Mass *(Missa exequialis.).*[74] Therefore no funeral Mass may be said for such as die unbaptized, unless they were catechumens who without their fault died before they received Baptism.[75] Heretics, too, and schismatics, as well as condemned Masons, are to be denied the funeral Mass. Neither are dead rulers or persons of royal blood who were not Catholics to have a funeral Mass.[76]. However the term funeral Mass must be interpreted strictly. It does not include a private Mass not connected with the funeral services. What if a relative offers a Mass stipend for the repose of a deceased non-Catholic? May the priest accept it? A decision of the Holy Office[77] would seem to forbid such acceptance, no

71 S. C. P. F., Aug. 6, 1840 (*Coll.*, n. 910).

72 S. O., July 12, 1865 (*Coll.*, n. 1274). It would be superstitious if one believed that the Mass is an infallible remedy for all kinds of troubles or a sure means of obtaining any grace or favor.

73 C. 1, C. 24, q. 2; c. 12, X, III, 28.

74 Can. 1239–1241.

75 For living and dead catechumens or converts *in fieri,* therefore, Mass may be said; cfr. c. 2, X, III, 43; Gasparri, *l. c.*, n. 487.

76 Gregory XVI, Feb. 16, 1842.

77 S. O., April 7, 1875 (*Coll.*, n. 1440).

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matter whether the application is publicly known or known only to the priest and the person who offers the stipend. Yet in spite of this decision some authors say the priest may accept the offering privately on condition that he expressly declares that he will say the Mass as far as he is allowed to do so and according to the will of God.[78] This seems a plausible theory if the non-Catholic in question was not a bigoted and prominent defender of his belief, and especially if he was kindly disposed towards the Catholic religion, or died with signs of repentance. For the above-named decision lays stress on "manifest heresy." Besides our Code (can. 1240) insists upon *notorious* heresy or schism, which rarely occurs in our country. As to dead *infidels* or non-baptized persons no decision is known to us that would either forbid or allow the application of a Mass for them. However, a funeral Mass is forbidden. Whether a private Mass is allowed must, we believe, be decided according to the rule laid down with regard to baptized non-Catholics.[79]

PREPARATION AND THANKSGIVING

CAN. 810

Sacerdos ne omittat ad Eucharistici Sacrificii oblationem sese piis precibus disponere, eoque expleto, gratias Deo pro tanto beneficio agere.

The priest should not omit to prepare himself for the

[78] Lehmkuhl, *l. c.*, n. 176; Gasparri, *l. c.*; n. 4091, says that the priest would be allowed to accept the offering, but would have to declare that the Mass would be applied for all the poor souls with the intention of succoring the particular person if it pleased God. Lehmkuhl, *l. c.*, excludes a "Black" Mass with a special oration *pro hoc defuncto acatholico*. A "Black" Mass *pro defunctis* could be said if the rubrics permitted.

[79] Thus Gasparri, *l. c.*, n. 489, but the decision which he quotes from S. C. P. F., April 18, 1757 (*Coll.*, n. 405; ad 5) only speaks of *schismatics*.

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celebration of the Eucharistic Sacrifice by pious prayers and give thanks to God for this great grace after celebration.

It is understood that the celebration of the divine office, especially in choir, is a fitting preparation for Mass, because the liturgical office tends towards the Sacrifice as its center.

VESTMENTS FOR MASS

CAN. 811

§ 1. Sacerdos, Missam celebraturus, deferat vestem convenientem quae ad talos pertingat et sacra ornamenta a rubricis sui ritus praescripta.

§ 2. Abstineat autem a pileolo et annulo, nisi sit S. R. E. Cardinalis, Episcopus vel Abbas benedictus, aut nisi apostolicum indultum eorundem usum in Missa celebranda eidem permittat.

The priest, when saying Mass, shall wear the cassock *(soutane)* and the sacred vestments prescribed by his rite; but no ring or skullcap, unless he is a cardinal, a bishop, or a blessed abbot, or unless an Apostolic indult permits him to wear these insignia at Mass.

The rule laid down in § 1 is sufficiently known from the general and special rubrics. No departure from it is allowed without weighty reasons. Such a reason would be persecution. But even in times of persecution the Holy See would not be likely to grant a general permission to all the priests of the province or country involved, but only to some who might be expected to make a wise use of the privilege.[80] The term *sui ritus* implies that

[80] S. C. P. F., Nov. 30, 1828 for China (*Coll.*, n. 807). Bishops and Vicars Apostolic should wear the rochette, ring, and pectoral cross, unless there is a grave and urgent reason which excuses them.— S. C.

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Latin priests must observe the rules of the Latin rite as to the various vestments and their color, and that Oriental priests must follow the practice of their rite.

§ 2 enumerates the *skullcap* and the *ring,* which by law may be used only by Cardinals, bishops and abbots. No others are allowed to wear these insignia, though there seems to have been a special temptation to wear the ring. Rome has never allowed Cathedral and Collegiate Canons to wear a ring at sacred functions, not even when an immemorable or inveterate custom could be claimed.[81] Neither is a Commendatory Prior or Abbot, or the Provost of a Collegiate Chapter entitled to wear a ring.[82] Nor does the title of doctor give a claim to it, although it confers the right of wearing a ring outside the sacred functions.[83] The height of ambition was reached by some pastors, especially archpriests *(arcipreti),* of a Sicilian diocese, who claimed the right to pontificate or chant High Mass with ring and purple mantelletta and surrounded by four ministers in cope.[84] A papal indult was granted to the *Protonotaries Apostolic de numero participantium* to wear a ring and black skullcap at all sacred functions, and to *supernumerary Protonotaries Apostolic* to wear a black skullcap under the mitre at Pontifical Vespers, and the ring at all functions.[85] The Vicar-General and honorary Prothonotaries Apostolic are not allowed to wear either the ring or the skullcap at any function.[86] We may add that no

P. F., March 22, 1669 (*Coll.*, n. 178 ad 1); on vestments see Benedict XIV, *De Sacrif. Missae,* l. I, c. 7.

81 S. Rit. C., Nov. 20, 1628; April 11, 1840; Aug. 20, 1870; March 9, 1844 (*Dec. Auth.*, nn. 483, 2805, 3218, 3821).

82 S. Rit. C., April 12, 1704, ad 2; Aug. 4, 1657 (*Dec. Auth.*, nn. 2130, 1032).

83 S. Rit. C., May 23, 1846; June 30, 1883 (*Dec. Auth.*, nn. 2907, 3580).

84 S. Rit. C., July 28, 1876; Jan. 30, 1878 (*Dec. Auth.*, nn. 3408, 3442).

85 Pius X, "*Inter multiplices,*" Feb. 21, 1905, nn. 4, 9 (*Am. Eccl. Rev.*, 32, 614).

86 *Ibid.*, nn. 27, 28, 31, 47–49 (*Am. Eccl. Rev.*, 32, 619 f.).

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titular abbot is entitled to wear either ring or skullcap unless this privilege was especially granted to him, and that there is no obligation to wear a skullcap at sacred functions either for prelates [87] or for the others who are entitled to these insignia by privilege, unless perhaps for the reason of using the privilege. There is some significance in the ring, but very little in the skullcap.

NO ASSISTANT PRIEST ALLOWED AT MASS

CAN. 812

Nulli sacerdoti celebranti, praeter Episcopos aliosque praelatos usu pontificalium fruentes, licet, sola honoris aut sollemnitatis causa, habere presbyterum assistentem.

With the exception of bishops and prelates entitled to the use of pontificals, no priest is allowed to have an assistant priest in celebrating Mass merely for the sake of honor or solemnity.

The right of pontificating belongs by law to *Cardinals* outside of Rome. If they pontificate in cathedral churches, which they may do upon due notice to the Ordinary of the diocese, they may employ a *presbyter assistens*.[88] *Bishops* and *archbishops* are expressly mentioned as entitled to this privilege. Other prelates who enjoy it are *abbates regiminis,* after they have been blessed by the bishop, and abbots or prelates *nullius*.[89] The supernumerary Protonotaries Apostolic may also have a *presbyter assistens* if no bishop or prelate of higher rank than a bishop is present. *Protonotaries Apostolic ad instar* may employ an assistant priest only when they pontificate outside their church or in other

[87] All the texts only say *poterunt*, they may.

[88] Can. 239, § 1, 15.

[89] Can. 325; can. 625.

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churches when no bishop or higher prelate is present.[90] *Canons* of Cathedral or Collegiate churches, although dignitaries, and provosts *are not* allowed to have a *presbyter assistens*.[91] Much less can the custom, even though immemorable, be tolerated that simple priests celebrate Mass with an assistant priest.[92] But what about the custom of employing a *presbyter assistens* at the *first Holy Mass* of a newly ordained priest? This question was placed before the Sacred Congregation, who answered: *posse tolerari*.[93] In itself this answer does not sound favorable, since it implies a mere negative toleration; yet we believe the Code does not mean to reprobate the custom, because a *presbyter assistens* is, on such an occasion, not employed for mere honor or pomp, but for the purpose of aiding the neopresbyter.

MASS WITHOUT A SERVER

CAN. 813

§ 1. Sacerdos Missam ne celebret sine ministro qui eidem inserviat et respondeat.

§ 2. Minister Missae inserviens ne sit mulier, nisi, deficiente viro, iusta de causa, eaque lege ut mulier ex longinquo respondeat nec ullo pacto ad altare accedat.

A priest shall not say Mass without a minister who serves and answers him. *Women* may not serve Mass unless no man is present and there is a just cause, and then they must answer from a distance and not approach the altar.

90 Pius X, "*Inter multiplices*," nn. 29, 47 (*Am. Eccl. Rev.*, 32, 619, 623).

91 S. Rit. C., Aug. 7, 1628; April, 1666; Sept. 10, 1701; Sept. 19, 1883 (*Dec. Auth.*, nn. 475, 1337, 2078, 3588).

92 S. Rit. C., July 28, 1876; Jan. 30, 1878 (*Dec. Auth.*, nn. 3408, 3442).

93 S. Rit. C., Dec. 1, 1882 (*Dec. Auth.*, n. 3564).

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The obligation to have a server at Mass is *per se* grievous, as it is prescribed by the rubrics.[94] However, by reason of the faculties formerly granted to our Ordinaries and communicated by them to all their priests, we have become accustomed to say Mass without a server for reasons which really would not stand the canonical and moral test. Does custom even now excuse us from grievous transgression in this matter? Where normal conditions exist in a regularly established parish it would be difficult to excuse the old custom. But where missionary conditions still prevail we believe priests need not scruple to say Mass without a server, especially when there are some frequent communicants and the boys are in school or on vacation. For there can hardly be a doubt that the spiritual benefit is proportionately greater than the observance of a law which, if too strictly enforced, would diminish religious fervor. This is our view. For the rest, all authors[95] agree that Mass may be said without a server if the Viaticum has to be consecrated, or on holydays of obligation for the people as well as the priest, or if the server should leave after Mass is considerably advanced.[96] Attention may be called to the fact that in our country people are neither scandalized nor surprised to see a priest say Mass without a server.

As to *women,* Benedict XIV ruled that they shall not serve at the altar, but the sacred Congregation has since permitted girls in institutions or Sisters to answer the

94 C. 6, X, I,17; *Conc. Basil.*, sess. 21, c. 8; *Missale Rom., Ritus Servandus in Celebratione Missae;* Gasparri, *l. c.*, n. 645 ff. The server at low Mass should not open the missal, or mark the several parts of the prayers, as the S. Cong. has forbidden this. The prohibition also applies to prelates inferior to bishops when they say Mass privately; Gasparri, *l. c.*, n. 648.

95 Cfr. Lehmkuhl, II, n. 244.

96 "*Etsi pastoralis,*" May 26, 1742, § VI, n. XXI; "*Allatae sunt,*" July 26, 1755, § 29 (referring to a Greek custom).

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priest from behind a railing *in case of necessity*.[97] It seems to us that it would be preferable, for reasons of mere devotion, to employ a woman server, than to say Mass without any server at all.[98] But the faculty granted in virtue of Form I, Art. 23, to say Mass without a minister can no longer be made use of.[99]

ARTICLE II

RITES AND CEREMONIES OF THE MASS

The Species

CAN. 814

Sacrosanctum Missae sacrificium offerri debet ex pane et vino, cui modicissima aqua miscenda est.

CAN. 815

§ 1. Panis debet esse mere triticeus et recenter confectus ita ut nullum sit periculum corruptionis.

§ 2. Vinum debet esse naturale de genimine vitis et non corruptum.

The Holy Sacrifice of the Mass must be offered in bread and wine, and to the latter must be mixed a few drops of water.

The *bread* must be of pure wheat and freshly baked, so that no corruption need be feared.

The *wine* must be natural wine made of the juice of the grape and uncorrupted.

Can. 814 embodies an article of faith.[1] The Armen-

97 S. Rit. C., Aug. 27, 1836; March 18, 1899 (*Dec. Auth.*, nn. 2745, 4015).

98 Lehmkuhl, *l. c.*

99 S. C. Consist., April 25, 1918 (see Vol. II, p. 587); Putzer, *Comment. in Facul. Ap.*, ed. 4, p. 277; *Am. Eccl. Rev.*, 55, 314.

1 *Trid.*, sess. 22, can. 9, *de Sacrif. Missae.*

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ians, who were more or less inclined to Monophysitism, stubbornly refused to mix a little water with their wine. The Church, on the other hand, was just as tenacious in upholding the Apostolic or divine tradition and refused to deviate from it, though she freely acknowledges that the water does not belong to the essence of the sacrifice *(de necessitate sacramenti)*.[2] Therefore converted Armenian priests must adopt the Catholic practice,[3] which is based on John 19, 34 and Apoc. 17, 1, 15, as the Council of Trent says.[4] Our text, following the rubrics of the Missal, says *modicissima aqua,* a very small quantity. This means about three to ten drops. If the water would exceed in quantity one-third of the wine, consecration would be doubtful.[5]

§ 1 of can. 815 requires *pure wheaten bread* for valid consecration. This excludes every other kind of grain, such as barley, rye, oats, maize (corn), rice or potato flour, as also an admixture of one or more of the aforesaid substances. The wheat used may be hard or soft, red or white, etc., just so it is really wheat. If spelt is considered a hard-grained variety of wheat, it is valid matter; but if it is taken as an intermediate product between wheat and barley it is not valid. This depends much on local nomenclature.

The wheat must be *recently* baked into bread, as bread is usually made,[6] that is mixed with water, not milk, or wine, or oil, or spices. *Recenter confectus* signifies, not that the flour must be freshly ground, but that the bread must be recently baked, *i. e.,* it should not be older than

2 S. C. P. F., Jan. 30, 1635 (*Coll.*, n. 81).

3 S. O., Aug. 7, 1704 (*Coll.*, n. 267).

4 Sess. 22, c. 7, *de Sac. Missae.*

5 Prümmer, *l. c.*, III, n. 173.

6 S. O., June 23, 1852 (*Coll.*, n. 1076) permitted the custom of putting ground grain into water for several hours to solve it and then placing the mass on hot irons.

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fourteen days.[7] In summer as well as in moist weather or damp places the danger of corruption is especially great, and hence the frequent renewal of the bread under such conditions is not only advisable, but imperative. A late decree of the S. C. of Sac. says that altar bread should not be bought for two or three months ahead and that hosts more than two or three months old cannot be used for the Holy Sacrifice of the Mass and for Communion.[8]

As to the *form* of the bread, *round* hosts are used in the Latin Church, whereas the Oriental Church employs square hosts.[9] The *size* of the host for Holy Mass and exposition in the Ostensorium should be from two to three and of the particles for distribution about one inch. The altar breads should be neither too thick nor too thin.[10]

§ 2 describes the quality of the *wine*. It must be natural wine made from grapes. But no wild grapes may be used,[11] whilst wine obtained from pressed grapes, if it has the taste, smell and color of wine, is allowed.[12] The wine must be *fermented,* for this is a natural quality of wine, but it should not contain more than 12 per cent. of alcohol. If wine is very weak, so that it would suffer from transportation or be easily corrupted, an admixture with wine spirit (alcohol obtained from wine) is permissible. But the mixture is to be made in such a way that the alcoholic percentage of both the natural wine and the wine alcohol does not exceed 12 per cent., and when the wine is still young, after the first fermentation.[13]

7 S. Rit. C., Dec. 1826; Sept. 12, 1884 (*Dec. Auth.*, nn. 2650, 3610).

8 S. C. Sacr., Dec. 7, 1918 (*A. Ap. S.*, XI, 8).

9 Benedict XIV, *De Sac. Missae*, I, c. 6.

10 Prümmer, *l. c.*, III, n. 171.

11 S. C. P. F., 1819 (*Coll.*, n. 732); Gasparri, *l. c.*, nn. 811 ff.

12 S. O., July 22, 1706; May 7, 1879 (*Coll.*, nn. 270, 1518).

13 S. O., July 30, 1890 (Coll., n. 1735).

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Spanish wines, being very sweet and easily liable to corruption, especially in transit, may be mixed with wine alcohol to such an extent that the whole alcoholic percentage would amount to 17 or 18 per cent.[14] If the wine does not contain sugar enough to preserve it, it is permitted to evaporate or boil the grapes recently pressed (must) so as to obtain a wine of 14 or 16 per cent. of alcohol. But this process is allowed only if it does not prevent the natural fermentation of the wine.[15] Not easily tolerated, or tolerated only for very special reasons and with the express approval of the Sovereign Pontiff, is the following: Ten pounds of sugar cane are mixed with 100 pounds of wine grapes, and both fermented until about sixty-seven pounds are left.[16]

These and other decisions show how careful the Church has been in procuring genuine bread and wine for the Holy Sacrifice, and how strictly she enjoins on Ordinaries to use great care in selecting wheat and wine dealers to supply the needs of the clergy.[17] A new obligation seems to arise for hierarchy and clergy from extreme prohibition. (For can. 816 see Appendix, pp. 572 sqq. *infra.*)

CAN. 817

Nefas est, urgente etiam extrema necessitate, alteram materiam sine altera, aut etiam utramque, extra Missae celebrationem, consecrare.

It is unlawful, even in case of extreme necessity, to consecrate one species without the other, or to consecrate both outside the Mass.

14 S. O., Aug. 5, 1896; May 22, 1901 (*Coll.*, nn. 1950, 2113).

15 S. O., May 22, 1901 (*Coll.*, n. 2113).

16 S. O., June 25, 1891 (*Coll.*, n 1757).

17 S. O., July 9, 1881; Aug. 30, 1901 (*Coll.*, nn. 1556, 2122).

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The first of these clauses touches the very essence of the Mass, which most probably consists in the consecration of both species. However, theologians [18] generally admit, following the *Missale Romanum*,[19] that the consecration of one species would be valid without the consecration of the other. This might happen if a priest would grow seriously ill after the consecration of one species, or if, by mistake, he would consecrate water and no wine would be at hand, or danger of death would immediately follow the consecration of one species. Yet all these are merely physical accidents. Intentionally to consecrate only one species is never allowed, not even to provide the Viaticum, although such consecration would be valid.[20]

To consecrate *outside the Mass* would not only be a sacrilege, but probably also an attempt at invalid consecration. The priest would certainly not perform that action in the person of Christ, nor according to the intention of the Church, which is restricted to the celebration of the Mass.[21]

OBSERVANCE OF RUBRICS AND RITES

CAN. 818

Reprobata quavis contraria consuetudine, sacerdos celebrans accurate ac devote servet rubricas suorum ritualium librorum, caveatque ne alias caeremonias aut preces proprio arbitrio adiungat.

18 Cfr. Noldin, *Summa Theol. Moralis*, 1912, *De Sacram.*, n. 102.
19 *De Defectibus*, c. IV, nn. 5, 8.
20 Noldin, *l. c.*, and n. 104.
21 Prümmer, *l. c.*, III, n. 176.

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CAN. 819

Missae sacrificium celebrandum est lingua liturgica sui cuiusque ritus ab Ecclesia probati.

The priest, when celebrating Holy Mass, must accurately and devoutly observe the rubrics of the respective ritual books and avoid the arbitrary addition of other ceremonies and prayers. Every contrary custom is hereby reprobated.

There is a distinction between prescriptive and directive rubrics which should be retained.[22] The obligation imposed by *prescriptive* rubrics is greater and more serious than that which attaches to merely directive rubrics. The former concern the celebration of the Mass itself, whilst the latter refer to what immediately precedes or follows the celebration, for instance, how the priest should approach or leave the altar, etc. But even the prescriptive rubrics do not all oblige with equal strictness. They distinguish between the *ordinary* and the extraordinary parts of the Mass, the former being such as occur in every Mass (confession, orations, offertory, breaking of the host and the dropping of a particle into the chalice), whereas the latter occur only in a certain kind of Masses (Gloria, Tract, Credo, various commemorations, etc.). But the juridical obligation of saying everything according to the rubrics, whether in red or black, is undeniable.[23] The rubrics of the canon in particular must be carefully followed.

No addition is allowed even for the sake of devotion, and the prayers and ceremonies must not be curtailed[24]

22 Noldin, *l. c.*, n. 208 f. It would be unreasonable to reject this distinction, and lead to unnecessary scruples, or Jansenistic rigorism, or Pharisaism.

23 S. Rit. C., Nov. 12, 1605 (*Dec. Auth.*, n. 194).

24 *Ibid.*

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or mutilated. Hence no arbitrary prayers, ejaculations or gestures are to be used.

These rules also bind, to their fullest extent, *all religious,* whether exempt or not. They are not allowed to insert in the canon the name of their superior, unless, of course, he is an abbot *nullius.*[25] Should they attempt any change or mutilation or addition, the Ordinary may proceed against them with ecclesiastical censures, against which no appeal or injunction or inhibition is permissible.[26]

The ceremonies and prayers of the Mass must be carried out according to the *respective ritual books.* Hither refers also *can. 819,* which rules that Mass must be celebrated in the *liturgical language* proper to each one's rite, as approved by the Church. The Roman Pontiffs, whilst permitting and upholding the Oriental rites, at the same time kept watch against schismatical tendencies. The reason is obvious: the *lex orandi* reflects the *lex credendi.* Therefore the Orientals, no less than the Latins, are obliged to use the liturgical books approved by Rome.[27]

The *liturgical language* is Latin for the whole Western Church, and wherever else it is in use, as, for instance, in parts of Servia.[28] The Oriental Rites differ in language. The Missal for the Latin Church was issued and approved by Pius V, in 1570, and the last revision, comprising the chant, was made in 1883 by authority of Leo XIII. As to the *monastic Missal,* enough has been said

25 *Ibid.*

26 Benedict XIV, "*Ad militantis,*" March 30, 1742, § 6; S. Rit. C., March 16, 1591; Aug. 19, 1651 (*Dec. Auth.*, n. 9, ad 19, n. 937, ad II). Why regulars should wear a hood (*caputium*) instead of a birretta is not quite intelligible.

27 Benedict XIV, "*Etsi pastoralis,*" May 26, 1742, § IX, n. XVIII; "*Demandatam,*" Dec. 24, 1743, § 11; "*Inter omnigenas,*" Feb. 2, 1744, § 18.

28 Benedict XIV, "*Inter omnigenas,*" § 18.

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in Vol. III of this Commentary; we will only add that its general rubrics are identical with those used by the secular clergy.

Every edition of the Missal must be approved by the S. Rituum Congregatio, or at least contain a declaration by the Ordinary that it conforms to the edition of 1883. Lately a few additions have been made as to the Gregorian Chant, especially with regard to the "Gloria" and "Ite Missa est," of which we now have fifteen varieties,— certainly not to the gain of uniformity.

No *mixture* of rites or change from one rite to another by the same priest is allowed. Thus the Greeks are not allowed to say Mass in the Latin Rite, even in a Latin Church, nor are Latin priests allowed to celebrate Mass in the Greek Rite,[29] for instance, on the antimensia of Ruthenian churches. An exception was made in favor of some Oriental colleges in Rome and of the Greek College under the direction of the Benedictines, who may say Mass either in the Latin or in the Greek Rite. But this singular provision, made for the benefit of the students of these colleges, not for the benefit of the priests to whom the college is entrusted, cannot be alleged as a precedent for violating the general rule of not mixing the various rites.[30]

A curious mixture, however, is noticeable in the provinces of Gorizia, Zara, and Zagrab, where the use of the *old Slavic* or *Glagolitic* language is permitted under certain conditions which have been established by the S. Rit. C. after a protracted and heated controversy.[31]

29 St. Pius V, "*Providentia*," Aug. 20, 1566; "*Quoprimum*," July 14, 1570, § 3; Benedict XIV, "*Impositio Nobis*," March 29, 1751, § 9.

30 Benedict XIV, "*Allatae sunt*," July 26, 1755, § 34 f.

31 S. Rit. C., Feb. 13, 1892; Aug. 5, 1898 (*Dec. Auth.*, nn. 3768, 3999); Aug. 14, 1900; March 14, 1902 (*Anal. Eccl.*, VIII, 417; X, 206; XV, 22). Some Chinese missionaries were allowed to say Mass *tecto capite*, but the custom was to be eliminated gradually; S. C. P. F.,

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Finally it may be added that Mass must be celebrated in a *standing,* not *sitting,* posture. This rule, being merely ecclesiastical, does not bind the Pope, who may therefore sit when saying Mass. Any other priest would need a papal indult (S. C. Sacr.) to say Mass either partly or entirely in a sitting posture.[82] Of course, when the rubrics permit the minister to sit down, he may and should do so.

ARTICLE III

TIME AND PLACE OF CELEBRATING THE MASS

CAN. 820

Missae sacrificium omnibus diebus celebrari potest, exceptis iis qui proprio sacerdotis ritu excluduntur.

Holy Mass may be celebrated on all days except those on which the respective rite forbids the priest to say it.

In the Latin Church the general rubrics prescribe that no private Masses be celebrated during the three days preceding Easter. This is to be understood as follows: On *Maundy Thursday one solemn* Mass should be celebrated in all the churches where the Blessed Sacrament is preserved[83] and the liturgical functions are performed according to the *Memoriale Rituum* issued by Benedict XIII. In churches where, on account of a lack of clerics or servers, the sacred ceremonies cannot be duly held, the bishop may grant permission to the priests to say a low Mass for the convenience of the people. However, this Mass should be said before the solemn High Mass

July 31, 1673 (*Coll.*, n. 206). They were not, however, allowed to say Mass in the Chinese language; S. C. P. F., Jan. 7, 1755 (*Coll.*, n. 394).

82 Benedict XIV, "*Aestas,*" Oct. 11, 1757, nn. VII–XII.

83 S. Rit. C., March 28, 1775 (*Dec. Auth.* 2503).

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in the cathedral or mother church begins. Besides, according to the decree,[34] this permission must be obtained anew every year. However, even setting aside the contrary custom, the bishop can undoubtedly issue a faculty to be valid for a number of years. In a large diocese the annual issuance of such faculties would cost time and money without any special benefit.

Religious communities, under a decree of the S. Congregation of Rites,[35] may have one Mass said in their chapels, even though the prescribed liturgical functions are not performed there on the three days preceding Easter. If they have no chapel of their own, they may hear a private Mass in a neighboring church, but the doors must be shut.[36] If a feast of obligation falls on Maundy Thursday, it must be transferred to the day following Low Sunday, but the obligation of hearing Mass and abstaining from servile work remains attached to the original day.[37]

On *Good Friday* only one *Missa Praesanctificatorum* may be celebrated, and priests who have two parishes to attend to are not allowed to binate on that day.[38]

On *Holy Saturday* only one solemn Mass may be cele-

34 S. Rit. C., July 31, 1821 ad 1 (*Dec. Auth.*, n. 2616); "*petita quotannis venia*" is put in brackets.

35 S. Rit. C., Aug. 31, 1839 (*Dec. Auth.*, n. 2799). This may be extended to seminaries and pious places which have their own chaplain and the right of preserving the Bl. Sacrament. S. Rit. C., June 28, 1821, ad 1 (*Dec. Auth.*, n. 2616); whether the *venia Episcopi,* as Gasparri (*l. c.*, n. 81) maintains, is required, is doubtful. Contrary custom would rather deny it.

36 Doubtless this provision was added because of the parochial service, with which the private service should not clash.

37 S. Rit. C., Sept. 13, 1692 (*Dec. Auth.*, n. 1883). If the feast of the Annunciation falls on Good Friday or Holy Saturday, the whole feast with all the obligations is to be transferred to the Monday after Low Sunday; S. Rit. C., March 11, 1690. If a patron feast falls on that day, the obligation of abstaining from servile work remains for Good Friday, but the obligation of hearing Mass ceases; Gasparri, *l. c.*, n. 85 f.

38 Benedict XIV, *De Sacrif. Missae,* l. III, c. 5, n. 5.

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brated in churches in which the liturgical functions of Holy Week are performed. Private Masses are not easily allowed in any church on that day.[39] In small or *poor parishes* a low Mass may be said if custom permits. But neither a local nor personal indult permits private Masses to be said in churches which are not parish churches. Therefore a special indult is required for such, and the priest who says this Mass must omit every ceremony and commence with the Confessio without the Introitus. A bishop who ordains on that day in his private chapel must begin the Mass with the prophesies.[40] Priests of the *Oriental Rite* do not say Mass on days of strict fasting. Thus during Lent they celebrate only the *Missa Praesanctificatorum,* except on Saturdays, Sundays, and high feastdays, when they say Mass as usual.

THE HOUR FOR SAYING MASS

CAN. 821

§ 1. Missae celebrandae initium ne fiat citius quam una hora ante auroram vel serius quam una hora post meridiem.

§ 2. In nocte Nativitatis Domini inchoari media nocte potest sola Missa conventualis vel paroecialis, non autem alia sine apostolico indulto.

§ 3. In omnibus tamen religiosis seu piis domibus oratorium habentibus cum facultate sanctissimam Eucharistiam habitualiter asservandi, nocte Nativitatis Domini, unus sacerdos tres rituales Missas vel, servatis servandis, unam tantum quae adstantibus omnibus ad praecepti quoque satisfactionem valeat, celebrare potest et sacram communionem petentibus ministrare.

39 S. Rit. C., Feb. 12, 1690 (*Dec. Auth.*, n. 1822).
40 Gasparri, *l. c.*, n. 88 ff.

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§ 1. Mass should not be commenced earlier than one hour before dawn, nor later than one hour after noon.

The starting-point is dawn, or daybreak *(aurora)*, which, of course, depends on the hour of sunrise. Dawn in our country lasts about one hour and a half.[41] Therefore a priest is allowed to begin Mass about two hours and a half before sunrise. This, we believe, should be early enough for all reasonable demands, especially since the legislator himself has now added one hour to the time allowed before by common law. We do not believe that exempt and other religious who claim the privilege, granted after the Council of Trent, of celebrating one hour before dawn and one hour after noon, will now be allowed to extend the same to two hours. For the legislator by extending the time has not extended the starting-point (dawn) for the privilege. The privilege granted before the Council of Trent appears somewhat doubtful and it is in the ordinary power of bishops to compel even exempt religious to abide by the rule fixing the hour for celebrating Mass.[42] But we would not doubt the right of anticipating the hour of celebrating Mass when necessary for administering the viaticum [43] for devotion's sake. Another case of necessity would undoubtedly be the obligation of hearing Mass for working people who would otherwise have to arise before five o'clock in winter. (In summer time the case of necessity would hardly be verified.) Still another case of necessity would arise for the priest from the precept of

41 See the table of duration of dawn in Benedict XIV's *Inst.*, 13, and Gasparri's, *De Ssma Euch.*, Vol. I, p. 65. Dawn, on May 1, lasts here, at Conception, Mo., 42nd degree latitude, one hour and 45 min.; on Jan. 1, 1 hour and 39 min.; on Oct. 13, 1 hour and 31 min. See *infra*, Appendix.

42 Benedict XIV, *Inst.*, 68, n. 11.

43 *"Praeceptum sumendi viaticum praevalet legi ecclesiasticae de tempore celebrandi Missam."*—S. C. P. F., Feb. 29, 1836 (*Coll.*, n. 846).

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hearing Mass on a holyday, which otherwise could not be complied with by reason of a necessary journey.[44]

The bishop may permit Mass, especially on a solemn occasion, to be protracted until after two P. M.[45] But he is not empowered to forbid the saying of Mass before sunrise.[46] In countries where there is hardly any dawn, as in the polar regions, Mass may commence about the time people arise and go to work.[47]

§ 2. On Christmas night only the *conventual or parochial Mass may be commenced at midnight* to the exclusion of every other Mass not granted by special Apostolic indult.

§ 3. *In all religious or pious houses* which possess an oratory with the faculty of habitually keeping the Holy Eucharist, *one priest* may say one or three Masses according to the rubrics Christmas night. Those who assist thereat comply with the obligation of hearing Mass, and Holy Communion may be administered to such as desire it.

The moment at which Mass *may be begun* on Christmas is the hour of midnight, not before. Hence it would be an abuse to commence Mass so early that the priest would be at the gospel or elevation when the clock struck twelve.[48] There is no strict obligation *(inchoari potest)* to commence at midnight, for the service may be postponed if there is an impediment. But the rubrics require of those bound to say public office, like cathedral chapters, and most of the regulars, that they sing

44 Noldin, *l. c.*, n. 204; Marc, *l. c.*, II, n. 1625.

45 S. Rit. C., July 7, 1899 (*Dec. Auth.*, n. 4044).

46 S. Rit. C., Jan. 10, 1597 (*Dec. Auth.*, n. 62).

47 Cong. Specialis, Sept. 18, 1634. The reason why Mass is to be celebrated at daytime is because Christ, the brightness of eternal light, is offered up therein.—Benedict XIV, *Inst.*, 13, n. 2.

48 S. Rit. C., May 11, 1878, ad XV; June 2, 1883, ad X (*Dec. Auth.*, nn. 3448, 3576).

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Matins before the Mass and Lauds after it. This order may not be changed on that day.[49]

Our text clearly states that *only* the *conventual* or *parochial* Mass may be commenced at midnight. Hence neither canons, nor dignitaries, nor regulars of any kind or exemption, nor religious in general, may, in virtue of the common law, say three Masses immediately after midnight.[50] The priest who says the conventual or parish Mass at midnight must wait with the other two Masses until the rubrical time has arrived,[51] that is to say, till about five thirty A. M., when he may say the other two. It requires an *apostolic indult* to say the three Masses one immediately after the other, commencing at midnight. An indult, though a species of privilege, is not given by way of communication, and therefore no *communicatio privilegiorum* is permissible in this case. This is evident also from the fact that the custom of celebrating the three Christmas Masses at midnight has been condemned as an abuse which must be entirely eliminated.[52]

§ 3, then, grants by universal law a favor which formerly was given only by a special indult. Thus, for instance, the Ursulines, their pupils and lay sisters enjoyed this privilege of a Mass and Holy Communion at midnight,[53] where their rules approved by the Holy See prescribed this custom.[54] Pius X, the great promoter of devotion to the Blessed Sacrament, extended this favor to all religious institutes, pious houses and clerical sem-

49 S. Rit. C., April 3, 1830 (*Dec. Auth.*, n. 2676).

50 S. Rit. C., Nov. 22, 1681; March 23, 1686 (*Dec. Auth.*, nn. 1683, 1761).

51 S. Rit. C., Nov. 14, 1676 (*Dec. Auth.*, n. 1584).

52 S. Rit. C., Sept. 18, 1781 (*Dec. Auth.*, n. 2520).

53 S Rit. C., July 27, 1720 (*Dec. Auth.*, n. 2267).

54 S. Rit. C., Aug. 7, 1871, ad IX (*Dec. Auth.*, n. 3254).

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inaries.[55] Our text simply says: *"in all religious or pious houses."* What a *religious house* is may be seen from can. 488, 5°, where such a house is said to belong to a religious institute in general. From this it follows that all communities of religious may enjoy the right granted in this canon. A *pious house* is one where Christian charity is practiced under the supervision of ecclesiastical authority. Charity here comprises every species of good works, educational, corporeal works of mercy, etc. But it is essential that such a house be superintended by ecclesiastical authority.[56] To this class belong hospitals, asylums for the aged, orphans, and foundlings, clerical seminaries, and houses of religious societies of men and women (see can. 673). The latter cannot *strictly* be called religious houses, because not inhabited by religious in the canonical sense of the word, but in a wider sense they may safely be styled religious houses. A doubt may arise concerning hospitals conducted by religious but really superintended by lay or civil officials. However, if the religious form a community of their own, and have their own oratory, in which the Blessed Sacrament is kept, we would not exclude them from the benefit granted by this canon. A different status is that of our State asylums and penitentiaries. They are purely secular institutions, entirely managed by seculars, even though there be a temporary chapel where the Blessed Sacrament could hardly be kept. These, therefore, are not entitled to the favor here in question.

Our canon requires that in all such houses there be an *oratory endowed with the privilege of habitually keeping the Blessed Sacrament.* According to certain decrees of the Holy Office, of 1907 and 1908, it makes no differ-

[55] S. O., Aug. 1, 1907; Nov. 26, 1908 (*A. Ap. S.*, I, 146).

[56] Devoti, *Institut. Canonic.*, 1874, Vol. I, p. 560; cfr. can. 1489.

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ence whether this oratory be public, semi-public, or private. If it is a private oratory, an apostolic indult is needed to keep the Blessed Sacrament, whilst for a semi-public or public oratory the permission of the Ordinary is sufficient, as shall be seen under can. 1265.

The text furthermore says that one priest *(unus sacerdos)* may say one or three Masses *(Missas rituales)*. Hence if there are more than one, the others must say Mass later. The three Masses must be said *according to the rubrics, i. e.,* as they follow each other in the Missal, and not all three according to the formulary *pro Missa in Nocte.* But if a priest (for instance, an assistant at the cathedral who is also chaplain of a convent or hospital) says only one Mass, he is bound to observe what the law prescribes, *servatis servandis.* In other words, if he says but one Mass at midnight, he must say the other two Masses according to the rubrical time, *i. e.,* the second not earlier than about 5.15 or 5.30 A. M., and the third, *de die,* after that.

The last clause is an extension of the decrees of the Holy Office of 1907 and 1908, which require that the doors of the oratory be shut *(ianuis clausis)*. Our canon contains no such clause, wherefore outsiders, for instance, friends and relatives, may be admitted and by assisting comply with the precept of hearing Mass on Christmas Day, and also, if they so desire, receive Holy Communion. This is plainly expressed in the words: *adstantibus omnibus,* all who assist. But this favor can not be extended to the *churches* of religious, whether exempt or not, for not only was it directly denied to them by decree of the Holy Office, Nov. 26, 1908,[57] but our

[57] *"An indultum oratoriis concessum extendi possit ad ecclesias religiosorum, quae publico fidelis populi usui inserviunt? Negative, salvo tamen religiosorum privilegio in media nocte Missam celebrandi."*

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text itself excludes such an extension, as it speaks only of religious or pious houses which have an oratory, not of churches. The reason obviously is not to create a prejudice against parish churches. However, the same decree allows, and the text of our canon does not forbid, religious to have a midnight Mass for themselves, *i. e.*, behind closed doors, at which the members may receive Holy Communion.

THE PLACE FOR SAYING MASS

CAN. 822

§ 1. Missa celebranda est super altare consecratum et in ecclesia vel oratorio consecrato aut benedicto ad normam iuris.

§ 2. Privilegium *altaris portatilis* vel iure vel indulto Sedis tantum Apostolicae conceditur.

§ 3. Hoc privilegium ita intelligendum est, ut secumferat facultatem ubique celebrandi, honesto tamen ac decenti loco et super petram sacram, non autem in mari.

§ 4. Loci Ordinarius aut, si agatur de domo religionis exemptae, Superior maior, licentiam celebrandi extra ecclesiam et oratorium super petram sacram et decenti loco, nunquam autem in cubiculo, concedere potest iusta tantum ac rationabili de causa, in aliquo extraordinario casu et per modum actus.

§ 1. Mass must be celebrated upon a *consecrated altar* and in a consecrated or blessed church or oratory.

The Latin Church does not allow the unbloody Sacrifice to be offered except on an entirely consecrated altar, or at least on an altar stone consecrated according to the prescribed rules (see can. 1197 ff.). The Orientals use

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a so-called *antimension* or linen cloth blessed by the bishop, into the corners of which relics are sewed, and which is spread over the altar table.[58]

The *general rule* for the Latin Church is that, *outside the case of extreme necessity*, it is never allowed to say Mass in a place which is not sacred (*in aedibus non sacris*),[59] or, as our text has it, outside a church or an oratory which is either consecrated or blessed. In private and semi-public oratories, which are neither blessed nor consecrated, Mass may be celebrated only if they fulfil the necessary requirements, as stated in can. 1196. In private houses, especially sick persons, it is allowed to say Mass only if the viaticum can be neither secretly nor publicly brought to the sick.[60]

The *altar stone* must contain sacred relics. If the relics have been removed, the stone must be reconsecrated. To consecrate altars without relics for saying Mass requires a very special indult, such as was given to vicars Apostolic in times of persecution.[61]

§ 2 and 3. The privilege of a *portable altar* is granted either by law or by an indult of the Holy See. This privilege carries with it the faculty of celebrating Mass in any place, provided it be respectable and decent, and upon an altar stone; only celebration at sea is excluded. Before the Council of Trent bishops were empowered to grant permission to have a private oratory for the purpose of having Mass said therein, but after the Council this right, and consequently also the grant of a portable altar, was reserved to the Apostolic See.[62] This change,

58 Benedict XIV, *"Impositio Nobis,"* March 29, 1751, § 4; In., *De Sacrif. Missae*, l. I, c. 2; cfr. cc. 1, 2, 11, Dist. 1, *de cons.*

59 Benedict XIV, *"Inter omnigenas,"* Feb. 2, 1774, § 22.

60 S. C. P. F., Dec. 14, 1668; April 30, 1753 (*Coll.*, nn. 172, 388).

61 S. Rit. C., Oct. 6, 1837; Dec. 7, 1844; May 23, 1846 (*Dec. Auth.*, nn. 2777, 2876, 2911); S. C. P. F., Jan. 14, 1802; May 14, 1681 (*Coll.*, nn. 660, 223).

62 Benedict XIV, *"Magno cum*

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however, did not affect the private oratories in episcopal palaces, because the latter are not comprised under the name of private houses.[63] Therefore episcopal oratories, as well as those of Cardinals,[64] exist by law. If special privileges are asked for, the S. C. Sacr. is competent to grant them.[65]

It must be added that even *exempt religious* require a special privilege, ratified after the Council of Trent, to make use of a portable altar, and the Ordinary, in virtue of *Sess. XXII, decretum de observandis et evitandis in celebratione missae,* may proceed against them if they presume to celebrate upon a portable altar or keep such an altar in their rural houses.[66] All privileges granted to that effect before the Council of Trent, even by the Pope himself, must be regarded as revoked.[67] On the other hand, Cardinals as well as bishops may continue to use the portable altar even without the permission of the local Ordinary in whose diocese they may wish to say Mass.[68] The clause, "*non autem in mari*" does not apply to Cardinals and bishops,[69] but to all others, unless besides the indult of a portable altar they also have a special indult permitting them to celebrate Mass on shipboard.[70]

§ 4. The local Ordinary, or, in the case of an exempt religious house, the higher superior, may grant permis-

animi," June 2, 1751, § 11; Id.; *De Sacrif. Missae,* III, 6, 5 f.

63 Benedict XIV, *Const. cit.,* § 2.

64 Cfr. can. 239, § 1, 7°; can. 349, § 1, n. 1.

65 *Normae Peculiares,* c. VII, art. 3, n. 11 (*A. Ap. S.,* I, 88).

66 S. C. C., June 4, 1672, Aug. 29, 1761 (Richter, *Trid.,* p. 130, nn. 9 f.).

67 S. C. C., March 23, 1907 (*Anal. Eccl.,* t. 15, 101 ff.).

68 Benedict XIV, *De Sacrif. Missae,* l. III, 6; n. 5; cfr. c. 12, 6°, V, 7.

69 Can. 239, § 1, n. 8; can. 349, § 1, n. 1.

70 S. Rit. C., March 4, 1901, ad 4 (*Anal. Eccl.,* t. 9, 115): "*Si capella navium locum fixum habeat in navi, uti publica pro navigantibus habenda est; secus neque publica est neque privata, sed habetur ut altare portatile;*" ad V, *ibid.*

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sion to say Mass outside a church or oratory, upon a consecrated altar stone, provided the place is decent (no bed room) and the permission is granted for a just and reasonable cause, for extraordinary cases only, and not habitually.

This canon contains part of the faculty formerly granted to our American bishops.[71] Two Ordinaries are named in § 4: the local Ordinary and the Ordinary of exempt religious. To begin with the latter, note that the *major superior* of exempt religious can give the permission in question only with regard to a *house* of his own religious institute. Hence he cannot permit his subjects to say Mass in a strange place not owned by the religious, for instance, on a missionary trip.[72] In this case the competent Ordinary would be the Ordinary in whose diocese the religious wishes to say Mass. But if the house belongs to, and is occupied by, religious of the same order, the legitimate superiors, *i. e.*, the general, the provincial and all those who represent the former, may grant the permission in question.

The *local Ordinary* is the one commissioned to watch over his diocese, and is responsible for abuses which may creep into it. He may grant the permission in question under the following conditions:

(1) That Mass be said upon an *altar stone* which contains sacred relics and is validly consecrated and prepared.[73]

(2) That the place in which Mass is to be said is *decent* or respectable. Decency must be gauged not by adornment merely, but by the respect and reverence due to the august Sacrifice. It is forbidden to say Mass in

71 Form I, art. 6; cfr. Putzer, *Comm.*, p. 277 ff.

72 S. C. P. F., Nov. 18, 1765 (*Coll.*, n. 461).

73 S. C. P. F., Feb. 29, 1836 (*Coll.*, n. 846).

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the churches of heretics and schismatics (see can. 823, § 1), and it would be improper to offer the holy Sacrifice in the private houses of unbelievers or non-Catholics. Theatres and Masonic temples could hardly be styled respectable places for saying Mass, although the former might be used in case of extreme necessity. The open air would be a decent place.

(3) That no permission be given to say *Mass* in *bedrooms* (*in cubiculis*). Hence it would be better, in case of necessity, to choose the living or sitting room for saying Mass. However the S. C. Prop. has given permission to say Mass in the sleeping room of a sick person (*in cubiculo infirmi*) if there is no other way of administering the Viaticum.[74] But then the minister should see to it that there are no indecent or superstitious emblems or pictures in the room.[75]

(4) That the permission be granted for a *just and reasonable cause*. As stated above, the Blessed Sacrament may never be exposed to irreverence, nor should the faithful be scandalized. A just reason would be if an epidemic raged in the town or city which would necessitate the closing of the churches; if there were no Catholic church or public oratory in the town or city,[76] or if the precept of receiving Easter communion could not otherwise be complied with; or if the administration of the Viaticum required it.[77] War and social disturbances would be an additional reason for granting the permission.

(5) This permission, however, is *not* to be understood as an *habitual faculty* or a right to be used by the priest *ad libitum*, but only, as the text says, "*in casu extraor-*

74 S. C. P. F., April 30, 1753 (*Coll.*, n. 388).

75 S. C. P. F., Sept. 6, 1821 (*Coll.*, n. 764).

76 S. C. P. F., April 30, 1753, ad 2 et 4 (*Coll.*, n. 388).

77 S. C. P. F., Sept. 5, 1821 (*Coll.*, n. 764).

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dinario et per modum actus." This would seem to imply that a priest should ask for it every time he deemed it necessary. However, we believe the Ordinary can grant the permission to priests in such a way that they would not have to ask for it every time they needed it, provided, of course, the conditions set forth in this section be present.[78] Lastly, it may be noted that this permission may be granted so as to allow Mass to be said in private houses and on any day;[79] but the permission must be issued gratis.[80]

CAN. 823

§ 1. Non licet Missam celebrare in templo haereticorum vel schismaticorum, etsi olim rite consecrato aut benedicto.

§ 2. Deficiente altari proprii ritus, sacerdoti fas est ritu proprio celebrare in altari consecrato alius ritus catholici, non autem super Graecorum *antimensiis*.

§ 3. In altaribus papalibus nemo celebret sine apostolico indulto.

§ 1 forbids saying Mass in *churches of heretics and schismatics,* even though these may have once been duly consecrated or blessed.

That the church sometimes reconsecrates temples formerly belonging to heretics, is proved by historical examples dating back to the sixth century (Arians).[81] From this practice it follows that churches once consecrated and hallowed by Catholic services, when they have fallen into the hands of non-Catholics, are considered desecrated and therefore unfit for the celebration of the

78 S. C. P. F., Feb. 29, 1836 (*Coll.*, n. 846).

79 S. C. Sacr., March 22, 1915, ad 1 (*A. Ap. S.*, VII, 147).

80 S. C. Sacr., Dec. 23, 1912, ad 1 (*A. Ap. S.*, IV, 725).

81 Cfr. cc. 21, 22, Dist. 1, *de cons.*; Benedict XIV, "*Iam inde,*" May 12, 1756, § 3.

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Sublime Mystery. The decisions of the Roman Court are to the effect that rather than say Mass in a non-Catholic temple a priest should use a portable altar or celebrate the Holy Sacrifice in a private house.[82] However, the Holy Office once permitted the archbishops of Antivari to use a schismatic church, provided a separate Catholic altar was set up therein and one part of the church was reserved exclusively for Catholics.[83] But this was a case of necessity. Ordinarily priests should rather make use of portable altars. In another instance the Holy Office permitted the simultaneous use of a garrison chapel at Malacca for Catholic and non-Catholic services, but instructed the Vicar Apostolic to ask the government to build a separate chapel, or, if that could not be done, to build one himself from alms collected. It may be added that Clement XI permitted Catholic services to be held in so-called "simultaneous churches[84] in Switzerland.[85]

§ 2. A Latin priest may celebrate Mass on a consecrated altar of another rite, but not upon a Greek *antimension*. These antimensia being, as stated, not altar stones, but consecrated sheets of linen, do not come up to the requirements of the Latin Church.[86]

§ 3. On *papal altars* no one is allowed to say Mass without a special indult. Benedict XIV gives two reasons why an altar is called papal: either because it was consecrated by the Pope or because he said Mass upon

82 S. C. P. F., May 21, 1627; Feb. 13, 1629; May 7, 1631 (*Coll.* nn. 34, 47, 69): neither chalices nor vestments of schismatics may be used.

83 S. O., Dec. 1, 1757 (*Coll.*, n. 408).

84 S. O., June 5, 1889 (*Coll.*, n. 1707).

85 S. O., June 13, 1634 (*Coll.*, n. 75); Putzer, *l. c.*, p. 279. "Simultaneous" churches are those in which Catholics and Protestants hold service at different hours.

86 Benedict XIV, "*Etsi pastoralis*," § VI, nn. VIII, XIX; S. O., June 7, 1726 (*Coll.*, n. 306).

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it.[87] Several altars in Rome are called papal, *viz.*, those of the patriarchal basilicas of St. John Lateran, St. Peter, St. Paul, and Santa Maria Maggiore. There are also a few papal altars outside Rome. Benedict XIV sent one to Lisbon[88] and on another occasion declared the high altar on the side of the pontifical throne in the church of St. Francis at Assisi a papal altar.[89] From this we may conclude that to the two reasons stated a third must be added, *viz.*, a special distinction granted directly by the Sovereign Pontiff. The consequence is that no one, not even a Cardinal or bishop, may say Mass on such an altar without a papal indult. This indult is generally affixed to the altar when another than the Pope says Mass on it. The reason for this rule lies in the dignity of the consecrator or grantor of the privilege.[90]

ARTICLE IV

ALMS OR STIPENDS FOR MASSES

CAN. 824

§ 1. Secundum receptum et probatum Ecclesiae morem atque institutum, sacerdoti cuilibet Missam celebranti et applicanti licet eleemosynam seu stipendium recipere.

§ 2. Quoties autem pluries in die celebrat, si unam Missam ex titulo iustitiae applicet, sacerdos, praeterquam in die Nativitatis Domini, pro alia eleemosynam recipere nequit, excepta aliqua retributione ex titulo extrinseco.

§ 1 approves the time-honored custom which allows

87 "*Dilectus Filius*," Jan. 15, 1745, § 1 (S. Maria Maggiore).

88 "*In postremo*," Oct. 20, 1756, § 9.

89 "*Fidelis Dominus*," March 25, 1754.

90 Cfr. c. 97, Dist. 2, *de cons.*

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every priest who says Mass to accept an alms or stipend for the same.

In the early days of Christianity the faithful were wont to offer bread and wine at each Mass which they attended. Money too was sometimes laid upon the altar, intended either for the poor members of the congregation or for the clergy in common. The practice of giving alms to a determined priest so that he might offer the special or ministerial fruit of the Holy Sacrifice either for the donor or his relatives and friends, began about the eighth century and became universal after the twelfth. There is no incongruity in applying the Mass for a special person or purpose. For, although the Holy Sacrifice, by reason of its main offerer and object, *viz.*, Christ, is of infinite value, yet the special fruit or effect is not infinite, and therefore one person may derive greater profit from it than the rest, and repeated oblations for a particular person or object will produce their effect more certainly and abundantly.[91] Nor is there any simony connected with receiving a Mass stipend. For, as St. Thomas says,[92] the priest does not receive the stipend as a price for the consecration of the Holy Eucharist, but as part of his support. Hence Wiclif and his followers misunderstood the nature of prayer for others when they called those who obliged themselves to pray for others simonists.[93] Mistaken also was the notion of the pseudo-council of Pistoja that the application of the priest did not produce a special effect in favor of those for whom it was made, and that the acceptance of stipends was a shameless abuse.[94] It cannot be denied, however, that abuses did creep in. Some avaricious priests either

91 Benedict XIV, *De Sacrif. Missae*, l. III, c. 21, nn. 1–7.

92 *Summa Theol.*, II–II, q. 2, art. 2.

93 Cfr. prop. 25 (Denzinger, n. 501).

94 Propp. 30, 54 (Denzinger, nn. 1393, 1417).

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traded in Masses or said Mass several times a day for filthy lucre's sake.[95] These abuses prompted the Church to enact, in the matter of stipends, severe laws, which are now embodied in the Code. We add to § 1 only one comment, namely, that the text *requires that Mass be said and applied*. Saying Mass, therefore, is not sufficient to justify a stipend, but application of its special fruits must be made at least before the consecration of the wine. A *habitual intention* once made and not consciously retracted suffices. It is also sufficient if one celebrates according to the intention of the superior who distributes Masses to his subjects. If one has received a number of stipends and does not remember from whom or in what order they were given, it is sufficient that he say them with the intention to apply them in the order in which they were given. If another has collected the stipends, it suffices that the one who says the Masses have the intention of saying them according to the order intended by the distributor.[96]

§ 2. A *binating* priest who is obliged to apply one Mass *ex titulo iustitiae, is not allowed to accept a stipend for the other*. An exception to this rule is *Christmas Day*, on which a priest who says three Masses may accept three stipends. A partial exception to the general rule is the privilege of accepting some compensation for the other Mass for a reason which is extrinsic to the nature of a Mass-stipend as such (*ex titulo extrinseco*). Our parish priests and bishops are now obliged in *justice* to apply Holy Mass for the people *(pro populo)* on Sundays, holydays of obligation, and the suppressed holydays mentioned in can. 466 and 339 (see Vol. II of this Commentary).[97] No pastor is allowed to accept a stipend

[95] Benedict XIV, *l. c.*, n. 8.
[96] Lehmkuhl, *l. c.*, II, n. 188 f.
[97] Vol. II, p. 550. See also S. C. C., July 13, 1918 (*A. Ap. S.*, XI,

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on such days. For the *titulus iustitiae* is strictly attached to the obligation of saying Mass for the people. The only exception is for Christmas Day, when the pastor must apply only one Mass for his people, and may accept stipends for the other two.[98] On *All Souls' Day* he may receive a stipend for one of the three Masses; and even if he says only one, he is entitled to a stipend.[99] For this day is not one of the holy-days mentioned in canons 466 and 339.

Now what is an *extrinsic title* which permits a priest to accept a remuneration for one Mass, whilst he is obliged to offer another *ex titulo iustitiae?* The general rule may be stated thus: It must not be of the nature of a stipend given for the application of the special fruits, nor of the nature of a just claim which would oblige the priest to apply them *ex iustitia.* The Church has never, except for very special reasons, allowed the acceptance of two stipends on one day. An extrinsic title, therefore, would exist if one had to walk a considerable distance to say a Mass for which he is not entitled to accept anything, or if he had to fast for an unusually long time to impart an extraordinary instruction to which he were not otherwise obliged.[1] Besides if bound merely by the *titulus caritatis,* he would be allowed to say Mass to which this title obliges him. There is an authentic decision to this effect. A congregation of priests obliges its members to say one Mass for every deceased member. The question arose: May a priest of that society, when he bi-

46 ff.), S. C. Cons., Aug. 1, 1919 (*A. Ap. S.*, XI, 346 f.), has definitely settled this question. For the decree quoted requires three things: definite boundary lines, residence, and endowment. And these conditions certainly obtain in many city, and even in some country parishes.

98 Benedict XIV, "*Quod expensis,*" Aug. 26, 1748; S. C. C., Sept. 25, 1858.

99 Benedict XV, "*Incruentum,*" Aug. 10, 1915 (*A. Ap. S.*, VII, 403).

1 S. C. C., May 23, 1861; cfr. Prümmer, *Theol. Moral.*, III, n. 288.

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nates, apply the second Mass for a deceased member? The S. Congregation answered yes.[2] From this we may infer that the members of a purgatorial society of priests, on days on which they are allowed to binate, may apply one Mass for their people (or accept a stipend if they are not obliged to say Mass *pro populo*), and say the other for a deceased member of the society. For a purgatorial society is based upon the *titulus caritatis* no less than the above-mentioned congregation. We may further conclude that priests of a religious community who are compelled to binate, may apply one Mass for their deceased members, and the other either *pro populo* or for the donor of a stipend. Here again the *titulus caritatis* is obvious.

This extrinsic title, however, cannot be invoked for the two Masses which the priest says on All Souls' Day, one for all the deceased faithful and the other according to the intention of the Supreme Pontiff. Therefore, even if he has to say Mass at an inconvenient hour, or in a rural oratory, or on a cemetery, he is not allowed to accept anything for his labor or inconvenience. Furthermore, the stipend to which priests are entitled for one Mass must not exceed the usual or customary or synodal tax, though they are allowed to accept free offerings that are in no wise solicited. Besides, priests are forbidden to receive a stipend and apply the other two Masses which they may say on All Souls' Day for another person or purpose, reserving the two for the poor souls and according to the intention of the Holy Father for another day. The bishop may proceed against priests who fail to

2 S. C. C., Sept. 14, 1878 (*Coll. P. F.*, n. 1500); it is, of course, supposed, that the priest says one Mass *ex titulo iustitiae* or *stipendii*, otherwise no decision would have been required.

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comply with these rulings with ecclesiastical censures, including suspension.[3]

The S. C. Propaganda sometimes, for particular reasons, granted permission to receive a stipend for both Masses a priest had to say.[4] But this faculty was never given in virtue of the formularies formerly issued, nor is it to be expected now, except in very extraordinary circumstances.

CAN. 825

Nunquam licet:

1.° Missam applicare ad intentionem illius qui applicationem, oblata eleemosyna, petiturus est, sed nondum petiit, et eleemosynam postea datam retinere pro Missa antea applicata;

2.° Eleemosynam recipere pro Missa quae alio titulo debetur et applicatur;

3.° Duplicem eleemosynam pro eiusdem Missae applicatione accipere;

4.° Alteram recipere eleemosynam pro sola celebratione, alteram pro applicatione eiusdem Missae, nisi certo constet unam stipem oblatam esse pro celebratione sine applicatione.

It is forbidden:

1.° To apply a Mass for the *intention of one who may ask* for the application of a Mass and offer a stipend in future, but who has not yet asked for it, and to keep the stipend afterwards given for the Mass already said. This would be a sort of interpretative intention. The priest, in this case, only surmises or supposes that he is to receive a stipend, but is certain neither as to the per-

[3] S. C. C., Oct. 15, 1915 (*A. Ap. S.*, VII, 480).

[4] S. C. P. F., Oct. 15, 1863; May 24, 1870 ad 18 (*Coll.*, nn. 1244, 1352).

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son nor as to the stipend expected. This practice was strictly forbidden by the S. Congregation, though some theologians, especially in Spain, had defended it.[5]

It would not be contrary to law if one said Mass for the intention of a person who requested the favor but would offer the alms only after the Mass had been applied.

It is unlawful:

2.° To *receive a stipend for a Mass which is due and must be* applied for some other reason. Thus a pastor who is obliged to apply a Mass for his people, may not receive a stipend for the same, even though his salary is not sufficient to support him.[6] A canon or beneficiary who is bound to apply Mass for the benefactor or founder of the benefice or chaplaincy, is not allowed to receive a stipend other than the one that may accrue from the benefice or foundation.[7] For a conventual Mass, which is generally offered for the living and the dead benefactors of the community, no stipend may be accepted.[8]

It is furthermore forbidden:

3.° To *accept two stipends for the application of one and the same Mass.* Even after the Council of Trent, which branded the abuse of Mass stipends as akin to simony, there were theologians who thought it permissible to receive two stipends for one Mass. The reason they gave was that the fruit of the Mass which may be disposed of by the priest according to his own good pleasure, is of two kinds: satisfactory and impetratory. The former may be applied for a deceased person and the latter for a living sick person. Besides, they argued,

5 Benedict XIV, *De Sacrif. Missae*, III, 22, 10.

6 S. C. C., Aug. 30, 1698; Feb. 1716 (Richter, Trid., p. 134, n. 32).

7 S. C. C., Nov., 1702; Sept. 18, 1603 (*ibid.*, nn. 33, 64).

8 S. C. C. June 28, 1708; May 16, 1733 (*ibid.*, nn. 56, 58).

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the priest may, as it were, give up his own personal fruit for the benefit of another and therefore receive a stipend for that as well as for the special or ministerial fruit. Hence, they held, it is permissible to receive two stipends for one and the same Mass. But neither the Holy Office nor the S. Congregation of the Council shared this opinion; on the contrary, they condemned the practice based upon it.[9]

It is unlawful, finally,

4.° *To receive one stipend for the celebration, and another for the application of the same Mass,* unless it is certain that one stipend has been offered for the celebration alone without the application. Two decisions of the S. Congregation may illustrate this text.[10] A pious testator had founded a benefice or chaplaincy with the *express clause* that the priest or beneficiary was not obliged to apply the Mass. The S. Congregation decided that the fruit or interest of the benefice might be accepted and a stipend taken for the application of the same Mass. In another case a founder had directed that a Mass be said by the chaplain on every Sunday and holy-day of obligation, without specifying on whose behalf it should be said or applied. In that case, because nothing certain could be deduced from the will, the chaplain was instructed to apply for the benefit of the founder. Perfectly legitimate is the acceptance of an offering for singing a High Mass in the place of a sick or absent pastor, who may not be able to sing that Mass on that day, but says nothing about its application, for instance, *pro populo*. In that case the substitute may accept the offering for the singing

9 S. O., Sept. 24, 1665, prop. 8, 10 (Denzinger, nn. 979, 981); S. C. C., Dec. 13, 1859; Benedict XIV, *De Sacrif. Missae*, l. III, 22, 4 f.

10 S. C. C., July 13, 1630; March 18, 1668; Benedict XIV, *De Sacrif. Missae*, l. III, 22, 6 f.

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of the High Mass and receive a stipend for the special intention. For it is evident that the offering is given for the special labor of singing High Mass and accommodating the absent pastor, who would be obliged to sing it himself if he were at home.[11]

VARIOUS KINDS OF MASS STIPENDS

CAN. 826

§ 1. Stipendia quae a fidelibus pro Missis offeruntur sive ex propria devotione, veluti ad manum, sive ex obligatione etiam perpetua a testatore propriis heredibus facta, *manualia* dicuntur.

§ 2. *Ad instar manualium* vocantur stipendia Missarum fundatarum, quae applicari non possunt in proprio loco, aut ab iis qui eas applicare deberent secundum tabulas fundationis, et ideo de iure aut Sanctae Sedis indulto aliis sacerdotibus tradendae sunt ut iisdem satisfiat.

§ 3. Alia stipendia quae ex fundationum reditibus percipiuntur, appellantur *fundata* seu *Missae fundatae.*

§ 1. Stipends offered, as it were, offhand by the faithful for Masses, either out of pure devotion, or in the form of an obligation, even perpetual, imposed upon his heirs by the testator, are called *manual.*

§ 2. *Quasi-manual* are stipends for foundation-masses, which for one reason or another cannot be said in the church in which, or by the priest by whom, they should be said according to the charter, and are therefore, either

11 This is also true of a low Mass, especially if one would have to travel a certain distance to say it for the required purpose, *e. g.*, to enable the faithful to comply with their duty on a Sunday or holy-day of obligation.

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by law or by an Apostolic indult, to be handed over to other priests.

§ 3. Other stipends which are received from the interest of legacies, are called *foundations*. In order to understand the distinction between these three kinds of Masses we must proceed from the term *foundation,* which here means a legacy or testamentary bequest of goods or chattels, which,[12] by a legal fiction, bears the character of an artificial person or quasi-corporation. A foundation or pious legacy made for a good purpose is what we call a *pia causa* and possesses a juridical entity of its own. A foundation or founded Mass in the sense of our canon is a legacy made by a testator for the purpose of having a Mass said either at a certain place (altar, chapel, church) or by a certain priest. Such a legacy, to be valid, must be accepted by those to whom it is made, and made according to the rules prescribed by the Church. It may entail special conditions or qualifications which must be conscientiously carried out. A founded Mass, therefore, would be one to be said on a certain altar or in a certain church for all time. But if the testator had expressly stipulated only a certain altar or church, but no particular application, the Mass would not be a foundation, though it might be a benefice or chaplaincy. On the other hand, if the testator has not expressly excepted the application of the Mass, it is always to be presumed that the Mass is a founded Mass to be applied for the *legatarius*.[13] Sometimes the testator determines the priest who is to say the Mass, for instance, the chaplain attached to a certain church, or altar, or who says Mass at a specified hour (*primassarius*) or, more generally, the priests

12 Blackstone-Cooley, *Com.*, Vol. II, 512.

13 S. C. C., Jan. 11, 1710 *et pluries* (Richter, *Trid.*, p. 137, n. 55); cfr. can. 1544 f.

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assigned to a certain parish. If no special priest is mentioned, the choice is left to the heirs to determine.[14] Finally, it may happen that a testator leaves, say, $1000 for Masses to be said each year forever without further determination. In that case the executor has to see to it that the will is put into effect.[15] The final obligation rests on the heirs, who may relieve themselves of further responsibility by handing over the legacy to the Ordinary. In the last hypothesis no foundation would be created because no obligation is attached to any particular church or altar, nor are the celebration and application of the Masses imposed on a determined priest. Hence such Masses are really *manual stipends*. $1000, at 5% interest, would produce $50 *per annum* and entitle the testator to fifty Masses.

Quasi-manual Masses arise from founded Masses which are to be said either in a particular church or by a specially designated priest. If the testator has left it to the Ordinary to make a change concerning the place or priest, the latter may *de iure* order such a change and assign another altar or church and give the stipend to another priest. If the charter contains no clause as to the free choice of place or person, the Holy See (S. Cong. Conc.) must be asked. For the last will of the faithful is to be respected, especially with regard to Masses.[16]

A *manual stipend* may, therefore, be called an offhand stipend involving no obligation other than the application of the Mass. A *quasi-manual stipend,* on the other hand,

14 S. C. C., Jan. 15, 1639 and *passim* (Richter, *l. c.*, n. 59 f.).

15 Here it may not be amiss to draw attention to certain civil laws. Where these are not favorable to such legacies, it would be wise not to mention the specific purpose for which the sum is left, but leave it to the executor to specify and apply it. But the heirs are under grievous obligation of handing over the money.

16 Urban VIII, "*Cum alias,*" ad dub. 1 (Richter, *Trid.*, p. 146).

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is a modified foundation, the obligation of which is limited as to place or person. A *foundation proper,* finally, is a legacy attached either to a certain place (altar, chapel, church) or to a certain priest by the will of the testator.

NO TRAFFICKING IN MASSES ALLOWED

CAN. 827

A stipe Missarum quaelibet etiam species negotiationis vel mercaturae omnino arceatur.

Every species of bartering or trafficking with Mass stipends must be strictly avoided.

The terms *negotiatio* and *mercatura* are nearly synonymous, except that the former, which may be translated by bartering or exchange of wares, has perhaps a more general meaning. Trafficking is a common term for buying and selling for the sake of gain. Even *negotiato* includes the notion of profit, at least in common parlance. To understand this canon fully, it must be viewed in the light of the following decisions.

1. *Collecting* of Mass stipends by booksellers and other merchants through public advertisements and promises of premiums is strictly forbidden, as is also the distribution of stipends in the form of books or merchandise, whether to the full amount of the stipends or retaining a profit, no matter whether this profit is given to pious institutions or kept by the agent, whether others have handed over these stipends to said merchants or whether they have collected them themselves. Stress is to be laid on the act of *collecting* and the number of Masses.[17]

2. It is also forbidden to *diminish Mass stipends;* thus

[17] S. C. C., July 25, 1874, n. 1–5 (*Coll. P. F.,* n. 1423).

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from Masses to be said in a celebrated sanctuary nothing may be deducted for the adornment or decoration of the altars, etc.[18]

3. According to a decision of the S. C. C., it would *not* be trafficking if good books or magazines were given in place of stipends, or if other merchandise were given for the same *by ecclesiastics*.[19] However, a decree (*"Vigilanti"*) of May 25, 1893, prohibits accepting books from booksellers in lieu of Mass stipends. It is not without reason that Cardinal Gasparri in his notes omits all reference to this mitigated interpretation. In general, therefore, whatever savors of trade or bartering is forbidden, no matter what some theologians say who wrote before the Code. On the other hand, we hardly believe that a priest would be forbidden to give a book to a brother priest with the request: "Please say a Mass according to my intention." For there is no trafficking involved in such an agreement. The purpose of the legislator is to exclude trading in Masses.

CAN. 828

Tot celebrandae et applicandae sunt Missae, quot stipendia etiam exigua data et accepta fuerint.

The number of Masses to be said and applied must correspond with the number of stipends given and accepted, even though these be small.

This rule, given by Urban VIII and re-iterated by Innocent XII, is to be understood as follows:[20] If a priest receives, for instance, ten Mass intentions, but only five dollars, he is bound to say ten Masses, provided, of

18 S. C. C., May 25, 1893 (*Coll.*, n. 1832); this is only allowed by a special papal indult.

19 S. C. C., April 24, 1875; July 25, 1874 (*Coll. P. F.*, n. 1443, 1423).

20 Urban VIII, *"Cum alias"*; Innocent XII, *"Nuper"* (Richter, *Trid.*, p. 145 ff.).

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course, as our text says, he has accepted the stipends. But it could not be said that he accepted the obligation if he received the five dollars without being aware of the smallness of the amount, or if the donor had deceived him or given him a counterfeit note. There is a contract between the one who offers the stipend and the priest who says the Mass.[21] This contract is of the nature of a tacit *do ut facias.* Now any contract that is not knowingly and willingly agreed to by both parties must be regarded as invalid, and a priest is not supposed to acquiesce in fraud or deceit. But if he accepts the five dollars with the promise that he will say ten Masses, he must abide by his promise, even though the amount is not the customary or synodal one. This rule affects all priests, regular as well as secular, individuals as well as communities, congregations and orders of religious.[22] Greek priests must offer the Holy Sacrifice according to the intention of those who make voluntary offerings (oblations), and if several persons make an offering, the priest must inform them of the preceding oblations, and, unless they all declare themselves satisfied with one Mass, he must offer as many Masses as there are oblations. Nor is it sufficient to put particles on the table according to the number of the offerers, or to make a simple commemoration for the different donors.[23]

21 S. O., Sept. 24, 1665, prop. 10 dam. (Denzinger, n. 981): *"Non est contra iustitiam, pro pluribus Sacrificiis stipendium accipere, et Sacrificium unum offerre. Neque etiam est contra fidelitatem, etiamsi promittam promissione, etiam iuramento firmata, dandi stipendium, quod pro nullo alio offeram."*

22 Urban VIII, *"Cum alias,"* § 5.

23 Benedict XIV, *"Demandatam,"* Dec. 24, 1743, § 10; S. C. P. F., April 13 1807, n. XVI (*Coll.*, n. 692).

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CAN. 829

OBLIGATION NEVER CEASES

Licet sine culpa illius qui onere celebrandi gravatur, Missarum eleemosynae iam perceptae perierint, obligatio non cessat.

Even though the alms given for Masses have perished without the fault of the one who is obliged to say the Masses, the obligation does not cease.

This is merely a consequence of what was said in the preceding canon concerning the species of contract, which obliges as soon as it is entered upon. Hence if a priest has received money for some Masses and loses it, the loss is his *(res perit domino)* and he remains bound to say the Masses.

A reasonable doubt may arise about founded Masses, though there is a Roman decision which rather favors the existence of the obligation. Regulars were entrusted forever with a church to which the obligation of saying one Mass daily for the founders and benefactors was attached. Though it was not evident that this burden had been attached at the time of the foundation and there was no trace of annual revenues, the S. Congregation decided that the religious were bound to apply the Mass.[24] This is in keeping with can. 825, 4°, and therefore our present text probably also applies to foundations, unless the Holy See either modifies or abolishes the obligation.

24 S. C. C., Jan. 28, 1708; Dec. 15, 1731 (Richter, *Trid.*, p. 137, n. 56).

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NUMBER OF MASSES NOT DETERMINED

CAN. 830

Si quis pecuniae summam obtulerit pro Missarum applicatione, non indicans earundem numerum, hic supputetur secundum eleemosynam loci in quo oblator morabatur, nisi aliam fuisse eius intentionem legitime praesumi debeat.

If one offers a sum of money for the application of Masses without determining the number, this is to be reckoned according to the amount usually given in the place where the donor lived, unless it may be lawfully presumed that he had a different intention.

This canon must be compared with canons 828 and 831. The former makes the number of Masses to be applied dependent upon the contract entered between the donor and the priest, whilst can. 831 rules that the Ordinary should determine what constitutes a stipend. Neither of these two canons applies to the hypothesis set up in can. 830. *In concreto,* this hypothesis is that a man hands a priest ten dollars for stipends without determining the number of Masses he wishes to have said. If he would say to the priest: "Please say *a* Mass," the remainder of the sum (nine dollars) might justly be taken as a personal gift, especially if the donor is known as a generous man, or if it would be around Christmas time or the priest's birthday, etc. But if the donor would say: "Please say *Masses* for my intention," then ten Masses would have to be said in our country, where the usual stipend is one dollar for a Mass.[25]

[25] Innocent XII, "*Nuper*," § 15; S. C. C. Nov. 15, 1698; Benedict XIV, *Instit.*, 56, n. X.

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MASS STIPENDS TO BE FIXED BY THE ORDINARY

CAN. 831

§ 1. Ordinarii loci est manualem Missarum stipem in sua dioecesi definire per decretum, quantum fieri potest, in dioecesana Synodo latum; nec sacerdoti licet ea maiorem exigere.

§ 2. Ubi desit Ordinarii decretum, servetur consuetudo dioecesis.

§ 3. Etiam religiosi, licet exempti, circa stipem manualem stare debent decreto Ordinarii loci aut dioecesis consuetudini.

§ 1. It belongs to the Ordinary of the diocese to fix, if possible by a synodal decree, the amount of a manual Mass stipend, and priests are not allowed to demand more.

§ 2. Where there is no episcopal decree on the subject, the diocesan custom must be observed.

§ 3. Religious, also, even though exempt, must abide by the episcopal decree or diocesan custom.

This text is so plain that it needs no explanation. We will therefore only add that the Ordinary may enact, and enforce his enactment with ecclesiastical censures, that the secular as well as regular clergy shall not accept *less* than what either the synodal decree or diocesan custom prescribes; but he may not forbid priests to accept *more* than is customary, if the faithful voluntarily offer more.[26] The Ordinary is *not* entitled to fix the stipend for founded Masses for exempt religious.[27]

26 S. C. C., Jan. 16, 1649; Benedict XIV, *Instit.*, 56, n. XI.

27 S. C. C., Jan 15, 1698; Benedict XIV, *De Sacrif. Missae*, l. III, 22, 9, in agreement with the superiors regular, fixed the sum at 60 scudi ($60). This sum, according to the present value of money, would be from $240 to $300.

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CAN. 832

Sacerdoti fas est oblatam ultro maiorem stipem pro Missae applicatione accipere; et, nisi loci Ordinarius prohibuerit, etiam minorem.

A priest is allowed to accept a stipend which is larger than the one determined by diocesan statute or by custom; and, unless the Ordinary has forbidden, he may also accept a lesser one. The prohibition to receive a stipend below the customary sum must be made antecedently, and it would not be just to punish a priest for doing so if no prohibition had been promulgated.

ADDITIONAL STIPULATIONS

CAN. 833

Praesumitur oblatorem petiise solam Missae applicationem; si tamen oblator expresse aliquas circumstantias in Missae celebratione servandas determinaverit, sacerdos, eleemosynam acceptans, eius voluntati stare debet.

It is presumed that the one who offers a stipend asks only to have the Mass applied; but if he expressly determines certain circumstances to be observed in the celebration of the Mass, his wishes must be complied with.

This follows from the nature of the stipend as a contract. Any one who makes a contract is allowed to add stipulations *(modi contractus)*, provided, of course, they are not opposed to the substance of the contract or forbidden by law. The " circumstances " of which our canon speaks, may refer to time, day or feast, kind of Mass and altar, etc. Of the time within which Masses are to be said the next canon (834) treats. We will only observe

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that, if the petitioner asks to have the Mass said on a certain day, and the priest agrees to do so, this stipulation must be complied with.[28]

(a) Similarly, if a certain *day* or *feast* is stipulated, it must be strictly observed, or the stipend returned, unless the priest knows the mind of the donor.

(b) If the donor asks for a *certain Mass,* for instance, a votive Mass in honor of the Blessed Virgin, the priest should say that Mass, though not bound under grievous obligation to do so. If the priest is asked to say a Mass for the poor souls, he should say a "Black" Mass.

The question has been asked whether a priest would satisfy the obligation arising from a stipend for a Mass for the dead, if he said the Mass of the day, though he could and should say a "Black" Mass. The S. Congregation of Rites answered that if the rubrics permitted a votive Mass or *Missa de requiem,* the priest would not fulfill his obligation by saying the Mass of the day, because the will of the testator or giver, if reasonable, must be respected.[29] In a mitigated form the same answer was returned twenty years ago by the same Congregation. The question was:[30] "Does a priest who is given a stipend for a Mass to be said for one or several dead, or in honor of a holy mystery, or of the Blessed Virgin, or of a Saint, fulfill his obligation if he says and applies the Mass of the day, because the rubrics do not permit him to say the Mass especially asked for? The answer was:

28 Theologians (cfr. Prümmer, *l. c.,* III, n. 266) maintain that the obligation is a grave one if the donor insists on a special day, but only a *levis* if he asks for a certain day without insisting on it or for no special reason. Besides, if many Masses are offered, say to a monastery, without a specially urgent appeal, it may reasonably be supposed that the donors are satisfied to have the Masses said as soon as possible, even though they should prefer a certain day.

29 S. Rit. C., March 3, 1761, ad 7 (*Dec. Auth.,* n. 2461).

30 S. Rit. C., June 13, 1899, ad IV (*Dec. Auth.,* n. 4031).

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Yes, but with the addition: "It would be more advisable to comply, as far as possible, with the intention of the giver by saying the 'Black' or votive Mass." From this decision we may gather that the priest should comply with the manifest and expressed intention of the giver but is not under a strict obligation to do so, unless a direct demand was made as to the kind of Mass to be said, especially if it be a foundation. In our country, we believe, most people are satisfied if the priest says a "Black" Mass, even though the intention was directed for the benefit of the living, and we do not quite understand why some theologians [31] regard it as incongruous to say a "Black" Mass for the living. Does not the act of charity done to the poor souls enhance, as it were, the fruits of the Mass thus applied? Of course, if a Mass in honor of a special Saint, *e. g.*, St. Anthony, were asked for, based on the belief that this Saint is a particularly powerful intercessor with God, it would not be prudent to say a "Black" Mass.

(c) If a *special altar* is asked for by the donor, this wish should be conscientiously complied with, in as far at least as canon 836 does not permit a deviation from the rule.

Here the question of the *privileged altar,* which will be more fully discussed under cans. 916–918, may be briefly touched upon as far as it is connected with our present subject. Generally speaking, privileged altars are intended for the dead, and therefore "Black" Masses should, as a rule, be offered thereat. The rubrics forbid a *Missa de Requiem* on *duplex* days, unless it be a *cantata in die obitus,* etc. Yet, says the S. Congregation, if the Mass is *de facto* applied for the intention of the giver or founder, the privilege is not lost, *i. e.,* the indul-

31 Thus Prümmer, *l. c.,* III, n. 268.

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gence attached to such an altar is gained also by a *Missa de festo* or *die occurrenti* prescribed according to the rubrics. Neither does it matter whether the altar is thus privileged *in perpetuum, or ad tempus,* or *pro certis diebus,* if the Mass is said on the privileged days, and the Mass has to be said in the color of the day according to the rubrics.[32] Hence, to gain the indulgence attached to a privileged altar it is not necessary to say a "Black" or Ferial or Vigil Mass with the oration for the deceased, although this may be laudably done.[33]

(d) The donor may also stipulate that the Mass be said in a certain *church* or *chapel.* In that case the priest must say the Mass in the church or chapel appointed. A chaplain who is appointed to a certain chapel, must say Mass there, and if the founder has not expressly determined otherwise, he must also apply the Mass for the founder.[34] The rector of a church in which a Mass must be said by the last will of a testator, may not permit a priest to whom he has given the stipend to say the Mass in another church, or to subtract anything from the original alms.[35] If a Mass to be said in a certain church must be transferred to another church, some compensation for wine, altar bread, candles, and the use of vestments may be demanded.[36] From this it logically follows that a priest saying Mass in a strange church would not act against ecclesiastical law or natural courtesy if

32 S. Rit. C., Aug. 5, 1662; Dec. 1, 1666; Aug. 13, 1669 (*Dec. Auth.*, nn. 1238, 1343, 1392).

33 S. O. (sect. Indulg.), Feb. 20, 1913 (*A. Ap. S.*, V, 122); Benedict XIV, *Instit.*, 56, n. XV.

34 S. C. C., Aug. 18, 1668; Jan. 11, 1710 (Richter, *Trid.*, p. 136 f. nn. 49, 55); Dec. 19, 1904, ad 3; especially is the chaplain not allowed to determine *ad libitum* the stipend to be given to another priest for saying Mass in that chapel (which would be against n. XV of the "*Ut debita,*" May 11, 1904).

35 S. C. C., Dec. 19, 1904, ad 2 (*Linzer Q.-S.*, 1905, Vol. 58, p. 674).

36 S. C. C., Jan. 15, 1639, *et pluries* (Richter, *Trid.*, p. 137, n. 62; Benedict XIV, *Instit.*, 56, n. XIII).

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he would leave some compensation at least for the janitor and the altar boys.

Here we may add something concerning the thirty so-called *Gregorian Masses,* which, according to tradition, originated with St. Gregory the Great (590–604), who celebrated Mass for thirty consecutive days to redeem the soul of a monk who had died with some unlawfully retained property. The custom is widespread to-day, but some have exaggerated notions as to the effects of these Masses. We are concerned only with the law regarding them, which has lately been fixed as follows:

(a) The thirty Gregorian Masses must be celebrated on thirty consecutive days, without interruption;

(b) A priest cannot say, for instance, three Masses on Christmas Day as Gregorian Masses, and then on the 28th Dec. resume the celebration.

(c) Nor can he give the thirty Masses to different priests that they may be said in less than thirty days.

(d) It is not required that the same priest say all thirty Masses, or that he say a "Black" Mass on the days when the rubrics permit.[37]

Since the Gregorian Masses are a burden and a risk, it would not be against ecclesiastical law if the Ordinaries[38] would fix an "extra" tax for them. For religious the Ordinary in that case is the superior major, who, therefore, is entitled to make or authorize an additional charge for Gregorian Masses.

[37] S. O. (Sect. Indulg.), Dec. 12, 1912 (*A. Ap. S.*, V, 32 f.); the three last days of Holy Week do not interfere with the thirty *consecutive* days.

[38] This is done in some Eastern dioceses, where the charge is $45.

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TIME OF FULFILLING THE OBLIGATION

CAN. 834

§ 1. Missae pro quibus celebrandis tempus ab oblatore expresse praescriptum est, eo omnino tempore sunt celebrandae.

§ 2. Si oblator nullum tempus pro Missarum manualium celebratione expresse praescripserit:

1.° Missae pro urgenti causa oblatae quamprimum tempore utili sunt celebrandae;

2.° In aliis casibus Missae sunt celebrandae intra modicum tempus pro maiore vel minore Missarum numero.

§ 3. Quod si oblator arbitrio sacerdotis tempus celebrationis expresse reliquerit, sacerdos poterit tempore quo sibi magis placuerit, eas celebrare, firmo praescripto can. 835.

§ 1. If a term has been expressly fixed by the donor, the Masses must be said at the time required.

This obligation, as already observed, follows from the stipulation attached to the contract.[39]

§ 2. If no *time* has been expressly fixed for *manual stipends,* the following rules must be followed:

1°. *Urgent* Masses must be said *as soon as possible* within an equitable period. Thus if a Mass is ordered for a successful operation or child-birth, it is supposed to be said before or on the day of the event. However, the legislator says "*tempus utile*" (see can. 35), which here means, if the priest is not occupied with other intentions or obligations. Should he take sick or be lawfully prevented on the day on which he is obliged to say the

39 S. C. C., June 23, Sept. 1, 1742, ad 9.

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stipulated Mass, he would have to ask another priest to say the Mass in his stead,[40] provided he could find one who would be willing and able; if not, he may keep the stipend and say the Mass as soon as possible.

2°. If the Masses are not urgent, they must be said within a short time *(intra modicum tempus)*, proportionate to the greater or smaller number of Masses. By *modicum tempus* was always understood *one month* from the date of the obligation in case of one Mass.[41] A scale was proposed to the S. Congregation[42] for a greater number, as follows:

For	10	Masses,	1 month
"	20	"	2 months
"	40	"	3 "
"	60	"	4 "
"	80	"	5 "
"	100	"	6 "

The answer was: "It is left to the discretion of the priest, with due regard to the decree '*Ut debita,*' of May 11, 1904, and to the rules of approved authors." But it must be noted that the scale as proposed applied to stipends received from one person, not several. Hence, if of 100 persons each would offer one Mass stipend, the six months' term would not apply, unless the intention of the donors to have them said within that time were evident. Therefore, if the priest tells the person who offers a stipend that he cannot say the Mass within one month, or three months, and the person thus advised says: "All right, Father," he may accept the stipend. An im-

40 S. C. C., Sept. 18, 1683; June 4, 1689 (Richter, *Trid.*, p. 138, n. 65 f.).

41 S. C. C., July 17, 1755; Benedict XIV, *Instit.*, 56, n. XIV; "*Ut debita,*" May 11, 1904 (*Anal. Eccl.*, t. 12, 202).

42 S. C. C., Feb. 27, 1905 (*Anal. Eccl.*, t. 13, 124).

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plicit stipulation to the same effect may be assumed if the faithful know that many Masses are said in a monastery or religious community and nevertheless send their stipends there. It may, we say, be presumed that they are satisfied to have the Masses said when it suits the community. If they are not " urgent " as to the time, *tempus utile* may be taken.

§ 3 renders this explanation clearer. If the donor *expressly leaves* the *time* for saying the Mass *to the discretion of the priest,* the latter may say it when most convenient for him, with due regard to can. 835.

CAN. 835

Nemini licet tot Missarum onera per se celebrandarum recipere quibus intra annum satisfacere nequeat.

No one is allowed to receive more Masses to be celebrated by himself, than he can say within a year.

The phrase *" per se celebrandarum"* means that the *priest himself,* and not another, is supposed to say the Masses. Otherwise a priest may accept as many Masses as he wishes and dispose of them according to the rules laid down in can. 839 ff.

The phrase *" intra annum" (within a year)* also calls for an explanation. The starting point for *manual Masses* is the date on which the first Mass is received and accepted. Say this is the first of March, 1919, and suppose the donor (according to can. 834, § 3) has left it entirely to the discretion of the priest when to say the Mass. If he says it any time before March 1, 1920, he will have complied with the law. He may, before he has said the Mass accepted on March 1, 1919, accept others, and say them first. But if the donor has set no time for the Mass given on March 1, 1919, nor expressly left it to

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the discretion of the priest when to say it, the priest must say the Mass within a month, although he may receive other Masses before April 1, 1919, before having said the Mass accepted on March 1, 1919. For these Masses received in the meantime, say on the feast of St. Joseph, 1919, the same rules hold good.[43] It is well to instruct the faithful on this point and also to ask the giver in each instance whether he is willing to leave the time for saying the Mass to the priest.

POSTERS IN CHURCHES

CAN. 836

In ecclesiis in quibus ob fidelium peculiarem devotionem Missarum eleemosynae ita affluunt, ut omnes Missae, celebrari ibidem debito tempore nequeant, moneantur fideles, per tabellam in loco patenti et obvio positam, Missas oblatas celebratum iri vel ibidem, cum commode poterit, vel alibi.

The churches here in question are mainly famous sanctuaries or shrines. When it proves impossible to say all Masses in such sanctuaries for which stipends are offered, in order that the expectations of the faithful may not be disappointed, they should be advised that the Masses will be said either in the church itself, if convenient, or else in some other church.[44] A public notice to this effect should be posted in a conspicuous and easily accessible place. If stipends are offered nevertheless, the ministers cannot be accused of "pious fraud."

Evidently this rule applies only to churches where the faithful make their offerings personally, not to communities to which stipends are sent.

[43] Innocent XII, "*Nuper*," § 15 ad 11 (Richter, *Trid.*, p. 146).

[44] S. C. C., March 8, 1659; Benedict XIV, *Instit.*, 56, n. XIV.

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MASSES SENT AWAY

CAN. 837

Qui Missas per alios celebrandas habet, eas quamprimum distribuat, firmo praescripto can. 841; sed tempus legitimum pro earundem celebratione incipit a die quo sacerdos celebraturus easdem receperit, nisi aliud constet.

Whoever has Masses to be said by others, should distribute them as soon as possible, with due regard to can. 841. But the lawful time for saying them commences on the day on which the priest who is to say them has received them, unless the contrary is evident.

Here the *intentionarius* of religious communities and of priests overloaded with Mass intentions is especially aimed at. The second clause may be illustrated thus: A religious in Rome receives from his home monastery thirty Masses. Sent on Feb. 1, they arrive on March 1. Ordinarily the religious would have time to say them from March 1 to the middle of May. If, however, the letter contains a clause urging him to say the Masses as soon as possible, he would have to hurry up; but if the letter says: "at your convenience," he could postpone saying the thirty Masses and say them when he had no other intentions.[45] A decision of the S. Congregation advises that where there is a large number of intentions, the Masses should be distributed among several priests, so that they may be said more promptly.[46]

[45] "*Ut debita*," n. 4.

[46] S. C. C., Feb. 27, 1905, ad 4.

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CAN. 838

Qui habent Missarum numerum de quibus sibi liceat libere disponere, possunt eas tribuere sacerdotibus sibi acceptis, dummodo probe sibi constet eos omni exceptione maiores vel testimonio proprii Ordinarii commendatos.

This canon is a corollary to the preceding one, for it describes the qualities of the priests to whom superfluous Masses, of which one may freely dispose, may be entrusted. Any priests may be freely chosen, provided they are absolutely reliable or recommended by the local Ordinary. It is not necessary, therefore, that they be known personally [47] *(facie ad faciem)* to those who distribute the Masses.

DURATION OF THE OBLIGATION OF A MASS STIPEND

CAN. 839

Qui Missas a fidelibus receptas aut quoquo modo suae fidei commissas aliis celebrandas tradiderint, obligatione tenentur usque dum acceptatae ab eisdem obligationis et recepti stipendii testimonium obtinuerint.

Whoever gives Masses received from the faithful or otherwise entrusted to his care to others is personally responsible for them until he is informed that the obligation has been accepted and the stipend received.

It is evident that the priests to whom Masses are sent according to this canon, must have the same qualities as those described in can. 838. The *obligation* for Masses

47 "*Ut debita,*" n. 5, says: "*personaliter sibi notis*"; but this is omitted in our text. However, even the wording of "*Ut debita*" did not absolutely require personal knowledge.

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given to others does not cease until the other has *accepted* the obligation and *received the stipend*. The reason is evidently based upon the nature of the contract. For readiness to accept the obligation is only half efficacious, and does not become fully so until the object is delivered, which is done by actual transmission and reception of the price. It is further necessary to have reliable information with regard to both these essential conditions. This information may be given orally or in writing, but it must produce moral certainty. No Masses whatsoever are excepted from this law, not even those sent to the Ordinary or the Holy See. Therefore the old ruling of "*Ut debita,*" 1904, n. 6, must be modified to the effect that the obligation remains until information is given either by the Ordinary or the Holy See if Masses are sent to either. Also the risk of losing the money must be borne by the sender. When a check or draft is sent, there is no loss to be feared except of time, and the cancelled check upon its return will serve as a receipt. Whether this would suffice for making sure of the acceptance of the obligation depends on the business capacity of the recipient and the custom of the country. In our country cashed and returned checks are acknowledged as legal receipts.

CAN. 840

§ 1. Qui Missarum stipes manuales ad alios transmittit, debet acceptas integre transmittere, nisi aut oblator expresse permittat aliquid retinere, aut certo constet excessum supra taxam dioecesanam datum fuisse intuitu personae.

§ 2. In Missis ad instar manualium, nisi obstet mens fundatoris, legitime retinetur excessus et satis est remittere solam eleemosynam manualem dioecesis in qua

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Missa celebratur, si pinguis eleemosyna locum pro parte teneat dotis beneficii aut causae piae.

§ 1. He who sends manual stipends to others, *must transmit* them as he has received them, *i. e., in full,* unless the donor has expressly permitted him to retain part of the stipend, or unless it is evident that whatever exceeds the synodal or customary stipend was intended for the person of him to whom the stipend was given.

There are many strict prohibitions to this effect from the time of Urban VIII to our own, intended to keep "damnable lucre" out of the Church.[48] The decree "*Ut debita,*" of May 11, 1904, abolished all previous privileges or indults and demanded "a new and special concession of the Apostolic See," which cannot be communicated to others, for the superiors of famous sanctuaries who wish to retain a small percentage of the stipends for the upkeep and adornment of the church. If a Mass stipend for a certain place or sanctuary were $2, therefore, the priest who said the Mass must be given the two dollars in full.[49] However, the S. Cong. made an exception in favor of sanctuaries by adding: "*nisi de consensu oblatorum,*" that is, if the donors *expressly* (no *praesumpta* or *tacita licentia*) state that a small sum may be kept out of the usual stipend for the sustenance of the church, it would be allowed by law.[50]

Another reason for retaining a part of a Mass stipend would be if the amount exceeded the usual tax and was given *intuitu personae,* for personal reasons. In Holland the faithful often give their pastors stipends which are

48 "*Alias,*" June 21, 1625, § 6: "*damnabile lucrum*"; S. O., Sept. 24, 1665, prop. dam. 9 (Denzinger, n. 980).

49 S. C. C., Dec. 19, 1904, ad 3 (*Anal. Eccl.*, t. 13, p. 70). This law also obliges the Oriental priests; S. C. P. F., Jan. 20, 1893 (*Coll.*, n. 1823).

50 S. C. C., "*Vigilanti,*" May 25, 1893 (*Coll. P. F.*, n. 1832).

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almost equal to a salary. They do this partly to insure their support, and partly out of gratitude and affection. The pastors, when absent or sick, or for other reasons, have their chaplains or curates *(coadiutores)* say the Masses for the usual or synodal stipend and keep the surplus for themselves. The matter was brought to Rome, and the S. Poenitentiaria, in the name of Benedict XIV, decided that the practice was permissible.[51] Now a priest may receive a stipend of $5 from a friend, or as a present, and if he is certain that the *pingue stipendium* was given for merely personal motives, he may keep the $4 and give $1 to another priest to say the Mass, unless, of course, the donor had insisted that he himself say the Mass.

In another case solved by the S. Poenitentiaria[52] pastors were accustomed to exchange Mass intentions with their assistants or curates, who sang the *Missa cantata* in the pastor's place, but received no stipend. The pastor on his part did not say the Mass according to the intention of the assistant, but gave a manual stipend to a third priest, who said the Mass according to the intention of the assistant. The S. Congr. decided that such an exchange of intentions was allowed, provided the third priest was aware of the higher stipend and freely and of his own accord renounced it. The reason given was that there is no detestable trading in that case.

§ 2. The *excess or surplus of quasi-manual stipends* may be lawfully retained if the *pingue stipendium* takes the place of a partial endowment of an ecclesiastical pre-

[51] S. Poenit., April 6, 1742 (*Coll. P. F.*, n. 336); Benedict XIV, "*Quanta cura*," June 30, 1741, enacted severe penalties against so-called trading and approved the decision of S. Poenit. h

[52] S. Poenit., Aug. 22, 1826 (*Coll. P. F.*, n. 789). This decision runs counter to the doctrine of St. Alphonsus.

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bend or pious institution, unless the will of the founder reads otherwise. In that case, then, if the beneficiary has the Mass said by another priest, the former is bound only to hand the customary or diocesan stipend to his substitute.

How can this ruling be made to square with § 1 of the same canon? The answer is obvious. The surplus stipend is given as a sort of contribution to the necessary support of the priest, who is employed for a certain benefice or chapel, and since the stipend itself is of the same nature, there is no alienation involved either of the foundation or of the stipend. Besides, there is no trading, because the priest receives the stipend to which he is entitled according to the diocesan custom. In Bavaria and elsewhere, where the income of pastors is fixed by the civil government by agreement with the ecclesiastical authority, the salary includes the stipends accruing from foundation Masses, and from requiem and marriage Masses, for which a larger stipend is paid than for ordinary Masses.

Since, however, the pastors are sometimes lawfully prevented from saying these Masses personally, they give them to other priests, who say them for the usual stipend, which is less than the one received by the pastors, who retain a portion of the original stipend as part of their legitimate income. Rome has declared this practice lawful, because the money thus kept is really a part of the salary.[53] The surplus may also be retained in favor of the church to which a priest is assigned.[54] If the founder, however, has set up a clause forbidding such retention, it would be unlawful, as the

53 S. C. C., Monacen., Feb. 28, March 28, Aug. 22, 1874 (*A. S. S.*, Vol. 8, 65 ff.).

54 S. C. C., Jan. 21, 1898 (*Anal. Eccl.*, t. 15, 65).

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will of the founder must be religiously respected.[55] This rule, we believe, may also be applied to our country, where quasi-manual stipends form part of the salary of priests, provided no contrary stipulation exists in the will of the founder.

CAN. 841

§ 1. Omnes et singuli administratores causarum piarum aut quoquo modo ad Missarum onera implenda obligati, sive ecclesiastici sive laici, sub exitum cuiuslibet anni, Missarum onera quibus nondum fuerit satisfactum, suis Ordinariis tradant secundum modum ab his definiendum.

§ 2. Hoc autem tempus ita est accipiendum ut in Missis ad instar manualium obligatio eas deponendi decurrat a fine illius anni intra quem onera impleri debuissent; in manualibus vero, post annum a die suscepti oneris, salva diversa offerentium voluntate.

§ 1. Administrators of pious institutions, and all, whether clergymen or laymen, who are in any way bound to have Mass obligations fulfilled, must at the end of each year send the Masses not yet said to their Ordinaries in some manner to be determined by the latter.

§ 2. The time for complying with this obligation runs, for quasi-manual stipends, from the end of the year during which the Masses should have been said, and for manual stipends from the day on which the obligation was accepted, with due regard to the intention of the donor.

Causae piae are *pious institutions* under the direction of the local Ordinary, which generally have a number of Masses either imposed by the will of founders or offered by the faithful. The administrator (or *syndicus,* as he

[55] S. C. C., Feb. 21, 1688 (Richter, *Trid.*, p. 138, n. 69); "*Ut debita,*" May 11, 1904, n. 15; Feb. 23, 1907 (*Anal. cit.*, p. 64).

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was formerly called) of each house is responsible for the Mass obligations being duly fulfilled. *Pia causa* in this context certainly includes the administration of any ecclesiastical institute with the sole exception of male religious, as can. 842 clearly implies. Hence it also comprehends religious houses of women who are not under the jurisdiction of a prelate regular. Besides *piae causae* here comprises also parishes, chaplaincies, rectories, in fact, any one, clergyman or layman, who has to see to the fulfillment of such obligations; also guardians or *executors* of last wills and the heirs upon whom devolves the duty of complying with pious obligations.

The Ordinary to whom the Masses not yet said must be sent, is the one in whose diocese the *pia causa* is located.

§ 2 defines the *date from which* the obligation commences. For *quasi-manual* Masses, which are attached either to a definite church or to a specified priest, the time runs from the end of the year within which the Masses were to be said. Suppose, *e. g.*, a quasi-manual Mass was to be said on St. Michael's Day, 1918. If this Mass was not said that year, it must be handed over to the Ordinary before the last day of Dec., 1918, because we now generally understand the civil year, which commences Jan. 1. However, if it were taken to mean the ecclesiastical year, the end of that year would be the Saturday before the first Sunday of Advent. If the document merely says: "So many Masses must be said each year," we should take the civil year. But if a date is stated, from which the obligation commences, the year is reckoned from that date.

If there is question of *purely manual stipends,* the obligation of sending them to the Ordinary commences on the first day after a full year has elapsed from the day

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when the obligation was assumed. For instance, a Mass was ordered on St. Michael's day, Sept. 29, 1918, but not said on that day, and hence the Mass must be sent to the Ordinary on Sept. 30, 1919. Only if the will of the donor has expressly left it to the discretion of the priest to prolong the term of one year, may he refrain from sending it to the Ordinary.

DUTY OF ORDINARIES AND RELIGIOUS SUPERIORS

CAN. 842

Ius et officium advigilandi ut onera Missarum adimpleantur in ecclesiis saecularium pertinet ad loci Ordinarium; in religiosorum ecclesiis, ad eorum Superiores.

The right and duty of watching over the fulfilment of Mass obligations belong to the Ordinary of the diocese with regard to the churches of secular priests, and to the superiors of religious with regard to *their* churches.

This canon repeats the ruling of Innocent XII, who gravely enjoined Ordinaries to see to it, at their canonical visitations and on other occasions, that all the regulations concerning Mass stipends are carried out without delay, cavil, or perverse interpretation.[56] However this duty extended only to churches where *secular priests* are employed — *in ecclesiis saecularium.* The legislator, by extending the exemption formerly belonging to exempt regulars exclusively, has made the *superiors of religious,* whether exempt or not, *responsible* in this matter. This had been the law ever since the times of Urban VIII and Innocent with regard to foundation Masses.[57] But the bishop of St. Pölten, in Lower Austria, thought he was

[56] "*Nuper,*" Dec. 23, 1697, § 24.
[57] Ib. § 25; S. C. C. Nov. 14, 1699; June 26, 1700.

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entitled to inspect the books for manual stipends kept by the Franciscans of his diocese. The S. Congregation thought differently and told the bishop that he could not claim the right of inspecting the records of even manual Masses at the time of his canonical visitation. This decision touched the books kept in a parish church in charge of the Franciscans.[58]

The text says, *in ecclesiis religiosorum*. What churches are these? We believe that since the text draws no distinction between churches perpetually and temporarily entrusted to religious, the legislator intends to include both classes. But the religious must be such as defined by the Code, *viz.*, members of a congregation with the three religious vows. A doubt may arise as to communities of nuns or Sisters who are subject to the diocesan Ordinary but have a religious as chaplain. Who is the responsible person in that case? We believe a distinction will disperse the doubt. For the Masses which are sent to the religious community of Sisters, as such, and which cannot be said by the chaplain, the superioress is responsible, and ultimately the local Ordinary, because such congregations are subject to him. As to the Masses given to the chaplain, he must answer for them to his superior, because by the name of Ordinary, according to our text, is to be understood the superior of the religious; — *pro suis respectivis subditis,* as one decision declares.[59]

STIPEND-BOOKS

CAN. 843

§ 1. Rectores ecclesiarum aliorumque piorum locorum sive saecularium sive religiosorum in quibus

58 S. C. EE. et RR., May 11, 1904 (*Anal. Eccl.*, t. 12, p. 248).

59 S. C. C., Feb. 27, 1905 (*Anal. Eccl.*, t. 15, 123).

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eleemosynae Missarum recipi solent, peculiarem habeant librum in quo accurate notent Missarum receptarum numerum, intentionem, eleemosynam, celebrationem.

§ 2. Ordinarii tenentur obligatione singulis saltem annis huiusmodi libros sive per se sive per alios recognoscendi.

§ 1. Rectors of churches and other pious institutions, whether in charge of seculars or religious, where Mass stipends are wont to be received, shall keep a special book, in which the stipends are to be entered as to number, intention, amount, and date of celebration.

§ 2. The Ordinaries are obliged to inspect these books at least once a year, either personally or by a deputy.

The latter section, of course, affects mainly secular institutions, not exempt or other religious, as otherwise can. 842 would be meaningless; but the religious superiors, too, must inspect the books kept in or for the community.[60]

CAN. 844

§ 1. Ordinarii quoque locorum et Superiores religiosi, qui propriis subditis aliisve Missas celebrandas committunt, quas acceperint Missas cum suis eleemosynis cito in librum per ordinem referant curentque pro viribus ut quamprimum celebrentur.

§ 2. Imo omnes sacerdotes sive saeculares sive religiosi debent accurate adnotare quisque Missarum intentiones receperit, quibusve satisfecerit.

§ 1. Local Ordinaries and religious superiors who give Masses to their own subjects or to others, shall promptly enter the Masses they receive, together with the amount

[60] Cfr. S. C. EE. *et* RR., May 11, 1904.

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of the stipend, according to the order of time in which they were received, in a book, and see to it that they are said as soon as possible.

§ 2. All priests, secular as well as religious, shall keep an accurate account of the intentions received and the Masses said by them.

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CHAPTER II

THE HOLY EUCHARIST AS A SACRAMENT

ARTICLE I

THE MINISTER OF HOLY COMMUNION

CAN. 845

§ 1. Minister ordinarius sacrae communionis est solus sacerdos.

§ 2. Extraordinarius est diaconus, de Ordinarii loci vel parochi licentia, gravi de causa concedenda, quae in casu necessitatis legitime praesumitur.

The ordinary minister of Holy Communion is the priest alone, the extraordinary minister may also be a deacon, if the local Ordinary or pastor grants him permission, which should be given for a grave reason, and is lawfully presumed in case of necessity.

Whereas *priests* by their ordination receive the power of consecrating and distributing the Holy Eucharist,[1] *deacons* only obtain the power of distributing the same. By custom rather than by divine law their power is made subordinate to the jurisdictional power of the Ordinary, in order to show forth the hierarchic order. Besides, since the pastor, who must be a priest, is the legitimate head of the flock assigned to him, it is becoming that the

1 C. 29, Dist. 2, *de cons.* (a text taken from the reform-synod of Paris, 829; cfr. Hefele, *Concil., Gesch.*, IV, 60, can. 45) relates with horror that women entered the sanctuary and distributed holy Communion.

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deacon, who is his inferior, should depend on him for permission to exercise his power.

Lay men, and especially women, are expressly excluded from distributing Holy Communion, because they belong not to the *Ecclesia sanctificans*, but to the *Ecclesia sanctificanda*. That in extreme necessity laymen may give communion to themselves, may be admitted, since history reports examples of this practice.[2] *Deacons,* then (but not subdeacons),[3] may, with the permission of the Ordinary or pastor in whose diocese or parish they wish to distribute Holy Communion, perform that function. But the permission is not to be granted without a *grave cause*. Such a cause would exist if the pastor were lawfully prevented from giving Holy Communion to the people on a holyday of obligation, or if a large number of people had to be accommodated, making it impossible for the pastor to finish in time. We hardly believe permission should be granted for the sake of a few daily communicants, unless the parents of a newly ordained deacon should perhaps wish to receive Holy Communion at the hands of their son. In *case of necessity*[4] the permission may be presumed. Such a case would be the administration of the Viaticum, or of paschal Communion to such as have no opportunity to receive it on some other day.

When a deacon administers Holy Communion, he may proceed as follows: Dressed with the surplice and stole crossed on the right side, he recites the *Misereatur* and *Indulgentiam,* making the sign of the cross over himself or over the communicants (or, if he brings the Viaticum, over the sick person), distributes Holy Communion, re-

2 Noldin, *De Sacramentis,* ed. 10, n. 124.

3 They sometimes usurped that prerogative; cfr. Hefele, *l. c.,* p. 621.

4 S. Rit. C., Feb. 25, 1777 (*Dec. Auth.,* n. 2504): "*Extra casum necessitatis non licet diacono.*"

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cites the " *O sacrum,*" according to the season, then the *Dominus vobiscum,* and blesses the people (or the infirm) with the Blessed Sacrament. All this is allowed when the deacon has express or presumed permission.[5] If he is merely helping the pastor, he should abstain from reciting the prayers and blessing the people.

In case no other priest is present, a priest may administer Communion to himself, even for mere devotion; and the same holds good of a deacon.[6]

COMMUNION AT MASS AND OUTSIDE OF IT

CAN. 846

§ 1. Quilibet sacerdos intra Missam et, si privatim celebrat, etiam proxime ante et statim post, sacram communionem ministrare potest, salvo praescripto can. 869.

§ 2. Etiam extra Missam quilibet sacerdos eadem facultate pollet ex licentia saltem praesumpta rectoris ecclesiae, si sit extraneus.

§ 1. Any priest may distribute Holy Communion *during* Mass, and, if he celebrates privately, also immediately *before and after Mass,* with due regard to the regulations for private Oratories laid down in can. 869.

§ 2. Even *outside of Mass* every priest enjoys the same right, provided he has at least the presumed permission of the rector of the church if he is a stranger.

§ 1 distinguishes between *two kinds* of Masses, of which one is called *private,* while the other is not determined. What, then, is a *private* Mass?

There are, as Benedict XIV says,[7] various meanings at-

[5] S. Rit. C., Aug. 14, 1858 (*Dec. Auth.*, n. 3074).
[6] Noldin, *l. c.*, n. 124.
[7] *De Sacrif. Missae*, l. II, c. 22, n. 7.

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tached to the term "private Mass." It may be a Mass said in a private place, or on a day not a feast-day, or because the fruit is applied to a private person, or because only a few persons are present, or because it is not said on the main altar or as a parochial or conventual Mass, or, finally, because the priest alone receives Holy Communion. There is a decision of the S. Congregation of Rites [8] which seems to throw some light on our subject. The question was asked whether priests duly vested for saying Mass could, for a reasonable cause, distribute Holy Communion before or after the *solemn* Mass, or at the *Missa cantata,* or the *conventual* Mass, as is permitted before and after the private Mass. The answer was, no. Hence a private Mass would be one said without solemnity or chant, not as a conventual Mass, but simply for the sake of devotion. But what about a *parochial* Mass? Here we believe a distinction should be drawn as follows: The parochial Mass, properly speaking, is the one said for the people,— the *Missa pro populo,* as it is now required on all holydays of obligation and some suppressed feasts. This is strictly the parochial Mass, because it is said for the people and, at least as a rule, in their presence. On other days the pastor is supposed to say private or merely devotional Masses, because there is no strictly juridical obligation of saying Mass on those days. We are aware [9] that some take the term "private Mass" simply in the sense of *Missa lecta,* even though it be a parish or conventual Mass. This may be true with regard to certain rubrical considerations, but in our case it certainly cannot be the underlying idea, as the decision

[8] S. Rit. C., Jan. 19, 1906 (*Anal. Eccl.*, t. 14, 104 f). A conventual Mass is one either sung or read by religious corporations.

[9] *Am. Eccl. Rev.*, 1916, Vol. 55, p. 429 f.

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quoted proves. Hence *during,* but not immediately before or after, a solemn, or sung, or conventual, or strictly parochial Mass Holy Communion may be distributed, whilst a priest saying private Mass may also distribute it before, during, and after Mass.

Every priest is entitled to distribute Holy Communion even *in a church not his own,* provided he has the at least presumed permission of the rector of the church where he says Mass. The accessory follows the principal,[10] which in this case is the celebration of the Holy Sacrifice. This rule holds good also with regard to religious, although the Decretals[11] were rather severe in condemning religious who ventured to distribute the Holy Eucharist without the special permission of the pastor.

A permission may be presumed if no express prohibition has been issued by the local pastor.

If there is a public notice hung up in the sacristy regulating the hour for distributing Holy Communion, visiting priests should heed it, because it is intended to preserve order.

When Holy Communion is distributed at a "Black" Mass (which is not forbidden),[12] the priest may communicate the faithful during Mass with particles consecrated in another Mass, or before and after Mass if there is a plausible reason. However, before and after Mass the blessing is to be omitted.[13]

10 Reg. Juris, 42, in 6°.
11 C. 1, Clem. V, 7.
12 S. Rit. C., July 24, 1683 (*Dec. Auth.*, n. 1711).
13 S. Rit. C., July 23, 1868 (*Dec. Auth.*, n. 3177).

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PUBLIC HOLY COMMUNION FOR THE SICK

CAN. 847

Ad infirmos publice sacra communio deferatur, nisi iusta et rationabilis causa aliud suadeat.

CAN. 848

§ 1. Ius et officium sacram communionem publice ad infirmos etiam non paroecianos extra ecclesiam deferendi, pertinet ad parochum intra suum territorium.

§ 2. Ceteri sacerdotes id possunt in casu tantum necessitatis aut de licentia saltem praesumpta eiusdem parochi vel Ordinarii.

Holy Communion should be *brought to the sick publicly,* unless a just and reasonable cause advises otherwise.

The right and duty to bring Holy Communion publicly to the sick, even though they be not his parishioners, belongs to the *pastor* within the limits of his parish. *Other priests* may perform this function only in case of necessity or with the at least presumed permission of the pastor or Ordinary.

These two canons concern countries where it is still customary to bring Holy Communion to the sick publicly, *i. e.,* in procession, formed by the pastor and some faithful lay people, or by the pastor and his sexton or a cleric who carries a light or lantern.[14] Only in cases of necessity, when the *furor gentilium* or violence and great irreverence was to be feared, was secret communion permitted.[15] Special faculties were issued for countries in

14 Benedict XIV, "*Inter omnigenas,*" Feb. 22, 1744, § 21 f.; S. C. P. F., Sept. 11, 1779 (*Coll.*, n. 537).

15 S. Rit. C., Feb. 10, 1871, ad I, n. 1, 3–5; May 23, 1843; Sept. 12, 1857 (*Dec. Auth.*, nn. 3234, 2908, 3059).

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which there was danger of sacrilegious irreverence. Now these faculties are no longer needed, as any reasonable cause suffices to dispense from what was formerly the general law. To decide whether such reasons exist, as they surely do in our country, belongs to the Ordinary, or the pastor, because the law fixes no limit. Our canon puts the right of bringing Holy Communion publicly to the sick among the parochial rights (cfr. can. 462, 3°), but this has reference *only to the public mode* of administering the Viaticum, not the private. What was said concerning religious under can. 514 must be here repeated.[16]

PRIVATE COMMUNION

CAN. 849

§ 1. Communionem privatim ad infirmos quilibet sacerdos deferre potest, de venia saltem praesumpta sacerdotis, cui custodia sanctissimi Sacramenti commissa est.

§ 2. Quando privatim sacra communio infirmis ministratur, reverentiae ac decentiae tanto sacramento debitae sedulo consulatur, servatis a Sede Apostolica praescriptis normis.

§ 1. Any priest may bring Holy Communion privately to the sick, provided he has the at least presumed permission of the priest who is the custodian of the Blessed Sacrament.

The custodian of a cathedral church properly is the chapter,[17] but generally the *custos* or dean of the chapter. In religious communities of men the custody is entrusted to the superior of the house, the *custos sacrae supellectilis*, or the parish priest, if a parish is attached to the house.

16 Cfr. C. 1, Clem. V, 7.

17 Can. 415, § 3, 1.°

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The pastor is the custodian of the Blessed Sacrament in his parish; the chaplain, in religious communities of women and pious institutions.

§ 2. When Holy Communion is brought privately to the sick, care should be taken that due reverence and respect is rendered to the august Sacrament according to the rules prescribed by the Apostolic See.

One of the latest rules, taken from Benedict XIV's Constitution "*Inter omnigenas,*" (Feb. 2, 1744) and reenforced by the S. Congregation of the Sacraments,[18] is the following: Ordinaries may permit Communion to be brought to such as are sickly *(mala affectis valetudine)* and cannot leave their home, but would like to receive the Holy Eucharist for devotion's sake. But the priest must always wear the stole under his dress, or what we call coat; the pyxis must be placed in a burse appended by strings from the neck and carried on the breast. The priest shall never go alone, but be accompanied by at least one of the faithful. In case of necessity, we suppose, this last condition might be dispensed with, although it certainly is a very grave one, as appears from the aforesaid Constitution and other instructions.[19]

What we observed under can. 847 concerning the bringing of Holy Communion secretly is corroborated by this canon, and hence the faculty given in virtue of form 1, art. 24, is no longer needed.[20]

18 Dec. 23, 1912 (*A. Ap. S.*, IV, 725).

19 S. C. P. F., Sept. 20, 1739; Sept. 11, 1779; Feb. 25, 1859 (*Coll.*, nn. 324, 537, 1171); the stole was dispensed with on account of a long trip and the possible transparency through the light vestment.

20 Cfr. Putzer, *Comm.*, p. 282 ff.

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THE HOLY VIATICUM

CAN. 850

Sacram communionem per modum Viatici sive publice sive privatim ad infirmos deferre, pertinet ad parochum ad normam can. 848, salvo praescripto can. 397, n. 3 et can. 514, §§ 1–3.

To bring Holy Communion as *Viaticum* to the sick, either publicly or privately, belongs to the *pastor* in accordance with can. 848, with due regard to can. 397, n. 3, and can. 514, §§ 1–3.

The right here established belongs to the *strictly parochial* rights, and must therefore be respected by all priests, assistants or curates, including religious, even if exempt or acting as missionaries.[21] This is also true if Tertiaries of the Order of St. Francis are sick in their own houses and wish to receive the Viaticum. A Franciscan may hear their confession, but the administration of the last Sacraments belongs to the pastor in whose parish they live.[22] Exempt from this rule are clerical religious and cloistered Sisters, as explained under can. 514.

Canons of the cathedral are obliged to administer the last rites to their bishop, according to canon 397, 3°. Canons who reside in a parish must receive the last rites at the hands of the pastor within whose jurisdiction they live, not from the canons or dignitaries of the chapters to which they belong, whether collegiate or cathedral.[23]

It may not be amiss to add that the Code mentions no punishment for trespassing upon the rights of the pastor

21 S. C. P. F., June 13, 1633 (*Coll.*, n. 73). Of course, if the express consent of the pastor is obtained, all those mentioned may administer the Viaticum.

22 S. Rit. C., June 20, 1609 (*Dec. Auth.*, n. 271).

23 S. Rit. C., Mar. 17, 1663, ad 4; Dec. 18, 1756 (*Dec. Auth.*, nn. 1255, 2441).

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by religious, as was the case up to the date of its promulgation.[24] But it may also be useful to state that, as the right of pastors is here set forth, obedience involves a duty. Hence the pastor should not wait until he is called to the sick, but lovingly and prudently seek them out and persuade them to receive the Sacraments.[25] He should not discriminate between poor and rich, between those of noble and those of low birth or station.[26] It is the duty of the Ordinary to see to it that this obligation is not neglected by the pastors under his jurisdiction. This is one point that may be investigated at the canonical visitation.[27]

Can. 851

§ 1. Sacerdos sacram communionem distribuat azymo pane vel fermentato, secundum proprium ritum.

§ 2. Ubi vero necessitas urgeat nec sacerdos diversi ritus adsit, licet sacerdoti orientali qui fermentato utitur, ministrare Eucharistiam in azymo, vicissim latino aut orientali qui utitur azymo, ministrare in fermentato; at suum quisque ritum ministrandi servare debet.

The priest shall distribute Holy Communion according to his rite, either in unleavened or in leavened bread. But in case of necessity, if no priest of the respective rite is present, a priest of the Oriental rite, who would otherwise use leavened bread, may administer the Holy Eucharist in unleavened bread, and, conversely, a priest of the Latin or Oriental rite, who would ordinarily use unleavened bread, may give Holy Communion in leav-

24 Pius IX, "*Apostolicae Sedis*," Oct. 12, 1869, II, 14.

25 S. C. P. F., Sept. 11, 1719 (*Coll.*, n. 537).

26 Benedict XIV, *Omnium sollicitudinum*," Sept. 12, 1744, § 14, ad dub. XII.

27 *Ib.*, "*Firmandis*," Nov. 6, 1744, § 9.

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ened bread; but each must observe the rubrics of his own rite.

Orientals generally use leavened bread for the Holy Eucharist, only the Armenians and Maronites are accustomed, ever since the fourth century, to consecrate and distribute unleavened bread.[28] The faithful, though they may gather in a church which serves both rites, must receive Holy Communion at the hands of the priest of their own rite, consequently in unleavened bread, if their rite so prescribes, or in leavened bread, if their rite prescribes that kind.[29] Pius X, who so ardently advocated frequent Communion, ruled in one of his Constitutions that, although unwarranted promiscuity of rite should be avoided, the faithful may, even for mere devotion's sake, receive Holy Communion according to any rite,[30] and consequently under the species of either leavened or unleavened bread. But the administering priest must say the prayers and observe the ceremonies according to his own language and rubrics.

COMMUNION UNDER THE SPECIES OF BREAD

CAN. 852

Sanctissima Eucharistia sub sola specie panis praebeatur.

Holy Communion may be administered under the species of bread only.

This brief canon recalls a long history of dissension and tragedy, especially in Bohemia, which the unhappy Hus attempted to separate from the centre of unity. He

28 Benedict XIV, "*Allatae sunt*," July 26, 1755, § 23.

29 *Ibid.*, "*Etsi Pastoralis*," May 26, 1742, § VI, n. XI.

30 "*Tradita ab antiquis*," Sept. 14, 1912 (*A. Ap. S.*, IV, 615 f.), II, III.

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was not the originator of the demand for communion under both kinds, but his disciples carried the subversive principles of the master to their final consequences and adopted the chalice for the laity as a symbol of the Hussite union.[31] Against these heretics the Council of Constance, whose decision was approved by Martin V, maintained the ancient practice of the Church, which, as it says, was introduced in order to avoid the danger and scandals which so easily occur when Holy Communion is given under both species.[32] This text makes it evident that the *law* enacted in our canon is *ecclesiastical,* not divine, and, consequently, that the Church may tolerate a contrary custom, as she does among several (not all) Oriental rites.[33] But where the practice is connected with a heretical tendency, the Church must combat it. This tendency lies in the belief either that Christ is not received entirely under one species, or that the use of the chalice is required by divine law and hence the Church was mistaken in forbidding it. Where this error has taken root, the faithful must be carefully instructed and the use of the chalice gradually abolished.[34]

ARTICLE II

THE RECIPIENT OF HOLY COMMUNION

CAN. 853

Quilibet baptizatus qui iure non prohibetur, admitti potest et debet ad sacram communionem.

Every baptized person not forbidden by law may and must be admitted to Holy Communion.

31 Cf. Funk, *Manual of Church History,* 1913, Vol. II, p. 35.

32 Martin V, "*In eminentis,*" Feb. 22, 1418 (Denz., n. 585).

33 Benedict XIV, "*Allatae,*" July 26, 1755, § 25.

34 S. C. P. F., Dec. 6, 1777 (*Coll.,* n. 524).

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Every baptized person is by divine right entitled to receive Holy Communion, because Baptism has bestowed this right upon him. The *obligation* to receive Holy Communion rests, not on its absolute necessity for salvation *(necessitate medii)*, but on the divine precept contained in the words of our Lord: *"Unless you eat the flesh of the Son of Man, you shall not have life in you."* [35] This is a general law, which is based on the very end and organization of the Church. It has been modified in the course of centuries by special laws and regulations laid down by the Church for the welfare of the faithful and to safeguard the reverence and devotion due to this august Sacrament. The Church repels no one from the holy Table, even though his condition be humble, his mind weak, whether he lives in a palace or a sordid hut. All are called by Christ to His banquet,[36] and therefore the priests are in duty bound to offer every opportunity to the faithful for receiving Communion and to lay aside unreasonable and Jansenistic scruples. This does not mean that they should indiscriminately admit all, even public sinners, practical pagans, and unworthy Catholics who are a scandal to their community. Certain guiding rules [37] are set forth in the following canons.

COMMUNION OF CHILDREN

CAN. 854

§ 1. Pueris, qui propter aetatis imbecillitatem nondum huius sacramenti cognitionem et gustum habent, Eucharistia ne ministretur.

§ 2. In periculo mortis, ut sanctissima Eucharistia

35 John VI, 54.

36 Alex. VII, "*Sacrosancti*," Jan. 18, 1658, in XII, XIII (*Coll. P. F.*, n. 129); of the same tenor is Clement IX, "*In excelsa*," Sept. 13, 1669.

37 S. C. P. F., April 29, 1784 (*Coll.*, n. 569).

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pueris ministrari possit ac debeat, satis est ut sciant Corpus Christi a communi cibo discernere illudque reverenter adorare.

§ 3. Extra mortis periculum plenior cognitio doctrinae christianae et accuratior praeparatio merito exigitur, ea scilicet, qua ipse fidei saltem mysteria necessaria necessitate medii ad salutem pro suo captu percipiant, et devote pro suae aetatis modulo ad sanctissimam Eucharistiam accedant.

§ 4. De sufficienti puerorum dispositione ad primam communionem iudicium esto sacerdoti a confessionibus eorumque parentibus aut iis qui loco parentum sunt.

§ 5. Parocho autem est officium advigilandi, etiam per examen, si opportunum prudenter iudicaverit, ne pueri ad sacram Synaxim accedant ante adeptum usum rationis vel sine sufficienti dispositione; itemque curandi ut usum rationis assecuti et sufficienter dispositi quamprimum hoc divino cibo reficiantur.

§ 1. To *children* who, by reason of their tender age, are unable to know and desire this Sacrament, *it should not be given.*

The dogmatic aspect of this canon is stated by the Council of Trent when it says that there is no obligation for children to receive Holy Communion,[38] because being regenerated in the laver of Baptism, and embodied in Christ, they have received the grace of adoption, which, at their age, they cannot lose.[39] The same Council refused to reprimand or forbid the custom of the Orientals to give Holy Communion to children under both species,[40] as

38 Sess. 21, can. 4 de Communione.

39 *Ibid.*, cap. 4.

40 Among the Copts of Egypt the custom prevailed to administer holy communion even to children only eight days old, who would often vomit up the species of the sacred blood; S. O., June 14, 1741 (*Coll. P. F.*, n. 326).

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long as belief in its necessity was not defended. But Benedict XIV forbade the Italian Greeks to follow that practice.[41] In the Latin Church the custom of administering Holy Communion to infant children never took root, and it is now universally forbidden. Our text is taken from the *Rituale Romanum*,[42] which has been the law for the Latin Church in the matter.

Our canon does not specify any age, but says, "*pueris qui cognitionem et gustum non habent.*" The limit, according to can. 83, § 3, is about the seventh year. But this limit is not to be taken in the strict sense, because the clause is modified by the apposition phrase: "*who have neither knowledge nor desire of the Holy Eucharist.*" Precocious children may have such a knowledge as well as desire, and may therefore be admitted to holy Communion. But no obligation to admit them before the seventh year can be read into the text, nor has such an obligation been established by the latest decrees.[43]

§ 2. Holy Communion *may and must be administered* to children who are in *danger of death* if they are able to distinguish the Holy Eucharist from common bread, and to adore it reverently. This means that they should be able to grasp at least the most necessary notion of that mystery, the real presence of Christ in the Holy Eucharist.[44] It has been officially styled a "detestable abuse" not to administer the Viaticum to children who have attained the age of reason.

§ 3. Apart from the danger of death, a fuller knowledge of Christian doctrine and a more careful preparation is justly demanded, so that they may know, as far

41 "*Etsi pastoralis*," § II, n. VII; cf. IDEM, "*Allatae*," July 26, 1755, § 24.

42 Tit. IV, c. 1, n. 11.

43 S. C. Sacr., Aug. 8, 1910 n. I (*A. Ap. S.*, II, 582).

44 S. O., April 10, 1861, ad 1 (*Coll.*, n. 1213).

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as they are capable, at least the mysteries which are absolutely necessary for salvation (*necessitate medii*) and approach the Holy Eucharist devoutly, according to the capacity of their age. This sounds quite different from the propositions proscribed in 1687 and 1690, of which the former required a passive attitude without an act of virtue or personal effort, whilst the latter demanded an absolutely pure love of God without any alloy as a requisite for receiving Holy Communion.[45]

The mysteries that are necessary *necessitate medii* for salvation are the Blessed Trinity and the Incarnation, of which the latter is an indispensable preamble to the mystery of the Holy Eucharist.

The age at which the obligation of receiving Holy Communion begins is approximately the *seventh year*. A full and perfect knowledge of the catechism is not required.[46] Formerly children had to be fully instructed in all the questions of the Catechism before they were admitted to the Sacred Table, but Pius X changed that.

§ 4. It belongs to the *confessor* and to the parents or guardians to judge whether children are sufficiently prepared for first Holy Communion.

§ 5. But it is the *pastor's* office to see to it, even by an examination if he prudently deems it opportune, that children are not admitted to Holy Communion before they have attained the age of discretion or without sufficient preparation, and to take care that those who have attained the use of reason and are sufficiently prepared, are nourished with this divine food as soon as possible.

Benedict XIV instructed bishops to admonish pastors not to admit any one to Holy Communion who did not know the more important articles of faith and chapters

45 Prop. 32 (of Mich. Molinos); propos. 23 (Denz., nn. 1119, 1180).

46 S. C. Sac., Aug. 1910 (*A. Ap. S.*, II, 582, n. II & III).

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of Christian doctrine and the strength and efficacy of the Bl. Eucharist.[47]

WHO ARE NOT TO BE ADMITTED TO HOLY COMMUNION

CAN. 855

§ 1. Arcendi sunt ab Eucharistia publice indigni, quales sunt excommunicati, interdicti manifestoque infames, nisi de eorum poenitentia et emendatione constet et publico scandalo prius satisfecerint.

§ 2. Occultos vero peccatores, si occulte petant et eos non emendatos agnoverit, minister repellat; non autem, si publice petant et sine scandalo ipsos praeterire nequeat.

§ 1. The Holy Eucharist may not be given to such as are *publicly unworthy, e. g.*, the excommunicated, interdicted and notoriously infamous, unless they have given signs of repentance and amendment and have repaired the scandal publicly given.

The general rule, as laid down by Benedict XIV,[48] is that *public and notorious sinners* must not be admitted to Holy Communion, *no matter whether they demand it publicly or secretly*. To give them the Body of Christ would be to coöperate in a profanation of the Sacrament, and such coöperation cannot be justified even on the plea of saving the good name of the petitioner, because by the publicity and notoriety of his crime he has lost the claim to a good name.

47 "*Etsi minime*," Feb. 7, 1742, § 9. There is, of course, room left for speculation.

48 "*Ex omnibus*," Oct. 16, 1756, § 3 f. The case concerned the Constitution of Clement IX, "*Unigenitus*," Sept. 8, 1713, by which 101 propositions of Paschasius Quesnel were condemned and which had aroused opposition.

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The next question is: Who are *public and notorious sinners?* According to the same Pontiff sinners are public and notorious, (a) if they have been declared such by an ecclesiastical judge, or (b) if they have publicly confessed their crimes or, as we say, "pleaded guilty"; or (c) if they have committed in word or deed a crime that still lasts and is known to the public as not atoned for and therefore is a source of scandal. A sin is therefore *notorious* when it cannot be concealed, and *public,* like a matrimonial impediment, when it can be proved in court. All of which supposes, in our case, that the priest as well as the congregation, or at least the larger part thereof, are aware of the unworthiness of the one who wishes to receive Communion. If the priest knows nothing, or doubts the publicity or notoriety of the crime, it would certainly be safer to give the Holy Eucharist to one who publicly asks for it.[49]

The text adds: "*quales sunt excommunicati, interdicti manifestoque infames.*" *Excommunication* requires at least a declaratory sentence, and hence notoriety is easily acquired. By *interdicti* must here be understood those who are under a personal *interdict,* because this alone follows the person.[50] *Infamy* is attached to certain crimes, either *ipso facto,*[51] or by declaration of the ecclesiastical court. Our canon does not distinguish between *excommunicati vitandi* and *tolerati,* nor between infamy of fact and of law, nor between excommunication reserved to the Holy See (in whatever form) and excommunication re-

49 Lehmkuhl, *l. c.,* II, n. 40.

50 Cf. can. 2269, § 2.

51 *Ipso facto infames* are those mentioned in can. 2320 (who desecrate the sacred species), in can. 2328 (who desecrate graves), in can. 2343 (who maliciously lay hands on the Pope), in can. 2351 (those who engage in duelling), in can. 2356 (polygamists), in can. 2357 (those condemned for unnatural crimes *contra sextum*). *Infames* formerly were the *histriones,* or public actors, who perverted young people; c. 95, Dist. 2, de cons.; also public usurers; cr. 3, 5, X, V, 19.

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served to the Ordinary.[52] Hence all these categories are comprised by the term "*publice indigni.*"

But the legislator adds the clause: ***unless it is known that they have repented and amended*** and ***repaired the public scandal they have given.*** Both these conditions are required. The following rules[53] are generally set up for judging the external disposition — of the internal men can hardly form a judgment — of a penitent:

(1) If a public sinner has lived in proximate occasion of sin, he must abandon it before he can be admitted. This applies especially to concubinarians.

(2) If no proximate occasion is involved a confession made publicly, or seen by several persons who are ready to testify to the fact, suffices, provided no ecclesiastical sentence has been pronounced; for if sentence of excommunication or a verdict was publicly pronounced, or infamy publicly declared, mere confession is not sufficient, but the sentence must first be withdrawn by the authority who pronounced it. After proper rehabilitation the penitent may be admitted unless he has again given public scandal.

(3) If a public reparation is required, as it sometimes is from those who have contracted marriage before a non-Catholic minister, it must be made before the culprit is admitted to Holy Communion.

(4) In the case of those who have relapsed into a vicious crime, if confession was made and the scandal somewhat repaired, some time should elapse before they are admitted to Communion, so that there be some guarantee of genuine amendment.

Those who order their *bodies to be cremated after death,* though they are not members of a Masonic sect nor

[52] C. 9, C. 11, q. 3.
[53] Cf. Lehmkuhl, II, n. 41; Noldin, *l. c.,* n. 37.

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have embraced its principles, must be admonished to retract the order, otherwise they cannot be given the last Sacraments. If admonition proves fruitless and no scandal is to be feared, they may be admitted to the Sacraments, provided they are in good faith.[54]

§ 2. *Occult sinners,* if they *ask secretly* and the priest knows they have not amended, should be refused the Bl. Sacrament; but not if they ask *publicly* and cannot be passed over without scandal.

This rule was made to spare the good name of such occult sinners as have not lost their reputation. *Occult* sinners are those whose unworthiness or crime is known only to a few persons and, we must add, which will not be proved in court within a short time.

All these, then, according to the general rule of the Church,[55] must be admitted to the Bl. Sacrament, if they ask for it publicly, *i. e.,* approach the Communion railing together with others. The same rule holds good if such a one asks for the Viaticum, but in that instance the priest should elicit an act of sincere contrition and demand the retraction of possible errors[56] before he administers the Viaticum.

Freemasons and others who *secretly* belong to a sect condemned by the Church, cannot be refused if they publicly approach the Holy Eucharist, but notorious members of a condemned sect may and should be repulsed.[57]

CAN. 856

Nemo quem conscientia peccati mortalis gravat, quantumcumque etiam se contritum existimet, sine

54 S. O., July 27, 1892 (*Coll. P. F.*, n. 1802 ad 1).

55 Benedict XIV, "*Ex omnibus,*" § 9.

56 *Ibid.* This may also be the case with secret Modernists.

57 S. O., Aug. 1, 1855 (*Coll. P. F.*, n. 1116).

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praemissa sacramentali confessione ad sacram communionem accedat; quod si urgeat necessitas ac copia confessarii illi desit, actum perfectae contritionis prius eliciat.

No one who is conscious of a mortal sin, no matter how sorry or contrite he may feel, is allowed to receive Holy Communion without having previously gone to confession. In case of urgent necessity, when no suitable confessor is at hand, such a one must make an act of perfect contrition before approaching the Sacred Table.

This canon we leave to moralists to explain, because it pertains to the court of consequence. We will only add that this law, no matter whether it be regarded as divine or ecclesiastical, is a grave one, as is apparent from the Council of Trent. *Copia confessarii* must be understood of any confessor with the necessary faculties who is not an accomplice of the penitent. Theologians say that the repugnance to, or impossibility of going to confession must be such as is not directly connected with the act itself. *Urgent necessity* of receiving Holy Communion exists when one has to fulfill the paschal obligation, and before contracting marriage.

COMMUNION MAY BE RECEIVED ONLY ONCE A DAY

CAN. 857

Nemini liceat sanctissimam Eucharistiam recipere, qui eam eadem die iam receperit, nisi in casibus de quibus in can. 858, § 1.

No one is allowed to receive Holy Communion on the day on which he has already received it; exception is made in case of the Holy Viaticum or irreverence to be avoided (see can. 858, § 1).

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THE EUCHARISTIC FAST

CAN. 858

§ 1. Qui a media nocte ieiunium naturale non servaverit, nequit ad sanctissimam Eucharistiam admitti, nisi mortis urgeat periculum, aut necessitas impediendi irreverentiam in sacramentum.

§ 2. Infirmi tamen qui iam a mense decumbunt sine certa spe ut cito convalescant, de prudenti confessarii consilio sanctissimam Eucharistiam sumere possunt semel aut bis in hebdomada, etsi aliquam medicinam vel aliquid per modum potus antea sumpserint.

§ 1. One who has not fasted since midnight cannot be admitted to Holy Communion, except he be in danger of death, or it be necessary to prevent irreverence towards the Blessed Sacrament.

This law is *ecclesiastical* only, but very ancient. It has always been rigorously enforced by the Church. The Pope alone has power to dispense from it.[58]

It does not, however, apply to those who are in probable danger of death, *i. e.*, suffering from a sickness which may prove fatal. Soldiers going into battle are not *per se* exempt from it. If wounded, of course, the law ceases for them too; but it does not cease for those who have to meet sentence of death, unless they are at the same time suffering from a serious disease.[59] The second reason which excuses from fasting and also from the law that Holy Communion may be received but once a day, is

[58] C. 54, Dist. 2, *de cons.;* Benedict XIV, "*Quadam,*" March 24, 1756, § 3 (dispensing James III of England).

[59] July 5, 1854, ad 1 (*Coll.*, n. 1099); the quotation of Noldin (*l. c.*, n. 154), from S. C. P. F., July 21, 1841 (*Coll.*, n. 928) mentions the case of prisoners to whom Holy Communion must be given as Viaticum, but nothing is said of their being dispensed from the law of fasting.

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the *necessity of preventing irreverence* towards the Blessed Sacrament. This would exist, *e. g.*, if the altar or church were on fire or about to collapse, leaving no time for removing the Bl. Sacrament to a place of safety; or if it would be impossible to secure it from profanation by invading barbarians, heretics or infidels.

Beyond these two cases a canonist cannot stretch the interpretation, although it is customary [60] to add another: *ad vitandum scandalum publicum.* This may be admitted as a matter of equity which inheres in every human law.

§ 2. The *sick who have been in bed for a month* and have no certain hope of speedy recovery, may, if the confessor prudently advises, receive the Holy Eucharist once or twice a week, even though they have taken medicine or something by way of a drink.

This privilege now applies to all the faithful without exception.[61] All that is required is the confessor's (not the pastor's) advice.

"*Per modum potus*" includes broth, coffee, or any liquid food mixed with something solid, as, for instance, wheat-meal (semolino) or ground toast (pangrattato), etc., provided the liquid form remains.[62] Whether an egg-nog would be allowed seems to be doubtful,[63] although in case of great weakness we should not hesitate to permit this mixture, as long as the liquid form prevails. We also submit the following considerations:

(1) The law of fasting before Holy Communion certainly is an ecclesiastical *positive* law which is complied

60 Noldin, *l. c.*, 153.

61 A decree of S. C. C., Dec. 7, 1906 (*Anal. Eccl.*, t. 14, 486 f.) permitted it once or twice a week for pious institutions; for the rest, once or twice a month.

62 S. O., Sept. 7, 1897 (*Coll.*, n. 1983).

63 Prümmer, *l. c.*, III, n. 203, would admit it; also Ballerini-Palmieri (*Opus Theol. Morale*, IV, 730).

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with by those sick persons who can and do fast, say, three or five times a week. Consequently, they are entitled to receive Holy Communion without any restriction, provided they are disposed for, and desirous of, receiving it. In other words, they must strictly observe can. 858, § 1.

(2) § 2 of same canon undoubtedly is a favorable extension or mitigation of an otherwise strict law. And this modification allows sick persons *in casu* to receive Holy Communion once or twice a week even though they have taken medicine or something *per modum potus,* which a decree of S. C. C. (Dec. 7, 1906) explains as a beverage mixed with some bread (toast), egg or milk. This is a positive grant or permission which the lawgiver undoubtedly wishes to see made use of in order to foster the frequency of Holy Communion. However, there would be no grant or favor conveyed by § 2, can. 858, if the persons *in casu* would not be permitted to receive once or twice a week, supposing they had already received in compliance with § 1 of the same canon. Hence I conclude that § 2 grants something beyond and besides what is stated in § 1. Therefore if a sick person could receive five times with fasting, he or she would also be allowed to receive once or twice a week without fasting, and hence daily or almost daily. This view is in keeping with the mind of the lawgiver, who wishes to promote frequent Communion, and also with the old adage: *favores convenit ampliari.*

OBLIGATION OF RECEIVING COMMUNION

CAN. 859

§ 1. Omnis utriusque sexus fidelis, postquam ad annos discretionis, idest ad rationis usum, pervenerit, de-

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bet semel in anno, saltem in Paschate, Eucharistiae sacramentum recipere, nisi forte de consilio proprii sacerdotis, ob aliquam rationabilem causam, ad tempus ab eius perceptione duxerit abstinendum.

§ 2. Paschalis communio fiat a dominica Palmarum ad dominicam in albis; sed locorum Ordinariis fas est, si ita personarum ac locorum adiuncta exigant, hoc tempus etiam pro omnibus suis fidelibus anticipare, non tamen ante quartam diem dominicam Quadragesimae, vel prorogare, non tamen ultra festum sanctissimae Trinitatis.

§ 3. Suadendum fidelibus ut huic praecepto satisfaciant in sua quisque paroecia; et qui in aliena paroecia satisfecerint, curent proprium parochum de adimpleto praecepto certiorem facere.

§ 4. Praeceptum paschalis communionis adhuc urget, si quis illud praescripto tempore, quavis de causa, non impleverit.

§ 1. *Every Catholic,* of either sex, who has reached the age of discretion, *i. e.,* attained the use of reason, must receive Holy Eucharist *once a year, at least during Easter time,* unless his own priest should, for a reasonable cause, advise him to abstain from it for a time.

The summary of the Decretals[64] says: "This is a famous chapter and often to be quoted." It is famous especially for the reason that some non-Catholic writers use it to establish the date when auricular confession was introduced into the Church. The initial words are taken from a Decretal of the Fourth Lateran Council, which was adopted as an ecclesiastical precept by the Council of Trent.[65] The precept was made obligatory even for missionary countries like China, as far as the annual

64 C. 12, X, V, 38.

65 Sess. 13, can. 9, *de Euch.*

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obligation goes, though as to the time some liberty was naturally left to the missionaries.[66] The obligation commences as soon as *discretion has been attained, i. e.*, about the *seventh year of age*.[67]

The next clause, concerning the *confessor's counsel* to abstain for a time, may be understood in the sense of spiritual direction, or as a reparation for scandal given, or similar reasons. The penitent's *own priest*, according to the Decretal, means the parish priest, and this no doubt is also the meaning of our text, though we believe that if the penitent would tell the pastor about his confessor's counsel, the pastor should not further trouble himself or the penitent.

§ 2. The *time* for receiving the Paschal Communion extends from Palm Sunday to Low Sunday; but the local Ordinaries may prolong the time for all the faithful of their diocese from Laetare Sunday to Trinity Sunday, both inclusive, provided circumstances of persons and place demand such a prolongation.

Benedict XIV had extended the time for receiving the Paschal Communion for Servia[68] from the beginning of Lent to Pentecost and in our country it was by special faculties prolonged from Lent to Trinity Sunday. Hereafter the common law must be observed, which, however, permits the Ordinaries to extend the term as stated. Every such extension must be duly promulgated, and if the bishop extends the time, it also benefits religious, who may therefore distribute Holy Communion in their churches during that time.[69] If the Holy Eucharist is distributed during the solemn Mass on Holy Saturday, the

66 S. O., March 23, 1656, Nov. 13, 1669; S. C. P. F., Sept. 12, 1645 (*Coll.*, nn. 126, 189, 114).

67 S. C. Sac., Aug. 8, 1910, ad 1 (*A. Ap. S.*, II, 582).

68 "*Inter omnigenas*," Feb. 22, 1744, § 21.

69 Benedict XIV, "*Magno cum animi*," June 2, 1751, § 22.

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faithful who receive it comply with this commandment.[70]

§ 3 says that it is *advisable* for the faithful (therefore, no longer[71] a strict command), to receive the Paschal Communion in their *own parish church,* and if they have received it in another church, to notify their pastor of the fact.

§ 4. The precept of receiving the Paschal Communion *obliges even after the lapse of the prescribed term,* and should therefore be complied with as soon as possible, and one may not wait until the next Easter time if he has neglected this duty.[72]

THE DUTY OF PARENTS AND OTHERS

CAN. 860

Obligatio praecepti communionis sumendae, quae impuberes gravat, in eos quoque ac praecipue recidit, qui ipsorum curam habere debent, idest in parentes, tutores, confessarium, institutores et parochum.

This canon reminds parents, guardians, confessors, directors of schools and pastors, of the obligation incumbent upon them to see to it that *impuberes* entrusted to their care comply with the precept of receiving Holy Communion at least once a year, during Easter time. Puberty, according to can. 81, § 2, commences for boys with the fourteenth, and for girls with the twelfth year, completed. After that age the obligation, if not morally, ceases at least juridically, for the classes of persons named in the text.[73]

70 S. Rit. C., March 22, 1806 (*Dec. Auth.,* n. 2561).

71 Cfr. Benedict XIV, "*Magno cum animi,*" § 22.

72 Eugene IV, "*Fide digna,*" July 8, 1440; Pruemmer, *l. c.,* III, n. 212.

73 S. C. Sac., Aug. 8, 1910, ad IV (*A. Ap. S.,* II, 582).

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UNWORTHY COMMUNION DOES NOT SATISFY THE LAW

CAN. 861

Praecepto communionis recipiendae non satisfit per sacrilegam communionem.

The precept of receiving the Eucharist is not complied with by a sacrilegious Communion.

The contradictory proposition was condemned by Innocent XI.[74] One who has knowingly and willingly made a sacrilegious communion must, either before the lapse of the term, or as soon as possible after the expiration of the paschal time, receive Communion worthily.

COMMUNION ON HOLY THURSDAY

CAN. 862

Expedit ut feria V maioris hebdomadae omnes clerici, etiam sacerdotes qui ea die a Sacro litando abstinent, sanctissimo Christi Corpore in Missa sollemni seu conventuali reficiantur.

It is *becoming* that, on Holy Thursday, all the clergy, even the priests who abstain from saying Mass on that day, receive Holy Communion at the solemn or conventual Mass.

Because, as a rule, there should be only one solemn Mass on Holy Thursday, many priests are free from the obligation of celebrating on that day. To perpetuate the memory of that Sacred Day, on which the Lord Himself distributed his Body and Blood, the Ordinaries are admonished to distribute Holy Communion to the clergy.[75] The S. Congregation has more than once declared that

74 Prop. 55 dam., March 4, 1679 (Denz., n. 1072).

75 *Caeremoniale Ep.*, l. II, c. 23, n. 6.

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the bishop can compel dignitaries and canons and their substitutes, if they are not obliged to say Mass,[76] to receive Holy Communion from him or another celebrant.[77] However, our text cannot be construed as implying a strict obligation, as "*expedit*" does not signify a strict law in canonical language. The Ordinary shall, therefore, use persuasion rather than force. After all the clergy have received Holy Communion, the civil magistrates may be admitted before the rest of the people, and at the procession, march after the baldachino.[78]

FREQUENT COMMUNION

CAN. 863

Excitentur fideles ut frequenter, etiam quotidie, pane Eucharistico reficiantur ad normas in decretis Apostolicae Sedis traditas; utque Missae adstantes non solum spirituali affectu, sed sacramentali etiam sanctissimae Eucharistiae perceptione, rite dispositi, communicent.

We are familiar with the rules concerning frequent Communion laid down by the saintly Pius X. The Church has never ceased[79] to exhort the faithful to frequent, nay even daily Communion, not only in spirit, but in reality, provided they were duly prepared. Jansenism, as is well known, was opposed to this practice, nor were the troublesome times of the French Revolution and the teaching of Wessenberg in Germany and the synod of

76 If a holy-day of obligation would fall on that day, several priests would have to say Mass; S. Rit. C., Sept. 27, 1716 (*Dec. Auth.*, n. 2240), and thus could not receive.

77 S. Rit. C., Sept. 19, 1654; Sept. 10, 1701; Dec. 22, 1770; Sept. 23, 1837 (*Dec. Auth.*, nn. 970, 2079, 2489, 2769).

78 S. Rit. C., Aug. 12, 1854 (*Dec. Auth.*, n. 3024).

79 S. C. C., Feb. 1679 (Denz., n. 1086).

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Pistoja in Italy favorable to its growth. But finally a pacific victory was brought about by the efforts of Pius X.

Our text mentions the *norms laid down in the decrees issued by the Holy See.* These norms are especially the "*Sacra Tridentina Synodus,*" of Dec. 20, 1905, the "*Editae saepe,*" of May 26, 1910, and the "*Quam singulari,*" of the S. Congregation of the Sacraments, of Aug. 8, 1910. The latter was ordered to be read annually in the vernacular, but the purpose of this provision seems to be attained by the promulgation of the Code, which embodies the main contents of the decree. We may therefore assume that the decree need no longer be read, though it would not be wrong to do so.

DUTY OF RECEIVING THE VIATICUM

CAN. 864

§ 1. In periculo mortis, quavis ex causa procedat, fideles sacrae communionis recipiendae praecepto tenentur.

§ 2. Etiamsi eadem die sacra communione fuerint refecti, valde tamen suadendum, ut in vitae discrimen adducti denuo communicent.

§ 3. Perdurante mortis periculo, sanctum viaticum, secundum prudens confessarii consilium, pluries, distinctis diebus, administrari et licet et decet.

§ 1. When there is *danger of death,* no matter from what cause it arises, the faithful are *obliged by the precept* of receiving Holy Communion.

This precept, though purely ecclesiastical, is a *grievous one.* It was insisted upon already by the Council of Nicaea.[80] Priests, therefore, should take care that

[80] C. 9, C. 26, q. 1.

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the Holy Eucharist be always ready for sick calls.[81] From *whatever cause* the danger may arise, says the text, which means that not only intrinsic maladies or diseases are to be considered but also extrinsic causes, such as a sentence of death awaiting prisoners.[82] Besides, though the illness may last a long time, as is the case with consumptives, the Holy Viaticum should not be delayed, especially if they live at a distance.[83]

§ 2. Although these have already received Holy Communion on the same day, they should be strongly *advised* to receive it again when the crisis sets in.

The Code has hereby cut short the controversy [84] on the necessity and admissibility of receiving Holy Communion twice on the same day. It is not only permissible, but even advisable, when there is danger of death, though no strict obligation is enforced.

§ 3. It is lawful and becoming to administer the Viaticum several times on different days as long as the danger of death lasts, according to the prudent judgment of the confessor.[85] In that case the formula "*Corpus Domini*" is used.

CAN. 865

Sanctum Viaticum infirmis ne nimium differatur; et qui animarum curam gerunt, sedulo advigilent ut eo infirmi plene sui compotes reficiantur.

The Holy Viaticum should not be too long deferred, and those in charge of souls should take great care that the sick receive it while fully conscious.

This law has been time and again impressed upon

81 C. 93, Dist. 2, *de cons.*

82 S. C. P. F., July 21, 1841 (*Coll.*, n. 928), but in that case they would have to fast.

83 S. C. P. F., Feb. 20, 1801 (*Coll.*, 657): *morbo etico.*

84 Cfr. Noldin, *l. c.*, n. 138.

85 *Rit. Rom.*, tit. IV, c. 4, n. 3.

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bishops as well as pastors.[86] It is a matter for the Ordinary to investigate at the time of the canonical visitation.[87] The reason is not far to seek; the better the disposition of the recipient, the greater the effects of this holy Sacrament.

CAN. 866

RITE OF HOLY COMMUNION

§ 1. Omnibus fidelibus cuiusvis ritus datur facultas ut, pietatis causa, sacramentum Eucharisticum quolibet ritu confectum suscipiant.

§ 2. Suadendum tamen ut suo quisque ritu fideles praecepto communionis paschalis satisfaciant.

§ 3. Sanctum Viaticum moribundis ritu proprio accipiendum est; sed, urgente necessitate, fas esto quolibet ritu illud accipere.

Holy Communion, even for devotion's sake, may be distributed to the *faithful of any rite* in the species consecrated in any rite; but they should be advised to receive the *Paschal Communion* in their own rite. The Holy Viaticum should, except in case of necessity, be received by the dying in their own rite.

These are the rules laid down by Benedict XIV, Leo XIII, and Pius X,[88] who all wished to see the faithful receive Holy Communion as often as their devotion and spiritual welfare demand. The condition, of course, is that the rite be Catholic, not schismatic or heretical.[89]

86 Alexander VII, "*Sacrosancti*," Jan. 18, 1658, § 2, n. XIII (*Coll. P. F.*, n. 129).

87 Benedict XIV, "*Firmandis*," Nov. 6, 1744, § 9.

88 "*Etsi Pastoralis*," May 26, 1742, § VI, n. XIII f.; "*Orientalium*," Nov. 30, 1894, n. II; "*Tradita ab antiquis*," Sept. 14, 1912, III–V.

89 S. C. P. F., Aug. 18, 1893 (*Coll.*, n. 1846).

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ARTICLE III

TIME AND PLACE FOR DISTRIBUTING HOLY COMMUNION

Time

CAN. 867

§ 1. Omnibus diebus licet sanctissimam Eucharistiam distribuere.

§ 2. Feria tamen VI maioris hebdomadae solum licet sacrum Viaticum ad infirmos deferre.

§ 3. In Sabbato Sancto sacra communio nequit fidelibus ministrari nisi inter Missarum sollemnia vel continuo ac statim ab iis expletis.

§ 4. Sacra communio iis tantum horis distribuatur, quibus Missae sacrificium offerri potest, nisi aliud rationabilis causa suadeat.

§ 5. Sacrum tamen Viaticum quacunque diei aut noctis hora ministrari potest.

§ 1. The Holy Eucharist may be distributed *every day* of the year.

§ 2. But on *Good Friday* only the Viaticum may be administered to the sick.

§ 3. On *Holy Saturday* Holy Communion may be distributed only at the (solemn) Mass or immediately thereafter.

§ 4. Holy Communion may be distributed only *at hours when Mass may be said,* unless good reasons advise a deviation from this rule.

§ 5. But the *Holy Viaticum* may be administered *at any hour* of the day or night.

Although, says a well-known decree of the S. C. Concilii, frequent and even daily Communion has been recommended by the Holy Fathers, yet the Church has never

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appointed certain days of the week or month on which the faithful should abstain from, or receive, Holy Communion. Much less is there any divine precept enjoining daily Communion.[90] If the *Viaticum* is brought publicly to the sick on *Good Friday* the psalms must be recited in a very low voice, but the color of the stole is *white*. When it is brought quasi-privately, the people must be dismissed from church without the usual blessing, because the Blessed Sacrament should not be kept in the church [91] but in the sepulchre.

It is remarkable that Communion may now be distributed immediately after the conventual or solemn Mass [92] on *Holy Saturday*. But the phrase "*continuo ac statim*" must be carefully noted, because it indicates that before the Mass, or after the priest has left the altar, no distribution of Holy Communion is allowed. The faithful who receive Holy Communion on that day fulfill the paschal precept.

The *time* for receiving Holy Communion is during Mass, and the faithful should be exhorted to receive it when assisting at the Holy Sacrifice. However, if they ask for it outside of Mass, they should not be refused, because they are supposed to ask reasonably.[93] But Holy Communion is not to be distributed [94] before the time for Mass, as stated under can. 821, nor after that time, especially not until sunset, because abuses might easily creep in.

90 Feb. 12, 1679 (*Coll. P. F.*, n. 219).

91 S. Rit. C., May 15, 1745 (*Dec. Auth.*, n. 2383).

92 S. Rit. C., March 22, 1806 (*Dec. Auth.*, n. 2561), did not yet allow that, but the decree of April 28, 1914, ad II (*A. Ap. S.*, VI, 196 f.) simply says: *et etiam expleta Missa*. Our text has two additions.

93 Gasparri, *De SS. Euch.*, n. 1084.

94 S. Rit. C., Sept. 7, 1816, ad 23 (*Dec. Auth.*, n. 2572); June 11, 1904, ad III (*Anal. Eccl.*, XII, 334).

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CAN. 868

Sacerdoti celebranti non licet Eucharistiam intra Missam distribuere fidelibus adeo distantibus ut ipse altare e conspectu amittat.

A priest saying Mass is not allowed to distribute Holy Communion during Mass to persons who are so far from the altar that he himself would *lose sight of the altar.*

The principle underlying this canon is that the priest must never lose sight of the altar for the reason that Holy Communion is an integral part of the Mass and some particles may remain unconsumed until the last ablution. Therefore the S. Congregation has decided more than once that a celebrating priest is not allowed to bring Communion during Mass to sick persons or others who are in a different though an adjoining room from the oratory where he says Mass.[95] This applies to pious institutions and private oratories. If all the particles have been distributed but some fragments remain on the paten, these should be placed in the pyxis which is kept in the tabernacle if no other priest says Mass in the same chapel.[96]

A practical conclusion from this law is that the Communion rails should be made so that the altar can be seen from every corner.

Place

CAN. 869

Sacra communio distribui potest ubicunque Missam celebrare licet, etiam in oratorio privato, nisi loci Or-

95 S. Rit. C., Dec. 19, 1829; Florentina, ad 1 (*Dec. Auth.*, n. 2672), Dec. 7, 1844 (n. 2883); May 11, 1878 (n. 3448).

96 S. Rit. C., March 1860 (n. 3099).

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dinarius, iustis de causis, in casibus particularibus id prohibuerit.

Holy Communion may be distributed wherever Mass may be said, even in private oratories, unless the local Ordinary should for just reasons forbid it in some particular case.

This text is based on a general decree of the Congregation of Rites permitting the distribution of Holy Communion to all the faithful who assist at Mass in a private Oratory. But the decree expressly says: *with due regard to the rights of the pastor,*[97] and consequently these should never be curtailed or jeopardized, otherwise the Ordinary may forbid the distribution of Holy Communion.

[97] S. Rit. C., May 8, 1907 (*Anal. Eccl.*, t. 15, 403).

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TITLE IV

THE SACRAMENT OF PENANCE

CAN. 870

In poenitentiae sacramento, per iudicialem absolutionem a legitimo ministro impertitam, fideli rite disposito remittuntur peccata post baptismum commissa.

In the Sacrament of Penance, through a judicial absolution imparted by a legitimate minister, the sins committed after baptism are forgiven to every faithful Catholic who is properly disposed.

This is the true concept of the Sacrament of Penance based on Scripture and tradition. Penance is one of the seven Sacraments instituted by Christ. It follows Baptism and is therefore sometimes called the "second plank of salvation" or "laborious Baptism." It is effected by the *judicial absolution* of the priest, but not without the formal coöperation of the penitent, who must be properly disposed by having either contrition or attrition, as the theologians [1] say.

What most concerns the canonist is the *judicial absolution.*[2] The power of the keys, *i.e.*, to forgive and retain sins, is exercised by pronouncing the sentence of forgiveness or retention. This sentence is rendered by the judges of the society founded by Christ. The essence

1 Cfr. Palmieri, *De Poenitentia*, Romae 1879; Pohle-Preuss, *The Sacraments*, Vol. III, 3rd ed., 1919.

2 *Trid.*, sess. 14, c; 1–8; can. 1–4, 9, 12, 15, *de Poenit.*

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of the judiciary power consists in authority to impose an obligation or to assert a right or law with regard to one who is subject to authority and a debtor to the law in a matter that falls under that law and authority. The penitent who accuses himself of guilt towards God, has contracted a twofold debt: the *reatus culpae* and the *reatus poenae:* guilt and punishment, and God alone can absolve him from either. He does not do so directly, but through certain human agents, who act by His authority and commission. These are true judges, and their power is a truly judiciary power which does not merely announce forgiveness, like a preacher of penance, but pronounces sentence of justification which is ratified by God.[3]

[3] *Trid.*, sess. 6, c. 14, can. 29, *de iustif.*

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CHAPTER I

THE MINISTER OF PENANCE

CAN. 871

Minister huius sacramenti est solus sacerdos.

CAN. 872

Praeter potestatem ordinis, ad validam peccatorum absolutionem requiritur in ministro potestas iurisdictionis, sive ordinaria sive delegata, in poenitentem.

The sole minister of this sacrament is the priest, who, to absolve validly, needs not only the power of order, but also the power of jurisdiction, either ordinary or delegated, over the penitent.

This again is a dogmatic truth, based on sources to which it is not necessary here to refer. Early documents amply prove that it was the *presbyteri,* both of the higher, i.e., episcopal and the lower, i.e., priestly rank, who exercised the power of the keys.[1] Peter Abélard wrongly limited the exercise of this power to the Apostles,[2] whereas Wiclif, Hus, and Luther unduly extended it to all Christians, including laymen.[3] The Church requires the priestly character as the fundamental condition or aptitude because of the hieratic element which is intimately connected with the jurisdictional

1 Cfr *Trid.*, sess. 14, c. 1, de *poenit.*; sess. 23, c. 15, *de ref.*

2 *Prop. dam. ab Innoc.* II., n. 12 (Denzinger, n. 321). Palmieri, l. c., p. 161 ff.

3 Denzinger, nn. 565, 566, 637.

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power. But since the exercise of this power is really a judiciary act, which pre-supposes jurisdiction, jurisdiction also is essentially required. The Code almost exclusively employs the term, *jurisdiction,*[4] *approbatio* being used, as it were, only by the way. Besides the term jurisdiction there occurs the noun *licentia.*[5]

1. *Jurisdiction* is here understood as the power of hearing confession or imparting judicial absolution *validly,* in the act of sacramental confession. This may, as the text says, like any other jurisdiction, be twofold, *viz.,* ordinary or delegated. It is *ordinary* if attached to the office one holds; *delegated* if given to the person by virtue of a special commission. It may be delegated either by a *local Ordinary* (can. 874, § 1), and in that case is limited to the territory of that Ordinary (can. 875, § 1) or by an *exempt religious superior,* and in that case is restricted to the person or subjects of the religious superior.[6]

2. *Licentia,* license or permission, is the formal approval required for *licitly* exercising the office of confessor. It is not necessarily the result of a doctrinal examination,[7] but may be a merely moral provision or concession made to render the act conformable to the requisites of obedience or subordination. And in this sense it may be identified with the former *approbatio,* inasmuch as this was considered to be an authentic judgment as to a priest's fitness for hearing confessions. The Code only mentions jurisdiction for validly, and license for licitly hearing confessions, but adds that the *jurisdiction* must concern the *penitent,* in other words, the con-

[4] Cfr. Vol. II, p. 170 ff., of this Commentary.

[5] Cfr. can. 881 f.; *approbatus,* as an adjective.

[6] Not quite accurate, therefore, is what we read in Schmitt, S. J., *Supplementum ad Noldin,* 1918, p. 53: "*iurisdictio vero delegata est tantum territorialis.*"

[7] Cfr. can. 877, § 1.

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fessor must have power over the penitent, who therefore becomes, or is supposed to be, his subject. This power, as stated before, is acquired by reason of the office or by special commission. Thus according to can. 875, § 1, an exempt religious superior of the clerical order grants to the priests of his organization delegated jurisdiction over the professed members, novices and others mentioned in can. 514, § 1. The Bishop enjoys ordinary jurisdiction for his territory and may delegate priests, secular as well as religious, for hearing confessions in his diocese.

Here it may be proper to discuss the controversy concerning the exemption which has formed a favorite topic in theological circles since the time of Martin IV (1281–1285).[8] Boniface VIII endeavored to settle the dispute between the Ordinaries and the mendicant friars. His Decretal[9] says that even if the Ordinary has given any one permission to choose his confessor, the latter can not absolve from cases especially reserved by the Ordinary. But since the exempt regulars contended that they obtained jurisdiction immediately from the Pope through their superiors, for which contention they were able to quote a Constitution of Martin IV, the dispute was by no means ended. The Council of Trent finally enacted that no priest, whether secular or regular, could absolve any one except he had first been examined and approved by the Ordinary. Exception was made for those who held a parish benefice,[10] because no one could be promoted to such a benefice without an examination. The rule thenceforth was that secular as well as regular priests, who wished to hear confessions of secular persons or nuns not subject to regular prelates, were obliged to have the "approbation" of the Ordinary of

[8] Cfr. Vol. III, p. 34 f., of this Commentary.

[9] C. 2, 6°, V.

[10] *Trid.*, sess. 23, c. 15, *de ref.*

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the diocese.[11] Notwithstanding these plain rules, it happened in Spain that persons sticking too closely to the "*Cruciata*," obtained special indults for choosing confessors not approved by the local Ordinaries. This abuse was done away with completely by Benedict XIV, following in the footsteps of his predecessors.[12] He, as well as Gregory XV and Clement X,[13] declared that a religious, even though approved for hearing confessions in his diocese by the local Ordinary, can not validly absolve in a strange diocese a penitent coming from the diocese for which he was approved. Some regulars, besides, claimed that a religious presented to the bishop but rejected in the examination, could validly hear the confessions of seculars and absolve from cases reserved to the bishop. This proposition was proscribed.[14] Parish priests, *i.e.*, priests who held a parish benefice, maintained that they could choose for their confessor any priest, even though he was not approved by the Ordinary. This proposition, too, was condemned.[15] Later it was asked of the S. Congregation whether a pastor, say of the diocese of St. Joseph, called in by a pastor of the diocese of Kansas City, may validly hear confessions without special jurisdiction from the bishop of Kansas City. The answer was: Yes, of his own subjects but not of others (*affirmative quoad subditos, negative quoad alios*).[16] This was the *status quaestionis* when the Code went into effect. These preliminary explanations will help the reader to understand the following canons.

11 S. C. C., June 7, 1755 (Richter, *Trid.*, p. 205, nn. 1, 4).

12 "*Apostolica indulta*," Aug. 5, 1744.

13 Gregory XV, "*Inscrutabili*," Feb. 5, 1622; Clement X, "*Superna*," June 21, 1670, § 4.

14 *Prop dam. ab Alex. VII*, n. 13, Sept. 24, 1665 (Denzinger, n. 984).

15 *Prop. dam. ab Alex. VII*, n. 16, Sept. 24, 1665 (Denzinger, n. 987).

16 S. C. C. Nov. 19, 1707 (Richter, *Trid.*, p. 206, n. 3); Benedict XIV, *Instit.*, 86, n. 7.

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ORDINARY JURISDICTION

CAN. 873

§ 1. Ordinaria iurisdictione ad confessiones excipiendas pro universa Ecclesia, praeter Romanum Pontificem, potiuntur S. R. E. Cardinales; pro suo quisque territorio Ordinarius loci, et parochus aliique qui loco parochi sunt.

§ 2. Hac eadem iurisdictione gaudent etiam canonicus poenitentiarius ecclesiae quoque collegiatae, ad normam can. 401, § 1, et Superiores religiosi exempti pro suis subditis, ad normam constitutionum.

§ 3. Haec iurisdictio cessat amissione officii, ad normam can. 183, § 1, et, post sententiam condemnatoriam vel declaratoriam, excommunicatione, suspensione ab officio, interdicto.

§ 1. Besides the Roman Pontiff, the Cardinals possess ordinary jurisdiction for hearing confessions *in the whole Church;* in the various dioceses the local Ordinaries, in their own districts the pastors, and those who take the place of pastors enjoy jurisdiction.

§ 2. The Penitentiary Canons of cathedral and collegiate Churches (can. 401, § 1) have the same jurisdiction; also *exempt religious* superiors with regard to their subjects, according to the constitutions of the respective institute.

1. The *Sovereign Pontiff* has the plenitude of the power of jurisdiction in and over the whole Church, and hence may hear confessions validly and licitly everywhere without notifying the local Ordinaries.

2. There can no longer be any doubt[17] that the

17 Formerly, unless they were *legati a latere*, cardinals did not, at least by law, enjoy this privilege.

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Cardinals of the Holy Roman Church, too, may personally hear confessions everywhere; but theirs is a strictly personal privilege[18] that can not be communicated to others. Can. 239, § 1, 1° says that Cardinals may validly and licitly hear confessions throughout the whole world, of secular as well as religious persons, and absolve them from all sins and censures except those most specially reserved to the Apostolic See and those attached to the revealing of the secret of confession, called "secret of the Holy Office."[19] From the general tenor of this canon it must be concluded that Cardinals may also absolve from cases reserved to, and by, the Ordinary.

3. The *Ordinary* enjoys ordinary jurisdiction ***within his territory,*** to which he is, as a rule, restricted. However, he may validly absolve *his own subjects* everywhere (*ubique terrarum;* can. 881, § 2).[20]

4. The same law applies to *pastors* and those who ***take their places.*** Pastors, therefore, enjoy ordinary jurisdiction in the court of conscience, for hearing confessions within the boundaries of their parishes, and for their *own subjects* also outside their parish limits, nay even outside the diocese. This is in accordance with the Council of Trent and certain later decisions of the Apostolic See.[21]

What about our American *parish priests?* We cannot

18 The S. C. Cons., April 25, 1918 (*A. Ap. S.*, X, 190) calls it a *personal* privilege, like those of Ordinaries, can. 349. Such personal privileges cannot be communicated *per modum facultatum;* cfr. S. Poenit., July 18, 1919 (*A. Ap. S.*, XI, 332).

19 The *secretum S. Officii* is a special secret to which all officials of the Holy Office and other persons placed under the same obligation are bound by an oath.

20 Cfr. Benedict XIV, "*Apostolicum ministerium,*" May 30, 1753, § 22.

21 *Trid.*, sess. 23, c. 15, *de ref.;* Benedict XIV, *Const. cit.;* S. C. C., Nov. 19, Dec. 3, 1707 (Richter, *Trid.*, p. 206, n. 3); Benedict XIV, *Instit.*, 86, n. 7; cfr. can. 881, § 2.

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depart from what we have said in Vol. II of this Commentary on their legal status. They are and must be considered *parochi,* no matter whether they are removable or irremovable, because this quality is now accidental only, and not essential, to a pastor, as canon 454, § 2 clearly states. Consequently, by virtue of their appointment they obtain ordinary jurisdiction for hearing confessions and from the moment of taking possession of their parish,[22] may exercise this ordinary jurisdiction.

Who are a pastor's *subjects?* Those who have their domicile or quasi-domicile within the limits of his parish. The confessions of these, then, he may validly and licitly hear everywhere.[23]

The question again arises concerning our *linguistically distinguished parishes.* To these, we believe, the Constitution of Benedict XIV, "*Apostolicum ministerium,*" which was issued for England in 1753, may be applied. § 2 of this Constitution says that secular as well as regular priests may hear confessions in the whole city or town without discrimination. This, we say, is similar to our case, and therefore, for instance, the pastor of a German-speaking congregation may *validly* hear the confessions of any of his subjects in the same town or city by virtue of his appointment and also the confessions of those who come to him from another parish, or even from another diocese. Besides, with due reverence to the pastor of another parish,[24] or with his permission, he may also *licitly* hear confessions in the church of that parish. Lastly, § 2 of can. 881 may be applied also to pastors, who thus may hear their own subjects everywhere.

22 Can. 461; can. 1443.
23 See Can. 811, § 2.
24 Benedict XIV, *Const. cit.,* § 22: "*debitis tamen officiis cum ipsius rectore antea persolutis.*"

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5. *"Aliique qui loco parochi sunt."* Who are these "others who take the place of a pastor"? They are the *oeconomi* and *coadiutores* who act as substitutes for disabled or absent pastors, as described in can. 473–475. Our so-called assistants or curates cannot be numbered among this class and therefore do not enjoy ordinary jurisdiction.

6. The *Canonicus Poenitentiarius* can absolve all, even strangers in the diocese, from sins and censures reserved to the bishop; he may absolve the subjects of his diocese outside his own territory. This power is granted to the canon penitentiary not only of the cathedral but also of a collegiate church.[25] Innocent III had ordained[26] that the bishops should choose helpers in the discharge of their pastoral office, especially for hearing confessions in cathedral and conventual churches. From this it follows that by their very appointment these canons enjoy ordinary jurisdiction according to what has been stated above.

7. *Exempt religious superiors,* finally, enjoy ordinary jurisdiction over their own subjects, according to the form of their constitutions. It was always understood that exempt religious superiors obtained their jurisdiction over their own subjects from the Sovereign Pontiff. This follows from the very notion of exemption. *Exempt superiors* are the superiors of all religious institutes which are exempt either by reason of their institution or by a special indult. As can. 875, § 2 clearly states, the privilege applies only to exempt institutes of *clerics.*

25 Can. 401, § 1.

26 C. 15, X, I, 31. The diocesan or collegiate chapter has no right to oppose the appointment of a Canon Poenit. (S. C. EE. *et* RR., Sept. 19, 1846; Bizzarri, *Collectanea,* p. 548 f.).

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The *superiors* here mentioned are those who are called *maiores,* hence the generals or provincials of exempt orders or congregations and their vicars, who hold a position similar to the provincial.[27] The text adds: *ad normam constitutionum,* in accord with the respective constitutions.

The abbots[28] of single and autonomous monasteries are real superiors in the sense of our text; such also are the *conventual priors*[29] of independent monasteries or convents, whereas the *priores claustrales* cannot claim ordinary jurisdiction, unless a special clause in the constitutions either denies that power to conventual priors or gives it to cloistral priors. Attention may here be drawn to can. 518, § 2, concerning the hearing of confessions of subjects.[30]

§ 3. *Ordinary jurisdiction for hearing confession ceases* when the office to which it is attached, is lost, as laid down in can. 183, and after a declaratory or condemnatory sentence of excommunication, suspension from office or interdict. Ordinary jurisdiction also ceases at the moment one's resignation is accepted, when privation or removal is duly intimated, when the term of office expires,[31] and after one has been declared to have incurred, or has been condemned to, excommunication,[32] or personal interdict,[33] or suspension from office.[34]

27 Can. 488, n. 8.

28 The Abbot President of the Swiss-American Congregation, *according to its Constitution,* may hear the confessions of all its members, otherwise the Abbot President would not be entitled to do so, nor is the Abbot Primate.

29 Concerning the Priors of the Augustinians see S. C. EE. *et* RR., June 3, 1864 (Bizzarri, *l. c.,* p. 720); they are real conventual priors and therefore *superiores maiores.*

30 Clement VIII, "*Sanctissimus,*" May 26, 1593; S. C. C., Sept. 21, 1624 (Bizzarri, *l. c.,* p. 246).

31 Can. 183.

32 Can. 2261, § 3.

33 Can. 2275, n. 2.

34 Can. 2284.

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DELEGATED JURISDICTION

CAN. 874

§ 1. Iurisdictonem delegatam ad recipiendas confessiones quorumlibet sive saecularium sive religiosorum confert sacerdotibus tum saecularibus tum religiosis etiam exemptis Ordinarius loci in quo confessiones excipiuntur; sacerdotes autem religiosi eadem ne utantur sine licentia saltem praesumpta sui Superioris, firmo tamen praescripto can. 519.

§ 2. Locorum Ordinarii iurisdictionem ad audiendas confessiones habitualiter ne concedant religiosis qui a proprio Superiore non praesentantur; iis vero qui a proprio Superiore praesentantur, sine gravi causa eam ne denegent, firmo tamen praescripto can. 877.

§ 1. Delegated jurisdiction is conferred by the *local Ordinary in whose diocese the confessions are to be heard,* on priests, secular as well as religious, even exempt religious, for hearing confessions of both secular and religious persons; but priests of religious institutes, though thus endowed with delegated jurisdiction, in addition thereto need the permission of their superiors, in order to absolve licitly, with due regard always to can. 519. Here the recipients of *delegated jurisdiction* are mentioned as far as certain classes of penitents are concerned, namely:

(a) *Secular persons, i.e.,* such as have not entered the religious state by taking the three vows; hence also members of societies who live in common without vows;[35] secular clergymen, even priests of any clerical rank of the secular order.[36]

35 Cfr. can. 673, § 1.

36 Gregory XV, "*Inscrutabili,*" Feb. 5, 1622, § 1; Clement X, "*Superna,*" June 21, 1670, § 1.

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(b) *Religious of the male sex,* no matter whether exempt or not. All these may be validly and licitly absolved by any priest who has been endowed with delegated jurisdiction by the Ordinary.

Here a doubt may occur as to *pastors,* who have ordinary power, but are not specially mentioned in can. 519. This doubt seems unfounded because in said canon approval only is mentioned, and pastors are certainly supposed to be approved by the Ordinary, and, besides, the validity could certainly not be doubted.

The *ministers* who receive jurisdiction from the Ordinary are *priests, secular* as well as *religious,* including those who are exempt. Concerning the latter, especially the mendicants, there was a controversy, which is now decided. *Religious,* therefore, no matter of what order, congregation, institute or society, even though otherwise exempt from the law, need delegated jurisdiction to hear the confessions of secular persons, including priests.[37] No exception is made for any kind of regulars or religious, even at the time of missions or on the occasion of a jubilee — unless, of course, the Bull of the Jubilee decided differently.[38] All must have delegated jurisdiction from the local Ordinary.

Now the *local Ordinary* is the one in whose diocese the confessions are heard. Hence it is not sufficient that a religious obtains what we call the faculties for the diocese in which the religious house is located, to validly hear

37 Cfr. the Constitutions quoted in the preceeding note, and S. C. EE. *et* RR., Zagabrien., Dec. 14, 1674 (Bizzarri, *Collectanea,* p. 271 ff.). Can. 514, § 1 is, of course, to be consulted, as seen under can. 875, § 1.

38 S. C. C., Dec. 4, 1683 (Richter, *Trid.,* p. 206, n. 2); the confessions heard by regulars at the time of a jubilee were invalid, and the penitents who had a doubt about the validity of their confession, or knew of the lack of jurisdiction of such confessors, had to repeat the confession, in order to gain the indulgence; those in good faith were not to be disturbed.

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the confessions of secular persons in another diocese. These faculties do not overlap. Hence if a religious whose house is located in the diocese of St. Joseph wishes to hear confessions in any part of the Des Moines diocese, he has to obtain the respective faculty from the Ordinary of Des Moines. This jurisdiction is needed even in the case of a penitent who has an apostolic indult permitting him to choose any confessor he pleases.[39] The same holds good concerning any secular priest who needs delegated jurisdiction.

In connection with this the question may arise: What about the *pastors* of a *diocese,* who according to can. 873, § 1, enjoy ordinary jurisdiction for their parishes, if they wish to hear confessions in another parish of the same or another diocese? Their jurisdiction as pastors is certainly limited to their own territory (*pro suo quisque territorio*). Consequently, in order to hear confessions validly outside their parishes they need delegated jurisdiction from the Ordinary of the diocese in which they wish to hear confessions, unless there is question of their own subjects, whose confessions they may hear anywhere.[40]

Another question: May the *pastor grant delegated jurisdiction* to another priest, secular or religious, to hear confessions within his district, without asking the local Ordinary? It would seem that canon 199, § 1, should be applied here, which says that those who enjoy ordinary jurisdiction may delegate it to others. But our text as well as certain decisions of the Holy See[41] plainly state that pastors cannot grant to other priests delegated jurisdiction to hear confessions in their parishes.

39 Benedict XIV, "*Apostolica indulta,*" Aug. 5, 1744, §§ 3, 5.

40 Can. 881, § 2.

41 S. C. C., Nov. 19, Dec. 3, 1707 (Richter, p. 206, n. 3); Benedict XIV, *Institut.*, 86, n. VII. Hence

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The last clause of § 1, says that *religious need at least the presumed permission of their respective superiors.* Religious, before being presented to the Ordinary for approval, are usually examined as to their qualification for that office by their superiors or a board of professors.[42] If a religious thus examined is approved by the Ordinary and continues to hear confessions without objection on the part of his superior, the permission may be presumed, even though it has not been asked for every single instance. Thus, also, permission may be presumed if one is sent to help another on a Sunday.

Note that this *permission in nowise affects the validity of confession* as long as the jurisdiction delegated by the Ordinary is not withdrawn. The Dominicans have a statute which says that their superiors should suspend from hearing confessions any religious found unfit for that office. If such a religious has obtained faculties from the Ordinary and continues to hear confessions, are the latter valid? They are, even though the absolution is given by a suspended religious against the will of his superiors. Such a religious, of course, acts illicitly, but the absolution he gives is valid because of the jurisdiction received from the diocesan Ordinary.[43]

§ 2 is the logical consequence of what has thus far been stated. The local Ordinaries shall not grant *jurisdiction* to hear confessions *habitually* to religious who are not presented by their own superiors. On the other hand they shall not, except for grave reasons, refuse faculties to such as are presented by their superiors, with due regard, however, to canon 877.

the pastor cannot delegate his assistants or curates; such delegation must be given by the Ordinary.

42 This is the practice in every well-regulated community; Bizzarri, *Collectanea,* p. 753.

43 S. C. EE. *et* RR., March 2, 1866 (Bizzarri, *l. c.,* p. 755). This religious incurred no irregularity; *ibid.*

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This is a reminiscence of the medieval quarrel between the secular and the regular clergy, especially the Mendicants, which Boniface VIII and John XXII endeavored to settle.[44] The term *presented,* occurring in their Decretals, meant that the general or the provincial should present themselves personally or by deputy before the prelates (*i.e.,* Ordinaries, in order to obtain their *licentia, gratia et beneplacitum,* and then choose a sufficient number from among their members as confessors, who again must be presented to said Ordinaries for the "*licentia, gratia et beneplacitum.*" If the latter was refused, the Pope gave the power of hearing confessions "*ex plenitudine potestatis.*" It is not difficult to perceive that the Ordinaries and pastors were not satisfied with this solution. Hence the Council of Trent[45] and later papal Constitutions[46] demanded faculties properly so-called, but at the same time warned the bishops against unreasonable refusal. Now-a-days a recommendation from the religious superior may suffice, provided can. 877 is complied with. However, if the bishop insists upon personal presentation, he does not exceed the limits of his power.[47]

A *serious reason for refusing faculties* would be lack of knowledge, moral deficiency, or want of pastoral prudence.

44 C 2, X, Clem. III, 7 (Boniface VIII, "*Dudum*"); c. un. Extrav. Comm., II, 1 (John XXII, "*Frequentes*") c. 2, Extrav Comm., III, 6 (Boniface VIII, "*Super cathedram*").

45 *Trid.*, sess. 23, c. 15.

46 Gregory XV, "*Inscrutabili,*" 1622; Clement X, "*Superna,*" 1670; Benedict XIV, "*Apostolica indulta,*" 1744 (explaining the extent of the "*Cruciata*"); S. C. EE. *et* RR., April 11, 1698.

47 S. C. C., June 4, 1755 (Richter, *Trid.*, p. 206, n. 4).

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CONFESSORS OF EXEMPT RELIGIOUS

CAN. 875

§ 1. In religione clericali exempta ad recipiendas confessiones professorum, novitiorum aliorumve de quibus in can. 514, § 1, jurisdictionem delegatam confert quoque proprius eorundem Superior, ad normam constitutionum; cui fas est eam concedere etiam sacerdotibus e clero saeculari aut alius religionis.

§ 2. In religione laicali exempta, Superior proponit confessarium, qui tamen iurisdictionem obtinere debet ab Ordinario loci, in quo religiosa domus reperitur.

In *exempt religious* institutes of clerics delegated jurisdiction for hearing the confessions of the professed members, novices, and other persons mentioned in can. 514, § 1, may be given by their *own superior* according to the constitutions. This same Superior may also grant such jurisdiction to secular priests or priests of another religious institute.

The Council of Trent[48] did not change anything concerning the right of exempt religious to assign their own confessors. This right is part and parcel of the juridical institute of exemption. It was fully acknowledged by many constitutions and decisions of the Holy See.[49] But a dispute arose on the question whether, for instance, a Jesuit could validly absolve a Benedictine without faculties from the local Ordinary.[50] Our text clearly says that all that is needed is delegated jurisdiction from the exempt religious superior. Hence a religious of another religious institute, whether exempt or not, nay, even a

48 Sess. 23, c. 15, *de ref.*

49 Clement VIII, "*Sanctissimus*," May 23, 1593; "*Romani Pontificis*," Nov. 23, 1599; Clement X, "*Superna*," June 21, 1670; S. C. C., Sept. 21, 1624 (Bizzarri, *Collectanea*, p. 246 f.).

50 Cfr. Bizzarri, *l. c.*, p. 723, note.

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secular priest, may validly absolve a religious whose exempt religious superior has granted to that religious or secular priest delegated jurisdiction. Therefore no jurisdiction from the local Ordinary is required. By "*proprius eorundem superior*" is to be understood not only the general or provincial, but also the conventual prior, unless the constitutions of the resp. institute rule otherwise.[51] What has been said under can. 514, § 1, is, we believe, amply sufficient.[52]

But this rule applies only to exempt *clerical* institutes, because § 2 rules that in exempt *lay* institutes the superior *proposes the confessor,* who must obtain *jurisdiction* — not only permission — *from the Ordinary* in whose diocese the religious house is located. This is a new canon, although quite old in effect, according to the general principle: *Nemo dat quod non habet,* and superiors of lay institutes, although exempt, never, at least *de iure,* enjoyed jurisdiction in matters of confession. We may add that the superior has a strict right to present whom he pleases, and consequently the Ordinary *must* give the faculties if the presented candidate is fit.

CONFESSORS OF FEMALE RELIGIOUS

CAN. 876

§ 1. Revocata qualibet contraria particulari lege seu privilegio, sacerdotes tum saeculares tum religiosi, cuiusvis gradus aut officii, ad confessiones quarumcunque religiosarum ac novitiarum valide et licite recipiendas peculiari iurisdictione indigent, salvo praescripto can. 239, § 1, n. 1, 522, 523.

51 S. C. EE. *et* RR., June 3, 1864 (Bizzarri, *l. c.*, p. 720 ff.).

52 Cfr. Vol. III of this Commentary, pp. 141 f.

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§ 2. Hanc iurisdictionem confert loci Ordinarius, ubi religiosarum domus sita est, ad normam can. 525.

§ 1. Secular as well as religious priests, of whatever rank or office, need a *special jurisdiction* for validly and licitly hearing the confessions of *female religious and their novices.* Only the Cardinals are exempt from this general law. Can. 522 and 523 mention some modifications of this general law which no contrary particular law or privilege can nullify or alter.

§ 2. This jurisdiction is granted by the *Ordinary in whose diocese the religious house is located,* according to can. 525.

This law, though not explicitly enunciated by the Council of Trent, was enacted by Gregory XV and reasserted in later papal constitutions. Wherefore, though the second order of nuns or *moniales* was subject to the jurisdiction of the prelate regular of the first order, yet the confessors appointed by that prelate were first to be examined or at least found fit and then to be given a special approbation.[53] The Constitution of Clement X, "*Superna,*" further ordains that a confessor assigned to one convent of Sisters cannot validly hear confessions of the Sisters of another convent and that extraordinary confessors appointed for single monasteries and for single extraordinary occasions, need jurisdiction every time they are appointed for hearing confessions. This is still the rule[54] if the Ordinary, in granting faculties, does not explicitly state that the confessor appointed may hear the confessions of *all moniales on all occasions.* We may also add that the said constitutions mention only *moniales,* and therefore female religious with simple vows

53 Gregory XV, "*Inscrutabili,*" Feb. 5, 1622; Clement X, "*Superna,*" June 21, 1670.

54 Cfr. S. C. C., June 5, Aug. 2, 1755 (Richter, *Trid.*, p. 413, n. 10).

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were not considered as falling under this law. The Code, which is now everywhere law, simply says *religiosarum ac novitiarum,* and consequently all *religious* who go by that name, and all their novices, can validly confess only to a priest endowed with special jurisdiction by the local Ordinary. This ruling must not, however, be extended to the other persons mentioned in can. 514, namely, pupils, servants, sick persons, and guests. For hearing the confessions of these no special jurisdiction is needed. The Code further establishes that *rank or office* exempts no priest from the duty of obtaining special jurisdiction. Therefore, with the exception of *Cardinals,* no other dignitaries may claim any privileges in this regard. Of course, the local Ordinary who imparts the special jurisdiction may himself hear the confessions of Sisters. This is also true of all others who go by the name of Ordinary,[55] such as prelates *nullius,* vicars general, administrators, vicars and prefects Apostolic, but no prelate regular as such.

Lastly, attention is drawn to the beginning of the canon: "*revocata qualibet contraria particulari lege seu privilegio.*" Such a particular law existed in Spain,[56] in virtue of a brief of Urban VIII, but has now ceased. We know of no privilege or special law granted after the aforesaid Constitution of Gregory XV; if any has been granted it is now void.

Concerning the *exceptions* mentioned in the present canon, these refer to Sisters who for conscience sake wish to go to a confessor approved by the Ordinary for hearing women's confessions in a church or semipublic oratory, and to sick Sisters, who may call in any confessor approved for women.[57]

55 Can. 198, § 1.

56 Benedict XIV, *De Syn., Dioec.,* IX, 15, 9.

57 Can. 522 f.; see this Commentary, Vol. III, p. 162 f.

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What does "special jurisdiction" mean? Simply that the Ordinary, in granting faculties, must expressly state: "*Etiam ad confessiones audiendas religiosarum ac novitiarum.*" Of course, if he appoints a priest as confessor for Sisters, he is supposed to grant this special jurisdiction, even though, by mistake, this is not expressly[58] stated in the written or oral appointment.

§ 2 refers to can. 525, which says that the local Ordinary appoints the confessors,[59] ordinary as well as extraordinary, for Sisters either immediately subject to the Apostolic See or to the Ordinary himself. The prelate regular may present a priest to the local Ordinary, who then imparts to him jurisdiction for such nuns as are subject to the regulars of the respective institute.

In the *Irish Ecclesiastical Record* of 1919 (March and May, pp. 239 ff., pp. 414 ff.; cfr also *American Eccl. Review,* Oct. 1919, pp. 446 f.), there was a controversy over the wording: "*ad suae conscientiae tranquillitatem,*" "for the peace of her conscience." The question was: Does this term imply a *conditio sine qua non* of valid confession, or is it simply a clause which does not affect the validity of confession? When we wrote on can. 522, we held it was no condition in the proper sense of the word, but a motive cause which prompted the legislator to do away with unnecessary and conscience-torturing restrictions. Nor have we been converted to the contrary view after having read the answers — we suppose by Dr. Kinane — to "Inquirer."

Here are our reasons: If we solved that "*ad*" into a dependent clause, this clause would read: *ut consulatur conscientiae tranquillitati.* Evidently here the motive is

[58] This is not contrary to can. 879, § 1, because the very appointment as such of a confessor includes jurisdiction.

[59] Cfr. this Commentary, Vol. III, p. 166 f.

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expressed by the *ut finalis*. This, even if taken as a *causa finalis*, not merely *impulsiva*, cannot be construed as a *conditio sine qua non*. For, *finis legis non cadit sub lege*, unless it is expressed in the law itself (see can. 11). Take, for instance, the well-known Constitution of Martin V, "*Ad evitanda*," where the *finis legis* is clearly expressed. A similar phrase ("*ad consulendum conscientiae*") occurs in the decree "*Ne temere*," art. VII. Here the phrase is taken to mean a reason for admitting the extraordinary form of contracting marriage, the non-existence of which reason would invalidate a marriage informally contracted. But it would need a strong proof to read a *conditio sine qua non* even into this phrase, notwithstanding the assertion of Vermeersch, quoted by Kinane. Vermeersch speaks of a strict obligation, but this may be only moral, as the preceding words seem to insinuate. The main point in said decree is the "imminent danger of death," which generally causes unrest or disturbance of mind which is made the *conditio in directo* for contracting marriage before any priest and two witnesses. Not even in that case would the priest have been obliged to ask the person "in imminent danger of death" whether or not he or she wished to appease his or her conscience. There, too, the "*consulendum conscientiae*" is the impulsive or, if you wish, the motive cause for this permission, but not the *conditio sine qua non*, this being the imminent danger of death. The Code (can. 1098) has happily omitted the clause.

The preposition *ad* has several meanings in law texts. It may signify nearness or approach to something, and also a final cause, or even a condition, but as a rule it has this latter meaning only when a contract or stipulation is involved; for instance, I promise you something *ad ar-*

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bitrium boni viri, i. e., iudicis.[59a] What is conscience? "*Conscientia nihil aliud est quam sensus animae cognoscentis bonum et malum et quid intrinsecus latens in mente, quod probari non potest directo.*"[59b] Now the conscience is something hidden in the mind, and cannot easily be proved in the external court. Can this be made a *conditio sine qua non* of the validity of confession? We hardly believe. Yet in the opinion of the learned professor who answered "Inquirer" in the *I. E. R.*, this would happen in our case. He reads three conditions into can. 522: The religious must make her confession: (1) for the peace of her conscience, (2) to a confessor approved by the local Ordinary to hear the confessions of women, (3) in a church or oratory, even a semipublic oratory (March No., p. 239 f.). Then (May No., p. 418) he adds: "If it is stated that a certain act is invalid, when a number of conditions are fulfilled [we suppose there is a printing mistake, otherwise the sentence is unintelligible, therefore either in the first clause we must read *valid,* or put a negative in the second, *not fulfilled*], it is clearly implied that the defect of any of these conditions involves the invalidity of the act." Again: "The canon itself puts the three [conditions] upon the same footing." The former statement is true only if all the conditions are to be taken conjunctively, but must be rejected if the conditions may be taken disjunctively (for instance, in can. 966), so that only the one or the other condition is required for the validity of an act. This is expressed by *aut* or *vel.*

But is it true that all three conditions are put upon the same footing? And first is it really true that the phrase *ad conscientiae quietem* involves a condition? As seen

59a Barbosa, *Tractatus Varii, Dictiones Usu Frequentes,* n. VI, ed. Lugd. 1660, p. 644.

59b Barbosa, *Axiomata,* 52, *l. c.,* p. 34.

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above it *may* signify a condition, but does so as a rule only in onerous contracts. That it has this signification in can. 522, needs stronger proofs than those so far advanced. But suppose it were a condition. In that case the peace of conscience would be on a level with the other two conditions, which certainly affect the validity of the confession. Hence the religious herself would be made co-arbiter of the validity of confession, or at least she would administer the material for valid confession, not only by her confession and contrition, but also by her "peace of conscience." This would be a new kind of theology.

But let us not drift into ridicule. We believe that Benedict XIV, in his Constitution, *Pastoralis Curae*, of Aug. 5, 1748, has solved the question quite clearly. There amongst other things he mentions a case quite similar to ours. Some nuns or sisters had asked for a special confessor, not only in case of sickness or aversion against the ordinary confessor, but for their greater peace of mind and further progress on the way of the Lord: "*verum pro majori animi sui quiete atque ulteriori in via Dei progressu.*" The prelates regular refused to accommodate the sisters, but Benedict XIV leaned to a more lenient and charitable treatment. He says: "*Persuasum enim habebimus, adeoque habemus, non solum integrae Communitati, sed singulis etiam Monialibus indulgendum esse in iis rebus, quae iuste et rationabiliter petuntur, maxime quum illae ad earum conscientiae quietem, et securitatem conferre dignoscuntur. Neque sane huiusmodi postulationes aut temere exaudiri, aut sine causa, reiici debere censemus; sed inquirendum in primis esse de qualitatibus tum Monialis, quae Confessarium extra ordinem petit, tum Confessarii, qui ab ea requiritur; ut utriusque diligenter inspectis, deliberari*

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possit, an illius votis annuendum sit, an non. Si enim Monialis ex una parte nullum det adversae suspicioni locum, ex altera vero confessarius non modo legitimam Ordinarii approbationem, sed etiam commune probitatis testimonium pro se habeat, nullo modo probare possumus tam firmum huiusmodi Praelatorum in renuendo propositum; nec intelligimus, cur post Confessarium extraordinarium integrae Communitati, iuxta legem Concilii Tridentini, oblatum, nulla omnino Monialibus singulis spes relinquatur obtinendi peculiarem Confessarium, cuius consilio et opera, justis fortasse de causis, indigere se arbitrentur." If any one wishes to read a strict condition into this text, he may do so at his own pleasure, but he will certainly contradict the wording of the text, as well as the mind of the great Pontiff and canonist. The meaning is clear: in order not to torture the consciences of the poor sisters (" *pro animi quiete,*" " *ad earum conscientiae quietem et securitatem*") the Pope gives them liberal and generous permission to call in another confessor, even if they have to apply to the S. Poenitentiaria. This is the motive cause, but not a condition in the proper sense of the word.

We finally draw attention to what we said in note 13, p. 156, Vol. III, of this Commentary. There is no need of inquiring into the reasons which prompted Pius X to unfetter the consciences of religious. The view advocated in the *I. E. R.* would re-enthrall them and throw a Jansenistic cloak about the generous law of the Code.

EXAMINATION OF CONFESSORS

CAN. 877

§ 1. Tum locorum Ordinarii iurisdictionem, tum Superiores religiosi iurisdictionem aut licentiam audiendarum confessionum ne concedant, nisi iis qui idonei

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per examen reperti fuerint, nisi agatur de sacerdote cuius theologicam doctrinam aliunde compertam habeant.

§ 2. Si post concessam iurisdictionem aut licentiam prudenter dubitent num probatus a se antea sacerdos pergat adhuc idoneus esse, eum ad novum doctrinae periculum adigant, etsi agatur de parocho aut canonico poenitentiario.

§ 1. The local Ordinaries shall not grant jurisdiction, nor the religious Superior jurisdiction or license for hearing confessions except to such as have been found fit upon *examination*. An exception may be made in favor of those whose theological competency is sufficiently known from other sources.

All the papal constitutions and decisions insist upon the *fitness* (*idoneitas*) of those who hear confessions. This includes two qualities, intellectual and moral. The *intellectual* consists in doctrinal knowledge, especially of the respective portions of Moral Theology [60] and Canon Law, and familiarity with the language in which confessions are to be heard.[61] The *moral* qualities required are prudence, probity of life, and zeal. Therefore the examiners should insist upon these qualities before they render their verdict to the Ordinary.[62]

Our Code admits a noteworthy mitigation in favor of those who are *known for their theological learning*. Thus now-a-days a teacher of Moral Theology or a synodal examiner may be exempted from this examination, also any one whose competency is well known to the bishop.

60 S. C. P. F., April 13, 1807, n. XII (*Coll.*, n. 692).

61 S. C. P. F., March 17, 1760; Aug. 2, 1762 (*Coll.*, nm. 427, 444): this rule affects the secular as well as the religious clergy.

62 Benedict XIV, "*Apostolicum ministerium*," May 30, 1753, § 8.

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§ 2. Should the Ordinary or religious Superior have a prudent doubt as to whether a priest once approved continues to be fit, they may submit him to a new doctrinal examination, no matter whether he be a pastor or canon penitentiary.

Here stress is laid on knowledge, and consequently the moral qualifications need not be re-examined because it might reflect on the priest's character.[63] The Ordinary is entitled to subject any confessor to an examination, even though he be a pastor or penitentiary canon. Also one, whose competence was assumed may be submitted to an examination after he has been given the faculties. The religious Superior may submit a religious to a new examination in case he has extra-sacramental knowledge of his doctrinal deficiency on some point.

LIMITED JURISDICTION

CAN. 878

§ 1. Iurisdictio delegata aut licentia audiendarum confessionum concedi potest certis quibusdam circumscripta finibus.

§ 2. Caveant tamen locorum Ordinarii ac religiosi Superiores ne iurisdictionem aut licentiam sine rationabili causa nimis coarctent.

Delegated jurisdiction, or the license for hearing confessions, may be limited, but local Ordinaries and religious Superiors should not restrict it unreasonably.

The first section is couched in general terms and *excludes no class of clergy* who need delegated jurisdiction. Therefore also exempt religious[64] who obtain delegated

63 S. C. EE. *et* RR., May 29, 1760; April 11, 1698 (Bizzarri, *Collectanea*, pp. 546 f., 282).

64 The regulars claimed exemption from all restrictions, but Alexander VII, Jan. 30, 1659 proscribed the

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jurisdiction either from the local Ordinary or from their Superior may have their jurisdiction limited. But the reason for so doing should at least have the semblance of *justice*. The S. Congregations have more than once admonished Ordinaries not to vex religious with unnecessary restrictions.[65] Any limitations should be based on unfitness, as resulting from the examination, as the Constitution of Clement X, "*Superna*," plainly states.[66] Restrictions may be made as to persons, place and time. As to *persons* it may be that a priest may be too young to hear women's confessions, or may be suited for one class of persons but not for another, etc. The same reasons would also justify limitation as to *place*. As to *time*, the Constitution of Clement X distinguishes between priests who were found generally fit, and others who proved less or not quite fit in the examination. De Lugo says the bishop may have a reasonable suspicion that one approved forever might care little for further study or intellectual improvement, or the moral character of the candidate may not be fully known to him.[67] The Ordinary should not make the exercise of delegated jurisdiction dependent on the permission of the parish priest;[68] in fact, he should not lay down too many conditions.

proposition: "*Non possunt Episcopi limitare seu restringere approbationes, quas regularibus concedunt ad confessiones audiendas, neque ulla ex parte revocare.*" Cfr. Benedict XIV, *Instit.*, 86, n. IX.

65 S. C. EE. et RR., Sept. 13, 1641; Sept. 22, 1645 (Bizzarri, *l. c.*, p. 25 f.); S. C. P. F., Dec. 11, 1838, ad 5 (*Coll.*, n. 879).

66 See § 4, and Innocent XIII, *Apostolici ministerii*," May 23, 1723, §§ 16, 19.

67 Ballerini-Palmieri, *Opus Theol. Moral.*, V., p. 287.

68 S. Rit. C., May 13, 1719 (*Dec. Auth.*, n. 2264).

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JURISDICTION EXPRESSLY TO BE GRANTED

CAN. 879

§ 1. Ad confessiones valide audiendas opus est iurisdictione scripto vel verbis expresse concessa.

§ 2. Pro concessione iurisdictionis nihil exigi potest.

For the valid hearing of confessions, jurisdiction must be *granted expressly* either in writing or by word of mouth; but *nothing is to be charged* for the grant. Tacitly granted jurisdiction is hereby entirely rejected. One would look in vain for the word "*expresse*" in the papal constitutions [69] quoted by Cardinal Gasparri, though its equivalent is certainly to be found there. What is *tacit jurisdiction?* It is one which an Ordinary or Superior knows to be exercised by his subjects, and to which he does not object, although he could easily do so. For instance, a bishop calls a missionary from another diocese to give a mission in a parish of his own territory. Thereby he was formerly supposed to have granted him the necessary faculties for hearing confession.[70] Such tacitly granted jurisdiction can no longer be held to be sufficient for validly hearing confessions. There must be an *express* grant. The Ordinary in calling a missionary must explicitly confer upon him delegated jurisdiction, and the pastor must expressly obtain the same for a missionary, unless the latter belongs to the diocese or has obtained faculties for the diocese in which he is to give the mission.

We said this express grant is required for *delegated* jurisdiction. The text does not contain this adjective;

69 Benedict XIV, "*Apostolica indulta*," Aug. 5, 1744, § 3, expressly mentions tacit approbation or jurisdiction as sufficient.

70 Noldin, *l. c.*, n. 347; Sabetti-Barrett, *Theol. Moral.*, ed. 1917, p. 706; *Am. Eccl. Rev.*, 1918, Vol. 58, p. 681.

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but it is clearly implied, because ordinary jurisdiction is acquired by reason of the office to which it is attached.

Here it may not be amiss to answer the question whether jurisdiction for hearing confessions may be acquired *by custom*. The Decretals [71] absolutely deny the possibility of acquiring such jurisdiction at least directly, by custom, even though it be immemorable. Indirectly, as Pirhing says,[72] one could obtain ordinary jurisdiction by acquiring a parochial benefice. Now this way is precluded, since all provision must be made in writing.[73]

Different from the express or tacit grant of jurisdiction is a doubtful and probable jurisdiction. A *doubtful jurisdiction* would be if one would not remember the date when, or the time for which, it was granted, or doubt the material extent of the faculties. *Probable* would be the jurisdiction in reserved cases and censures as to whether the circumstances are really such as would render the sin a reserved one or one punished by censures. Our Code has solved this doubt in favor of validity in both cases.[74]

REVOCATION OF JURISDICTION OR LICENSE

CAN. 880

§ 1. Loci Ordinarius vel Superior religiosus iurisdictionem vel licentiam ad audiendas confessiones ne revocent aut suspendant, nisi gravem ob causam.

§ 2. At graves ob causas Ordinarius potest etiam parocho aut poenitentiario confessarii munus interdicere, salvo recursu in devolutivo ad Sedem Apostolicam.

71 C. 2, 6°, V. 10.
72 *Com.*, lib. V, tit. 38, n. 36.
73 Can. 159.
74 Can. 207, § 2; can. 209; Ballerini-Palmieri, *l. c.*, V, p. 319 ff.

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§ 3. Non tamen licet Episcopo, inconsulta Sede Apostolica, si de domo formata agatur, omnibus alicuius religiosae domus confessariis una simul iurisdictionem adimere.

§ 1. Local Ordinaries *shall not revoke* or suspend jurisdiction or license for hearing confessions, *except for a grave* reason.

§ 2. But if there is such a reason, the local Ordinary may also forbid the pastor or canon penitentiary to exercise the office of confessor, with due regard, however, to the right of *appeal in devolutivo* to the Apostolic See.

§ 3. In the case of a *domus formata,* the bishop is not allowed, without having first consulted the Apostolic See, to take away jurisdiction from all confessors of a religious house at the same time.

Revoking the faculties or jurisdiction affects the validity of confessions, while the recall of the license only concerns licitness, but may reflect on the moral character and reputation of the confessor. Hence it is that a *grave reason* is required for the revocation of either. Such a reason is stated in a decree of 1615 and styled "a reason connected with confession."[75] This apposition is then further determined in the Constitution of Clement X, *"Superna,"*[76] which indeed speaks only of regulars, but may be said to cover our case, which includes both religious and secular clerics. It is stated there that if religious live scandalously or dishonorably, or if they have committed a crime which, according to the prudent judgment of the bishop, demands suspension from hearing confessions, these would be reasons justifying suspension from hearing confessions. For, adds said

[75] S. C. EE. *et* RR., Nov. 20, 1615 (Bizzarri, *l. c.*, p. 21).

[76] See §§ 5, 6.

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Constitution, the principal quality of a minister of the Sacrament of Penance is probity of life and good conduct. The Code simply says: "a grave reason," and with this, says the "*Superna,*" the conscience of the bishop is charged: *i.e.,* he must use common sense and act with due deliberation. A grave reason would also be disregard of a decree of interdict, or the discovery of irregularities at the canonical visitation.[77]

§ 2 applies the same law to *pastors* and *canonici poenitentiarii* of cathedral and collegiate churches who otherwise enjoy ordinary jurisdiction. Therefore these, too, may be suspended from the office of confessors, so that the confessions would no longer be valid, unless, of course, can. 209 would apply. But the text adds that they may have recourse to the Apostolic See *in devolutivo,* which signifies that the order must be obeyed until reversed by Rome.[78]

§ 3 repeats former enactments [79] concerning *confessors of religious communities.* The sources from which our text is taken mention the houses of exempt regulars and of *moniales.* There were many complaints against Ordinaries for suspending all the confessors of a convent, though formerly approved by them for *hearing the confessions of lay people.*[80] This, as one decree says, caused scandal and injury to souls. Hence the new law which has entered the Code. But our text apparently draws a distinction between *domus formatae* and *non formatae, i.e.,* houses in which at least six professed members live, four of whom are priests, and houses with less than this

77 S. C. EE. *et* RR., Nov. 20, 1615; Dec. 9, 1740 (Bizzarri, *l. c.,* pp. 21, 326, 350); S. C. P. F., Dec. 11, 1839, ad 4 (*Coll.,* n. 892).

78 Benedict XIV, "*Ad militantis,*" March 30, 1742, §§ 15, 20.

79 Innocent X, "*Cum sicut accepimus,*" May 14, 1648, § 4; Clement X, "*Superna,*" § 6; S. C. EE. *et* RR., Nov. 20, 1615.

80 S. C. EE. *et* RR., Nov. 28, 1732 (Bizzarri, *l. c.,* p. 328).

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number. The former documents simply say: *alicuius conventus*. But the Code implies that only in the case of a *domus formata* must the Holy See be consulted before the Ordinary can suspend all the priests of a community from hearing confessions. In smaller communities, which have not at least six members, four of whom are priests, all the priests may be suspended by the bishop from hearing the confessions of lay people or secular priests or non-exempt religious. From hearing the confessions of exempt religious the Ordinary cannot suspend exempt religious, since these receive delegated jurisdiction from their own superiors. If a bishop should attempt such suspension in the case mentioned (*domus formata*), it would be the Metropolitan's right and duty to remind him of can. 880, § 3.[81] On the other hand, the Ordinary may, for a grave reason, without asking or notifying the superior, remove or suspend a religious from hearing the confessions of female religious.[82] But if the female religious be subject to a religious exempt superior, the latter would be entitled to present another religious for approval or examination, in order to obtain jurisdiction.

It may strike the student as odd that the Code, in § 3, has chosen the term "*bishop*," whereas in the other two sections it uses the word "Ordinary." Was this done merely for the sake of change? We hardly believe so for reasons derived from a decision of the S. Congregation. The question was asked, whether the vicar capitular (diocesan administrator in our country) may suspend either secular or regular priests from hearing confessions. The answer was that there was no difficulty

81 *Ibid.*

82 S. C. EE. *et* RR., Dec. 9, 1740 Bizzari, *l. c.*, p. 350). Revoking or suspending faculties *without a reason* (also under § 1) would be valid, as clearly implied by "*Suprema.*"

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as to secular priests, but the case was otherwise with regard to exempt religious once approved by the bishop either without limitation, or with the clause "*ad beneplacitum nostrum.*" To remove such is, according to the School, a personal right of the bishop which does not pass to the chapter or the vicar capitular,[83] and hence to proceed thus is not in the power of the administrator, nor, since it is a personal right, is it in the power of the vicar general except with a special mandate.

CONFESSORS OF VAGI AND PEREGRINI

CAN. 881

§ 1. Omnes utriusque cleri sacerdotes ad audiendas confessiones approbati in aliquo loco, sive ordinaria sive delegata iurisdictione instructi, possunt etiam vagos ac peregrinos ex alia dioecesi vel paroecia ad sese accedentes, itemque catholicos cuiusque ritus orientalis, valide et licite absolvere.

§ 2. Qui ordinariam habent absolvendi potestatem, possunt subditos absolvere ubique terrarum.

§ 1. Secular as well as religious priests who are approved for hearing confessions in some place, no matter whether their jurisdiction be ordinary or delegated, may validly and licitly absolve *vagi* and *peregrini* who come to them from another diocese or parish, and also Catholics of any Oriental Rite.

The Holy See, says an Instruction,[84] has always observed the rule that, in a matter so delicate as the Sacrament of Penance, the liberty of the faithful should not be impeded, but they should be free to confess to whom they prefer. Of course jurisdiction must always be

83 S. C. EE. *et* RR., June 19, 1806 (Bizzarri, *l. c.*, p. 407 f.).

84 S. C. P. F., June 2, 1835 (*Coll.*, n. 839).

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supposed. Now the text says that *both* secular and religious priests may absolve *in casu,* whilst the Constitution of Clement X, "*Superna*" (§ 7) only mentions regulars who are approved for the place or diocese in which they hear confessions. Hence a confessor approved for the diocese of St. Joseph and hearing confessions in that diocese, may absolve such as come to him from the diocese of Kansas City. But what does "*approbati in aliquo loco*" mean? It can mean neither license nor something midway between license and jurisdiction. The text itself explains the phrase. Approval is here only a general term which includes both jurisdiction and permission (for religious especially, who need the latter in order to hear confessions licitly). Hence the addition without the copula *et:* "*sive ordinaria sive delegata iurisdictione instructi.*" Those who have ordinary jurisdiction are the bishops and pastors, each within his own territory, the bishop within the whole diocese, the pastor within his parochial district.[85] If the latter has received delegated jurisdiction for hearing confessions in the whole diocese, he may perform that office in any part of the diocese.

The *subjects* of this general rule are *vagi, peregrini,* and *Catholici ritus Orientalis. Vagi* are such as have neither domicile nor quasi-domicile in any place, diocese or parish. *Peregrini* are those who have a domicile or quasi-domicile, but for the time being live outside of it, in a strange place.[86] Oriental Catholics are those of an Oriental Rite differing from the Latin, though partaking of the Catholic communion. This threefold class of per-

[85] S. C. C., quoted by Benedict XIV, *Institut.,* 86, n. 14: "*An provisus de parochiali per concursum, censendus sit approbatus idoneus minister ad audiendas confessiones in illa dioecesi, in qua illam parochialem obtinet?* RESP.: *Censeri dumtaxat in ea civitate, vel oppido, ubi sita est parochialis, non autem passim per totam dioecesim.*"

[86] Can. 91.

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sons, then, may be absolved by any priest who has either ordinary or delegated jurisdiction for the place in which he actually hears confessions. As to the difference of rite, there is no difficulty, because the Sacrament of Penance, as far as the formula of absolution is concerned, has little or nothing to do with the rite. Wherefore the S. Congregation [87] has more than once enjoined the bishops of the Oriental Rite not to forbid their subjects to go to confession to Latin priests. Neither is there any doubt as to *vagi*, because custom testifies to the fact that they may be absolved by any priest endowed with jurisdiction. Unless jurisdiction is granted in one way or another, absolution, which is given in the form of a judicial sentence, cannot be imparted validly. This calls for a brief observation concerning *peregrini*. We will not enter into the controversy which raged several years ago concerning this point,[88] but will only state what, according to the Code, seems to us the more probable and consistent view. All admit, with St. Alphonsus,[89] that the Pope may grant jurisdiction to any priest for absolving *peregrini* (strangers) and that, without either ordinary or delegated jurisdiction, no valid absolution may be imparted. The question is: Who grants the jurisdiction necessary for absolving a stranger: — the bishop of the stranger who has left his domicile or quasi-domicile, or the bishop in whose territory the stranger dwells at the moment? Concretely, if a stranger comes from the diocese of Kansas City to a priest in the diocese of St. Joseph, and asks to be absolved, which bishop grants jurisdiction, the

87 S. C. P. F., June 2, 1835; Dec. 11, 1838; April 30, 1862, n. 2 (*Coll.*, nn. 839, 879, 1227). A general prohibition would render confession neither invalid nor illicit.

88 Cfr. Ballerini-Palmieri, *Opus Theol. Moral.*, V. p. 305, nn. 613 ff.; Lehmhuhl, *l. c.*, II, n. 384; Noldin, *Zeitschrift für Kath. Theol.*, 1881, 453 f.; *De Sacramentis*, n. 349.

89 *Theol. Moral.*, VI, n. 588.

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bishop of Kansas City or the bishop of St. Joseph? After reading the acute reasoning of Ballerini-Palmieri, it seemed to us that they had gained the point, and certainly, before the Code was promulgated, their position was speculatively the stronger. But after pondering can. 881, as compared with can. 879, § 1, this difficulty appeared: How about express jurisdiction? Ballerini-Palmieri's reasoning is based upon "tacit consent," "explicit or implicit license or approbation." The *peregrinus* is supposed to have the tacit consent of his bishop which he transfers to the confessor. However since tacit jurisdiction is now excluded, and since our text speaks of such as are approved "*in*" some place or diocese, we cannot help saying that the necessary jurisdiction must come from the Ordinary of the diocese *in* which the confession is heard. The difficulty arises from the fact that the *peregrinus* is not *subject* to the Ordinary who is supposed to grant jurisdiction over him. According to the Council of Florence and that of Trent,[90] the confessor must have either ordinary or delegated power over his penitent. It is true that the jurisdiction cannot be claimed by reason of domicile or quasi-domicile; yet it appears to us that the old adage, "*Actor sequitur reum*,"[91] may to some extent be applied here, for the penitent, being himself plaintiff and defendant, may choose the *forum competens* and thus submit himself to a judge otherwise competent, *i.e.*, any priest who has jurisdiction. Therefore the Church, especially now-a-days when changes of domicile and wandering are so frequent, has wisely left it to the penitent to choose his own confessor, as long as the latter is qualified according to general law of the Church.

90 Thus Ballerini-Palmeri, V. p. 306, n. 615; *Decret. pro Arm.* (Denzinger, n. 594), *Trid.*, sess. 14, c. 7, *de poenit;* can. 872.

91 Cc. 5, 8, X, II, 2.

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§ 2. *Those who possess ordinary jurisdiction for absolving may absolve their own subjects everywhere.* Therefore Ordinaries and pastors (but not curates, assistants, or rectors) may absolve their subjects by reason of their office, to which this power is attached. The Cardinals enjoy the same power by reason of a personal privilege, which, however, cannot be communicated to others, except on their own behalf and that of their *familiares*.[92]

Subjects of Ordinaries and pastors are those who have their domicile or quasi-domicile within the boundaries of the diocese or parish. These, then, may be absolved by their respective Ordinaries or pastors in any diocese or parish, no matter where they may meet.[93] The ordinary jurisdiction may therefore be called extra-territorial or personal.

ABSOLUTION IN DANGER OF DEATH

CAN. 882.

In periculo mortis omnes sacerdotes, licet ad confessiones non approbati, valide et licite absolvunt quoslibet poenitentes a quibusvis peccatis aut censuris, quantumvis reservatis et notoriis, etiamsi praesens sit sacerdos approbatus, salvo praescripto can. 884, 2252.

When there is danger of death, any priest, even though not otherwise approved for hearing confessions, may validly and licitly absolve any penitent from whatever sins and censures, including those which are reserved and notorious, even though an approved priest may be present. But the rules laid down in can. 884 and 2252 must be observed.

92 Can. 239, § 1, nn. 1, 2.
93 S. C. C., Nov. 19, Dec. 3, 1707 (Richter, *Trid*, p. 206, n. 3).

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The penitential discipline,[94] which was rather severe in the first century, was gradually mitigated so as to open the gate of salvation to public penitents, who could receive the imposition of hands at least at the point of death. The last of the three customary impositions was indeed reserved to the bishop, but the priest was allowed to give it in the "last necessity,"[95] which certainly was the approaching end. The subsequent ages[96] witnessed further mitigations, until the present discipline was established by the Council of Trent,[97] which, *inter alia,* enacted the wholesome law that no censure or reserved sin can debar a dying penitent from receiving the benefit of absolution.

"How is the *periculum mortis* or danger of death to be understood?" was asked by a former bishop of Cincinnati, and the Holy Office[98] referred him to "approved authors." One of these authors tells us that danger of death exists, not only in a very serious sickness, but also when there is danger to life from an external cause, for instance, before a battle, upon setting forth on a perilous voyage, before a difficult childbirth, etc.[99] In such a circumstance, then, our canon may be applied, and any priest, even though he has neither ordinary nor delegated jurisdiction or permission, may validly and licitly absolve. The text goes still further by saying: *even though an approved priest may be present.* Hence any validly ordained priest, even though belonging to a heretical or schismatic sect, or apostatized or censured may, even in

94 Cfr. Pohle-Preuss, *The Sacraments* Vol. III, pp. 37 ff.: M. J. O'Donnell, *Penance in the Early Church,* 1907. Palmieri, *De Poenit.,* p. 159, justly distinguishes a threefold *manuum impositio:* at the beginning, during, and at the end of public penance, which latter signified absolution.

95 C. 14, C. 26, q. 6.

96 C. 1, Extrav. Comm., V. 7 (Boniface IX, "*Inter cunctas*").

97 Sess. 14, C. 7, *de poenit.*

98 S. O., Sept. 13, 1859, ad 1 (*Coll. P. F.,* n. 1181).

99 Noldin, *De Sacram.,* n. 353.

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presence of an approved confessor, validly absolve any one in danger of death, and if we connect that clause with the present, he may also do so licitly.[1] It is but just, however, to add another decision of the Holy Office, in answer to the question: "Whether it is permitted to demand absolution of a schismatic priest in danger of death if no Catholic priest is at hand," as follows: Yes, provided no scandal is given to the faithful, no danger of perversion threatens the sick person, and, finally, provided that it may be reasonably presumed that the schismatic minister will absolve according to the rite of the Church.[2] The validity is not affected, provided he pronounces the formula correctly, but the obligation here imposed should not be made light of.

Furthermore, the Code says: he may absolve from *all sins* and *censures,* although reserved and notorious, except in two cases: the *absolutio complicis,* of which can. 884 treats, and the obligation of recurring to the proper authority, if the penitent regains his health, as will be more fully explained under can. 2252. Observe that recourse to the Holy See, *i.e.,* the S. Poenitentiaria, must be had in case a sin has been forgiven which was *modo specialissimo* under censure reserved to the Holy See by either the law itself, or by the Holy See personally; and recourse must be had to the bishop if the law itself or the bishop has reserved a censure.

The time within which the application must be made is generally a month after the complete recovery of the penitent. It may be done either personally or through the confessor by mail,[3] of course, under fictitious names.

1 S. O., July 29, 1891 (*Coll. P. F.,* n. 1761) only mentions validity.

2 S. O., June 30, July 7, 1864, ad 6 (*Coll. cit.,* n. 1257).

3 Can. 2254, § 1; S. O., Aug. 19, 1891 (*Coll. P. F.,* n. 1764).

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CONFESSORS AT SEA

CAN. 883.

§ 1. Sacerdotes omnes maritimum iter arripientes, dummodo vel a proprio Ordinario, vel ab Ordinario portus in quo navim conscendunt, vel etiam ab Ordinario cuiusvis portus interiecti per quem in itinere transeunt, facultatem rite acceperint confessiones audiendi, possunt, toto itinere, quorumlibet fidelium secum navigantium confessiones in navi excipere, quamvis navis in itinere transeat vel etiam aliquandiu consistat variis in locis diversorum Ordinariorum iurisdictioni subiectis.

§ 2. Quoties vero navis in itinere consistat, possunt confessiones excipere tum fidelium qui quavis de causa ad navim accedant, tum eorum qui ipsis ad terram obiter appellentibus confiteri petant eosque valide ac licite absolvere etiam a casibus Ordinario loci reservatis.

§ 1. Any priest traveling on the ocean may hear the confessions of all Catholics who travel with him on board the same ship, although the vessel may on its trip pass, or even stop for some time at, various places subject to different Ordinaries. But in order to absolve these travelers validly and licitly the priest must have duly obtained the faculty either from his own Ordinary, or from the Ordinary of the place he sails from, or from the Ordinary of any port which the vessel passes.

This canon, as is natural, grew out of the recently increased travel. It is not surprising, therefore, that theologians as well as the Holy Office were at first in doubt as to which Ordinary should impart jurisdic-

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tion. It was first decided that the Ordinary of the diocese from which the ship sailed should grant the necessary faculty, but that it should last only until the vessel reached the next station where an Ordinary was located.[4] Later the faculty was extended over the whole trip, even though the vessel made several stops of some duration (*aliquandiu*).[5] Finally the Holy Office formulated the text which is our present § 1, but limited the faculty of hearing confessions to the ship itself.[6]

§ 2 is the final formulation as it was rendered by the Holy Office on December 13, 1906, but which has not entirely entered our Code. What the legislator has adopted into the text is the following: As often as the vessel stops on its trip, the priests endowed with faculties, as stated under § 1, may validly and licitly hear the confessions of such of the faithful as may for any reason visit the vessel, as well as the confessions of those who approach them for that purpose when they go on land for a short stop. In this latter case, they may absolve also from cases reserved to the Ordinary of the diocese where they stop. The omission in the Code of one clause inserted by the Holy Office is noteworthy. The Holy Office had made a condition in the case where a priest hears confessions on land and absolves from reserved cases, viz: "provided there be no, or only one, approved priest in that place and the Ordinary cannot easily be reached."[7] The legislator certainly knew of that ruling, and the fact that he omitted it purposely from the Code shows that he intended to free the priests in question from the condition named. It would, besides, be embarrassing for traveling priests, who perhaps do not even know the lan-

4 S. O., March 17, 1869 (*Coll. P. F.*, n. 1343).

5 S. O., April 9, 1900 (*ibid.*, n. 2082).

6 S. O., Aug. 23, 1905 (*ibid.*, n. 2244, note).

7 *Ibid.*

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guage of the country, to have to ask about the presence of priests or the whereabouts of the Ordinary.

§ 1 states that the respective priests must have duly (*rite*) obtained the faculties. This implies that they were found worthy and fit, according to the enactment of the Council of Trent, to obtain the faculties.[8] Therefore Ordinaries are at liberty to subject them to an examination, unless, knowing them personally or from recommendation, they deem this measure superfluous. Now-a-days wireless telegraphy might prove a convenient means of obtaining faculties in case a priest has forgotten to do so, when leaving the port or diocese.

ABSOLUTIO COMPLICIS INVALIDA

CAN. 884.

Absolutio complicis in peccato turpi invalida est, praeterquam in mortis periculo; et etiam periculo mortis, extra casum necessitatis, est ex parte confessarii illicita ad norman constitutionum apostolicarum et nominatim constitutionis Benedicti XIV *Sacramentum Poenitentiae*, 1 Iun. 1741.

In the Constitution of Benedict XIV, "*Sacramentum Poenitentiae*," the *sin* from which an accomplice may not be absolved is called "*peccatum turpe atque inhonestum contra sextum decalogi praeceptum commissum.*" That it be such, it must be committed by both parties and constitute a certain, external, and grievous sin on both sides by reason of the internal and external act. The accomplice may be of either sex.[9]

If a confessor attempts to absolve his accomplice in

8 S. O., Aug. 23, 1905 (*ibid.*).

9 S. O., Sept. 13, 1859 (*Coll. P. F.*, n. 1181), which refers to *probatos auctores*, and especially to St. Alphonsus; cfr. Noldin, *De Sacramentis*, n. 384.

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such a sin, his jurisdiction ceases: *nulla atque irrita omnino sit,* as if it were an absolution imparted by a priest who lacked jurisdiction and the faculty of absolving validly. This invalidity, as stated by law in said Constitution, affects every person involved in such a crime, and comprises the whole act or matter of confession, not only the act of complicity. Whether a confessor who would *bona fide* absolve his accomplice, either because he did not know the penitent, or was not aware of the law which deprives him of jurisdiction *in casu,* would absolve validly is a controverted point.[10] The wording of the Constitution in our opinion rather favors the invalidity of such a confession, although the *excipere audeat*[11] seemingly supposes an act of presumption and voluntary disobedience, which, of course, in a case of ignorance or inadvertence the confessor could not be charged with. If the accomplice should, by reason of forgetfulness or even purposely but *bona fide,* omit all mention of the complicity, the confession would be valid.[12] If the penitent had already confessed the sin in question to another priest, and was absolved by him, the guilty confessor may afterwards validly and licitly absolve his accomplice, even though the latter should, among other sins, again confess the sin of complicity.[13]

When there is *danger of death,* the confessor may validly and licitly absolve his accomplice from the sin of

10 Noldin, *l. c.,* n. 385.

11 The phrase *ausus fuerit* occurs in the clause which states the censure and commences with: *et nihilominus;* the absolution is not only invalid, but liable to censure. The censure would not, however, be incurred in the controverted case.

12 If the priest accomplice had either directly or indirectly induced his accomplice not to confess this sin, excommunication would follow; cfr. can. 2367, § 2; S. Poenit., Feb. 19, 1896.

13 Noldin *l. c.,* n. 385, says in a note: "*Sunt tamen inter recentes praesertim D'Annibale (III, n. 32, 4 Scavini (III, n. 367) et Genicot (II, n. 352), qui confessario potestatem tribuant etiam in peccatum complicitatis, postquam hoc semel directe iam remissum est.*"

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complicity, if there is real *necessity, i.e.,* according to Benedict XIV,[14] *if no other priest,* whether with or without jurisdiction, *is to be had.* But the same Pontiff also foresaw the case of scandal or loss of reputation if another priest, *simplex sacerdos,* should have to be called. Hence he says: If another priest cannot be called without giving scandal or seriously impairing the reputation of the guilty priest, then the other priest may be considered as not present.

However, the guilty priest, continues the Pope, should not imagine danger of scandal and ill repute, but rather, if it should be necessary, endeavor, as much as lies in him, to prevent and remove by ordinary means the possibility of scandal, so that another priest can be called without causing a stir or surprise. Then is added the clause which our Code has adopted from said Constitution, *viz.:* Should the priest purposely neglect to employ the means for calling another priest, or put it off maliciously, so that really no urgent necessity would entitle the guilty priest to absolve his accomplice, *absolution* would indeed be *valid,* but grievously illicit, and the guilty priest would incur the censure inflicted by law. Thus far the Constitutions which concern our case. For the rest, we refer to can. 2367 and merely add that those who absolve an accomplice *"ex ignorantia crassa or supina"* incur the censure which the law has established.[15]

14 *"Apostolici muneris,"* Feb. 8, 1745, § 2–4: *"Tunc alium sacerdotem perinde haberi, censerique posse, ac si revera abesset, atque deficeret; ac proinde in eo rerum statu, non prohiberi socio criminis sacerdoti absolutionem poenitenti ab eo quoque crimine impertiri. Sciat autem complex ejusmodi sacerdos, et serio animadvertat, fore se re ipsa coram Deo, qui irrideri non potest, reum gravis adversus praedictam nostram Constitut. inobedientiae, latisque in ea poenis obnoxium, si praedictae infamiae, aut scandali pericula sibi ultro ipse confingat, ubi non sunt."*

15 S. O., Jan. 13, 1892 (*Coll. P. F.,* n. 1777). A very criminal yet curious proposition (n. 7) is that proscribed by Alexander VII, Sept. 24, 1665 (Denzinger, n. 978).

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ADDITIONAL PRAYERS

CAN. 885.

Etsi preces, ab Ecclesia formulae absolutoriae adiunctae, ad ipsam absolutionem obtinendam non sint necessariae, nihilominus, nisi iusta de causa, ne omittantur.

The form of absolution is: "*Ego te absolvo a peccatis tuis,*" and this is essential to the Sacrament.[16] However, there are some other prayers, *viz.*, the *Misereatur, Indulgentiam,* and the words which precede the formula: *Dominus,* etc., which, our text says, are joined to the formula of absolution by the Church, and though they are not required for absolution, yet should not be omitted without a just cause.

ABSOLUTION NOT TO BE REFUSED OR DEFERRED

CAN. 886.

Si confessarius dubitare nequeat de poenitentis dispositionibus et hic absolutionem petat, absolutio nec deneganda, nec differenda est.

If the confessor has no reason for doubting the proper disposition of the penitent, and the latter demands absolution, it is neither to be refused nor postponed.

This canon belongs mainly to Moral Theology, because it most intimately affects the conscience. Yet, it is astonishing how many wrong opinions, rejected by the Church, are connected with this subject. As usual, there are

[16] The word *ego* is not strictly essential to the formula of absolution, nor are the words *a peccatis tuis;* still less the *deinde;* but they should not be omitted; *nihil innovetur,* said the S. Rit. C., March 11, 1837 (*Decreta Auth.*, n. 2764). The *Passio,* etc., is not prescribed, and may therefore be omitted. (Noldin, *l. c.*, n. 237).

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excesses and defects. The former consist in demanding too much of the penitent. Thus Quesnel[17] called it wise, enlightened, and charitable to make penitents wait, to practice humility, to realize their state, to pray for the spirit of contrition and penance, and to make atonement before they are reconciled with God. The Synod of Pistoja[18] rejected attrition and demanded contrition for confession. The Jansenists required satisfaction before absolution could be imparted.[19] It would also be excessively rigorous to refuse absolution in time of sickness to such as were careless about receiving the Sacraments when they were in good health. No one who gives signs of repentance, should be refused absolution.[20]

A gross *defect* would be to give absolution to such as live in *proxima occasione peccandi* and make no effort to break the custom or remove the occasion, or such as are ignorant of the necessary mysteries of the Blessed Trinity and the Incarnation.[21] Concerning the necessary belief, a distinction between such articles of faith as are necessary *necessitate medii,* the two just mentioned, and such as are necessary *necessitate praecepti* must be made. Without belief in the former, absolution would simply be invalid.[22] If one is culpably ignorant of those articles of faith which are to be believed *necessitate praecepti,* he may be given absolution only if he is sorry for this culpable ignorance and accuses himself thereof, and also seriously promises to learn what he ought to know.[23]

17 *Prop. dam. a Clemente* XI, n. 87, "*Unigenitus,*" Sept. 8, 1713 (Denzinger, n. 1302).

18 *Prop. dam. a Pio VI.*, n. 36, "*Auctorem fidei*" Aug. 28, 1794 (*ib.*, n. 1399).

19 *Prop. dam. ab Alex. VIII.*, n. 15 and 17, Dec. 7, 1690 (*ib.*, n. 1172 f).

20 S. O., May 9, 1821 (*Coll. P. F.*, n. 757).

21 *Prop. dam.*, n. 60–64, March 2, 1679 (Denzinger, nn. 1077 ff).

22 S. C. P. F., April 13, 1807, n. XXI (*Coll.*, n. 692).

23 Benedict XIV, "*Etsi minime,*" Feb. 7, 1742, § 12.

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As to Greeks who come to Latin priests for confession,—the case was reported from Constantinople,[24] — it has been decided that they must be asked not only whether they believe what the Greek Fathers believed, but also whether they maintain the faith of "old"[25] Rome, *i.e.*, the Roman Pontiff.

As to *apostates* from the faith, they should not indiscriminately be refused absolution, but be absolved if they show signs of sincere repentance. They must indeed abjure their apostasy in the presence of the faithful to whom they have given scandal, but it is not necessary that they do so before infidels. They must, however, abstain from every act and sign of infidelity or paganism, so that the infidels gradually learn of the mental and moral change that has come over the former apostate.[26]

With regard to *Freemasons* and kindred secret societies there are two decisions which concern the *Fenians* of Ireland and of the U. S. These were declared to belong to sects condemned by the Apostolic Constitutions and their members cannot be absolved unless "they absolutely and positively abandon the society," otherwise absolution is invalid.[27] In general the Holy Office[28] has condemned all *societies* which plot against the ecclesiastical or civil government, no matter whether their members are bound by an oath of secrecy or not. Here again the question about the *Knights Templars, Odd Fellows, Sons of Temperance,* and *Knights of Pythias* recurs, and we must repeat what we have said in our Vol. III, namely, that these organizations are forbidden

24 S. C. P. F., Feb. 4, 1664, ad 2 (*Coll.*, n. 156).

25 The term is a counter-statement of can. 3, Constant. I, and can. 28, Chalced.

26 S. C. P. F., 1629, Dec. 28, 1770 (*Coll.*, n. 481).

27 S. O., June 27, 1838; Jan. 12, 1870 (*Coll. P. F.*, nn. 868, 1350).

28 S. O., Aug. 5, 1840 (*ibid.*, n. 1350, note).

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by the Church, but to exclude their members from absolution would be going too far,[29] since the Church has not pronounced them to be under censure. Here it may be well to report a reply given by the Holy Office to a Canadian bishop, who had asked whether or not Catholics who give their name to secret societies merely to avoid material loss, intending to remain good Catholics, could be absolved. The answer was that they may be admitted to the Sacraments, after previous absolution from censures, if necessary, provided that, (1) they separate themselves from the society; (2) they promise not to take any active part in the meetings or celebrations and not to pay the fees; (3) that they remove all occasion of scandal; (4) that they are ready to have their names cancelled from the list as soon as they can do so without serious loss.[30]

These then are the cases which refer more especially to the public discipline of the Church. As to the rules for the postponement of absolution and the treatment of *occasionarii* and *recidivi*, the reader must be referred to Moral and Pastoral Theology.[31]

WHOLESOME PENANCES

CAN. 887.

Pro qualitate et numero peccatorum et conditione poenitentis salutares et convenientes satisfactiones confessarius iniungat; quas poenitens volenti animo excipere atque ipse per se debet implere.

According to the quality and number of the sins com-

29 Thus Schieler-Heuser, *Theory and Practice of the Confessional*, 1905, p. 335, note 126.

30 S. O., March 7, 1883 (*Coll. P. F.*, n. 1593).

31 Cfr. the Instruction of the S. C. P. F., of Oct. 3, 1736 (*Coll.*, n. 321); and Schieler-Heuser, *l. c.*, p. 407 ff.

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mitted, and the condition of the penitent, the confessor should impose wholesome and proportionate penances, which the penitent must willingly accept and perform in person.

As the priest is under grave obligation to impose a penance or to demand satisfaction, the penitent is under the same obligation to accept and perform the penance personally, not by a substitute.[32] This obligation arises, not from the essence of Penance, but from the fact that satisfaction is an integral part of the Sacrament. For the significance or purpose of imposing a penance is not only to preserve the new life and to heal infirmity, but also to punish and destroy past sin.[33] From this it is evident why the penance is to be performed personally and that it is a really sacramental satisfaction or atonement for sins.[34]

At the same time the Code states that these penances should be *proportionate* to the sins committed and to the condition of the penitent, a point which is amply explained by the moralists.[35]

THE CONFESSOR A JUDGE AND PHYSICIAN

CAN. 888.

§ 1. Meminerit sacerdos in audiendis confessionibus se iudicis pariter et medici personam sustinere ac divinae iustitiae simul et misericordiae ministrum a Deo constitutum esse ut honori divino et animarum saluti consulat.

32 *Trid.*, sess. 14, c. 8, *de poenit.*

33 *Ibid.* and *prop. damn.*, Sept. 24, 1665, n. 15 (Denzinger, n. 986).

34 *Prop. damn.* in the "*Auctorem fidei*," Aug. 28, 1794, n. 35 (Denzinger, n. 1328).

35 Cfr. Sabetti-Barrett, *Theol. Moral*, 1916, p. 688 f.; Schieler-Heuser, *l. c.*, p. 256 ff.; and the Instructions of the S. C. P. F. of Oct. 3, 1736, and April 29, 1784 (*Coll.*, nn. 321, 569).

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§ 2. Caveat omnino ne complicis nomen inquirat, ne curiosis aut inutilibus quaestionibus, maxime circa sextum Decalogi praeceptum, quemquam detineat, et praesertim ne iuniores de iis quae ignorant imprudenter interroget.

The confessor shall remember that he is a judge and physician appointed by God to administer divine justice as well as mercy, in order to provide for God's honor and the welfare of souls.

He shall be careful never to ask the name of an accomplice, nor to detain the penitent with inquisitive and useless questions, especially concerning the sixth commandment, and above all he shall not imprudently ask young people about things they are ignorant of.

Benedict XIV issued three Constitutions [36] to eradicate an evil which had taken root in Portugal, namely, the practice of some confessors to ask for the name of the accomplice and to refuse absolution if the penitent refused to reveal it. The Pontiff forbade this abuse under pain of suspension from the faculty of hearing confessions and other still severer penalties. Those who defended the proposition condemned by the Holy See were subject to excommunication *latae sententiae Romano Pontifici simpliciter reservatae.*[37] Though this penalty does not appear in our Code the grievous obligation and liability to punishment remain. It is not permitted to ask the name or residence of an accomplice, or to inquire into any circumstances that might indirectly lead to the manifestation of his or her name.[38]

36 "*Suprema*," July 7, 1745; "*Ubi primum*," June 2, 1746; "*Ad eradicandum*," Sept. 28, 1746.

37 Pius IX, "*Apostolicae Sedis*," Oct. 2, 1869, § II, 1.

38 Cfr. c. 1, Dist. 6, de Poenit. (St. Aug.); c. 12, X, V, 38; Benedict XIV, "*Apostolica Constitutio*," June 26, 1749, §§ 19, 20; *De Syn. Dioec.*, XI, 2, 18.

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That the confessor should act as *judge and physician* is evident from the purpose of confession, which is not only to render a verdict, but also to apply the necessary means against the wounds inflicted by sin and against relapse.[39] Of course, the confessional should not be made a pulpit: the practice of preaching in it might deter people from going to confession.

THE SEAL OF THE CONFESSIONAL

CAN. 889.

§ 1. Sacramentale sigillum inviolabile est; quare caveat diligenter confessarius ne verbo aut signo aut alio quovis modo et quavis de causa prodat aliquatenus peccatorem.

§ 2. Obligatione servandi sacramentale sigillum tenentur quoque interpres aliique omnes ad quos notitia confessionis quoquo modo pervenerit.

§ 1. The sacramental seal is inviolable, and hence the confessor shall be most careful not to betray the penitent by any word or sign or in any other way for any reason whatsoever.

§ 2. The obligation of keeping the sacramental seal binds also interpreters and all other persons who may in any way have acquired knowledge of confession.

As long as public confession, at least for public and heinous crimes, and consequently public penance were in vogue, the sacramental seal naturally was not often mentioned. But when, after the incident at Constantinople,[40] auricular confession became more frequent, nay common, the clergy had to be advised and enjoined to take

39 Cfr. Schieler-Heuser, *Theory and Practice*, pp. 435 ff.

40 Cfr. Pohle-Preuss, *The Sacraments*, III, p. 203 f.

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heed lest they revealed anything that had been confessed in secret. St. Augustine demands of the priest that he, like a wise and perfect physician, first heal his own sores and then cure the wounds of others, and not make them known.[41] Leo the Great indicates the reason why auricular confession and the subsequent secrecy were commendable when he says men are more readily induced to confess their sins if their conscience is kept from the ears of the people.[42] A very remarkable text is that of the Decretals which says that what the priest knows from confession, he knows not as a (public) judge, but as God.[43] Hence under no pretext can the confessor be forced to reveal the crimes confessed to him.[44]

The seal of the confessional rests on natural, divine, and ecclesiastical law. The *natural law* dictates that an entrusted secret should never be revealed; it is privileged knowledge which even the civil courts respect in publicly acknowledged persons for the welfare of the community. The *divine law* demands that what is connected with a divine institution, such as confession, should be kept from profane ears, or, as the text above quoted says, that the secrets of God should not be revealed unless He gives permission to do so. But it would be absurd to assert that Christ permits such a revelation, because He knew that confession was a grievous burden, which would become intolerable if it impaired the penitent's good name. The divine precept of confessing even secret sins also demands absolute secrecy.

The *ecclesiastical law* inflicts the severest punishments on the transgressors of this divine command, subjecting

41 C. 7. C. 3, q. 7; cfr. *Reg. S. Bened.*, c. 46.

42 C. 89, Dist. 1, *de Poenit.*

43 C. 2, X, I, 31.

44 C. 13, X, V, 31.

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those who directly violate the seal of confession to that form of excommunication which is most especially reserved to the Apostolic See.[45]

The seal is violated *directly* if a sin confessed in the confessional and the name of the penitent is revealed; *indirectly,* if from the confessor's way of acting or speaking there is danger that the sin of the penitent be made known or that confession itself becomes hateful. It would be an indirect violation if the priest would ask questions in such a loud voice that the bystanders could understand them, or if he would use gesticulations known to bystanders as indicative of certain sins.

The custom of giving certificates (*schedula confessionis*) to those of the faithful who are admitted to Holy Communion has been deservedly rebuked.[46] However, it is permissible to give a certificate which testifies to the fact that the bearer has received both the Sacrament of Penance and Holy Communion. Another custom was also reproved by the S. Congregation. Some missionaries were accustomed to put exactly as many particles on the *patena* as there had been persons absolved and admitted to Holy Communion. This they could not do except by using sacramental knowledge, and the practice was therefore rebuked as an abuse.[47]

From all that has been said it appears how careful the Church is in guarding the sacramental secret. No power on earth can compel the confessor to reveal anything he has heard in the confessional.

§ 2 obliges by virtue, not of the divine, but of the natural and ecclesiastical law, which latter threatens severe punishment against transgressors, *i.e.,* such as obtain and

45 Can. 2369.

46 S. C. P. F., Jan. 14, 1906 (*Coll.,* n. 683).

47 S. C. P. F., Feb. 29, 1836 (*Coll.,* n. 846).

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make use of the *knowledge obtained in confession.* Thus, if a confessor directly or indirectly reveals anything out of confession, the hearers are bound to keep such knowledge to themselves. *Interpreters* are strictly bound to silence; bystanders who may perchance hear something said in confession are likewise obliged to secrecy.[48] Theologians and consultors are bound by the present law unless the one seeking advice frees them from this obligation. One who finds a list of sins drawn up for confession, is bound to keep it secret.[49] As to superiors, the following canon regulates their obligations.

USE OF KNOWLEDGE GAINED THROUGH CONFESSION FORBIDDEN

CAN. 890

§ 1. Omnino prohibitus est confessario usus scientiae ex confessione acquisitae cum gravamine poenitentis, excluso etiam quovis revelationis periculo.

§ 2. Tam Superiores pro tempore exsistentes, quam confessarii qui postea Superiores fuerint renuntiati, notitia quam de peccatis in confessione habuerint, ad exteriorem gubernationem nullo modo uti possunt.

§ 1. The confessor is strictly forbidden to make use of the knowledge gained from confession, if this use involves injury (*gravamen*) to the penitent, even though the seal of confession were not endangered.

Sacramental knowledge is, as it were, divine knowledge, and therefore must be kept as a divine secret. Hence, though a confessor knows one to be guilty of a crime, he is not allowed to rebuke him publicly or to excommunicate him, even if he is accused by others and apparently no

48 S. C. P. F., Sept. 6, 1630 (*Coll.*, n. 61).

49 Cfr. Noldin, *l. c.*, n. 425; Schieler-Heuser, *l. c.*, p. 466 ff.

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violation of the seal would follow.[50] The sole reason here given why the use of confessional knowledge is absolutely interdicted, is the damage or trouble (*gravamen*) that may accrue to the penitent.[51] *Gravamen,* literally, means heaviness; metaphorically trouble or complaint, either in the spiritual or the material life.[52] Therefore incautious remarks or personal references or intimations must be avoided. Defamatory remarks about individuals or communities which are the result of hearing confessions must be avoided. Even in his sermons the priest must beware of describing details which might point to a particular family or individual. All these are *gravamina,* which cause aversion to confession.

How serious this obligation is may be illustrated by the following case proposed by moralists.[53] If the confessor knows from confession that his life is at stake, he may indeed make his escape if he can do so without endangering the seal of confession or damaging the penitent; but if he cannot escape without violating the seal or causing a *gravamen* to the penitent, the confessor must face his fate.

§ 2. *Superiors* who are actually such at the time, as well as *confessors who afterwards become superiors,* are not allowed to make use of confessional knowledge for the *external government* of their subjects. This law was given by Clement VIII, 1593, and ratified by Urban VIII, from whom our text is almost verbally taken.[54]

Note that our canon speaks of *superiors generally,* though the decree of Clement VIII was intended chiefly

50 C. 2, X, I. 31.

51 *Prop. damn. a S. O.,* Nov. 18, 1682 (Denzinger. n. 1087).

52 S. C. P. F., Feb. 29. 1836 (*Coll.,* n. 846). The moralists are rather reticent about the nature of the *gravamen.*

53 Cfr. Schieler-Heuser, *l. c.,* p. 482; Noldin, *l. c.,* n. 431.

54 Cfr. Bizzarri, *Collectanea,* pp. 246 f.

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for religious superiors. The Code therefore includes *all* superiors, whether they are already in office or to be afterwards elected. Hence bishops, religious superiors, directors of seminaries and colleges, vicars general, and also those who are employed by the Roman Congregations are included.

It is the use of *sacramental knowledge* that is forbidden. Thus a superior, whose knowledge is based solely on confession, cannot make use of it for purposes of *external government;* for instance, he cannot remove a minor official from office; he cannot remove a pastor who accused himself of a sin which would render him unfit for continuing as pastor; he cannot forbid him the sacraments, if publicly approached, even at the risk of sacrilege; he is not allowed to treat him unkindly or to withdraw from him his confidence or a post of trust; he may not change a previous arrangement after hearing confession, even though this arrangement had not yet been made public.

If a superior has reliable knowledge obtained outside the confessional, he may, of course, make use of it, provided that this extra-sacramental knowledge is the motive of his action.[55] If this were not the case, the superior could not, for instance, remove a priest from the office of confessor for occult crimes known to him outside of confession.[56]

[55] Thus the moralists in general.
[56] S. C. EE. *et* RR., July 2, 1627 (Bizzarri, *l. c.*, p. 24).

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NOVICE-MASTERS AND DIRECTORS NOT TO HEAR CONFESSIONS

CAN 891

Magister novitiorum eiusque socius, Superior Seminarii collegiive sacramentales confessiones suorum alumnorum secum in eadem domo commorantium ne audiant, nisi alumni ex gravi et urgenti causa in casibus particularibus sponte id petant.

A logical consequence of § 2, can. 890 is that, as far as possible, every danger of using sacramental knowledge should be removed. A radical means is to forbid those directly concerned with disciplinary government to hear confessions. These are *masters of novices* and their *socii,* as well as the superiors or directors of *seminaries* and *colleges.* These, says can. 891, *should not hear the confessions of their subjects who live together with them in the same house,* unless the subjects themselves, for a grave and urgent reason, and in particular cases, ask them to hear their confessions. This demand must come freely and *spontaneously* and not be effected by insinuation or advice or threats or coaxing.

This enactment was first made for the superiors of the seminaries and colleges of Rome. It contained the phrase: "*excepto aliquo raro necessitatis, de quo eius conscientia oneratur.*" This may explain the wording of our text: "in particular cases of urgent and grave necessity."[57] Thus the above mentioned superiors — novice masters are really the superiors of the novices —[58] are not allowed habitually to hear the confessions of their subjects, and the latter are not allowed to ask for it regularly.

57 S. O., July 5, 1899 (*Coll. P. F.*, n. 2057).

58 S. O., Dec. 20, 1899 (*Anal. Eccl.*, Vol. 8, 55).

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The Holy Office, after (Aug. 23, 1899) extending the decree of July 5, 1899, to religious *congregations,*[59] declared officially (Dec. 20, 1899) that the religious *orders* might continue to be governed by the decree of Clement VIII, which ordained that the novices must confess to their novice-master, whereas the religious congregations were to obey the decree of July 5 and Aug. 23, 1899, which forbade that practice. The Code draws no distinction between orders and congregations, and consequently all religious communities must now abide by the law which forbids the novice-master to be the habitual confessor of the novices who live in the same house with him or his *socius*. A travelling novice stopping for a short time at a religious house, may choose the novice-master of that house for his confessor. A religious superior may be confessor of the students who live in the college if the latter is separated from his own dwelling place. But if the superior is at the same time the director of the seminary or college, can. 891 applies to him, even though he has his living-room in the convent, for as director he is supposed to live habitually with the students.

THE DUTY OF HEARING CONFESSIONS

CAN. 892

§ 1. Parochi aliique quibus cura animarum vi muneris est demandata, gravi iustitiae obligatione tenentur audiendi sive per se sive per alium confessiones fidelium sibi commissorum, quoties ii audiri rationabiliter petant.

§ 2. Urgente necessitate, omnes confessarii obliga-

[59] *Anal. Eccl.*, Vol. VII, 329.

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tione tenentur ex caritate confessiones fidelium audiendi, et in mortis periculo omnes sacerdotes.

§ 1. Pastors and others entrusted with the care of souls, by virtue of their office are strictly obliged in *justice* to hear the confessions of the faithful committed to their care as often as the latter reasonably demand to be heard. This obligation, which is personal, may be complied with through a substitute.

Here the legislator enjoins *pastors* in particular to perform the office of confessor, albeit not only pastors in the strict sense of the word, but also quasi-pastors, and all to whom the care of souls is entrusted (assistants, curates, etc.), are bound by a strict and *grievous obligation* to hear confessions. For their office has been given them for this purpose, since all the faithful are obliged to confess their sins at least once a year during the paschal time. There is then a real obligation resting upon these priests to perform what charity, religion and their official character demand of them. And in performing this duty no discrimination is to be made between persons agreeable and disagreeable or with reference to social, financial, or moral conditions.[60]

The text says: "if *reasonably* demanded." The parish priest, like everybody else, is entitled to reasonable treatment. Thus to keep order it is reasonable to set apart certain hours for confession, provided, of course, they are chosen with due regard to the circumstances of persons and places. It is also reasonable to choose a heated chapel, or even the school, if it has a confessional, for hearing confessions in winter. Needless to add, a zealous pastor will never refuse to hear confessions even out-

60 Clement XII, "*Compertum*," Aug. 24, 1734, §§ X, XII; Benedict XIV, "*Omnium sollicitudinum*," Sept. 12, 1744, §§ 26, 33.

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side the hours set by him in case of individual demand or necessity.[61] An orderly congregation and an orderly pastor will keep regular hours, and a reasonable rule will preserve him from annoyance. The text further says: "*sive per se sive per alium.*" A pastor's obligation of hearing the confessions of his people is personal because attached to his office, which is generally bestowed for personal qualities (*intuitu personae*). Hence it is the pastor's duty to hear confessions unless he is lawfully prevented. For a legitimate reason, such as hard hearing, or pastoral business, or sickness, or a legitimate vacation, the pastor may send his assistants to fill his place. These *assistants,* too, are obliged, by virtue of the care of souls entrusted to them, to hear confessions, and their obligation also is grievous, unless they be employed solely for saying Mass, or the diocesan statutes, or their letters of appointment exempt them from the obligation of hearing confessions. In the latter case the assistant could not be forced by the pastor to hear confessions. Neither may beneficiaries, who are not obliged either by the rules of the foundation or by their benefice, be compelled to discharge the office of confessor.

The legislator has foreseen a case which may occur, and in § 2 adds a new regulation: "*In urgent cases all confessors* and in case of danger of death, *all priests,* are obliged *in charity* to hear confessions." An urgent case is one in which no time is to be lost, for instance, in epidemics, war, and also, perhaps, when there is a great *concursus populi* that could not have been foreseen, or if those bound in justice to hear confessions are suddenly and lawfully prevented. In such cases the duty of hear-

61 Of course, we do not mean that a pastor is obliged to hear every scrupulous person or *devotula* at any time. Pastors are obliged to hear confessions in case of contagious diseases; Benedict XIV, *De Syn. Dioec.,* XIII, 19, 6 f.

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ing confessions obliges *omnes confessarii, i.e.,* all priests who possess the necessary jurisdiction. License may be presumed. As to religious, consult can. 608. Where there is *danger of death,* charity compels *all priests* to offer their services.

Exempt religious, at *home,* or in their regular residence, have to go to confession to the appointed confessors, with due regard to can. 519. When *travelling,* they formerly had to confess to their *socius,* provided they had one and he was *idoneus.* If they had no companion, or the *socius* was not *idoneus,* they could confess to any other priest, either secular or religious, even though the latter had no *approbatio Ordinarii,*[61a] *i.e.,* no jurisdiction in the sense of the Code. Can this practice be continued? The answer, we believe, should be as follows, *salvo meliore iudicio.* If this common doctrine is based *on law,* and not on mere privileges, the practice cannot be continued, because it is manifestly against the Code, which requires express jurisdiction in any case. If, however, the practice is based on *privileges,* it may be continued, because the Code has not done away with all the privileges granted to regulars; see can. 613. As far as we could gather from authors, the practice was based upon privileges. Of course, we suppose this one, too, would have to be submitted to the inspection and approbation of the S. C. of Religious.

61a See Ballerini-Palmieri, *l. c.*, p. 328 n. 640; Noldin *l. c.*, n. 360.

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CHAPTER II

THE RESERVATION OF SINS

CAN. 893.

§ 1. Qui ordinario iure possunt audiendi confessiones potestatem concedere aut ferre censuras, possunt quoque, excepto Vicario Capitulari et Vicario Generali sine mandato speciali, nonnullos casus ad suum avocare iudicium, inferioribus absolvendi potestatem limitantes.

§ 2. Haec avocatio dicitur *reservatio* casuum.

§ 3. Quod attinet ad reservationem censurarum, servetur praescriptum can. 2246, 2247.

Those who possess ordinary power for granting faculties to hear confession or to inflict censures, are also empowered to call certain cases before their tribunal, thus restricting the power of absolving vested in their inferiors. However, vicars capitular and vicars general may not use this power of restricting without a special mandate. This *avocatio* or restriction of cases is called *reservation*. Concerning the reservation of censures, see can. 2246, 2247.

It is not a mere coincidence that reservation of certain, especially public and heinous, sins was not generally applied before the twelfth century, when the penitential discipline, which, according to our views, was rather severe from the seventh to the eleventh century, began to be systematized and organized. Public penance was of long duration and austere in character, especially for

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apostasy, homicide, and *moechia*. A special kind of penalty consisted in protracted pilgrimages to some well-known shrine.[62] Among these the tombs of SS. Peter and Paul in Rome were most frequently chosen. There was a reason for this choice. It not infrequently happened that the bishops, who at that time administered the public discipline of penance, were in doubt as to what kind of penance to impose for a specific crime which was not mentioned in the penitential books and imposed a pilgrimage to Rome with the express command that the penitent present himself before the Pope, in order to await his verdict. The Pope either sent the penitent back to his bishop to receive absolution after the penance imposed had been complied with, or reserved the penance and absolution to himself. This was the original *avocatio criminum graviorum* or *causarum maiorum*, of the existence of which there are testimonies in the early centuries. Thus St. Cyprian asked the "Apostolic Lord" what to do with the apostates of the persecution; Himerius of Tarragona and Exuperius of Toulouse wished to know of Innocent I how they should proceed against clerics who had violated the law of celibacy. Even Cerdo and the two other Gnostics who were excommunicated by their bishops sought absolution from the Roman Pontiff. Leo I and Gelasius I state it as a practice — which was acknowledged by the synod of Sardica, A. D. 341 — that the Apostolic See took cognizance of the "*maiora peccata*." Gregory I did so in the case of Hadrian, bishop of Thebes.[63] And if we go still further back, we find that

62 Wasserschleben, *Bussordnungen der Abendländ. Kirche*, p. 104; "*Qui moechator matris est, III annis poeniteat cum peregrinatione perenni.*" See also pp. 113, 186, 259, 265, 310. Hausmann, *Geschichte der päpstl. Reservatfälle*, 1868, pp. 35 ff. The practice commenced in Ireland and England.

63 Cfr. c. 17, C. 9, q. 3; c. 52, C. 16, q. 1.

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the leniency of Pope Zephyrin (201–217) provoked the sarcasm and anger of Tertullian,[64] because it ran counter to the rigoristic tendency of a powerful party that had representatives even in Rome.

All this clearly shows that the Roman Pontiffs were conscious of their spiritual power. Excommunications inflicted *post factum* formed the first layer of reserved cases. From here it was but one step to the infliction of such penalties after the crime was committed and the determination of the penalty and the reservation of absolution for such who would commit such crimes. Here we have the origin of the distinction between a *censura lata a lege* and a *censura lata ab homine*. The crime furnished the guage for determining the penalty. If punished *ad libitum* by either pope or bishop after it had been committed, it was known as a penalty inflicted by the judge (*ab homine*); but if the judge merely applied a penalty already determined by law, it was a *censura* (generally) *a lege*.[65]

To return to the Middle Ages, we said that pilgrimages were frequently imposed as means of atonement for grievous crimes, and that they were most commonly made to Rome, the See of the Vicar of Christ. Such pilgrimages were at that time, *i.e.*, in the 10th and 11th centuries, considered the most efficacious and often the only means of bringing criminals, especially homicides, who then were rampant, to their senses. Disorder and lack of respect for authority grew to such an extent that in England, northeastern France, Germany, and Italy, crimes against the fifth and seventh commandments were frequently committed even against the lower and higher clergy. To counteract this lawlessness, many synods were held in the countries named, and the Second Lateran Council, in

64 *De Pudicitia*, c. 5.

65 Hausmann, *l. c.*, p. 22.

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1139, summed up their enactments in the well-known decree which constitutes the *privilegium canonis.*[66] This is the first case of a reservation established by general law.[67] From the twelfth to the fourteenth century papal reserved cases were as yet few, but their number grew considerably after heresies became more wide-spread. A tentatively fixed number first appears in the so-called "*Bulla Coenae*" or "*Bulla in Coena Domini,*" of which the written original dates from 1364, under Urban V. It mentions seven cases reserved to the Apostolic See. No adequate distinction between episcopal and papal cases can be discerned during this period. One rule indeed was strictly inculcated, *viz.*, that a simple priest, even if he were a pastor, could not impose penance for grievous sins, but had to refer all such cases to the bishop or, in more serious instances, to the Pope. After the "Babylonian Captivity" the catalogue contained in the "*Bulla Coenae*" was enlarged, first under Julius II (1503–1513), then under Paul III (1536), until Urban VIII, in 1627, put the final touches to it. It now contained twenty cases, and no change has been made in this solemn document since.[68]

Modern times required a different treatment, and this was applied by *Pius IX* in his Constitution "*Apostolicae Sedis,*" of Oct. 12, 1869, which introduced the new penal code containing reserved censures. This, too, is now superseded by the Code. *Ad quid perditio haec?* one may ask. We will answer this question; for unless we touched upon it, at least briefly, the reservation of cases could not

66 Can. 15; c. 29, C. 17, q. 4; see this Commentary, Vol. II, p. 58 f.

67 Hausmann, *l. c.*, p. 66 ff.

68 *Ibid.*, p. 88 ff. The Bull was called "*in Coena Domini,*" because the list of grievous crimes was read on Maundy Thursday and those guilty of these sins were declared unworthy to receive Holy Communion.

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be understood. Although the cases reserved to the Roman Pontiff in the first seven or eight centuries appear to have belonged to the external judiciary or executive power, yet the juridical basis for the court of conscience was not only acknowledged, but included, in the plenitude of the primacy. The very fact that cognizance could or should be taken of the criminal *causae maiores* [69] by the Supreme Pontiff pre-supposed that the right or power of absolving was believed to be vested in him. Besides, excommunication required a judiciary sentence, which, though mainly concerned with the external government of the Church, implied absolution in the true sense of the word, *i.e.*, for the court of conscience. And in the *forum internum*, too, there is a reservation of sins, properly so-called. That the two *fora*, like the two powers, papal and episcopal, were not always clearly distinguished, is easily understood.

After these preliminary remarks the text of our canon requires only a few observations.

1. The *persons who are vested with the power of reserving cases* are those who, *iure ordinario*, are entitled to grant the power of hearing confession or inflicting censures. These words emphasize an enactment of the Council of Trent,[70] which, after stating that it is conducive to morality that certain heinous sins should not be absolvable by every priest, but only by those of the highest authority, i.e., the Pope and the bishops, declares: "If any one saith that bishops have not the right of reserving cases to themselves, except as regards external polity, and therefore the reservation of cases does not hinder a priest from truly absolving from reserved cases, let him be anathema." [71] The right of the Pope and the bishops

69 Cfr. c. 52, C. 16, q. 1.
70 Sess. 14, c. 7, *de poenit.*
71 *Ibid.*, can. 11.

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to reserve cases to themselves is based upon the judicial character of the Sacrament of Penance.[72] But this reason does not explain why simple priests, even though they be pastors,[73] cannot exercise this right. Therefore another element must be added: the jurisdiction of the primacy contains the plenitude of power, and the jurisdiction of the bishops, even though given immediately by God, depends on the will of the Sovereign Pontiff, who therefore may communicate it as and when he wills.[74] This is required by the unity of church government and the hierarchic order. Now the grant of faculties is part and parcel of that external forum which is ruled by those in power, and from this simple priests are excluded. By that we do not mean that reservation belongs solely to the external polity. For as the power of forgiving and retaining sins is an outgrowth of jurisdiction, so too, is reservation.

A third element is the need of determining which sins are heinous and extraordinarily grievous. This power certainly belongs to him who is the supreme judge in matters of faith and morals *i.e.,* to the ***magisterium ecclesiasticum,*** from which simple priests, as such, are excluded.

Hence the power of reserving cases must be vindicated:

(1) to the *Pope,* because of the plenitude of his power over the whole Church and every part of it;

(2) to the *bishops,* each for his respective territory. As this prerogative belongs to them as Ordinaries, it might also be claimed by the *vicar-general,* were it not that positive law makes the valid and licit exercise of this power dependent upon the *special mandate* of the bishop.

Concerning the *vicar capitular* or administrator, our

72 Cfr. Pohle-Preuss, *The Sacraments,* Vol. III, p. 129.

73 Errors of those suspected of the heresy of Wiclif and Hus, n. 25 (Denzinger, n. 529).

74 Palmieri, *De Poenitentia,* p. 179.

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text says that he, too, needs a special mandate to exercise the power of reserving cases. But from whom? From the Apostolic See. At least this seems to be the most reasonable answer, as the chapter could not possibly grant that power. Benedict XIV says that though the power of granting indulgences flows from jurisdiction and not from the order, yet it is an extraordinary power attached to the episcopal dignity.[75] The same reasoning may be applied here by analogy, which in this instance is perfectly legitimate.

(3) Although this is true concerning vicars, it has been decided, and is expressly stated in can. 896, that *exempt religious superiors* enjoy the power of reserving cases among their own subjects. These superiors possess quasi-episcopal jurisdiction;[76] no other superiors are mentioned, nor may this power be extended to others, as the text says: "those who, *iure ordinario*, are entitled to grant faculties."

Febronius and his followers pretended that the right of reserving cases had *devolved* from the bishops to the Pope, and was based on mere custom, which might change with times and circumstances, and even be reasonably abolished.[77] However, this is not only perverting history, but is dogmatically wrong. The Pope's right of reserving cases existed before that of the bishops, who would surely not have applied for faculties to the Apostolic See had they not acknowledged a higher power in St. Peter. Of course, we do not mean to deny that the practice of reservation developed according to the exigencies of the times.

75 *De Syn. Dioec.*, II, 9, 7; cfr. c. 12, X, V, 31.

76 Clement VIII, "*Sanctissimus*," May 26, 1593; S. C. EE. *et* RR., Sept. 21, 1624 (Bizzarri, *Collectanea*, p. 246); S. C. C., June 1584; April 1587 (Richter, *Trid.*, p. 85, n. 1); Benedict XIV, *De Syn. Dioec.*, V, 4, 2.

77 *Prop. Synodi Pistorien. dam.*

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ONLY ONE SIN PROPERLY RESERVED TO THE HOLY SEE

CAN. 894.

Unicum peccatum ratione sui reservatum Sanctae Sedi est falsa delatio, qua sacerdos innocens accusatur de crimine sollicitationis apud iudices ecclesiasticos.

Only one sin is, as such, reserved to the Holy See, to wit, falsely *accusing an innocent priest of the crime of solicitation* before the ecclesiastical court.

Solicitation here is understood as an external and grievously culpable provocation to a sin against the sixth commandment, perpetrated in the confessional, or in the act of confession, even though the confessor has no jurisdiction or does not impart absolution, and even though the provocation may not be effective. Solicitation may be made to a person of either sex.[78] If a person *not solicited* would thus accuse an *innocent priest* of solicitation in the ecclesiastical court, his crime would be reserved to the Holy See, even though no censure were attached to it.[79] Neither ignorance nor doubt as to the law of reservation or the fact of the grievousness of the sin of false accusation, excuses from this reservation, which is also incurred if the accusation to the ecclesiastical court is made by an intermediary.[80]

The *ecclesiastical court* is the Ordinary of the diocese or the Inquisitors, where these still perform their functions.[81] The accusation may also be made to the diocesan chancellor or to the rural dean, or, in the case of an assist-

in the "*Auctorem fidei*," Aug. 28, 1794, n. 47 f. (Denzinger, n. 1407 f).

78 S. O., Feb. 11, 1661. It is not solicitation if a priest abuses knowledge gained in the confessional for soliciting a person afterwards; Lehmkuhl, II, n. 975 f.

79 But there *is* a censure attached to it; see can. 2363.

80 Benedict XIV, "*Sacramentum Poenitentiae*," June 1, 1741, § 3.

81 *Ibid.* § 1.

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ant, to the pastor; but if it is made orally to one of these, it should be put into writing and immediately forwarded to the Ordinary.[82] After accusation has been made in this formal way, the sin is committed and reserved.

Note that the accusation must concern a *priest*. Consequently, to accuse a cleric who heard confessions either in jest, or by mistake, or for the sake of practice, would not be a reserved case. It would be a reserved case, however, to falsely accuse a priest, even though he had no faculties for hearing confession. The intention of calumniating the priest need not be foremost in the accuser's mind,[83] but may be merely concomitant.

This law binds *all Catholics* and concerns all Catholic priests of whatever rite.[84]

This crime is *specially reserved to the Holy See*, and is never included in the faculties granted for absolving cases reserved to the Apostolic See.[85] Hence, to obtain absolution from this sin, even if the censure was not incurred or has been removed, application must be made to the S. Poenitentiaria, either personally or through the confessor. Fictitious names should be used in the petition.

RESERVATION TO BE MADE AT THE SYNOD

CAN. 895

Locorum Ordinarii peccata ne reservent, nisi, re in Synodo dioecesana discussa, vel extra Synodum auditis Capitulo cathedrali et aliquot ex prudentioribus ac probatioribus suae dioecesis animarum curatoribus,

82 Can. 1936.

83 Noldin, *l. c.*, n. 393, seems to over-emphasize the fact of calumny.

84 Benedict XIV, "*Etsi pastoralis*," May 26, 1742, § IX, n. V; S. O., June 13, 1710; S. C. P. F., Aug. 6 1885, n. 2 (*Coll.*, nn. 279, 1640).

85 S. O., June 27, 1866 (*Coll. P. F.*, n. 1294).

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vera reservationis necessitas aut utilitas comprobata fuerit.

Local Ordinaries should not reserve sins, unless the matter has been discussed at a diocesan synod, or consultation with the Cathedral Chapter and some of the more prudent and experienced directors of souls, has made evident the necessity or utility of a reservation.

Benedict XIV explains the reasons why reservations should be made at the *diocesan synod*. First, he says,[86] because a synod offers the best opportunity for discussion, since as a rule many worthy and experienced priests are present on that occasion. Secondly, in order that the pastors who enjoy jurisdiction may have no reason to complain of an undue restriction of their power. For they are supposed to be present at the synod and therefore have a chance to object or demand more solid reasons for an intended reservation. Lastly, because a reservation made at the synod is more in accord with a condition of stable and permanent law than one made by the bishop alone.

No doubt these reasons prompted the Holy Office to issue the decree of July 13, 1916, which furnished the text for our canon.[87] The best occasion, therefore, for establishing reserved cases is at a diocesan synod; but, as Benedict XIV adds, such a measure must be taken with great caution lest the sacramental seal be endangered.[88]

Another way of setting up such cases is after obtaining the *advice* (not consent) of the *cathedral chapter,* or, with us, of the diocesan *consultors.*[89] The bishop must call a meeting of these because the text says: *capitulum.* To this meeting he may also call other priests who have

86 *De Syn. Dioec.*, V, 4, 3.
87 *A. Ap. S.*, VII, 313.
88 *De Syn. Dioec.*, V, 4, 3.
89 Can. 427.

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charge of souls. A decree of 1602 says that men distinguished by piety and learning should be called, in order to examine and discuss the matter thoroughly.[90] Our text reads: *animarum curatores,* a general term which is evidently used to exclude the idea that only pastors are to be invited. Assistants, confessors of religious, missionaries, etc., may be heard, provided they belong to the "more prudent and tried" class, and are or were actually engaged in the care of souls.

EXEMPT RELIGIOUS SUPERIORS

CAN. 896

Inter Superiores religionis clericalis exemptae unus Superior generalis, et in monasteriis sui iuris Abbas, cum proprio cuiusque Consilio, peccata, ut supra, subditorum reservare possunt, firmo praescripto can. 518, § 1, 519.

Among the superiors of *exempt clerical institutes,* the superior general, and in autonomous monasteries the Abbot, with his counsellors, may reserve sins of their subjects, with due regard, however, to can. 518, § 1, and to can. 519.

Clement VIII and a decree of the S. C. of Bishops and Regulars had emphasized, not the power of exempt religious, for this follows from exemption itself, but the need of prudence and moderation in reserving cases, the number of which was reduced to eleven,[91] but is still more restricted by can. 897.

The superiors to whom can. 896 applies are those of

90 S. C. EE. *et* RR., Nov. 26, 1602 (Bizzarri, *Collectanea,* p. 13 f.).

91 Clement VIII, "*Sanctissimus,*" May 26, 1593; S. C. EE. *et* RR., Sept. 21, 1624 (Bizzarri, *l. c.,* p. 246 f.).

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exempt clerical orders or congregations. Superiors of exempt lay or of non-exempt clerical congregations do not enjoy the power of reserving cases. For the latter class the Ordinary may establish reservations, as also the Apostolic See when approving the Constitutions.

In centralized religious orders the *superior general* alone can reserve cases. In doing so, he must proceed like the bishop, *i.e.*, consult with his counsellors and, if he wishes, with others who are experienced in the direction of souls. It is true he is not bound by their advice, for the text of can. 895, to which our canon refers, does not require their consent. But it would be folly and a grievous transgression of a serious law in a serious matter not to obtain the advice of the counsellors.

The *abbot* of an *autonomous* monastery must proceed in the same manner. By the way it may be noted that neither the Abbot Primate of the Benedictine Order, nor the Abbot President of each congregation, has any power with regard to reserving cases.

Our canon, lastly, draws attention to can. 518, § 1, and can. 519. The former prescribes, in accordance with an enactment of Clement VIII, that a number of confessors shall be appointed in each house for absolving from reserved cases. Can. 519 grants to any priest approved by the Ordinary the right of absolving any religious from cases reserved by the religious superior.[92]

NUMBER AND QUALITY OF RESERVED CASES

CAN. 897

Casus reservandi sint pauci omnino, tres scilicet vel, ad summum, quatuor ex gravioribus tantum et atrocioribus criminibus externis specifice determinatis; ipsa

[92] Cfr. Vol. II, p. 152 ff. of this Commentary.

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vero reservatio ne ultra in vigore maneat, quam necesse sit ad publicum aliquod inolitum vitium exstirpandum et collapsam forte christianam disciplinam instaurandam.

CAN. 898

Prorsus ab iis peccatis sibi reservandis omnes abstineant quae iam sint Sedi Apostolicae etiam ratione censurae reservata, et regulariter ab iis quoque quibus censura, etsi nemini reservata, a iure imposita sit.

The cases to be reserved shall be few, namely, three, or at most four, of the more grievous and atrocious external crimes, specificially determined. The reservation itself should not remain in force longer than is necessary to uproot some inveterate public crime and to restore Christian discipline.

But Ordinaries, and religious superiors as well, shall refrain from reserving sins already reserved to the Holy See by reason of the censures attached to them, and, as a rule, shall not reserve sins which the law has laid under censure, even though this censure be not reserved to any one in particular.

These two canons define the number and quality of the sins that may be reserved and the purpose of reservation, and declare which sins should not be made reserved cases.

1. The *number* is reduced to *four,* at the highest, beyond which neither Ordinaries nor exempt religious superiors may go. Rome had more than once on previous occasions declared that the number of reserved cases should be very small (*paucissimos*) and selected with great discrimination, lest reservation result in spiritual injury rather than benefit. It also enjoined that the con-

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ditions of each province and the character of the people should be taken into consideration.[93]

2. The *quality* of the sins that may be reserved is described by four attributes: they must be particularly grievous, atrocious, external, and specified crimes. Although no definite rule can be formulated by which the *grievousness and hideousness* of a crime could be exactly determined, yet the habitual proclivity of a certain nation to a certain crime would be a sufficient reason for reserving that sin in order to break their obstinacy by making it difficult to obtain absolution.[94] Hence, as stated above, *local conditions* should be studied. No reservation should be attached to sins from which no absolution is given except under the condition of restitution, or to sins into which ordinary persons often fall. *"In peccatis etiam carnalibus reservandis multâ utantur circumspectione, propter periculum scandalorum in iis maxime personis, in quas ob accessum ad confessarios extraordinarios, vel frequentem reditum ad ordinarios, suspicionis aliquid cadere potest."* [95]

Broadly it may be stated that sins which are grievous by reason of their very nature or betray an atrocious character on account of the damage done to ecclesiastical discipline and the welfare of souls, may be reserved.

This is confirmed by the addition of the word *external*. For although, as some theologians say, internal sinful acts may in *summo iuris rigore* be reserved, yet it has never been Roman practice to reserve merely mental sins, for instance, internal heresy.[96] Note, however, that *external* is not the same as *notorious* or *public*. A sin may be

93 S. C. EE. *et* RR., Jan. 6, 1601; Nov. 26, 1902 (Bizzarri, *l. c.*, p. 13 ff.).

94 Benedict XIV, *De Syn. Dioec.* X, 5, 4.

95 S. C. EE. *et* RR., Nov. 26, 1602 (Bizzarri, *l. c.*, p. 14).

96 Benedict XIV, *l. c.*, V, 5, 5.

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committed externally, yet be unknown to any one except the person who committed it. A *crime,* however, is always supposed to be external, for it is a *delictum publicum,* at least in the wider sense.

The Code requires that the crimes be *specified* or specifically determined. As sins are specified by their opposition to certain definite virtues or laws, and by the different objects comprised by the various virtues, so also should reservation be specific.[97] The quality and mode of a crime determine its specific nature and also the manner of reservation, whether or not under censure. Thus adultery, if it became rampant in a province, or diocese, or city, might become a matter for reservation; also incendiarism, burglary or bank-robbing.

The text says further that reservation should cease as soon as its purpose is attained. This is the case when an inveterate vice is extirpated and Christian discipline restored. Here the principle holds goods: Reservation, if uselessly protracted, might do more harm than good.

3. Canon 898 distinguishes between sins under censure reserved to the Holy See and sins under censure reserved to no one in particular. From reserving sins of the first kind, Ordinaries and religious superiors should *abstain entirely;* from reserving sins reserved under censure to no one they should refrain *as a rule.* This law rests on the *regula iuris* 54 in 6°: "*Qui prior est tempore, potior est iure,*" provided, of course, that all other things are equal.[98] As the common law is supposed to be prior to any particular law or jurisdiction, inferiors should cede power to the superior. But the cases reserved to no one suffer an exception, for the text says: as a rule (*regulariter*).

97 Marc, *Institut, Moral. Alphons.,* 1898, I, n. 324.

98 Reiffenstuel, *In Reg. Juris,* 54 in 60, n. 2.

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"Frequency, scandal or another reason"[99] may advise reservation by the Ordinary besides the one imposed by common law, and in that case such a *double reservation* would be admissible.

It may be helpful to mention the cases which are reserved under censure.

I. Specialissimo modo reserved to the Apostolic See are:

1°. *Species consecratas desecrantes* (can. 2320);

2°. *Violentas manus iniicientes in Romanum Pontificem* (can. 2445);

3°. *Absolventes vel absolvere fingentes complicem* (can. 2367);

4°. *Directe violantes sigillum confessionis* (can. 2369).

II. Speciali modo reserved to the Apostolic See are:

1°. *Apostatae, haeretici, schismatici* (can. 2394);

2°. *Edentes, defendentes, legentes, retinentes, libros eorum, qui haeresim vel schisma propugnant* (can. 2318);

3°. *Laici celebrationem Missae vel confessionem simulantes* (can. 2322);

4°. *Violentas manus iniicientes in Cardinales, Legatos Ap. Sedis, vel Episcopos* (can. 2343);

5°. *Provocantes ad concilium generale* (can. 2332);

6°. *Recurrentes ad laicam potestatem ad litteras apostolicas impediendas vel acta quaelibet* (can. 2333);

7°. *Impedientes immunitatem ecclesiasticam* (can. 2334);

8°. *Violantes privilegium fori quoad praelatos superiores* (can. 2340);

9°. *Usurpantes vel detinentes bona ad Ecclesiam Romanam pertinentia* (can. 2345);

[99] S. C. EE. *et* RR., Nov. 26, 1602 (Bizzarri, *l. c.*, p. 14).

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10°. *Falsarii litterarum apostolicarum* (can. 2360);

11°. *Falso denuntiantes sacerdotem innocentem de sollicitationis crimine* (can. 2363).

III. Simpliciter reserved to the Apostolic See are:

1°. *Quaestum facientes ex indulgentiis* (can. 2327);

2°. *Nomen dantes sectae massonicae etc.* (can. 2335);

3°. *Absolvere praesumentes ab excommunicatione Sedi Apostolicae specialissimo vel speciali modo reservata* (can. 2338, § 1);

4°. *Impendentes auxilium vel favorem excommunicato vitando in delicto excommunicationis* (can. 2338, no. 2);

5°. *Violantes privilegium fori in praelatos episcopis inferiores* (can. 2341);

6°. *Clausuram papalem violantes et moniales exeuntes,* (can. 2342);

7°. *Duellum perpetrantes et cooperantes* (can. 2351);

8°. *Qui invalidum matrimonium attentant ex ordine clericorum vel religiosorum et personae cum ipsis contrahentes* (can. 2388).

IV. Nemini reservatae are the following excommunications:

1°. *Qui ausi fuerint mandare tradi sepulturae ecclesiasticae contra can. 1240 praescriptum* (can. 2339);

2°. *Alienantes absque beneplacito apostolico* (can. 2347);

5°. *Cogentes ad statum clericalem vel religiosum* (can. 2352).

V. Cases reserved to the Ordinary by law:

1°. Those mentioned under can. 2319 concerning marriage before a non-Catholic minister, etc.;

2°. *Conficientes falsas reliquias* (can. 2326);

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3°. *Violentas manus iniicientes in clericos* (can. 2343, § 4);

4°. *Procurantes abortum, matre non exceptâ, effectu secuto* (can. 2350);

5°. *Professi simpliciter matrimonium contrahentes et personae contrahentes cum ipsis* (can. 2388);

6°. *Apostata religiosus, qui pertinet ad ordinem exemptum vel non exemptum, si pertinet ad religionem exemptam, excommunicatio reservata est Superiori religioso maiori (vel abbati monasterii sui iuris)* (can. 2385).

This conspectus shows who possesses the power of reserving and which cases should not be reserved, because already reserved by law. But those mentioned under IV as "*nemini reservatae*" may, if frequency or scandal should necessitate such a measure, be reserved also by the Ordinary, as such. The cases placed under that heading are worthy of close inspection, especially at the time of canonical visitation of religious institutes.

It may also be opportune to indicate some cases which the Code does not expressly lay under censure, but in regard to which it explicitly states that the Ordinary may punish the transgressors "also by censure" (*etiam censura*).

1°. Those who trade in Mass stipends (can. 2324);

2°. Those who pertinaciously refuse to obey the legitimate injunctions of the Roman Pontiff or of the Ordinary (can. 2331);

3°. Those who have received legacies or bequests or donations for pious or charitable purposes and refuse to comply with the obligation of applying them to said purposes (can. 2348);

4°. Those who live in simultaneous bigamy (can. 2356).

In all these cases Ordinaries would act in conformity with the Code if they reserved them to themselves, even

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by previously promulgating the censure. Only one rule they should keep in view: the necessity or utility of reservation, and after the evil has been cured, they should remove the censure. A very opportune measure was taken by the bishops of Holland in their Lenten Pastoral for 1919. They forbade Catholics to join or remain in any socialist or anarchistic union or club, under penalty of refusal of absolution. The same penalty was threatened against those who regularly read anarchistic or socialist literature, or who professed subversive doctrines. This joint procedure was perfectly legitimate and may be justified on the basis of can. 2335.

If we may venture to suggest the cases which *exempt religious superiors* may eventually reserve, the following taken from the decree of Clement VIII, in a modified form, might be proposed:

1°. *Gravis transgressio voti paupertatis,* amounting to a sum which formerly was reserved to the S. Penitentiary, say, about $50.

2°. *Peccatum contra votum castitatis perpetratum cum religiosa femina, vel etiam repetita sodomia, vel concubinatus.*

3°. *Qui Romano Pontifici vel Superiori religioso aliquid legitime praecipienti vel prohibenti secundum regulam et constitutiones in materia gravi, e.g., missionis, scholae, officiorum, non obtemperant pertinaciter et cum scandalo aliorum sive extraneorum sive religiosorum.*

4°. *Falsificatio manus aut sigilli officialium monasterii aut conventus, aut litterarum vel actorum ecclesiasticorum tam publicorum quam privatorum.*

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PROMULGATION AND ABSOLUTION OF RESERVED CASES

CAN. 899.

§ 1. Statutis semel reservationibus quas vere necessarias aut utiles iudicaverint, curent locorum Ordinarii ut ad subditorum notitiam, quo meliore eis videatur modo, eaedem deducantur, nec facultatem a reservatis absolvendi cuivis et passim impertiant.

§ 2. At huiusmodi absolvendi facultas ipso iure competit canonico poenitentiario ad normam can. 401, § 1, et habitualiter impertiatur saltem vicariis foraneis, addita, praesertim in locis dioecesis a sede episcopali remotioribus, facultate subdelegandi toties quoties confessarios sui districtus, si et quando pro urgentiore aliquo determinato casu ad eos recurrant.

§ 3. Ipso iure a casibus, quos quoquo modo sibi Ordinarii reservaverint, absolvere possunt tum parochi, aliive qui parochorum nomine in iure censentur, toto tempore ad praeceptum paschale adimplendum utili, tum singuli missionarii quo tempore missiones ad populum haberi contingat.

§ 1. Cases reserved for reasons of necessity or utility *should be brought to the knowledge of their subjects* by the Ordinaries, who should not grant indiscriminate faculties to absolve from them.

This rule was made by the Council of Trent[1] and insisted upon by the S. Congregation.[2] But a distinction must be made as to the manner in which the cases are reserved. If they are reserved at a diocesan synod, promulgation is supposed to be effected after the Ordinary has put his signature to the synodal acts, and no fur-

1 Sess. 14, c. 7, *de poenit.*
2 S. C. EE. *et* RR., Nov. 26, 1602 (Bizzarri, *l. c.*, p. 14).

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ther publication is required, unless a clause to this effect appears in the synodal acts.[3] If the cases were reserved at a meeting of the consultors, they must be brought to the notice of the clergy[4] by an official circular letter, issued by the Ordinary or his chancellor.

The text furthermore says that *faculties for absolving from reserved cases should not be granted indiscriminately.* To do so would render reservation ludicrous and frustrate its purpose.

§ 2. The *Canonicus Poenitentiarius* has by law the faculty of absolving from the cases reserved to the bishop. This canon penitentiary may belong to a cathedral or to a collegiate church, both of whom enjoy the power of absolving by virtue of their office and of law, which is expressed in this canon as well as in can. 401, no. 1. Besides, the legislator wishes that the faculty of absolving from these reserved cases should be *habitually delegated* to the *rural deans,* who should also be given the power of *subdelegating toties quoties* confessors of their districts, especially in parishes distant from the episcopal see, whenever these confessors have recourse to the deans for individual and urgent cases.

Note well the difference between the faculties habitually given to the rural deans and the faculties given to confessors in distant parishes. The latter must be applied for in each single case, and can be granted only if the case is urgent. The application must be sent to the rural dean either in writing or orally; by telephone only if there is an absolute necessity and no violation of the sacramental seal need be feared. Any pastor or assistant, in fact, any confessor, may foresee the cases, and

[3] See can. 362.

[4] The clergy should, therefore, make these cases known to the people, for the term "*subditi*" comprises all the faithful.

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hence apply for the faculty before going into the confessional. One thing is certain, *viz.*, that the faculty of absolving from cases reserved to the Ordinary should not be imparted habitually to all pastors, or curates, or assistants, but only in individual cases. Habitual faculties are to be given only to the rural deans.

The question may be asked: *Which are the reserved cases* from which the *Poenitentiarii* (by law) and the rural deans (in virtue of habitual faculties) may absolve? The answer is not as evident as one might wish, and it is therefore with some misgiving that we state our own view.

1°. It is certain that the cases are included which the Ordinary has reserved to himself, to wit, the three or four cases exclusive of the six mentioned in the preceeding canon under V.

2°. The *Canon Poenitentiarius* may absolve, not only from the three or four cases reserved by the Ordinary to himself, but also from the six cases mentioned under V. This we deduce from the wording of can. 401, § 1, where he is said to have jurisdiction by law to absolve from all sins and censures reserved to the bishop (*episcopo reservatis*) and from can. 899, § 2: "*ipso iure ordinario competit.*"

3°. The bishop may habitually delegate the *rural deans* to absolve, not only from the three or four cases he has reserved to himself, but also from the six cases mentioned under V as reserved to the Ordinary by law. For can. 2253 says clearly that the one to whom a censure is reserved by law, or his delegate, may absolve from the same.

4°. It matters not whether the Ordinary reserves his own cases under censure or not, or whether he reserves censures *nemini reservatae.*

§ 3 concerns pastors and all who, in law, go by the name of pastors, hence also *missionaries.* *Pastors* are de-

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fined in can. 451, where it is laid down that in law those, too, go by the *name of pastors* who govern *quasi-parishes* where the hierarchic order is not completely established or restored, and likewise *vicars of parishes* who are endowed with full parochial powers.[5] These are further determined in can. 471–473, *viz.*, the actual pastors of incorporated parishes, vicars *ad interim*, and administrators. Concerning temporary substitutes there might perhaps be a doubt. Yet if the last clause of can. 474 is not applicable, *i.e.*, if neither the Ordinary nor the pastor has excepted any parochial right, we believe that they may safely be called pastors under the law. But *assistants* or curates are not comprised here, because they do not go by the name of pastors in law.

Missionaries are those who give temporary missions to the people. Retreat masters are not included here, unless they give retreats to the whole parish or perhaps to a class or group of members, say, young men or women.

All these may absolve by law from *any case which the Ordinary has reserved to himself in any shape or form*, during the *whole time set for fulfilling the paschal duty. Missionaries* enjoy the same power, also by law, *during the time of a mission.* The *cases* are those which the Ordinary has reserved to himself, *i.e.*, the three or four which are reserved not to or by the Apostolic See, or by law to the Ordinary.[6] But it does not matter —*quoquo modo* — whether they are reserved as simply reserved cases, or under censure. *By law* signifies that no delegation or express concession is needed. Hence any missionary who has received express jurisdiction from the Ordinary for hearing confessions in the diocese or parish

[5] See our Commentary, Vol. II, p. 559 ff.

[6] S. O., July 13, 1916 (*A. Ap. S.*, VIII, 314): "*Quaevis Ordinariorum reservatio ipso iure*," etc.

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where he is to give a mission, may absolve from the cases reserved by and to the Ordinary, even though this faculty is not mentioned in the general (but express) grant of faculties. Pastors, and all those who go by the name of pastors, may licitly and validly absolve from cases reserved to and by the Ordinary by the very fact that they hear confessions during the paschal season. If this season is extended by the Ordinary, *e.g.*, from Laetare to Trinity Sunday, they may during this whole period make use of the power granted by law without further application to the Ordinary. They may also absolve the same persons several times during this period, for the stress is on the time, not on the number of absolutions.

WHEN RESERVATIONS CEASE OR LOSE THEIR FORCE

CAN. 900

Quaevis reservatio omni vi caret:

1.° Cum confessionem peragunt sive aegroti qui domo egredi non valent, sive sponsi matrimonii ineundi causa;

2.° Quoties vel legitimus Superior petitam pro aliquo determinato casu absolvendi facultatem denegaverit, vel, prudenti confessarii iudicio, absolvendi facultas a legitimo Superiore peti nequeat sine gravi poenitentis incommodo aut sine periculo violationis sigilli sacramentalis;

3.° Extra territorium reservantis, etiamsi dumtaxat ad absolutionem obtinendam poenitens ex eo discesserit.

All reservations cease or lose their force:

1°. When those who go to confession are sick and cannot leave the house, or if they are about to be married;

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2°. As often as the lawful superior refuses a faculty asked for in a particular case, or when, according to the prudent judgment of the confessor, the faculty cannot be asked of the lawful superior without great inconvenience to the penitent or without danger of violating the sacramental seal;

3°. Outside the territory of the one who has reserved the case, even though the penitent has repaired thither solely for the purpose of obtaining absolution.

"*Quaevis reservatio,*" says the Code, whereas the decree of the Holy Office from which the text is taken adds: "*quaevis Ordinariorum reservatio,*" which is certainly the meaning of this canon; we can hardly believe that *papal* reservations cease under the conditions mentioned, because papal reservations with one exception (see can. 894), all have censures attached, for the absolution of which canons 2253 f. must be consulted.

1. The *aegroti,* or sick persons, are not further described, and hence we may assume that any kind or degree of sickness suffices, provided only it detains the patient at home, even though it exists only in the imagination, as is sometimes the case with hysterical women. *Parties before marriage* are also benefited, but it must be *ineundi causa, i.e.,* for the purpose of marriage. We would not exclude the case of a marriage that has to be rectified as to its validity. The absolution from censure mentioned in can. 2319, § 1, n. 1, cannot be imparted because it is reserved to the Ordinary by law, not by himself.

2. The second number mentions *refusal of the lawful superior* to grant the faculty. Whether this refusal be reasonable or unreasonable, formal or informal, matters not for the purpose in question, for the confessor is the best judge whether the persons are deserving of absolution, and authority has been safeguarded by the petition.

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Another reason which causes a reservation to cease is the *inconvenience* of the penitent. But this must be *great*. A little wait could not be called a great inconvenience for city folk. But if one living in the country would have to call again, this might be a great inconvenience. It might also be a great inconvenience to come again for a man or woman who is known as a rare churchgoer; for in that case gossip might easily result.

The *danger of violating the seal of the confessional* is another reason for the cessation of a reservation. This would be present if the person who committed the reserved crime were known to the Ordinary, or if circumstances might point to his identity, or if he would be the only one to go to confession (and wanted to receive Holy Communion), while the confessor had to leave the confessional and go to the telephone. The confessor should prudently judge whether the seal is endangered in any case.

3. The last number applies the benefit of cessation even to the case formerly called *in fraudem legis*. A person who leaves the diocese where he knows that his case is reserved, and goes to another diocese where the case is not reserved, may be absolved validly and licitly. This is a change of legislation, as formerly such an absolution was invalid.[7] But *peregrini* are bound by the reservations of the place in which they confess (Com. Interpret. C. I. C., Aug. 17, 1919; see *Irish Eccles. Record,* XIV, 330).

[7] Clement X, "*Superna,*" June 21, 1670, § 7; S. C. C., Sept. 16, 1649 (Richter, *Trid.*, p. 85, n. 8).

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CHAPTER III

THE SUBJECT OF PENANCE

MATTER AND INTEGRITY OF CONFESSION

CAN. 901.

Qui post baptismum mortalia perpetravit, quae nondum per claves Ecclesiae directe remissa sunt, debet omnia quorum post diligentem sui discussionem conscientiam habeat, confiteri et circumstantias in confessione explicare, quae speciem peccati mutent.

CAN. 902.

Peccata post baptismum commissa, sive mortalia directe potestate clavium iam remissa, sive venialia, sunt materia sufficiens, sed non necessaria sacramenti poenitentiae.

Whoever after Baptism has committed *mortal sins not yet directly forgiven* by the keys of the Church, must confess them and explain the circumstances which may change the species of sin. The accusation must be preceded by a careful examination of conscience. Necessary matter, therefore, are mortal sins not yet forgiven, whereas sins committed after Baptism, whether grievous but already directly forgiven by the power of the keys, or only venial, are sufficient matter for the Sacrament.

Like every other sacrament, Penance consists of matter and *form*. The latter, according to the teaching of the

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Church,[1] is the act of absolution. As to the *matter*, there is a controversy in regard to the proper constituents, but it is safe[2] to say that the acts of the penitent, to wit, contrition, confession and satisfaction, are, as it were, the proximate matter of the sacrament, while the sins are the *materia remota* or *circa quam*.

Can. 901 states that *all mortal* sins committed after Baptism *must* be confessed. As Penance is applied by a judicial act, it follows that to the sacred tribunal must be submitted all those sins which constitute matter for juridical cognizance, in other words, all mortal sins, because these prevent man from attaining eternal salvation and make him an object of divine wrath. It was these sins which Christ intended when He instituted this sacrament and which He commanded to be directly submitted to the power of the keys. *Directly* to submit these sins to the power of keys means to accuse oneself of them before the appointed judge and to receive absolution from him by an exercise of jurisdiction.[3] *Indirectly* mortal sins may be forgiven concomitantly, as when a penitent omits a sin through inculpable ignorance, or forgetfulness, or inability, or when a confessor, for weighty reasons, imparts absolution though not empowered to do so.[4] No one mortal sin can be forgiven without the others.

Can. 901, then, requires that confession be integral, *i.e.*, comprise all mortal sins according to number and species. The *number* the penitent is obliged to state as far as he can recollect it, and if the exact number cannot be given, he should say "about," or "at least," or "more

1 *Decretum pro Arm.* (Denzinger, n. 594); *Trid.*, sess. 14, c. 3, *de poenit.*

2 Cfr. Pohle-Preuss, *The Sacraments*, Vol. III, p. 76 ff.

3 Palmieri, *De Poenitentia*, p. 99 ff; p. 359 ff.

4 Schieler-Heuser, *Theory and Practice*, p. 41.

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or less."[5] Accuracy is also required in stating the *species,*[6] for it is the species which determines the nature of a sin, whether it is opposed to a special virtue, or to specific objects of a virtue, or to a specific commandment. Not only must the ultimate species (*infima species*) be stated, but the *specific circumstances,* too, must be explained. These are such as alter the species of a sin, and are attached to persons (*e.g.,* sacred persons), places or objects. For instance, an act of violence done in church, or a theft committed of sacred things.[7] The integrity of confession may never be dispensed with, not even when there is a great multitude of penitents, as may happen on feast days.[8] If one is lawfully excused from making a complete confession, for instance, on account of danger of death, he is obliged to mention the sins omitted in his next confession.[9] This, however, does not mean that a penitent who has made a confession as completely as he was able, is obliged to make another confession to supply the number. Unnecessary and inculpable scruples are to be discarded. In saying this we do not, of course, approve the Quietists' quaint and unqualified self-annihilation which would render a soul advanced in sanctity the purely passive and insensible instrument of even notably immoral acts.[10]

Can. 902 states which acts constitute *sufficient* but not necessary matter for confession. They are the mortal sins already directly forgiven, and venial sins. This is the doctrine of the Council of Trent.[11] Venial sins may

5 *Prop. Lutheri damn.*, n. 8 (Denzinger, n. 632); Schieler-Heuser, *l. c.*, p. 163.

6 *Trid.*, sess. 14, c. 5, *de poenit.*

7 *Prop. damn.*, Sept. 24, 1665, n. 24 sq.; *prop. damn.* March 4, 1679, n. 49 sq. (Denzinger, n. 995 f.; 1066 f.)

8 *Prop. damn.* March 4, 1679, n. 59 (Denzinger, n. 1076).

9 *Prop. damn.* Sept. 24, 1665, n. 11 (*ibid.*, n. 982).

10 *Prop. damn.* Nov. 20, 1687, n. 47, 48, 60 (*ibid.*, n. 1134 f.; 1147).

11 Sess. 14, c. 5, *de poenit.*; cfr. Pohle-Preuss, *l. c.*, p. 62.

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be forgiven, but they cannot be retained, since they do not entail eternal damnation. On the other hand the custom of confessing them is praiseworthy, and there is no reason to fear that the Sacrament may be rendered contemptible by the confessing of venial sins, as the synod of Pistoja falsely asserted.[12]

CONFESSING THROUGH AN INTERPRETER

CAN. 903.

Qui aliter confiteri non possunt, non prohibentur, si velint, per interpretem confiteri, praecavendo abusus et scandala, firmo praescripto can. 889, § 2.

Those who are unable to confess otherwise, may, if they wish, confess through an interpreter, provided abuses and scandals are avoided, with due regard to can. 889, § 2.

The canon says, they *may*, but not, they are obliged to confess through an interpreter. For although confession is necessary by divine command, and, at least indirectly, *necessitate medii*, for salvation, yet there is a distinction between actual submission to the power of the keys and submission in desire (*in voto*). The latter means that one is ready to subject himself to confession if he can do so in the proper and ordinary way and an occasion offers.[13] However, confessing through an interpreter is an extraordinary and, considering human reluctance in matters of conscience, a very burdensome means. Therefore it cannot be held that God meant to impose such an obligation on men, especially since an act of contrition,— provided confession is not spurned for other reasons,— can effect justification.

12 *Prop. damn.*, "*Auctorem fidei*," Aug. 28, 1794, n. 30 (Denzinger, n. 1402).

13 Benedict XIV, *De Syn. Dioec.*, VII, 15, 8; VII, 16, 11.

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The interpreter must observe the seal of confession. This is a grievous obligation.

By the way it may be stated that the term "interpreter" is to be understood strictly of a person, not of any other means, such as a letter, a telegram or a telephone message, etc.

OBLIGATION OF DENOUNCING SOLLICITATION

CAN. 904.

Ad normam constitutionum apostolicarum et nominatim constitutionis Benedicti XIV *Sacramentum poenitentiae*, I Iun. 1741, debet poenitens sacerdotem, reum delicti sollicitationis in confessione, intra mensem denuntiare loci Ordinario, vel Sacrae Congregationi S. Officii; et confessarius debet, graviter onerata eius conscientia, de hoc onere poenitentem monere.

In accordance with the Apostolic constitutions, especially that of Benedict XIV, "*Sacramentum Poenitentiae*," June 1, 1741, a penitent is obliged to report, within a month, any priest guilty of solicitation in confession. The report must be made either to the local Ordinary or to the Holy Office, and every confessor has the strict obligation to admonish his penitent of this duty.

The obligation of reporting *priests* who solicit a penitent *ad turpia* in the act, or on occasion, or under pretext of confession, is a grievous one, as will be seen from the instructions of the Holy Office quoted below. First we will give a few decisions referring to our case. Alexander VII, on Sept. 24, 1665, condemned[14] the two following propositions:

Prop. 6: "Confessarius, qui in sacramentali Confes-

[14] See Denzinger, nn. 977 f.

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sione tribuit poenitenti chartam postea legendam, in qua ad venerem incitat, non censetur sollicitasse in confessione, ac proinde non est denuntiandus."

Prop. 7: "Modus evitandi obligationem denuntiandae sollicitationis est, si sollicitatus confiteatur cum sollicitante: hic potest ipsum absolvere absque onere denuntiandi."

To the question proposed to the Holy Office, whether or not the expression, "*simulantes confessiones audire*" is to be understood conjointly of solicitation *and* confession, either real or feigned, the answer was: Either suffices. This must evidently be taken as bearing on confession. The same must be said of the answer given to the second question proposed on the same occasion: if a confessional (*i.e.*, confession-room) is also used as a parlor, and solicitation is made there, this would entail the obligation of denouncing the guilty priest.[15] This, we say, must also be considered as connected with confession. For the mere fact that the parlor also serves as a quasi-confessional would certainly not be sufficient to connect solicitation with confession.

The same S. Congregation has excused and exempted *women* from the obligation of denouncing if they live far from the seat of the Ordinary or the place where the denunciation should be made.[16] However the obligation revives[17] when the danger or impediments to the journey cease, and Ordinaries should, as far as possible, see to it that such impediments are removed.[18]

The *priest* who hears the confession of a person who

15 S. O., April 28, 1700 (*Coll. P. F.*, n. 248). The so-called parlor was really the "confession-room," of a convent, such as cloistered nuns have in some countries.

16 S. O., Jan. 22, 1727 (*Coll. cit.*, n. 308).

17 S. O., May 20, 1842 (*ibid.*, n. 949).

18 S. O., Feb. 20, 1866 (*ibid.*, n. 1282).

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has been solicited must admonish him or her of the grave obligation of reporting the guilty priest within a *month* from the date when he or she learned or first realized the duty of denunciation. Should the penitent refuse to denounce the culprit, absolution must be denied after a repeated effort to induce him or her to comply with the obligation.

The *place* where denunciation is to be made is the Ordinariate or the Holy Office in Rome.[19] There is no intermediary instance or authority, and religious superiors are not allowed to interfere in this matter. The Ordinary, however, may delegate another priest to hear the case and to employ a third as notary. But no other persons are to be admitted as witnesses, except, of course, such as testify to the character of the priest and the person solicited. *Anonymous* denunciations are not to be accepted, and the obligation itself is personal, *i. e.*, incumbent on the person solicited.

The *interrogatory* to be made by the bishop or his delegate, follows below. The obligation of denouncing culpable priests of solicitation in the act of hearing or on the pretext or occasion of confession *binds all the faithful* of both sexes and of every rite, Latin and Oriental.[20]

INSTRUCTIO S. OFFICII (FEB. 20, 1866)

1. Personae sive mares sive feminae, quaecumque illae sint, ad turpia sollicitatae in Confessione vel occasione aut praetextu Confessionis, quemadmodum enucleate in memorata Constitutione praecipitur, rem ad Sanctam Sedem vel ad loci Ordinarium deferre debent.

2. Denunciare oportet quemcumque sacerdotem, etiam iuris-

19 The address is: Sant' Uffizio, Via del Sant' Uffizio 5, Roma, Italy.

20 Benedict XIV, "*Etsi pastoralis*," May 26, 1742, § IX, n. V; "*Apostolici muneris*," Feb. 8, 1745, § 2.

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dictione carentem, vel etiam poenitentis sollicitationi consentientem, quamvis statim dissentientem de turpi materia loqui, illius complementum ad aliud tempus differentem, et non praebentem absolutionem poenitenti.

3. Huiusmodi denunciationes a nemine absque culpa letali omitti possunt. Qua de re poenitentes debent admoneri, neque ab iis admonendis instruendisque eorum bona fides excusat.

4. Sacerdotes ad sacras audiendas confessiones constituti, qui de hac obligatione poenitentes suos non admonent, debent puniri.

5. Poenitentes admoniti, et omnino renuentes, nequeunt absolvi; qui vero ob iustam causam denunciationem differre debent, eamque quo citius poterunt faciendam spondent serioque promittunt, possunt absolvi.

6. Denunciationes anonymae contra sollicitantes ad turpia nullam vim habent: denunciationes enim fieri debent in iudicio, nempe coram Episcopo eiusve delegato cum interventu ecclesiastici viri, qui notarii partes teneat, et cum iuramento, et cum expressione et subscriptione sui nominis; nec sufficit si fiat per apochas vel per litteras sine nomine et cognomine auctoris. Ceterum prohibetur, ne in recipiendis denunciationes praeter iudicem et notarium, virum utrumque ecclesiasticum, speciali et scripto exarata Episcopi deputatione munitum, testes intersint. Cavendum quoque ne ex denunciantibus quaeratur, num sollicitationi consenserint: et convenientissimum foret, si de huiusmodi consensu, quantumvis sponte manifestato, nihil notetur in tabulis.

7. Denunciationis onus est personale et ab ipsa persona sollicitata adimplendum. Verum si gravissimis difficultatibus impediatur, quominus hoc perficere ipsa possit, tunc vel per se, vel per epistolam, vel per aliam personam sibi benevisam suum adeat Ordinarium, vel sanctam Sedem per sacram Poenitentiariam, vel etiam per hanc supremam Inquisitionem, expositis omnibus circumstantiis, et deinde se gerat iuxta instructionem quam erit acceptura. Si vero necessitas urgeat, se gerat iuxta consilia et monita sui confessarii. Ast si nullo impedimento detenta denunciationem omnino renuat, in hoc casu aliisque supra memoratis, laudandus est confessarius, qui operam suam poenitenti non denegaverit, et vel Ordinarium vel Sanctam Sedem pro opportunis providentiis consuluerit, suppresso tamen poenitentis nomine.

8. Non infrequenter occurrit casus, ut confessarius aliusve ecclesiasticus vir ab Episcopis (quorum utique haec potestas

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est) deputetur ad denunciationes recipiendas in re ad sollicitationis crimen spectante absque interventu notarii. Huic instructioni folium adiicitur circa modum, quo hisce in casibus confici denunciatio debet.[21]

INSTRUCTIO S. OFFICII (JULY 20, 1890)

Modula Examinis Per Generalia Assumendi

Vigore epistolae Sacrae Supremae Congregationis datae sub die . . . (vel vigore decreti Illustrissimi ac Reverendissimi Domini Archiepiscopi Ordinarii) vocata personaliter comparuit coram Illustrissimo ac Reverendissimo Domino N. N. sistente in Cancellaria (vel in sacrario, aut in collocutorio monialium seu piae domus) in meique etc.

N. N. nubilis (vel uxorata) degens in hac civitate N. N., in paroecia N. N., filia (vel uxor) N. N., aetatis suae . . ., conditionis civilis (aut agricolae, aut famulatui addictae) cui delato iuramento veritatis dicendae, quod praestitit tactis SS. Dei Evangeliis, fuit Quest. An sciat vel imaginetur causam suae vocationis et praesentis examinis? — *Ans.* . . . Q. A quot annis usa sit accedere ad sacramentum Poenitentiae? — *Ans.* . . . Q. An semper apud unum eundemque confessarium sacramentum Poenitentiae receperit, vel apud plures sacerdotes: insuper an in una eademque, vel in pluribus ecclesiis? — *Ans.* . . . Q. An a singulis quibus confessa est sacerdotibus exceperit sanctas admonitiones, et opportuna praecepta, quae ipsam examinatam aedificarent, et a malo arcerent, et quatenus etc.— *Ans.* . . . Notandum: si responsio fuerit affirmativa, id est si dicat, se bene semper fuisse directam, tunc interrogatur sequenti modo: Q. An sciat vel meminerit aliquando dixisse vel audivisse, quod quidam confessarius non ita sancte et honeste sese gesserit erga poenitentes, quin murmurationes, seu verba contemptibilia contra ipsum confessarium prolata fuerint: ex. gr., quod ipsa examinata, ab uno vel a pluribus poenitentibus, atque ab uno abhinc anno, vel a quattuor aut tribus mensibus similia audierit? — Notandum: Si post hanc interrogationem et animadversionem examinata negare pergat, claudatur actus consueta forma, quae ad calcem huius instructionis prostat. At si quidquam circa aliquem confessarium, iuxta ea de quibus interrogatur, aperuerit, ulterius interrogabitur prout sequitur: Q. Ut exponat nomen,

21 *Coll. P. F.*, n. 1282.

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cognomen, officium, aetatem confessarii, et locum seu sedem Confessionis; an sit presbyter saecularis vel Regularis, et quatenus etc.— *Ans.* . . . Q. Ut exponat seriatim, sincere et clare ea omnia, quae in sacramentali confessione vel antea vel postea vel occasione confessionis audierit a confessario praedicto minus honesta: vel an ab eodem aliquid cum ipsa inhoneste actum fuerit nutibus, tactibus seu opere, et quatenus, etc.— Notandum: hoc loco iudex solerte curabit ut referantur iisdem verbis, quibus confessarius usus fuerit, sermones turpes, seductiones, invitamenta conveniendi in aliquem locum ad malum finem, aliaque omnia, quae crimen sollicitationis constituunt, adhibita vernacula lingua in qua responsiones sedulo et iuxta veritatem exarabuntur; animum addat examinatae, si animadvertat, eam nimio timore aut verecundia a veritate patefacienda praepediri, eidem suadens omnia inviolabili secreto premenda esse. Denique exquiret tempus a quo sollicitationes inceperint, quamdiu perduraverint, quoties repetitae, quibus verbis et actibus malum finem redolentibus expressae fuerint. Cavebit diligenter ab exquirendo consensu ipsius examinatae in sollicitationem, et a quacumque interrogatione, quae desiderium prodat cognoscendi eiusdem peccata.— Q. An sciat vel dici audierit praedictum confessarium alias poenitentes sollicitasse ad turpia; et quatenus eas nominet (atque hic iubebit nomen, cognomen, et saltem indicia clariora, quibus aliae personae sollicitatae detegi possint).— Notandum: Si forte inducantur aliae personae sollicitatae, erit ipsius iudicis eas prudenter advocare, et singillatim examinare iuxta formam superius expositam.— *Ans.* . . . Q. De fama praedicti confessarii tam apud se quam apud alios? — *Ans.* . . . Q. An praedicta deposuerit ex iustitiae et veritatis amore, vel potius ex aliquo inimicitiae vel odii effectu, et quatenus, etc.— *Ans.* . . . Quibus habitis et acceptatis dimissa fuit iurata de silentio servando iterum tactis SS. Dei Evangeliis, eique perlecto suo examine in confirmationem praemissorum se subscripsit (si fuerit illiterata, dicatur) et cum scribere nesciret, fecit signum Crucis. (Subscriptio personae examinatae.)

Acta sunt haec per me N. N., cancellarium vel notarium ad hunc actum assumptum.[22]

22 *Ibid.*, n. 1732.

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CONFESSIONS MAY BE MADE IN ANY RITE

CAN. 905

Cuivis fideli integrum est confessario legitime approbato etiam alius ritus cui maluerit, peccata sua confiteri.

All the faithful are free to confess their sins to any lawfully approved confessor whom they prefer, even though he belong to another rite.

It has always been the practice of the Church to allow the greatest possible liberty in such a delicate matter, and since the administration of this Sacrament involves no difference of rite, the choice of confessors is perfectly free,[23] and neither the higher nor the lower clergy are empowered to forbid their subjects to go to a confessor of another rite.[24] Neither are priests of the Latin Rite obliged to query penitents of an Oriental rite concerning their belief in such articles of faith as the Roman Pontiff, the *processio Spiritus Sancti,* the veneration of Saints, consecration in leavened bread, or purgatory, unless the confessor has a well-founded doubt concerning the penitent's orthodoxy.[25] The practice of obliging parishioners to make their *paschal confession* to their pastor or his substitute has been officially declared intolerable.[26]

23 S. C. P. F., June 2, 1835 (*Coll.*, n. 839).

24 S. C. P. F., Dec. 11, 1838 ad 3^m f. (*Coll.*, n. 879).

25 S. C. P. F., Jan. 22, 1688; April 16, 1862 (*Coll.*, n. 1227).

26 S. C. P. F., Sept. 17, 1792 (*Coll.*, n. 610).

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THE ANNUAL CONFESSION

CAN. 906.

Omnis utriusque sexus fidelis, postquam ad annos discretionis, idest ad usum rationis, pervenerit, tenetur omnia peccata sua saltem semel in anno confiteri.

All the faithful without distinction of sex, are obliged to confess all their sins once a year as soon as they have reached the age of discretion.

This text is taken from the famous Decretal which entered the eighth canon of the Council of Trent.[27] The duty has also been imposed on the missionary countries of China, India, etc., and missionaries of both the secular and the regular clergy are obliged to insist upon its fulfillment.[28] The obligation commences from the time the child begins to reason, *i. e.*, with us about the seventh year, sooner or later. Parents, confessors, directors or tutors, and pastors are under obligation to see to it that the children comply with this duty.[29]

Does the obligation bind even if no mortal sins have been committed? There is no strict obligation by divine law to confess any but mortal sins, yet the *positive law* of the Church obliges in this case. An analogy is easily found in the obligation of confession for gaining a plenary indulgence.[30]

Note that whereas Communion is prescribed for the paschal time, there is no period assigned for complying with the duty of annual confession and therefore the

27 C. 12, X, V, 38; Sess. 14, can. 8, c. 5, *de poenit.*

28 S. O., March 23, 1656; Nov. 13, 1669; S. C. P. F., Sept. 12, 1645; Sept. 21, 1840 (*Coll.*, nn. 126, 189, 114, 913).

29 S. C. Sacr., Aug. 8, 1910, nn. I, IV (*A. Ap. S.*, II, 582).

30 Benedict XIV, "*Inter praeteritos,*" Dec. 3, 1749, § 77. It appears to us that if the legislator had no strict obligation in view, he would have added the clause: *salvo praescripto can. 902.*

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pastor is at liberty to choose for the first confession of the children some other time of the year.

SACRILEGIOUS CONFESSION

CAN. 907.

Praecepto confitendi peccata non satisfacit, qui confessionem facit sacrilegam vel voluntarie nullam.

He who makes a sacrilegious or wilfully invalid confession does not comply with the duty of confessing his sins. The contrary proposition was proscribed by the Holy Office [31] in 1665. One who has made a sacrilegious or voluntarily invalid confession has to go to confession again, worthily and validly, in order to comply with the law of the Church as embodied in can. 906.

31 Cfr. *prop. damn.*, n. 14 (Denzinger n. 985).

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CHAPTER IV

THE PLACE FOR HEARING CONFESSIONS

CAN. 908.

Sacramentalis confessionis proprius locus est ecclesia vel oratorium publicum aut semi-publicum.

The proper place for sacramental confession is the church, or a public or semi-public oratory.

This canon *excludes private oratories,* yet no rigid exclusion is intended, as is apparent from the text itself, which merely says: *proprius locus,* the proper place. This is also the intent of the Roman Ritual,[32] as Benedict XIV insinuates.[33] Hence any reasonable cause would justify hearing confession in a private oratory, for instance, if the family wished to prepare for Holy Communion.

CAN. 909

§ 1. Sedes confessionalis ad audiendas mulierum confessiones semper collocetur in loco patenti et conspicuo, et generatim in ecclesia vel oratorio publico aut semi-publico mulieribus destinato.

§2. Sedes confessionalis crate fixa ac tenuiter perforata inter poenitentem et confessarium sit instructa.

CAN. 910

§ 1. Feminarum confessiones extra sedem confessionalem ne audiantur, nisi ex causa infirmitatis aliave

32 *Rit. Rom.*, tit. III, c. 1, *de Sacr. Poenit.*, n. 7.

33 "*Magno cum*," June 2, 1751, § 20.

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verae necessitatis et adhibitis cautelis quas Ordinarius loci opportunas iudicaverit.

§ 2. Confessiones virorum etiam in aedibus privatis excipere licet.

The confessional for hearing *women's* confessions must always be placed in an open and visible place, generally in the church or public or semi-public oratory assigned to women; it must have an immovable grate with small holes.

Women's confessions should *not be* heard *outside the confessional,* except in case of sickness or for other reasons of necessity, and under such precautions as the local Ordinary may deem opportune.

Men's confessions may be heard also in private homes. The assignment of a special place, or chapel, or room for hearing women's confessions is not customary in our country, nor have we seen it in vogue in other countries as a rule. It is different with Sisters, and especially cloistered nuns. These sometimes have special rooms, which are properly designated as confession-rooms, built within the enclosure, or at least in such a way that the nuns remain *intra septa,* whilst the confessor is outside. Such confession-rooms may be provided also for women who live in convents either as mere inmates or students (*conservatori, ritiri*). These rooms should serve as confessionals only, and are considered such for the Sisters as well as for the women or young ladies living in the convent.[34] Where no such special confession rooms are assigned for women, they must be heard in the church or oratory, where the confessor and penitent may be seen.

Women are not allowed to enter a convent of re-

[34] S. O., Nov. 25, 1874 (*Coll. P. F.*, n. 1424). If solicitation would take place in such a room, the obligation of denouncing would certainly result.

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ligious, where, for instance, only two or three priests dwell. If the chapel or oratory of these Fathers is located in the interior of the house, women may go by the public and direct way into the chapel, but no further, and there make their confessions. If there is no chapel attached to the hospice or residence of the missionaries, the confessional should be put in an open and accessible place, as near as possible to the gate or door. The Ordinary or local superior should assign the place and see to it that the rules are properly observed.[35]

The *confessional* itself should be furnished, if possible, with an iron grate[36] so fixed that it cannot be moved, and perforated with holes not bigger than the ring finger.[37] That a veil should be placed before it, is not prescribed. But the grate is of obligation everywhere, in all parts of the world. Where there is no stable oratory the women may cover their faces with a veil.[38]

Except in case of *sickness,* women's confessions shall not be heard outside the confessional. The term sickness includes old age, decrepitude, and deafness.[39] Whenever sick persons are heard outside the usual confessional, the door of the room should be left open, so that the confessor and the penitent can be seen from afar.[40] This may sometimes be impracticable in the case of hard-hearing penitents. For the rest, the precautions to be taken are left to the judgment of the Ordinary.

Here an additional remark may find a place. It con-

35 S. C. P. F., Aug. 26, 1780 (*Coll.*, n. 545).

36 *Ibid.*

37 S. C. EE. *et* RR., Sept. 22, 1645 (Bizzarri, *Coll.*, p. 26). This decision prescribes only a stole, but no surplice; and in case of sickness or necessity the regular habit without stole is sufficient.

38 S. C. P. F., March 17, 1785 (*Coll.*, n. 572).

39 S. C. P. F., Sept. 21, 1840 ad 8 (*Coll.*, n. 913).

40 S. C. P. F., April 13, 1807, n. XIII; Feb. 12, 1821 (*Coll.*, nn. 692, 754).

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cerns can. 522, which allows female religious to go to any confessor approved by the local Ordinary for hearing women's confessions, and declares such a confession, made in any church or semi-public oratory, to be valid and licit. Does this also apply to the Sisters' own chapel? We answer, yes. Can. 522 speaks of *any* church or semi-public oratory, and revokes every contrary privilege. Besides, can. 519 should disperse all doubt as to the perfect liberty of religious in matters of conscience. If a religious, even though exempt, may go, in his own house, to any approved confessor, why should that liberty be denied to Sisters in their chapel? The decree of Feb. 3, 1913, cannot be urged against the decree of Aug. 5, 1913.[41]

41 Cfr. *A. Ap. S.*, V, 62, 431. The argument that the Code was prepared while that decree was published has no juridical value.

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CHAPTER V

INDULGENCES

ART. I

GRANT OF INDULGENCES

CAN. 911

Omnes magni faciant indulgentias seu remissionem coram Deo poenae temporalis debitae pro peccatis, ad culpam quod attinet iam deletis, quam ecclesiastica auctoritas ex thesauro Ecclesiae concedit pro vivis per modum absolutionis, pro defunctis per modum suffragii.

An indulgence is a *remission* before God of *temporal punishment* due to sins, the guilt of which is already forgiven or wiped out. The source of indulgences is the treasury of the Church. They are granted by the ecclesiastical authority in favor of the living as well as of the dead, but to the former are applied by way of absolution, whilst the latter obtain their benefits only by way of suffrage. Indulgences should, therefore, be highly esteemed by all the faithful.

1. An indulgence is a remission of the *temporal punishments* which remain after the guilt (*culpa* or *reatus*) of sin has been taken away, either by sacramental absolution or by an act of perfect contrition.[1] It is a valid absolution, before God, from the punishments which a man

1 Cfr. Pohle-Preuss, *The Sacraments*, Vol. III, pp. 232 ff.

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would have to expiate, either in this world by voluntary acts of penance, or in purgatory by involuntary suffering. It is, we say, valid before God as well as before the Church, although applied extra-sacramentally.

2. The *source and foundation* of indulgences is the inexhaustible *treasury of the Church,*[2] which consists of the sum-total of the superabundant merits of our Lord and His Saints, stored away for the benefit of the living as well as the dead, in as far as they are capable of receiving them.

3. The *authority* which dispenses these treasures is the Catholic Church, to whom God has entrusted the keys of His kingdom, acting through the Pope and the bishops, who possess the power of the keys.

4. The *beneficiaries* of this thesaurus are the living faithful and the souls in Purgatory, with this difference that the former are benefited in the form of a remission or grant from the treasury as well as by an act of jurisdiction (*per modum absolutionis*), whereas the *dead* can receive the grant of remission only through the intercession of the living (*per modum suffragii*) because they are, at least directly, beyond the jurisdiction of the Church.

5. Indulgences should *be greatly esteemed by all.* The reason is partly selfish,— but, then, "charity begins at home"— and partly of an objective doctrinal character, based on history. Self-love teaches us to choose the lesser evil, and indulgences are certainly an easier means of satisfying the justice of God than compulsory expiation. Besides, by making proper use of indulgences, we show our gratitude and esteem for the immense treasury of merits stored up in the Church. This certainly was the intention of all ages, whether we look to the intercession

[2] This notion was first systematically applied by Alexander of Hales (XIIIth cent.).

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of the martyrs who offered *libelli pacis* to apostates who wished to be reconciled or whether we accompany public sinners on their pilgrimages, or the crusaders on their journey to the Holy Land. The idea remains the same: forgiveness, not of sins as such, but of the severe punishments meted out in the penitential books and by the ecclesiastical authorities. No doubt the ransom from penance as well as the works prescribed were liable to abuses and misconstruction, but the Church and her approved teachers always sought to enlighten the people and stem the mischief. Abuses attach themselves to the most sacred things. That they were connected with indulgences did not justify Wiclif in saying that "it is foolish to believe in the indulgences granted by the Pope and the bishops." [3]

WHO MAY GRANT INDULGENCES

CAN. 912.

Praeter Romanum Pontificem, cui totius spiritualis Ecclesiae thesauri a Christo Domino commissa est dispensatio, ii tantum possunt potestate ordinaria indulgentias elargiri, quibus id expresse a iure concessum est.

Besides the Roman Pontiff, to whom the stewardship of the whole spiritual treasury of the Church is entrusted by Christ our Lord, only those can by their ordinary power grant indulgences who are expressly authorized to do so by law.

Since the grant of indulgences is an act flowing from jurisdiction, not from the power of order,— because indulgences for the living are given in the form of absolution,— it follows that:

[3] *Prop. dam.*, n. 42 (Denzinger, n. 518).

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1°. The *Pope* may grant indulgences for the whole Church, without any limit as to kind, place, and persons.

2°. *Archbishops* and *bishops*[4] may grant indulgences in their respective provinces and dioceses, the former of 100 days, the latter of fifty days. These indulgences are called local because they apply only to the territory over which these prelates have jurisdiction.

3°. *Cardinals*[5] may grant a two hundred days' indulgence, *toties quoties,* in any place, (titular church or institution) and to any person under their jurisdiction and protection.[6] Their power also is an ordinary one by law.

Besides these no other prelates by law enjoy the power of granting indulgences. Thus it has been decided that no *titular bishop,* who is at the same time auxiliary to another bishop, may grant an indulgence of forty days in the diocese in which he is auxiliary.[7]

Apostolic Delegates who have received faculties from the Pope for granting indulgences, should abstain from attaching such to devotional objects or acts of piety which have already been thus enriched by a bishop within his territory.[8]

Bishops and archbishops may attach the indulgence which the law empowers them to grant on the occasion of solemn functions, to images or statues, provided the material is such as prescribed by the Church. These indulgences of 50 or 100 days may be gained by the faithful who recite the prayers prescribed before said statues or images. But these prelates are not allowed to grant more than 50 or 100 days.[9]

4 See can. 274, n. 2; can. 349, § 2, n. 2.

5 Can. 239, § 1, n. 24.

6 If they grant an indulgence of the same number of days outside the place of their jurisdiction or protection, this may be gained only by those present; *ibid.*

7 S. C. Indulg., Jan. 12, 1878, ad 4 (*A. S. S.*, 11, 153 ff.).

8 *Ibid.*

9 S. C. Indulg., Jan. 24, 1846;

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Can. 913.

Inferiores Romano Pontifice nequeunt:

1.° Facultatem concedendi indulgentias aliis committere, nisi id eis a Sede Apostolica expresse fuerit indultum;

2.° Indulgentias concedere defunctis applicabiles;

3.° Eidem rei seu actui pietatis vel sodalitio, cui iam a Sede Apostolica vel ab alio indulgentiae concessae sint, alias adiungere, nisi novae conditiones adimplendae praescribantur.

Prelates of inferior rank to the Pope:

1°. Cannot impart to others the faculty of granting indulgences, unless they have an express indult to that effect from the Apostolic See;

2°. Cannot grant indulgences applicable to the poor souls;

3°. Cannot attach additional indulgences to an object, or an act of piety, or a confraternity which have already been indulgenced by the Holy See or some other prelate, unless new conditions are prescribed.

The first clause of this canon is intended to prevent abuses. It renders control easier and the sources of abuses more readily discoverable.

No. 2 is based on the view that the supreme dispenser alone may exercise (indirect) power over those who are withdrawn from the proper jurisdiction of the Church.[10]

As to no. 3, two decisions will help to illustrate it.

Feb. 22, 1847 (Prinzivalli, *Resolutiones seu Decreta Authentica S. C. Indulg.*, Romae 1862, nn. 571, 583). The materials permitted are wood, ivory, iron, steel, stone, marble; excluded are lead, zinc, glass, gypsum, paper, pasteboard; cfr. Beringer, *Die Ablässe*, 10th ed., p. 302.

10 The question whether indulgences for the dead attain their purpose infallibly is controverted (cfr. Pohle-Preuss, *l. c.*, p. 201 f.); but acts of charity will certainly be rewarded.

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Titius, a pious citizen of Marseilles, had an image of the Blessed Virgin, which had been enriched with an indulgence of forty days, granted to all who would recite certain prayers before it. As often as a bishop came to the city, Titius asked him to attach forty more days. They did it willingly, but the S. Congregation declared all these indulgences except the forty days granted by the local Ordinary invalid.[11]

The Ordinary may, however, attach additional indulgences to a pious object, such as beads or crosses, or to works of piety, for instance, the support of good literature, or to a sodality, over and above those already granted by the Holy See, provided he prescribes new conditions, *e.g.*, additional prayers or some other good work. The successor may, moreover, grant new indulgences to things or persons indulgenced by his predecessor, under the same condition, *viz.*, that new works or prayers be performed.[12] But no bishop can increase the extent of an indulgence by dividing the same act into different parts, for instance, attaching fifty days to every word of the Hail Mary.[13]

THE PAPAL BLESSING

CAN. 914.

Benedictionem papalem cum indulgentia plenaria, secundum praescriptam formulam, impertiri possunt Episcopi in sua quisque dioecesi bis in anno, hoc est die sollemni Paschatis Resurrectionis et alio die festo sollemni ab ipsis designando, etiamsi iidem Missae sollemni adstiterint tantum; Abbates autem vel Prae-

11 S. C. Indulg., Dec. 17, 1838 (Prinzivalli, *l. c.*, n. 480).

12 S. C. Indulg., Jan. 12, 1878, ad 1 *et* 3 (*A. S. S.*, 11, 153 f.).

13 *Ibid.*, ad 5 (*l. c.*).

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lati *nullius*, Vicarii et Praefecti Apostolici, etsi episcopali dignitate careant, id possunt in suis territoriis uno tantum ex sollemnioribus per annum diebus.

CAN. 915.

Regulares, qui privilegium habent impertiendi benedictionem papalem, non solum obligatione tenentur servandi formulam praescriptam, sed hoc privilegio uti nequeunt, nisi in suis ecclesiis et in ecclesiis monialium vel tertiariorum suo Ordini legitime aggregatorum; non autem eodem die et loco quo Episcopus eam impertiat.

Every bishop may impart the papal blessing in his own diocese with a plenary indulgence, according to the formulary prescribed (in the *Pontificale Romanum*) twice a year: once on the feast of Easter, and once on another day, which they themselves may designate, even though they should only assist at the solemn Mass. The same may be imparted, but only on one of the more solemn feasts of the year, by abbots or prelates *nullius*, by vicars Apostolic and prefects Apostolic, even though they are not endowed with the episcopal dignity.

Regulars who have the privilege of imparting the papal blessing, are not only obliged to use the formula prescribed, but may use the privilege only in their own churches or in the churches of *moniales* and tertiaries lawfully aggregated to their order, and are not allowed to give the papal blessing on the same day and in the same place on which the bishop imparts it.

Before the occupation of Rome, in 1870, the popes were wont to bless the people solemnly on Maundy Thursday and Easter (at St. Peter's), on the feast of the Ascension (at the Lateran), and on that of the Assumption (at St.

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Maria Maggiore). On these occasions the pope ascended the balcony and solemnly blessed the people gathered on the plaza before the basilica. Sometimes others were delegated to impart this blessing. Regulars obtained a special privilege or indult for this purpose under certain conditions imposed by Benedict XIV and Clement XIII.[14] A Constitution of Clement XIII gave to patriarchs, primates, archbishops, and bishops the faculty of imparting the papal blessing *twice a year*. *Coadjutor* bishops have this power (see can. 913) only if they obtained it expressly from the Apostolic See. Clement XIII expressly says: "as long as they rule over their respective churches," from which it is clear that *titular bishops* who do not actually govern a diocese are not entitled to impart the papal blessing.

The *days* on which the papal blessing may be imparted are Easter Sunday and some other *solemn feast day* to be designated by each prelate *ad libitum*. A solemn feast-day is one of obligation, which is certainly the intention of the grantor, because the blessing is given for the benefit of the people gathered in church on such holy days, as the Constitution of Clement XIII says.

The prescribed *formula* is that found in the *Pontificale Romanum*. None other is to be substituted.[15] Even if the people leave, or the custom exists of leaving after the Pontifical Mass, the Apostolic brief must be read in the Latin wording of the *Pontificale* and in the vernacular.[16] There is no excuse for curtailing this ceremony, for the reading of both texts takes only about three minutes. In

14 "*Exempla Praedecessorum*," March 29, 1748; "*Inexhaustum*," Sept. 3, 1762.

15 S. Rit. C., May 23, 1835 (*Dec. Auth.*, n. 2720).

16 *S. Rit. C.*, Dec. 7, 1884 (*Dec. Auth.*, n. 2871). According to a decision of S. C. Indulg., June 30, 1840 (Prinzivalli, n. 501), all that is required for validity is that the indulgence be imparted by papal delegation. The formula see in *Pontificale Rom.*, P. III.

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the mean while the people may pray for the Holy Father and the Church.

The S. Congregation has given permission to aged prelates to impart the papal blessing even when they have not themselves pontificated but merely assisted at Mass.[17] This is now the general law, and the privilege is not conditioned upon ill health. But a bishop can not grant this indulgence if he is entirely absent from the solemn Mass.

Inferior Prelates, as mentioned in the second clause of can. 914, are bound by the same conditions as bishops, but are, as the "*Inexhaustum*" of Clement XIII ruled, allowed to impart the papal blessing only once a year on a feastday.

Can. 915 mentions *regulars* who have obtained the privilege of imparting the papal blessing. Benedict XIV as well as Clement XIII desired their privileges to remain intact. The term "*regulars*" must be strictly interpreted, and not taken as synonymous with *exempt.* Not all regulars have obtained this privilege. We know that, for instance, Benedictine abbots have had to apply for it and obtained it *ad decennium.*

The regulars who have the privilege must observe the conditions set forth in our text, to wit:

1. They must use the prescribed *formula.* As there are several formulas, a distinction is necessary.

(a) Benedict XIV ("*Exemplis Praedecessorum,*" March 19, 1748) prescribed a special form of imparting the papal blessing for regulars,[18] which is still to be observed when the blessing is solemnly given. A reasonable doubt arises as to whether this form must be observed by prelates or abbots who pontificate and impart the papal blessing after a pontifical Mass or Vespers. While it is

17 S. Rit. C., Jan. 15, 1847 (*Dec. Auth.*, n. 2925).

18 Cfr. *Rituale Rom.*, tit. VIII, c. 32 (Ed. Pustet, 1913, p. 260 f.),

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true that Benedict XIV prescribed the above-mentioned formula for all regular orders, "mendicant as well as non-mendicant, monastic as well as clerical," he says in the same Constitution that abbots may bless the people in the churches fully subject to them when they exercise pontifical functions. Hence it appears more reasonable to assume that they should make use of the form prescribed in the *Pontificale Romanum,* and not of the form prescribed for regulars by Benedict XIV. But this rule must strictly be observed: prelates with the right to pontificals may not use the form of the *Pontificale* if they do not pontificate themselves, but in that case must employ the form of the *Rituale Romanum,* as prescribed by Benedict XIV.

(b) When the *general absolution,* or the papal blessing with plenary indulgence, may be given according to a privilege obtained from the Holy See,[19] there are available *two different formulas*[20] prescribed by Leo XIII, "*Quo universi,*" July 7, 1882. The first begins with the words, "*Ne reminiscaris,*" the second with, "*Intret oratio.*" The latter, according to some decisions of the S. Congregation of Indulgences, should be applied in all religious congregations with simple vows which are *not* Tertiaries of a religious order, and *all secular* Tertiaries, for instance, of the Franciscans and Oblates of St. Benedict. The first-mentioned formula should be applied in all religious orders and such religious congregations with simple vows as are tertiaries of a religious order, for instance, Franciscan and Benedictine Sisters.[21]

2. Regulars may impart the papal blessing in their *own*

19 O.S.B. may impart it five times a year: on Ash Wednesday and on the four vigils of Christmas, Pentecost, Assumption, and All Saints; S. C. Indulg., Jan. 10, 1906 (*Anal. Eccl.,* 14, 31).

20 *Rit Rom.,* ed. Pustet, 1913, p. 134 f.

21 S. C. Indulg., Dec. 18, 1885; Aug. 18, 1903; Nov. 11, 1903 (*A. S. S.,* 18, 413; 36, 498. We venture to say that it would be more

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churches, i.e., such as are fully incorporated with the monastery or order; in churches of ***moniales*** who are under their jurisdiction, and, finally, in the churches of *Tertiaries* who are lawfully aggregated to their order. Tertiaries are *legitimately aggregated* as soon as the superior general has issued the decree of aggregation. (*Tertiaries* must here be understood of religious in the sense of can. 492, § 1). The papal blessing in the sense of general absolution with plenary indulgence may be imparted by any priest approved for hearing confessions, whether secular or religious, if the regularly appointed priest is absent for any reason.[22] Regular superiors may delegate a priest of their order who has no faculties for hearing confessions to impart the general absolution with plenary indulgence to secular Tertiaries in churches belonging to the regulars.[23] The one who imparts it to Tertiaries may also gain the indulgence,[24] provided, of course, he has complied with the prescribed conditions.

3. The *number* of times and the occasions on which regulars may impart the solemn papal blessing were determined by Leo XIII. In his "*Quo universi,*" 1882, he permitted regulars to give the blessing *twice* a year and emphasized that they must abstain from giving the solemn blessing on the same day on which and in the same town or city where, the Ordinary makes use of the same privilege. *In eodem loco* here means a town or city, not a parish. In a large city there may be many parishes, and if the bishop gives the papal blessing in one of them, the regulars are not allowed to give it in another.[25]

conformable to the Code if the first formula would be used by all religious, and the second by all secular Tertiaries, religious sodalities, and confraternities.

22 S. O. (Sect. Indulg.), Dec. 15, 1910 (*A. Ap. S.*, II, 22).

23 S. O. (Sect. Indulg.), May 28, 1914 (*A. Ap. S.*, VI, 347).

24 See Beringer, *l. c.*, ed 13, p. 338.

25 S. C. Indulg., May 20, 1896; Beringer, *l. c.*, p. 339.

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To complete these comments it may be added that the bishop, too, who imparts the papal blessing gains the indulgence attached to it. Those who take part in the celebration from a window of a house situated on the place where the blessing is given may gain the indulgence attached to the same. But this blessing does not involve absolution from censures or penalties. The same is true of the general absolution.[26]

PRIVILEGED ALTARS

CAN. 916.

Episcopi, Abbates vel praelati *nullius*, Vicarii ac Praefecti Apostolici et Superiores maiores religionis clericalis exemptae, possunt designare et declarare unum altare privilegiatum quotidianum perpetuum, dummodo aliud non habeatur, in suis ecclesiis cathedralibus, abbatialibus, collegiatis, conventualibus, paroecialibus, quasi-paroecialibus, non autem in oratoriis publicis vel semi-publicis, nisi sint ecclesiae paroeciali unita seu eiusdem subsidiaria.

Bishops, abbots or prelates *nullius*, Apostolic vicars and prefects, and the major superiors of exempt clerical religious may designate and declare one altar daily privileged forever in their cathedral, abbatial, collegiate, conventual, parochial, and quasi-parochial churches, provided there be no privileged altar in said churches as yet. In public or semi-public oratories, unless they are united to a parish church or serve as its subsidiaries, no privileged altar may be assigned by the prelates mentioned.

No traces of papal concessions of a privileged altar

26 Clement XIII, "*Inexhaustum*," Sept. 3, 1762. For the papal blessing in *articulo mortis* see *Rit. Rom.*, tit. V, c. 6 (ed. Pustet, p. 113).

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can be found before the end of the XVth century. Severe conditions were set up under Paul V (1605–1621) for obtaining this privilege, which was only given to churches where forty Masses could be celebrated daily. Succeeding popes, especially Benedict XIII and Clement XIII, mitigated this rigor by granting the privilege to all patriarchal, metropolitan, cathedral, collegiate, abbatial and parish churches.[27]

What is a privileged altar and what its purpose? The S. Cong. of Indulgences has declared: "As far as the intention of the grantor and the power of the keys extend, a *plenary indulgence* must be understood which in itself would be sufficient to forthwith free the soul from the pains of purgatory; but as far as the efficacy of the application is concerned, it is an indulgence the measure of which must be left to the divine mercy and acceptance."[28] In other words: the intention of the Church, which can never be entirely frustrated, is to liberate a determined soul from Purgatory, but whether this is fully achieved, must be left to God. The practical conclusion is that repeated Masses offered upon such an altar guarantee surer acceptance, and repetition is not superfluous.

The *prelates* who may assign such a privileged altar are: bishops, prelates *nullius,* Apostolic vicars and prefects, and the major superiors of exempt clerical orders. This classification is explained elsewhere as comprising all prelates who enjoy ordinary jurisdiction.[29] However, the vicar-general is not included, and may therefore not designate a privileged altar; for this privilege, says the

27 "*Omnium saluti,*" Aug. 20, 1724; Decree of May 19, 1759 (Prinzivalli, n. 242).

28 S. C. Indulg., July 28, 1840 (Prinzivalli, n. 502).

29 S. C. Indulg., June 7, 1842 (Prinzivalli, n. 531).

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S. Congregation, is given rather as a personal favor.[30]

The *churches* in which such privileged altars may be designated are cathedral, abbatial, collegiate, conventual, parish and quasi-parish churches. This is a complete enumeration.

If a cathedral church serves at the same time as a parish church, two privileged altars are not allowed.[31] Hence neither an abbey nor a collegiate church may have two privileged altars, at least by common law. *One* is the rule. If more are desired, a special indult should be asked for.

The text *excludes public and semi-public oratories,* except when such an oratory serves as *ecclesia filialis* of the principal or mother-church and parochial functions, such as funeral services, baptism, administration of the Holy Eucharist, are performed therein. The same rule applies to *subsidiary* chapels, for instance, during repairs of the parish church, and to chapels which may be called subsidiary *in perpetuum* on account of the distance from the parish proper; — provided always that parochial functions are held therein.[32] Purely semi-public oratories, such as we have in this country for religious communities, hospitals, or asylums, do not comply with the conditions laid down in our text.

What *qualifications* an altar must have to be declared privileged, is not determined in our text. We believe that the conditions formerly required still hold good. They are: (1) that the altar be *fixed or stable, i.e.,* irremovable, with an altar stone consecrated though not necessarily irremovable. It is not required that the altar be of marble

30 S. C. Indulg., May 24, 1843 (*ibid.*, n. 553).

31 S. Congr. Indulg., Sept. 18, 1776 (*ibid.*, n. 365).

32 S. C. Indulg., Jan. 30, 1760; Nov. 27, 1764 (Prinzivalli, nn. 246, 257).

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or stone. (2) The second condition is that the altar be ***not portable.*** The privilege is attached not to the stone, but to the altar, and cannot therefore be transferred by changing the stone.[33]

Can. 917.

§ 1. Die Commemorationis omnium fidelium defunctorum, omnes Missae gaudent privilegio ac si essent ad altare privilegiatum celebratae.

§ 2. Omnia altaria ecclesiae per eos dies quibus in ea peragitur supplicatio Quadraginta Horarum, sunt privilegiata.

On All Souls' Day all Masses enjoy the same privilege as if they were said on a privileged altar. All the altars of a chuch in which the *Forty Hours' Devotion* is held, are privileged during the days of this devotion.

Concerning the application on All Souls' Day a remark, although theological rather than canonical, may not be amiss. It appears that the Mass on that day can be applied for all the souls in purgatory. Yet it is the constant and common teaching of the Church that the application is made only *for one soul,* even when the Mass is said for the dead in general.[34] Hence, even if the privilege for a community or confraternity is worded in the plural: *"pro animabus presbyterorum, perinde suffragentur, ac si ad altare privilegiatum celebratae fuissent,"*[35] the benefit of the indulgence attached to the privileged altar is in fact applied only to one individual soul. Therefore, besides the intention for all the dead, it is

33 Schneider, *Rescripta Auth. S. C. Indulg.*, 1885, n. 405; Beringer, *l. c.*, p. 462 f.

34 S. C. Indulg., Feb. 29, 1864; Dec. 19, 1885 (*A. S. S.*, 18, 340); Beringer, *l. c.*, ed. 13, p. 469 f.

35 S. C. Indulg., July 16, 1765 (*Rescripta*, n. 228).

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well, though not necessary, to make a special intention for a particular soul.

CAN. 918.

§ 1. Ut indicetur altare esse privilegiatum, nihil aliud inscribatur, nisi: *altare privilegiatum,* perpetuum vel ad tempus, quotidianum vel non, secundum concessionis verba.

§ 2. Pro Missis celebrandis in altari privilegiato nequit, sub obtentu privilegii, maior exigi Missae eleemosyna.

In order to indicate the fact that an altar is privileged nothing else is required but the inscription: *Altare privilegiatum,* whether perpetual or for a certain time, daily or not, according to the wording of the grant.

For Masses celebrated on a privileged altar no higher stipend may be charged because of the privilege.

The latter rule was made by the S. Congregation of Indulgences when, in extending the indulgence of the privileged altar to all Masses said on All Souls' Day,[36] it stated that only a synodal or usual stipend may be received. Our Code adds the words: "*sub obtentu privilegii,*" which means that nothing more may be demanded on account of the altar being privileged, because this would be simony. If the privilege is personal, it is lost by asking more; if it is local, the indulgence is not gained.[37]

[36] S. C. Indulg., May 19, 1761 (Prinzivalli, n. 250).

[37] S. C. P. F., Aug. 13, 1774 (*Coll.*, n. 507).

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PROMULGATION OF INDULGENCES

CAN. 919.

§ 1. Novae indulgentiae, ecclesiis etiam regularium concessae, quae Romae promulgatae non sint, ne pervulgentur, inconsulto ordinario loci.

§ 2. In edendis libris, libellis, etc., quibus concessiones indulgentiarum pro variis precibus aut piis operibus recensentur, servetur praescriptum can. 1388.

CAN. 920.

Qui a Summo Pontifice impetraverint indulgentiarum concessiones pro omnibus fidelibus, obligatione tenentur, sub poena nullitatis gratiae obtentae, authentica exemplaria earundem concessionum ad Sacram Poenitentiariam deferendi.

New indulgences not published at Rome, may not be promulgated without the consent of the local Ordinary. This law is binding also on regulars.

In publishing books, pamphlets, etc., which contain indulgences for various prayers and pious works, can. 1388 must be observed.

Those who have obtained from the Sovereign Pontiff indulgences intended for all the faithful are obliged under penalty of nullification of the favor granted, to send an authentic copy of the same to the Sacred Penitentiary.

In ancient times alms were collected for the crusades and buildings for charitable purposes. The collectors were often entrusted with the preaching or promulgation of indulgences. Abuses of a grievous nature crept in, and greed exploited the most sacred things. The Council of Trent [38] endeavored to remedy these abuses by making

38 Sess. 21, c. 9, *de ref.*

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the promulgation of indulgences dependent on the co-operation of the local Ordinaries and two canons. But simpletons — we have no other name for those who hunt up every indulgence and believe every scrap of paper which pretends to convey some extraordinary spiritual favor [39] — are still rampant, and hence the rules of the Code are timely.

New indulgences are those which have not yet been promulgated at Rome, and are therefore not registered in the office of the S. Congregation of Indulgences. Since the establishment of the official *Acta Apostolicae Sedis* (1909) it is easy to know what indulgences are authentically promulgated.

Indulgences are generally granted *in forma gratiosa,* and do not therefore, *per se,* require an executor. However, if the rescript contains a favor destined for the public welfare, such as an indulgence, it must be presented to the Ordinary for *recognition.* This does not mean that the indulgence could not validly be gained if the Ordinary would fail to recognize it, unless indeed there is attached an invalidating clause to that effect.[40] A pastor, therefore, who receives from Rome an indulgence for his parish, may not publish it before his Ordinary has been informed or advised.[41] Neither may regulars or religious communities promulgate indulgences which they have received without the consent of the local Ordinary. No exemption may be rightfully claimed from this law.[42] The Ordinary is the one in whose diocese the religious

39 See, for instance, the facts reported by Beringer, *l. c.*, p. 118 f.: an indulgence of 80,000 years for one prayer!

40 The invalidity is stated neither by the Council of Trent, nor by the Apostolic See (Beringer, *l. c.*, p. 112), nor by our text.

41 S. O., July 8, 1846, ad 1, (*Coll. P. F.*, n. 1008).

42 *Trid.*, sess. 21, c. 9, *de ref.*; S. C. C., June 21, 1760 (Richter, *Trid.*, p. 123, n. 3).

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have their house or church and, according to can. 198, § 1, also the vicar-general, the administrator, a prelate *nullius,* an Apostolic vicar or prefect.

A strict prohibition to publish indulgences formerly bound *confraternities,*[43] to whom no spiritual favors or indulgences could be communicated without the formal recognition and knowledge of the Ordinary. Now, however, all that is required is that the Ordinary take cognizance of the indulgence — *praevia cognitione Ordinarii.*[44]

No recognition or cognizance by the Ordinary is required for promulgating indulgences granted by the Pope "*Urbi et orbi.*" To gain these it suffices that the faithful be certain that the grant has been made by the Pontiff.[45] Thus a religious superior, also of a female congregation, or a pastor, upon reading in the *Acta Ap. Sedis* of an indulgence granted "*Urbi et orbi,*" may apply it at once to his congregation.

Can. 920 embodies a law partly contained in a decree of Benedict XIV, Jan. 19, 1746, recalled to the knowledge of the bishops by Pius X, and finally by the present Pontiff. The respective documents ordain that *general concessions of indulgences* intended for all the faithful must be submitted to the S. Poenitentiaria. A *general indulgence* is one that can be gained by all the faithful everywhere and at any time (*universis catholici orbis christifidelibus*). A *particular indulgence* is one that can be gained either by belonging to a certain confraternity or by using a specified devotional object, or one granted to a certain person. Thus Pius X was wont to grant to

[43] Clement VIII, Dec. 7, 1604, § 7.

[44] S. C. Indulg., Jan. 8, 1861; (Beringer, *l. c.*, p. 539, 551).

[45] S. C. Indulg., July 1, 1839, ad 6 (Prinzivalli, n. 491).

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priests orally the faculty of attaching the *toties quoties* indulgence to crucifixes. Such particular indulgences or faculties need not be reported to the above-named Sacred Congregation. Neither need indulgences granted to a certain diocese, or confraternity, or order, or religious congregation, if not intended for all the faithful, be referred to Rome. But all general indulgences must be reported. This rule was made to eradicate abuses and scruples which may arise from a publication made without the knowledge of the S. Congregation.[46]

The Code requires that *authentic* copies of the concessions granted be submitted to the S. C. This means that either the original grant, as issued by Rome, or in case this is impossible or impracticable, an authenticated copy be sent to Rome. Any ecclesiastical notary may make the copy. A photographic reprint would also be considered authentic. The texts of Pius X and Benedict XV only mention *documenta exhibenda,* but failure to send the document — which Pius X demanded to be done within six months from the date of issuance — would entail invalidity of the indulgence.

To return to can. 919, § 2, the following remarks concerning the *publishing of books, pamphlets,* or *leaflets,* or summaries of indulgences, may prove useful. The Code refers to can. 1388, which requires the *permission of the local Ordinary,* according to the well-known Constitution of Leo XIII, "*Officiorum ac munerum,*" Jan. 25, 1897, n. 17. But § 2 of can. 1388 also requires the *express permission of the Holy See* for the publication, in any language, of an authentic collection of prayers or good works

46 S. C. Indulg., April 14, 1856 (Prinzivalli, n. 556); Benedict XIV, Jan. 19, 1746; Pius X, "*Cum per Apostolicas,*" April 7, 1910 (*A. Ap. S.*, II, 225); Benedict XV, "*Quandoquidem,*" Sept. 16, 1915 (*A. Ap. S.*, VII, 457 f.).

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to which the Apostolic See has attached indulgences, of a list of Apostolic indulgences, and of a summary of indulgences which have been previously collected but never approved, or are for the first time collected. Hence every new collection or new list (*elenchus*) or summary of indulgences which has not yet been approved by the S. C. Indulg., needs the express permission of the Holy See[47] and of the Ordinary. If an indulgence, or a list, or summary, or collection of indulgences which have been approved by the S. Congregation, or are taken from an Apostolic brief or rescript, is to be printed or published, the Ordinary may give permission to do so without submitting the same to the S. Congregation, unless a special prohibition has been issued.[48] Religious superiors may have a summary of the indulgences granted to confraternities established by their institute printed and circulated with the approval or *visum* of the Ordinary.[49]

PLENARY INDULGENCES

CAN. 921.

§ 1. Indulgentia plenaria concessa pro festis Domini Nostri Iesu Christi vel pro festis Beatae Mariae Virginis, intelligitur concessa dumtaxat pro festis quae in calendario universali reperiuntur.

§ 2. Concessa indulgentia plenaria vel partialis pro festis Apostolorum, intelligitur concessa dumtaxat pro eorum festo natali.

§ 3. Indulgentia plenaria concessa ut *quotidiana perpetua* vel *ad tempus* visitantibus aliquam ecclesiam vel publicum oratorium ita intelligenda est ut quacun-

47 S. C. Indic., Aug. 7, 1897 (*Coll. P. F.*, n. 1978).

48 S. C. Indulg., Jan. 22, 1858 (Prinzivalli, n. 674).

49 S. C. Indulg., Jan. 8, 1861 (Prinzivalli, n. 689); Beringer, *l. c.*, p. 116.

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que die, sed semel tantum in anno, ab unoquoque fideli acquiri possit, nisi aliud in decreto expresse dicatur.

A *plenary indulgence* is the remission of the whole debt of temporal punishment due to sin. To gain it fully, one must be free from all affection for sin.

A *partial indulgence* is the remission of a part of the temporal punishment due to sin, and is gauged by the public penances or penitential canons of the early Church. In this sense a partial indulgence is indeed a remittance of penances imposed by the former penitential discipline and valid before the external forum of the Church, but it would be wrong to imagine that this is its only effect. Even a partial indulgence signifies and effects the remittance of temporal punishments due to sin before God or in the court of conscience. Consequently, an indulgence of seven years means a remission of the temporal punishments which were formerly imposed by the ecclesiastical authority, for instance, seven years of fasting twice a week on bread and water, but as effective of true remission.[50]

Canons 921 sqq. lay down certain rules for the understanding and gaining of indulgences granted for certain feasts, sacred places and objects, as well as with regard to the time of gaining them.

§ 1 of can. 921 says that if a plenary indulgence is granted for the feasts of our *Lord* or of the *Blessed Virgin*, it must be understood only of those feasts which are assigned in the general calendar of the Church, to wit: Christmas, the Circumcision (New Year's) the Epiphany, Easter Sunday, the Ascension, and Corpus Christi; or the feasts of the Immaculate Conception, the Purification, the Annunciation, the Nativity and the Assump-

50 Pohle-Preuss, *l. c.*, III, p. 238 f.

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tion of the Bl. Virgin Mary.[51] Other feasts mentioned in private calendars, for instance those of religious, are not included in this grant.

§ 2 provides that an indulgence, whether plenary or partial, granted for the *feasts of the Apostles,* must be understood of the main or spiritual birthday feasts, not of other incidental feasts, therefore not of St. Peter's Chair or Chains, St. Paul's Conversion, etc.[52]

§ 3 declares that if a plenary indulgence is granted as daily forever or for a certain time (*quotidiana perpetua vel ad tempus*), this means that the faithful who visit the resp. church or public oratory may gain said plenary indulgence on *any day,*— weekday or Sunday,— *but only once a year,* unless the wording contains an extending clause. Therefore, if the grantor intends to grant an indulgence for every day, he must explicitly say so.[53]

THE TRANSFER OF FEASTS AND INDULGENCES

CAN. 922.

Indulgentiae adnexae festis vel sacris supplicationibus vel precibus novendialibus, septenariis, triduanis, quae ante aut post festum vel etiam eius octavario perdurante peraguntur, translatae intelliguntur in eum diem, quo festa huiusmodi legitime transferantur, si festum translatum habeat officium cum Missa sine sollemnitate et externa celebratione ac translatio fiat in perpetuum, vel si transferatur sive ad tempus sive in perpetuum sollemnitas et externa celebratio.

To understand this canon it had best be divided into three parts:

51 S. C. Indulg., Sept. 18, 1862.
52 *Ibid.*, Beringer, *l. c.*, p. 105.
53 S. C. Indulg., March 15, 1852 (Prinzivalli, n. 624).

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1. The indulgences here mentioned may be plenary or partial, and are granted for certain feasts, processions, or prayers recited during a certain time, three, seven or nine days. These processions or prayers (novenas, triduums or septenaries) may be performed either before or after the principal feast or during its Octave.

2. If a feast is legitimately transferred to another day, the indulgences, too, may be gained on that day. This is a general rule, established by the decree of Aug. 9, 1852.[54]

3. Here a distinction must be made as to *transfer and solemnity:* (a) If the feast has its office and Mass — although without solemnity and external celebration — *and* is transferred to another day *in perpetuum,* or forever, the indulgences are to be gained only on the day to which the feast is transferred. Thus, for instance, if the feast of a Saint is transferred forever to a day which would not otherwise be his *dies natalis,* the indulgence granted for his feast is also transferred.[55]

(b) If the feast is transferred as to its *solemnity and external celebration,* either accidentally, *i.e., ad tempus,* or forever, *in perpetuum,* the indulgence can be gained only on the feastday thus transferred.

A feast may be transferred *ad tempus* on account of a concurring feast. Example: On All Souls' Day a plenary indulgence *toties quoties* may be gained. However, it may happen that Nov. 2nd falls on a Sunday. In that case the indulgence can be gained on Monday, Nov. 3, because it is attached, not to Nov. 2nd, but to All Souls' Day.[56] Note that only a Sunday may interfere with the celebration of All Souls' Day, which is a first-class festi-

[54] Prinzivalli, n. 627.

[55] S. O., June 13, 1912, ad 1 (*A. Ap. S.,* VI, 624).

[56] S. O. (Sect. Indulg.), Dec. 14, 1916 (*A. Ap. S.,* IX, 179).

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val, and hence all particular feasts proper to certain places, churches, religious orders, and congregations, must make way for All Souls' Day and therefore be transferred to another day.[57]

A feast is transferred *in perpetuum* generally to a Sunday, for instance, the feast of SS. Peter and Paul, Epiphany (in France), etc. On that day, therefore, the *solemnity and external celebration* take place as if it were the proper day, even though the office and the Mass have been said on the latter. It may be asked: What does *external celebration* mean? It means the special prayers, solemn functions, and gathering of the faithful in church, exposition of the Saint's image or picture,[58] etc. The transfer of the indulgences takes place for religious orders or congregations no matter whether the transfer of the feast itself is made for the whole order or only for a province or house by reason of the diocesan or provincial directory.[59] And the members must follow the directory of their respective province. The faithful may gain the indulgences attached to a visit of a church of religious *either* on the day on which the diocese, *or* on the day on which the religious themselves celebrate the feast, but not on both.[60]

THE DAY FOR GAINING INDULGENCES

CAN. 923.

Ad lucrandam indulgentiam alicui diei affixam, si visitatio ecclesiae vel oratorii requiratur, haec fieri

57 S. Rit. C., Feb. 28, 1917 (*A. Ap. S.*, IX, 186).

58 Cfr. *Ephemerides Liturgicae*, 1892, p. 700, which says that it is immaterial whether all these or only parts occur.

59 S. O. (Sect. Indulg.), June 13, 1912, ad 2 (*A. Ap. S.*, IV, 624).

60 S. C. Indulg., Jan. 12, 1878; Beringer, *l. c.*, p. 111.

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potest a meridie diei praecedentis usque ad mediam noctem quae statutum diem claudit.

To gain an indulgence which is attached to a certain day, if visiting a church or oratory is required, the visit may be made from noon of the preceding day until midnight of the day proper. This rule applies to all indulgences, plenary, partial, *toties quoties*, to such already granted or yet to be granted, no matter how the time or day may be designated.[61] Thus, for instance, the *toties quoties* indulgence granted for All Souls' Day may be gained from noon, Nov. 1st, to midnight, Nov. 2nd.

LOSS OF LOCAL AND REAL INDULGENCES

CAN. 924.

§ 1. Ad norman can. 75, indulgentiae adnexae alicui ecclesiae non cessant, si ecclesia funditus evertatur rursusque intra quinquaginta annos aedificetur in eodem vel fere eodem loco et sub eodem titulo.

§ 2. Indulgentiae coronis aliisve rebus adnexae tunc tantum cessant, cum coronae aliaeve res prorsus desinant esse vel vendantur.

§1. Indulgences attached to a church are not lost even if the church is entirely destroyed, provided it is rebuilt within the space of fifty years on the same or nearly the same place, and under the same title.

This is according to can. 75. If the new church would be built under the same title, for instance, Holy Rosary, on the same place where the old one stood, or not more than twenty or thirty paces distant therefrom, the indulgence would not be lost.[62] But if the new church, though

61 S. O. (Sect. Indulg.), Jan. 26, 1911 (*A. Ap. S.*, III, 64).

62 S. C. Indulg., March 29, 1886 (*A. S. S.*, 19, 93f.).

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under the same title, would be built on the cemetery, the indulgence would be lost.[63] The same title must be attached to the whole building. Therefore it would not be sufficient to retain the indulgence if the new church were built on the same spot, but under a different title, even though a chapel or altar under the old title were erected in the new church.[64]

§ 2. Indulgences attached to rosaries (beads) and other objects are lost only if the beads or objects are destroyed or sold. If blessed crucifixes or crosses perish entirely, the indulgences attached to them are lost, but if only a small portion is destroyed or lost, this part may be renewed without losing the indulgences. If the cross is removed only temporarily, for a special reason, no new blessing is required.[65] If crosses or images of the XIV Stations are removed for a time and replaced, the indulgences are not lost. If the crosses of the XIV Stations, — not the images, which are not necessary for the indulgences,— are entirely destroyed or decayed, the indulgences are lost; if only a small portion is destroyed this may be repaired.[66] It is similar with beads. If the single beads are torn asunder but collected again and put on a new string, the indulgences are not lost, even though four or five new beads would have to be added.[67]

The *selling* of such articles entails entire loss of the indulgences, no matter whether a profit was made or not.[68] The Code says nothing of giving them away, and therefore we may conclude that, unless the article together with the indulgences is the exclusive property of any one

63 S. C. Indulg., Aug. 9, 1843, ad 2 (Prinzivalli, n. 557).
64 Beringer, *l. c.*, p. 70.
65 S. C. Indulg., Jan. 30, 1839, ad 5 (Prinzivalli, n. 686).
66 S. C. Indulg., Sept. 20, 1839 (*ibid.*, n. 694).
67 S. C. Indulg., Jan. 10, 1839 (*ibid.*, 682).
68 S. C. Indulg., Dec. 14, 1722 (*ibid.*, n. 50).

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person, the indulgences are not lost if the article is given to another.[69]

ARTICLE II

THE GAINING OF INDULGENCES

CAN. 925.

§ 1. Ut quis capax sit sibi lucrandi indulgentias, debet esse baptizatus, non excommunicatus, in statu gratiae saltem in fine operum praescriptorum, subditus concedentis.

§ 2. Ut vero subiectum capax eas revera lucretur, debet habere intentionem saltem generalem eas acquirendi et opera iniuncta implere statuto tempore ac debito modo secundum concessionis tenorem.

To be capable of gaining an indulgence for onself one must be baptized, not excommunicated, in the state of grace at least when he complies with the last work prescribed, and a subject of the grantor. To really gain the indulgences the capable subject must have at least the general intention of gaining them and comply with the conditions prescribed at the time and in the manner prescribed in the grant.

The text distinguishes between the capability of gaining indulgences and the actual gaining of them. The only capable subject is a baptized Catholic who is not excommunicated, for a non-Catholic can hardly be styled *subditus concedentis*. That the *state of grace is necessary* appears from the nature of an indulgence as a remission of temporal punishment after the guilt of mortal sin has been wiped out. But the state of grace is required only

69 Somewhat different Beringer, *l. c.*, p. 359, but he wrote before the Code was promulgated.

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for the last act to be performed. Benedict XIV says that if one were not in the state of grace when making the visits of the churches prescribed for gaining the jubilee indulgence, but made a worthy confession and communion before he makes the last visit, he would gain the indulgence.[70] Of course, this is only the limit, not an example for imitation.

Another condition is that one must be a *subject* of the grantor. Therefore a bishop may grant indulgences only to his own diocesans, and a strange bishop could not, even with the consent of the local Ordinary, grant indulgences to one not of his diocese.[71]

For the *actual gaining* of indulgences the following conditions are required.

(a) One must have at least a general or *habitual intention* of gaining all indulgences which one may obtain. This lasts until formally revoked. But if Mass is said on a privileged altar, no special intention is required, nor even the general one of gaining the indulgence attached to that altar.[72]

(b) The prescribed works must be performed within *the time* prescribed, which, as said above, runs from noon to midnight. But if a special hour is stated, this must be observed.[73] Besides, the good works must be performed in the *manner* prescribed. Thus, as a rule, the prayer "*Sacrosanctae*" must be recited kneeling; yet if one is legitimately prevented, *e.g.*, by sickness or physical inability, from bending the knees, he may gain the indulgence walking or standing.[74] The indulgences attached to the

70 "*Convocatis*," Nov. 25, 1749, n. XLVII; "*Inter praeteritos*," Dec. 3, 1749, § 75.

71 S. C. Indulg., Dec. 17, 1838 (Prinzivalli, n. 480); Jan. 12, 1878, ad 2 (*A. S S.*, 11, 153 f.).

72 S. C. Indulg., March 12, 1855 (Prinzivalli, n. 661).

73 S. C. Indulg., March 7, 1771, ad 4 (*ibid.*, n. 511).

74 S. C. Indulg., July 5, 1855; Jan. 7, 1856 (*ibid.*, nn. 652, 654).

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Rosary and the Hail Mary may be gained by those who recite these prayers alternately.[75] If a member of a confraternity, sodality, or congregation, for reasons of sickness or imprisonment, cannot pay the prescribed visit to a church, he may gain the indulgence if he devoutly performs the other works described.[75] For the rest, the tenor of each rescript must be carefully inspected and its regulations observed.

CAN. 926.

Plenaria indulgentia ita concessa intelligitur ut si quis eam plenarie lucrari non possit, eam tamen partialiter lucretur pro dispositione quam habet.

A plenary indulgence is understood to be granted in such a way that if one cannot gain it in its entirety, one may gain it partially, in proportion to his disposition. See can. 921.

CAN. 927.

Nisi aliud ex concessionis tenore appareat, indulgentias ab Episcopo concessas lucrari possunt tum subditi extra territorium, tum peregrini, vagi omnesque exempti in territorio degentes.

Unless the tenor of the grant sounds differently, indulgences granted by the bishop may be gained by his subjects also when outside their own diocese. *Peregrini, vagi,* and all who live in a territory may gain the indulgences granted for that territory. This, of course, is to be understood of indulgences that are not merely local; for local indulgences cannot be gained outside the place to which they are attached.

75 S. C. Indulg., March 1, 1820 (*ibid.*, n. 420).

76 S. C. Indulg., Aug. 2, 1760 (*ibid.*, n. 248).

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CAN. 928.

§ 1. Indulgentia plenaria, nisi aliud expresse cautum sit, acquiri potest semel tantum in die, etsi idem opus praescriptum pluries ponatur.

§ 2. Partialis indulgentia, nisi contrarium expresse notetur, saepius per diem, eodem opere repetito, potest lucrifieri.

Unless the contrary is expressly stated, a *plenary indulgence* may be gained only once a day, even though the same works are performed several times. But a partial indulgence may be gained as often as the works prescribed are repeated, unless the contrary is expressly stated.

The first clause is taken from a decree of the S. Congregation, which mentions a visit to a church or another good work to which a plenary indulgence is attached. This indulgence, says the decree, may be gained only once a day.[77] Whether several different plenary indulgences may be gained on the same day by performing different works prescribed, although only one confession and communion is made, is another question.[78] Our Code only mentions *idem opus,* the same work, and hence it would be possible to gain several plenary indulgences on one day.

77 S. C. Indulg., March 7, 1678; Benedict XIV, "*Inter praeteritos,*" Dec. 3, 1749, § 84.

78 Beringer, *l. c.*, ed. 13, p. 107, affirms, and S. C. Indulg., Jan. 12, 1878, ad 3, (*Coll. P. P.*, n. 1486) favors the view.

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VISIT OF A SEMI-PUBLIC ORATORY

CAN. 929.

Fideles utriusque sexus qui, perfectionis studio vel institutionis seu educationis aut etiam valetudinis causa in domibus ecclesia vel publico sacello carentibus, de consensu Ordinariorum constitutis, vitam communem agunt, itemque personae omnes ad illis ministrandum ibidem commorantes, quoties ad lucrandas indulgentias praescribatur visitatio alicuius ecclesiae non determinatae, vel indeterminati alicuius publici oratorii, visitare queunt propriae domus sacellum in quo obligationi audiendi Sacrum iure satisfacere possunt, dummodo cetera opera iniuncta rite praestiterint.

Up to the year 1909 practice and the law prescribed a visit to a public oratory, but several indults were granted enabling the inmates of religious institutes and seminaries to gain the indulgence in their own chapels.[79] Out of these indults developed the general grant,[80] given in the year 1909, which has entered our Code. The meaning of can. 929 is that:

(a) All the faithful of both sexes, who *lead a life in common,* either as religious or as inmates of an institution, a place of study, a hospital, or asylum for the aged or disabled, may gain an indulgence for which the visit of a public oratory is prescribed,

(b) By visiting the *semi-public oratory*[81] or chapel in the house in which they reside, if this house has no public oratory or church attached, provided the house has been

79 Beringer, *l. c.*, p. 87.

80 S. O., Jan. 14, 1909 (*A. Ap. S.*, I. 210).

81 To visit a church or chapel, if one be physically or morally near it; Beringer, *l. c.*, p. 86 f.

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established with the consent of the Ordinary and is considered a religious institute.

(c) The same indulgence may be gained in the same way by all who *wait on* or serve the members of such a house and reside therein,

(d) But this favor can be made use of only if the church or public oratory, the visit of which is prescribed for gaining the indulgence, is not determined or designated. Hence, if the visit of a certain church or oratory, for instance, the parish church, or the church of a religious order, were expressly prescribed, the indulgence could not be gained in the manner described above.

(e) Finally, in order to gain the indulgence in the above-named semi-public oratory, the other works or conditions imposed must be complied with.

We may add that all who are *chronically or continually ill or prevented by some other physical obstacle* from visiting a church or public oratory, may gain the indulgence by contritely confessing their sins and, instead of receiving Holy Communion and visiting a public oratory, performing some other good works which the confessor may impose on them.[82] This privilege was extended to all sick and aged persons who live in a community and under a rule — therefore also to religious societies which are not religious communities in the strict sense,— and who cannot make the prescribed visit. For these the confessor may prescribe other pious works.[83]

82 S. C. Indulg., Sept. 18, 1862 (*Coll. P. F.*, n. 1231).

83 S. C. Indulg., Jan. 16, 1886 (*Coll. P. F.*, n. 1649).

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INDULGENCES APPLICABLE TO THE DEAD

CAN. 930.

Nemo indulgentias acquirens potest eas aliis in vita degentibus applicare; animabus autem in purgatorio detentis indulgentiae omnes a Romano Pontifice concessae, nisi aliud constet, applicabiles sunt.

No one who gains indulgences can apply them to other living persons, but he may apply all indulgences granted by the Roman Pontiff to the poor souls in Purgatory, unless a contrary provision has been made. The first part of this law is clearly intended to remove abuses. It has a dogmatical bearing, because the living gain indulgences by way of absolution, which is a strictly personal affair, whereas the *poor souls* receive the benefit of indulgences by way of suffrage and are in the state of grace. The text says that *all indulgences granted by the Roman Pontiff* are applicable to the souls in Purgatory. By decree of Sept. 30, 1852, the S. Congregation had declared that all indulgences contained in the so-called *Raccolta* could be applied to the poor souls.[84] This application must not be understood as if the living person first gains the indulgence for himself, and then transmits it to the poor souls, but in this sense, that he may gain it either for himself or for the dead.[85]

84 Prinzivalli, n. 628.

85 Beringer, *l. c.*, p. 73. The first genuine document of a papal grant of indulgences applicable to the poor souls is that of Callistus III, 1457; Beringer, p. 51 f.

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CONFESSION AND COMMUNION

CAN. 931.

§ 1. Ad quaslibet indulgentias lucrandas confessio forte requisita peragi potest intra octo dies qui immediate praecedunt diem cui indulgentia fuit affixa; communio autem in pervigilio eiusdem diei; utraque vero etiam intra subsequentem totam octavam.

§ 2. Pariter ad lucrandas indulgentias pro piis exercitiis in triduum, hebdomadam, etc., ductis concessas, confessio et communio fieri etiam potest intra octavam quae immediate sequitur exercitium expletum.

§ 3. Christifideles qui solent, nisi legitime impediantur, saltem bis in mense ad poenitentiae sacramentum accedere, aut sanctam communionem in statu gratiae et cum recta piaque mente recipere quotidie, quamvis semel aut iterum per hebdomadam ab eadem abstineant, possunt omnes indulgentias consequi, etiam sine actuali confessione quae ceteroquin ad eas lucrandas necessaria foret, exceptis indulgentiis sive iubilaei ordinarii et extraordinarii sive ad instar iubilaei.

§ 1. If *confession* is required for gaining an indulgence, it may be made within the eight days immediately preceding the day to which the indulgence is affixed; Communion may be received on the day before the feast; both confession and communion may be received during the *entire octave*. For instance, one may receive Holy Communion on the feast of All Saints, in order to gain the *toties quoties* indulgence of All Souls' Day. But if All Souls' should fall on a Monday and All Saints' on a Saturday, Holy Communion would have to be received on Sunday, for this is the day before the feast to

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which the indulgence is affixed.[86] *Confession,* if prescribed as a condition for gaining the indulgence, must be made sacramentally within eight days preceding the day to which the indulgence is attached.[87] We mention sacramental confession because this is intended by the legislator as an *opus praescriptum.*[88] However, if the penitent would have no sins at all, not even venial sins, to confess, or if he would confess a venial sin for which the confessor would think it opportune not to impart absolution, sacramental absolution would not be required for gaining the indulgence.[89]

The Code adds that both confession and Communion may be made *within the octave* following the feast day proper. This is a new law, at least we could not find any text corroborating this enactment. It can apply only to feasts which have an octave, and hence we hardly believe that the Portiuncula or All Souls' Day indulgence could be gained by going to confession and Communion during the eight days following Aug. 2nd or Nov. 2nd. Yet we do not state this opinion without misgiving, especially because of

§ 2, which rules that indulgences granted for pious exercises conducted during a triduum or a week may be gained if the prescribed confession and Communion are made during the octave immediately following the close of these devotions. Of course in that case the visit of the church or attendance at these pious exercises is required during the time these devotions are held. But confession and Communion would then be the last work required for gaining the indulgence.

86 S. C. Indulg., Oct. 6, 1870 (*Coll. P. F.*, n. 1358).

87 S. O. (Sect. Indulg), April 23, 1914 (*A. Ap. S.*, VI, 308).

88 Benedict XIV, "*Inter praeteritos,*" Dec 3, 1749, § 77.

89 S. C. Indulg., Aug. 20, 1822, ad 2 (Prinzivalli, n. 432).

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§ 3 provides that those who are accustomed to go to confession at least twice a month, or to communicate daily in the state of grace and with an upright and holy intention, although they do not receive one or the other time a week, may without confession gain all the indulgences for which confession is prescribed as a necessary condition. From this favor are excluded indulgences of the ordinary and the extraordinary jubilee.[90]

Clement XIII had already granted indulgences to those who go to confession weekly. Pius X extended this privilege to daily or quasi-daily communicants.[91] Therefore in our text *two classes* are distinguished: (a) Those who go to confession twice a month — which means every two weeks[92] and (b) those who communicate daily or almost daily. For the latter no certain time for confession is prescribed, as they are presumed to be in the "state of grace." Monthly confession would be sufficient. But from this favor are excluded jubilee indulgences, for which the Sovereign Pontiff is entitled to impose confession as a special work.[93]

PRESCRIBED WORKS

CAN. 932.

Opere, cui praestando quis lege aut praecepto obligatur, nequit indulgentia lucrifieri, nisi in eiusdem concessione aliud expresse dicatur; qui tamen praestat

90 An *ordinary jubilee* is one granted at stated periods. Boniface VIII decreed (c. 1, Extrav. Comm., V, 9) that such a one should be held every 100 years. Later one was celebrated every 33 years, and finally every 25 years, as decided by Paul II in 1470. An *extraordinary jubilee* is one held on special occasions, *e. g.*, the accession of a pope, or his golden sacerdotal jubilee.

91 S. C. Indulg., Feb. 14, 1906 (*Coll. P. F.*, n. 2228).

92 S. C. Indulg., Feb. 25, 1885 (*ibid.*, n. 1653).

93 Benedict XIV, "*Inter praeteritos*," Dec. 3, 1749, § 77 f.

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opus sibi in sacramentalem poenitentiam iniunctum et indulgentiis forte ditatum, potest simul et poenitentiae satisfacere et indulgentias lucrari.

CAN. 933.

Uni eidemque rei vel loco plures ex variis titulis adnecti possunt indulgentiae; sed uno eodemque opere, cui ex variis titulis indulgentiae adnexae sint, non possunt plures acquiri indulgentiae, nisi opus requisitum sit confessio vel communio, aut nisi aliud expresse cautum fuerit.

No indulgence can be gained by performing a good work to which *one is obliged by law or precept,* unless the grant expressly admits such duplication. Thus fasting in Lent cannot be taken as fasting for gaining an indulgence. A priest cannot comply with the condition of saying certain prayers for gaining an indulgence by reciting the Breviary.[94] But religious may perform the pious devotions which they are wont to perform, not as strict obligation, but in virtue of their constitutions, with the intention of gaining indulgences, which they thus really gain,[95] provided it is not the Breviary or Holy Office which they are bound to recite by common law (can. 610).

Those, however, who perform a good work imposed as a sacramental penance may thereby comply with the penance and gain the indulgence, if said good work be indulgenced.

To one and the same object or place indulgences may be attached on various titles, but by one and the same good work, to which by reason of different titles indul-

94 S. C. Indulg., May 29, 1841, ad 2 (Prinzivalli, n. 511).
95 Beringer, *l. c.*, p. 81.

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gences are attached, these various indulgences cannot be gained unless the work prescribed be confession or communion, or unless the rescript read otherwise. Thus if a plenary indulgence is attached to a church by reason of the patronal feast and for the Portiuncula indulgence, all these may be gained by one confession and Communion, unless confession is required for other reasons, *i.e.*, to put one into the state of grace. But the prayers or good works must be repeated for every indulgence.[96]

CAN. 934.

§ 1. Si ad lucrandas indulgentias oratio in genere ad mentem Summi Pontificis praescribatur, mentalis tantum oratio non sufficit; oratio autem vocalis poterit arbitrio fidelium deligi, nisi peculiaris aliqua assignetur.

§ 2. Si peculiaris oratio assignata fuerit, indulgentiae acquiri possunt quocunque idiomate oratio recitetur, dummodo de fidelitate versionis constet ex declaratione vel Sacrae Poenitentiariae vel unius ex Ordinariis loci ubi vulgaris est lingua in quam vertitur oratio; sed indulgentiae penitus cessant ob quamlibet additionem, detractionem, vel interpolationem.

§ 3. Ad indulgentiarum acquisitionem satis est orationem alternis cum socio recitare, aut mente eam prosequi, dum ab alio recitatur.

§ 1. If general prayers for the intention of the Sovereign Pontiff are prescribed for gaining an indulgence, *mental prayer is not sufficient;* vocal prayers may be chosen *ad libitum* by the faithful, unless some special oration is prescribed.[97] Mental prayer is praiseworthy, but to gain indulgences, vocal prayers are required, that

[96] S. C. Indulg., May 29, 1841; Jan. 12, 1878 (*Coll. P. F.*, nn. 1486 ad 3).

[97] Benedict XIV, "*Convocatis,*" Nov. 25, 1749, § LI.

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is to say, the words must be uttered exteriorly, though they need not be audible. How many "Our Fathers" and "Hail Marys" should be recited the S. Congregation refused to decide.[98] Any prayer may be chosen, provided, of course, it be orthodox and approved by the Church. The general intention of the Holy Father is the exaltation of the Church, the propagation of the faith, the uprooting of heresies and schisms, the conversion of sinners, and peace and concord among the nations.

§ 2. If a special prayer is prescribed, the indulgence may be gained by reciting that prayer in any language, provided the accuracy of the translation is assured by a declaration of either the S. Poenitentiaria or the Ordinary of any diocese where the language is spoken. But all indulgences cease if any addition, subtraction or interpolation is made to the required prayers. Concerning the *quality* of the prayer it may be worth while to add a few remarks on the *Officium Parvum B. M. V.* A plenary indulgence may be gained by those who recite this office daily for one month; seven years and seven quadragenes (*i.e.*, 490 days of the old fast) for reciting it once a day. Formerly this office had to be said in Latin, but Leo XIII permitted it to be recited, privately, in the vernacular without losing the indulgence.[99]

For the *approval of translations* the diocesan ordinaries are competent. The text says: *unius ex Ordinariis,* one of the Ordinaries. Hence if the Ordinary of one diocese in our country approves an English translation of a prayer, it is sufficient for all dioceses where English is

[98] S. C. Indulg., May 29, 1841; Sept. 13, 1888 (*Coll. P. F.*, nn. 922, 1693).

[99] S. C. Indulg., April 30, 1852; Dec. 29, 1864; Sept. 13, 1888; Aug. 18, 1903 (*Coll. P. F.*, Vol. II, p. 699).

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spoken, even across the sea. The Ordinary is the one in whose diocese the English translation is either printed or published.[1]

The last clause of § 2 speaks of *addition, diminution,* and *interpolation,* all of which processes are prohibited under penalty of depriving a prayer of its indulgences. Such an addition, for instance, is the repetition of the mysteries in saying the Holy Rosary.[2] No particular rescript can abolish this general law, unless it be granted *after* the promulgation of the Code.

§ 3. To gain an indulgence it is enough to recite the prescribed prayer alternately with a companion, or to follow it in one's mind while another recites it. Thus by reciting the Rosary or the Angelus in common or together with others the indulgences may be gained by all who participate in the recitation,[3] and even by those who follow the one who recites the prayers only mentally, not orally.

COMMUTATION OF PIOUS WORKS

CAN. 935

Pia opera ad lucrandas indulgentias iniuncta, confessarii possunt in alia commutare pro iis qui, legitimo detenti impedimento, eadem praestare nequeant.

Pious works imposed for gaining indulgences may be commuted by the confessor into other good works for those who are lawfully prevented from performing the good works prescribed.

1 Can. 1390.

2 There is absolutely no foundation for the assumption that a particular decision or indult given for any diocese or for a particular language, can be transferred to other dioceses and other languages. If no other reason, at least the danger of exposing the faithful to losing the indulgence should stop this practice.

3 S. C. Indulg., 1820, ad 4 (Prinzivalli, n. 420).

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Thus, as mentioned above, sick and aged persons who cannot visit a prescribed church may have that requirement changed into some other good work.[4] Christians in China and Siam, who were members of the Confraternity of the Holy Rosary, but unable to recite the beads in common, were permitted to have this work changed into other works of charity and religion.[5] A commutation may be granted by the confessor also outside the confessional,[6] but not beyond the limits set by the papal constitutions or rescripts.[7]

MUTES

CAN. 936

Muti lucrari possunt indulgentias adnexas publicis precibus, si una cum ceteris fidelibus in eodem loco orantibus mentem ac pios sensus ad Deum attollant; et si agatur de privatis orationibus, satis est ut eas mente recolant signisve effundant vel tantummodo oculis percurrant.

Mutes may gain the indulgences attached to the recital of *public prayers* if together with the other faithful they assist and raise their mind and senses to God; as to *private* prayers it is sufficient that they recollect them in their mind and follow them either by signs or with their eyes (if they are able to read).

They need not pronounce the prayers or move their lips; nor need they recur to the confessor in each case; the law grants them this facility for gaining indulgences.[8]

4 S. C. Indulg., Jan. 16, 1886, ad 2 (*Coll. P. F.*, n. 1649).

5 S. C. P. F., Sept. 19, 1773 (*Coll.*, n. 499).

6 S. C. P. F., Feb. 20, 1801 (*Coll.*, n. 657).

7 Benedict XIV, "*Inter praeteritos*," Dec. 3, 1749, § 52 f.

8 S. C. Indulg., Feb. 16, 1852; July 18, 1902 (*Coll. P. F.*, n. 2147).

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TITLE V

EXTREME UNCTION

CAN. 937

Extremae unction is sacramentum conferri debet per sacras unctiones, adhibito oleo olivarum rite benedicto, et per verba in ritualibus libris ab Ecclesia probatis praescripta.

The Sacrament of Extreme Unction must be administered by the sacred anointments, with duly blessed olive oil, and by pronouncing the words prescribed in the rituals approved by the Church.

This Sacrament, as the Council of Trent[1] defines, was instituted by our Lord and promulgated by St. James the Apostle in his Epistle, which Luther rejected as apocryphal. The *remote matter* is pure *olive oil,* to the exclusion of all other oils, such as that made from nuts, sesame, cottonseed. The *proximate matter* is the act of anointing the body. What parts of the body must be anointed, or how many anointings constitute the essence of the Sacrament, cannot be determined with certainty from the ancient rituals, as they show a great diversity.[2] However, since in case of necessity (can. 947), a single unction is admitted as valid, it would be presumptuous to demand more. Ordinarily, and outside the case of necessity, the separate anointment of the seats of the five

1 Sess. 14, c. 1: can. 1–3, *de extrema Unct.*

2 Cfr. Pohle-Preuss, *The Sacraments,* IV, p. 19; J. Kern, S. J., *Tract. de Sacr. Extr. Unct.,* 1907.

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senses,— sight, hearing, smell, taste, and touch,— constitutes the proximate matter of Extreme Unction.[3] The form of the Sacrament consists in the *words* used at the anointings, as prescribed by the Roman Ritual.[4]

[3] *Decr. pro Arm.* (Denzinger n. 595).
[4] Tit. V, c. 1, n. 1.

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CHAPTER I

THE MINISTER OF EXTREME UNCTION

CAN. 938

§ 1. Hoc sacramentum valide administrat omnis et solus sacerdos.

§ 2. Salvo praescripto can. 397, n. 3, 514, §§ 1–3, minister ordinarius est parochus loci, in quo degit infirmus; in casu autem necessitatis, vel de licentia saltem rationabiliter praesumpta eiusdem parochi vel Ordinarii loci, alius quilibet sacerdos hoc sacramentum ministrare potest.

CAN. 939

Minister ordinarius ex iustitia tenetur hoc sacramentum per se ipse vel per alium administrare, et in casu necessitatis ex caritate quilibet sacerdos.

Every priest, and no one but a priest, may validly administer this sacrament. This follows from James V, 14 f., and was expressly defined by the Council of Trent.[1] Since *every* priest may validly administer this sacrament, it follows that excommunicated, suspended, interdicted or degraded priests are not excluded, though such, of course, cannot confer it licitly, as it flows from the power of order, not of jurisdiction. And because *no one but a priest* may confer Extreme Unction, no inferior cleric, though otherwise of the highest rank, can validly admin-

1 Sess. 14, c. 4, *de extr. Unct.*

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ister it. Not even the Pope could grant this power to a cleric who is not endowed with the priestly character. The singular (*sacerdos,* priest) must not be understood as if several priests could not administer this sacrament conjointly, as is customary with the Greeks, among whom seven priests together confer this Sacrament. This custom has not been reproved by the Church, but the Greeks are held to believe that one priest is sufficient to administer Extreme Unction validly and licitly.[2]

The ordinary minister of Extreme Unction is the *priest of the parish* where the sick person resides. In case of necessity, however, any priest may administer this Sacrament.

Since the administration of Extreme Unction is strictly a *parochial right,* it is by law [3] reserved to the pastor, and assistant priests or curates must have the pastor's permission to exercise it. This permission may be given habitually. Besides, the diocesan statutes or letter of appointment [4] may determine whether assistants have the right. The *oeconomus,* or temporary administrator, of a parish enjoys full parochial rights and may therefore give permission to administer this Sacrament [5] to another priest. *Regulars* have been enjoined time and again [6] not to interfere with this right. Secular Tertiaries are not allowed to receive this Sacrament at the hands of the Friars Minor.[7] To canons of cathedral as well as collegiate chapters this Sacrament must be administered by the pastor in whose parish they have their domicile.[8] Ex-

2 Benedict XIV. "*Etsi pastoralis,*" May 26, 1742, § V, n. III; "*Ex quo,*" March 1, 1756, § 45.

3 See can. 462.

4 Can. 476, § 6.

5 Can. 473; S. C. C., Sept. 12, 1874 (*A. S. S.,* VIII, 129 f.).

6 C. 1, Clem. V, 7; S. C. C., June 7, 1698, etc.; Benedict XIV, *De Syn. Dioec.,* VIII, 4, 7; IX, 16, 2.

7 S. Rit. C., June 20, 1609 ad 1 (*Dec. Auth.,* n. 271).

8 S. Rit. C., March 17, 1663, ad 4; May 13, Dec. 18, 1756 (*Dec. Auth.,* nn. 1255, 2441).

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empt from these rules is the Ordinary of the diocese, to whom the dignitaries or canons, according to rank and precedence, should administer Extreme Unction.[9] Besides can. 514 must here be applied, as explained elsewhere.[10]

The *ordinary minister,* says can. 939, is *obliged* in *justice* to administer Extreme Unction either himself or by a substitute. In case of necessity every priest is bound *by charity* to administer this Sacrament. This law was inculcated by Clement XII and Benedict XIV, who exhorted missionaries not to discriminate between rich and poor, as even pagan physicians do not disdain to minister to the lower classes (Pariahs).[11]

That great canonist and Pontiff, Benedict XIV, also discussed the question whether a pastor is obliged to administer Extreme Unction to such as are afflicted with a contagious or epidemic disease. After having quoted several authors, among them Suarez and Silvius, he concludes that sound theology answers in the affirmative, but adds that the pastor may send another priest and that all reasonable precautions should be taken to avoid contagion.[12]

9 Can. 397, n. 3.

10 Cfr. Vol. III, 141 ff., of this Commentary.

11 See the Constit. quoted by Gasparri *ad l. c.*

12 *De Syn Dioec.*, XIII, 19, 8–10.

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CHAPTER II

THE SUBJECT OF EXTREME UNCTION

CAN. 940

§ 1. Extrema unctio praeberi non potest nisi fideli, qui post adeptum usum rationis ob infirmitatem vel senium in periculo mortis versetur.

§ 2. In eadem infirmitate hoc sacramentum iterari non potest, nisi infirmus post susceptam unctionem convaluerit et in aliud vitae discrimen inciderit.

Extreme Unction may be administered only to faithful Catholics who have reached the age of discretion and are in danger of death on account of sickness or old age. The Sacrament may not be repeated in the same sickness, unless the patient has recovered after receiving Extreme Unction and his condition has again become critical.

The term *faithful Catholic* includes *neophytes, i.e.,* persons newly baptized, though concerning these, the Holy Office has decided that they may receive the Sacrament only if they are sufficiently instructed to receive it with profit and have the intention of receiving it for the benefit of their souls.[1]

The subject of Exreme Unction must have reached the *age of discretion, i.e.,* about the seventh year. It is the purpose of this Sacrament, as the form, *Indulgeat,* etc., indicates, to wipe out actual sins committed by the bodily

1 S. O., May 10, 1703 ad 8; April 10, 1801, ad 1; S. C. P. F., Sept. 26, 1821 (*Coll.*, nn. 256, 1213, 708).

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senses, which could not be accomplished in infants.[2] The same rule applies to those who have been insane from childhood,[3] though if the disease was contracted after the age of discretion, Extreme Unction can be administered.

The person to whom Extreme Unction is administered, must be *sick or so old* that the danger of death is at least very probable. The Greeks were accustomed to administer this Sacrament also to the healthy, but the Church has never tolerated the custom.[4] Those who are not sick, though exposed to probable or certain danger of death (soldiers, condemned criminals, travellers engaged in a dangerous journey, etc.) cannot receive this Sacrament.[5] Neither may women at childbirth, unless some extraordinary and serious illness should accompany the labor pains.[6]

The text says *ob senium,* including those who are in danger of death on account of old age. Benedict XIV says that people of advanced age die easily, and old age leads to a dissolution of the bodily faculties.[7] But some signs of approaching dissolution, such as fainting or sinking spells, should appear before Extreme Unction is given. Old age is generally held to commence with the sixtieth year, which also frees from the obligation of fasting.

§ 2 forbids repetition of Extreme Unction in the same sickness. Benedict XIV, after an interesting historical investigation, says:[8] If the crisis is passed, but the pa-

2 S. Thom., *Com. in. Sent.*, IV, dist. 23, q. 3, art. 2; Benedict XIV, *De Syn. Dioec.*, VIII, 6, 1; S. C. Sacr., Aug. 8, 1910, n. VIII (*A. Ap. S.*, II, 583).

3 Benedict XIV, *l. c.*, VIII, 6, 3 f.

4 Benedict XIV, *"Etsi pastoralis,"* May 26, 1742, § V, n. II.

5 *Rit. Rom.*, tit. V, c. 1, n. 9.

6 Benedict XIV, *De Syn. Dioec.*, VIII, 5, 1.

7 *Ibid.*, n. 2.

8 *Ibid.*, VIII, 8, 3, where he mentions the fact that the monks of Hirsau used to anoint their sick brethren every three years.

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tient has not entirely recovered, and suffers a serious relapse, Extreme Unction may be administered without hesitation. If the pastor is in doubt whether the crisis is a new one, or a continuation of the former, he should incline to repeated administration, because this is more in conformity with the ancient practice of the Church. It is not necessary to await the last stage of danger, or even the critical moment, and consumptives, etc., may be anointed even if there is no immediate danger. This rule applies especially in missionary countries, where priests are not always to be had.[9]

CAN. 941

Quando dubitatur num infirmus usum rationis attigerit, num in periculo mortis reipsa versetur vel num mortuus sit, hoc sacramentum ministretur sub conditione.

When it is doubtful whether the sick person has attained the use of reason — not the age of discretion — or whether he or she is really in danger of death, or already dead, Extreme Unction should be conferred conditionally.

According to high medical authority death sometimes does not occur for an hour or more after a man has drawn his last breath, and hence Extreme Unction may be administered during the interval.

CAN. 942

Hoc sacramentum non est conferendum illis qui impoenitentes in manifesto peccato mortali contumaciter perseverant; quod si hoc dubium fuerit, conferatur sub conditione.

9 S. C. P. F., Feb. 10, 1801 (*Coll.*, n. 651).

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This Sacrament may not be administered to those who stubbornly and manifestly live in the state of grievous sin; in case of doubt, however, let it be administered conditionally.

This rule may cause some trouble, especially in the case of *Freemasons* and persons enrolled in a cremation society. All such persons should be admonished to retract the order they have given to have their bodies cremated. If they refuse, Extreme Unction cannot be administered. *When* and *how* the admonition is to be made, is a matter for pastoral prudence; above all, the danger of scandal must be removed.[10]

CAN. 943

Infirmis autem qui, cum suae mentis compotes essent, illud saltem implicite petierunt aut verisimiliter petiissent, etiamsi deinde sensus vel usum rationis amiserint, nihilominus absolute praebeatur.

To those who asked for Extreme Unction at least implicitly or interpretatively whilst in the full possession of their mental faculties, the Sacrament may be administered even though they lose their senses or the use of reason.

This agrees with the advice given to an American bishop who had asked which sacraments may or should be given to *consuetudinarii*, or *recidivi*, or such as are utterly careless of their spiritual welfare. The answer was: If they have given signs of repentance, Extreme Unction may be administered.[11] Broadly speaking, it may be said that, unless positive refusal lasting up to the moment of unconsciousness can reasonably be assumed, this Sacrament may be administered.

10 S. O., July 27, 1892, ad 1 (*Coll. P. F.*, n. 1808).

11 S. O., May 9, 1821 (*Coll. P. F.*, n. 757).

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CAN. 944

Quamvis hoc sacramentum per se non sit de necessitate medii ad salutem, nemini tamen licet illud negligere; et omni studio et diligentia curandum ut infirmi, dum sui plene compotes sunt, illud recipiant.

Although this Sacrament is not absolutely necessary as a means of salvation, yet no one may neglect it; and care and diligence should be taken that the sick receive it while fully conscious.

Although, according to the theologians,[12] it would not be a grievous sin not to receive Extreme Unction, every pastor is under grievous obligation to administer this Sacrament to those who ask for it.[13] Regulars or religious who are missionaries are obliged by a decision of the Holy Office to obey the same law.[14] The Nestorians, and Orientals in general, have been admonished not to be neglectful in the administration of this Sacrament.[15] Bishops should see to it that pastors perform their duty in this regard.[16]

12 Cfr. Noldin, *De Sacram.*, ed. 10, n. 461.

13 S. O., March 23, 1656; S. C. P. F., Sept. 12, 1645 (*Coll.*, nn. 126, 114).

14 S. O., Nov. 13, 1609 (*Coll. P. F.*, n. 189).

15 Benedict XIV, "*Ex quo*," March 1, 1756, §§ 44, 46; S. C. P. F., July 31, 1902, n. 7 (*Coll.*, n. 2149).

16 Benedict XIV, "*Firmandis*," Nov. 6, 1744, § 9.

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CHAPTER III

RITES AND CEREMONIES

OLIVE OIL BLESSED BY THE BISHOP

CAN. 945

Oleum olivarum, in sacramento extremae unctionis adhibendum, debet esse ad hoc benedictum ab Episcopo, vel a presbytero qui facultatem illud benedicendi a Sede Apostolica obtinuerit.

The olive oil to be used in the administration of Extreme Unction must be blessed for that purpose by the bishop or by a priest who has obtained the necessary faculty from the Apostolic See.

Concerning the necessity of using olive oil blessed by a bishop different opinions were held, but it is safe to say that this canon embodies an ancient practice, mentioned by Innocent I as universal in the Western Church.[1] In the Greek Church the priests themselves bless the oil before administering this Sacrament.[2]

CAN. 946

Oleum infirmorum parochus loco nitido et decenter ornato in vase argenteo vel stamneo diligenter custodiat, nec domi retineat nisi ad normam can. 735.

The "oil of the sick" must be preserved in a vessel of silver or white metal (a composition of lead and silver),

1 Innocent I, *Ep., ad Decent. Eugub.*, 25, (Denzinger, n. 60).

2 Benedict XIV, "*Etsi pastoralis,*" May 26, 1742, § IV, n. 1.

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and in a neat and properly equipped place; — but it may not be kept at home, except in the case permitted by can. 735 (*q.v.*).

THE ANOINTINGS

CAN. 947

§ 1. Unctiones verbis, ordine et modo in libris ritualibus praescripto, accurate peragantur; in casu autem necessitatis sufficit unica unctio in uno sensu seu rectius in fronte cum praescripta forma breviore, salva obligatione singulas unctiones supplendi, cessante periculo.

§ 2. Unctio renum semper omittatur.

§ 3. Unctio pedum ex qualibet rationabili causa omitti potest.

§ 4. Extra casum gravis necessitatis, unctiones ipsa ministri manu nulloque adhibito instrumento fiant.

The anointments must be accurately performed, as stated in the Roman Ritual, which prescribes the words, the order and the manner of anointing. In case of necessity one anointment on the forehead with the short formula is sufficient; but the obligation of supplying the other anointments remains when the danger is over. The anointment of the loins is always to be omitted. The anointment of the feet may be omitted for any reasonable cause. Except in case of grave necessity, the anointments must be made by direct touch, without instruments. The Ritual exactly prescribes the manner in which this Sacrament must be conferred. Its prescriptions should be strictly followed. An anointing performed simultaneously by several priests who would divide the sacred function in order to gain time would

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be valid, but allowed only in case of grave necessity,[3] for which, however, the Code provides more effectively by ordaining that, when there is grave danger, one anointment is sufficient. This must be made on the forehead, with the formula: "*Per istam sanctam unctionem indulgeat tibi Dominus quidquid deliquisti. Amen.*"

A new and welcome regulation is the permission to *omit the anointment of the feet* for any reasonable motive, which we must leave to pastoral prudence and hygienics to determine.

Concerning the use of an "instrument," *e.g.*, a brush or a piece of cotton (*stylus, virgula*) or a little stick or twig, this may be allowed in contagious diseases, especially the bubonic plague,[5] but outside such cases of necessity, it is strictly forbidden.[6]

3 Cfr. *Anal. Eccl.*, 1900, Vol. 8, p. 428 f.

4 S. O., April 25, 1906 (*Coll. P. F.*, n. 2233).

5 S. O., July 11, 1754; S. C. P. F., June 21, 1788. (*Coll.*, n. 596).

6 S. Rit. C., May 9, 1857, ad II (*Dec. Auth.*, n. 3051).

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TITLE VI

HOLY ORDERS

CAN. 948

Ordo ex Christi institutione clericos a laicis in Ecclesia distinguit ad fidelium regimen et cultus divini ministerium.

What was said in Vol. II of this Commentary on the hierarchic distinction between clergy and laity, and the degrees of the hierarchic order, may suffice to illustrate the present canon.[1] It is the hieratic element, the power of order established by Christ himself, which distinguishes the clergy from the laity or ordinary faithful. It is the clergy who govern the faithful and conduct the divine worship. To the clergy is entrusted the government and administration of the mystical and the real body of Christ, whereas the laity cannot validly perform any act of jurisdiction or order.[2] This power is conferred by the Sacrament called Orders. There are various degrees, but conjointly taken, they signify the Sacrament by which a layman is marked with the clerical character, which can never be effaced.

CAN. 949

In canonibus qui sequuntur, nomine ordinum *maiorum* vel *sacrorum* intelliguntur presbyteratus, diacon-

1 Vol. II, p. 41 ff.
2 *Trid.*, sess. 23, can. 3, *de Sacr. Ord.*; cfr. *Professio Fidei Waldensibus proposita* (Denzinger, n. 370).

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atus, subdiaconatus; *minorum* vero acolythatus, exorcistatus, lectoratus, ostiariatus.

In the following canons the term *higher* or *sacred orders* signifies the priesthood, the diaconate, and the subdiaconate; the term *minor orders* signifies the offices of acolythe, exorcist, lector and doorkeeper. Here we must again refer to Vol. II.

Subdeaconship, properly speaking, is a *major,* but cannot strictly be called *sacred* order because it is not a Sacrament in the true sense of the word.[3]

The *episcopate* is a Sacrament, but is not enumerated among the higher or sacred orders for the reason that ecclesiastical terminology[4] has drawn a line of distinction between the episcopate, which contains the fullness of the priesthood, and the inferior ranks. Hence the order of the episcopate is marked as an independent and superior dignity or office, a singular institution, for the reason, no doubt, that the bishops are the spiritual fathers of the clergy whom they ordain.

Can. 950

In iure verba: *ordinare, ordo, ordinatio, sacra ordinatio,* comprehendunt, praeter consecrationem episcopalem, ordines enumeratos in can. 949 et ipsam primam tonsuram, nisi aliud ex natura rei vel ex contextu verborum eruatur.

Though the episcopate stands out prominently, it, too, is conferred by the Sacrament of Holy Orders, and order means a distinct degree of the hierarchic constitution, or of ecclesiastical power in general. In law, therefore, the

3 Cfr. Pohle-Preuss, *The Sacraments,* IV, p. 107 f.; c. 11, Dist. 32.

4 C. 4, Dist. 60: "*sacros autem ordines dicimus diaconatum et presbyteratum.*"

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terms "*ordinare, ordo, ordinatio, sacra ordinatio*" comprise not only the orders mentioned in the preceding canon, but also the episcopate and the first tonsure, unless the nature of the thing itself or the context imply a different meaning.

The act by which one receives the *episcopate* is properly called *consecration,* but since this act requires the use of the same matter and form which constitute the substance of Holy Orders, it is evident that the general terms: to ordain, ordination, etc., include the episcopal order. The Code does not pretend to solve the controversy concerning the sacramental character of the episcopate or that regarding the essence of the Sacrament — whether it consists in the act of delivering the instruments or in the laying on of the hands, or in both. As to tonsure, we have elsewhere noted that it is not a Sacrament but merely a preparation for Holy Orders.[5]

[5] Cfr. Vol. II, p. 43 f.; Layman, *Theol. Moralis,* l. V, tr. 9, c. 3, n. 3.

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CHAPTER I

THE MINISTER OF ORDINATION

CAN. 951

Sacrae ordinationis minister ordinarius est Episcopus consecratus; extraordinarius, qui, licet charactere episcopali careat, a iure vel a Sede Apostolica per peculiare indultum potestatem acceperit aliquos ordines conferendi.

The ordinary minister of sacred ordination is every (validly) *consecrated* bishop, even though he be a schismatic or heretic.

This was defined in the Decree for the Armenians and again by the Council of Trent.[1] However, it must be added that although every validly consecrated bishop may ordain validly, yet he must make use of the proper form in the act of ordination, and have the intention of conferring the power attached to the Sacrament; or rather, let us say, the *ordinans* must not positively exclude the intention of the Church. From this point of view the Anglican Orders were declared invalid by Leo XIII, in his "*Apostolicae curae,*" of Sept. 13, 1896.[2]

In saying that the bishop is the ordinary minister of the Sacrament of Holy Orders, the Code implicitly admits an *extraordinary minister, i.e.,* one who, though lacking the episcopal character, has obtained the power of ordain-

1 *Dec. pro Arm.*, Denzinger, n. 596; *Trid.*, sess. 23, c. 4; can. 7, *de Sac. Ord.*

2 See *Cath. Encycl.*, I, 491 ff.

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ing either by law, or by a special indult of the Apostolic See.

By law the following are extraordinary ministers of sacred ordination:

(a) The *Cardinals,* who have the privilege of conferring the *tonsure* and *minor orders,* provided the *promovendus* can show a dimissorial letter from his Ordinary. It is, of course, supposed that Cardinals are endowed with the priestly character; and if so, it matters nothing whether they are cardinal bishops, priests or deacons.[3]

(b) *Vicars Apostolic* and *Prefects Apostolic* may confer the tonsure and minor orders within their own territory and during their term of office, as per can. 957.

(c) *Abbates regiminis* may confer the tonsure and minor orders according to can. 964.

By a *special indult of the Apostolic See* a simple priest may obtain the faculty of bestowing tonsure and minor orders, though not, according to present practice, the subdeaconship or the diaconate.[4] Two things, however, are essential: (1) that the *ordinans* must be a priest, and (2) that a privilege or indult be obtained. If one who had received minor orders from a simple priest without faculties, were afterwards raised to sacred orders by a bishop, he would have to receive tonsure and minor orders again, but not the higher orders properly conferred by the bishop.[5]

3 Cfr. c. 11, x, I, 14; can. 232, § 1; can. 239, § 1, n. 22.

4 Concerning the Constitution of Innocent VIII, see Pohle-Preuss, *l. c.*, p. 124; *Anal. Eccl.*, 1901, p. 312 ff.

5 Cfr. c. 2, Dist. 68; c. 11, x, I, 14; S. C. Ec. it RR., Dec. 22, 1578 (Bizzarri, *Collectanea,* p. 218 f).

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PROMOTED BY THE POPE

CAN. 952

Nemini licet ordinatum a Romano Pontifice ad altiorem ordinem promovere sine Sedis Apostolicae facultate.

This is a celebrated text. Its original source is a rescript of Innocent III to the bishop of Modena. The facts were these: a cleric who had been ordained subdeacon by the Pope, was to be promoted to the diaconate by the bishop of Bologna, who had received an indult to that effect from Pope Innocent III.

Our canon says: *No one ordained by the Roman Pontiff may lawfully be promoted to a higher order without an Apostolic faculty.* This rule, however, holds only if the Pope in *person,* or another prelate by special command of the Pontiff, ordains a clergyman. Consequently, one ordained in Rome by the Cardinal Vicar does not enjoy this distinction.[6] On the other hand, it does not matter what order the Pope conferred, for the text says: "*Ordinatum a Romano Pontifice,*" and this term includes tonsure, according to can. 950. The episcopate also is comprised therein, but this is mentioned especially in can. 953.

MANDATUM DE CONSECRANDO

CAN. 953

Consecratio episcopalis reservatur Romano Pontifici ita ut nulli Episcopo liceat quemquam consecrare in Episcopum, nisi prius constet de pontificio mandato.

6 Benedict XIV, "*In postremo,*" Oct. 20, 1756, § 3 f.

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Episcopal consecration is reserved to the Roman Pontiff, and no bishop is allowed to consecrate anyone unless he is certain of the papal mandate.

Formerly, according to the Decretals,[7] the metropolitan had the right to consecrate suffragan bishops.[8] This right was, however, purely historic and could not prejudice the universal right of the Sovereign Pontiff, who at all times could, without usurpation, restrict or withdraw the faculty of metropolitans with regard to their suffragans. The change was brought about gradually in the form of a *mandate*. The *Pontificale Romanum*[9] prescribes that the consecrator must obtain a papal commission in the form of an Apostolic letter, if he resides outside the Curia, or an oral commission by the Roman Pontiff if he is a Cardinal,— we suppose *de curia*. Benedict XIV modified a former Constitution of Benedict XIII so as to permit the *consecrandus* to choose as his consecrator any bishop in union with the Holy See if the consecration was to take place outside the City of Rome. In Rome the *consecrandus* had to choose a cardinal endowed with the episcopal character, or one of the four titular patriarchs. As a reminder of the ancient discipline Benedict XIV ordered that if the metropolitan should chance to be in Rome at the time one of his suffragans was consecrated, the consecration should be performed by him.[10]

The canon then states: "*nisi prius constet de pontificio mandato.*" This mandate, as noted above, is given orally when the consecration is performed in Rome, but if it takes place outside the City, an *Apostolic letter* is required, which must be in the hands of the consecrator

7 Cc. 11, 32, x. I, 6; cfr. c. 3, Dist. 65.

8 Benedict XIV, *l. c.*, § 15.

9 *De consecratione electi in episcopum.*

10 "*In postremo*"; § 16.

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before he is allowed to perform the function. Without such a mandate he acts unlawfully, though validly. It is not sufficient that the letters be expedited in Rome and unofficial notice be sent of the fact.[11] If, however, certain and authentic notice has been received that the letters have been expedited in Rome, the law is complied with.[12] But an official or authentic notice can come only from the Roman Court. Thus any message, sent by the Secretariate of State by telephone, telegraph, or (we presume) wireless, to the effect that the Apostolic letters were expedited, would create a certainty.[13] The *mandatum consecrationis* may be contained in the letters of promotion in the form of the clause: "*ut electus a quocunque maluerit catholico antistite, gratiam et communionem Apostolicae Sedis habente consecrationis munus accipere valeat.*" When this clause does not occur in the letter of promotion, or when the letter contains a clause to the contrary, a special papal mandate is required for the consecration.[14]

This law is technically perfect, as it has a *penal sanction* attached to it. Those who bestow or receive consecration without an Apostolic mandate incur *suspension ipso facto,* which lasts until the Apostolic See expressly dispenses therefrom.[15]

11 Alexander VII, "*Alias,*" Feb. 27, 1660.

12 S. C. P. F., Dec. 30, 1781 (*Coll.*, n. 551).

13 S. O., Aug. 24, 1892; Sec. Status, Dec. 10, 1891 (*Coll. P. F.*, nn. 1810, 1775).

14 Leo XIII, "*Trans Oceanum,*" April 18, 1897 (*Coll. P. F.*, n. 1965, ad 1).

15 Can. 2370.

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CONSECRATORS

CAN. 954

Episcopus consecrator debet alios duos Episcopos adhibere, qui sibi in consecratione assistant, nisi hac super re a Sede Apostolica dispensatum fuerit.

Pseudo-Isidore has set up a fanciful reason why a bishop should not be consecrated by less than three bishops: — because, he says, James was consecrated bishop of Jerusalem by three Apostles, Peter, James the Elder and John.[16] The real reason for this ancient custom must be sought in the fact that the metropolitans were wont to consecrate their suffragans and the patriarchs the metropolitans, in the presence of the bishops of the same province. And as it was often impossible for all the bishops of a province to meet for the occasion, it grew to be the custom that at least three took part in every consecration.[17] Our canon prescribes that the *consecrator shall be assisted by two other bishops,* unless an Apostolic dispensation has been granted from this rule. This law does not affect the validity of a consecration,[18] but constitutes a grievous obligation to employ two co-consecrating bishops. Sometimes the Roman Court grants a dispensation permitting the employment of two dignities of the cathedral chapter, or simply two dignities, as assistants.[19] Thus Leo XIII permitted the bishops of *Latin America* to employ two dignitaries whenever two bishops were not readily available.[20] This indult is still

16 C. 2, Dist. 66.

17 C. 5, Dist. 51; c. 1, Dist. 64; c. 5, Dist. 65; Phillips, *K.-R.*, Vol. I, 1845, p. 362 f.

18 S. C. P. F., May 18, 1695 (*Coll.*, n. 239); somewhat surprising S. Rit. C., Dec. 17, 1642 (*Dec. Auth.*, n. 820): *convalidari posse;* but Benedict XIV, *De Syn. Dioec.*, XIII, 13, 7, plainly states the validity.

19 S. Rit. C., July 16, 1605 (*Dec. Auth.*, n. 186).

20 "*Trans Oceanum,*" ad 1.

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in force for that country, as the Code clearly says: "*nisi Ap. Sedis dispensaverit.*" If the two assistants at a consecration are not bishops, they must touch the head of the *consecrandus* with both hands, and in all other respects, also, carefully observe the prescriptions of the *Pontificale Romanum.*[21]

THE EPISCOPUS PROPRIUS

CAN. 955

§ 1. Unusquisque a proprio Episcopo ordinetur aut cum legitimis eiusdem litteris dimissoriis.

§ 2. Episcopus proprius, iusta causa non impeditus, per se ipse suos subditos ordinet; sed subditum orientalis ritus, sine apostolico indulto, licite ordinare non potest.

It is a time-honored principle[22] in the Church that no bishop or metropolitan shall trench upon the rights or powers of another bishop or ordinary, especially in regard to the exercise of pontifical rights, such as ordination.[23] Since one becomes incorporated in the Church by Baptism, and Baptism in the first four centuries was conferred on adults by the bishop himself, it was but natural that the spiritual father had the first claim on persons thus regenerated. *Baptism* constituted the first title for the competency of the bishop, and the synods of Sardica (343) and Antioch (332) strictly forbade bishops to coax laymen or subjects of one diocese or province into another and to ordain them to the clericate, except after having obtained the consent of their proper bishop.[24]

21 S. Rit. C., June 9, 1853 (*Dec. Auth.*, n. 3014).

22 C. 1, Dist. 71 (*Conc. Sardic.* x.).

23 *Trid.*, sess. 6, c. 5 *de ref.*

24 Cfr. Dist. 71; Thomassinus, *Vetus et Nova Discipl. Eccl.*, P. II, l. 1, c. 1.

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When infant Baptism came into vogue in the 10th century, it became necessary to examine the *origin* or birth of those who wished to enter the clerical ranks. Those who wished to be ordained in a strange country had to exhibit letters from the bishop of their own country. This practice was formally sanctioned by a decretal of Clement IV, who acknowledged as a further reason for competency *benefice,* by reason of which that Ordinary was competent who had bestowed a benefice upon the *ordinandus.*[25] The canonists and legists drew from the Roman law the title of domicile and introduced it into church discipline. Thus the *domicile* of the ordinand was legalized.[26] Three grounds of competency are therefore discernible in the Decretals: origin, domicile, and benefice. To these the Council of Trent added *familiaritas.*[27] The Code admits only origin and domicile.

It is almost superfluous to add that, as Clement IV had already decided that the *Popė* may grant permission to be ordained by any bishop, so he himself may ordain anyone anywhere.

Can. 955 in its § 1, lays down the general rule that *everyone should be ordained by his own bishop or at least with dimissorial letters from the latter.* These letters are nothing else but the (written) consent of the bishop permitting one of his subjects to be ordained by another bishop. The text plainly refers to the old practice and to the Council of Trent,[28] which complained that bishops *in partibus infidelium* had, like mercenaries, invaded the dioceses of others and ordained clerics indiscriminately without letters of recommendation. The result was that unfit and unworthy persons, nay even such as had been formally rejected by their own bishops,

25 C. 1, 6°, I, 9.
26 C. 3, 6°, I, 9.
27 Sess. 23, c. 9, *de ref.*
28 Sess. 14, c. 2, *de ref.*

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were ordained. Therefore the Council required that no titular bishops should dare to ordain another bishop's subjects without his consent.

This prohibition was extended to all bishops in regard to those not subject to them.[29]

Dimissorial letters are required also for conferring the *tonsure*.[30] Vicars Apostolic are not exempt from this law.[31] One decision of the S. Congregation declares that patriarchs should not impede the exercise of the jurisdiction of their suffragans with regard to ordination.[32] From this it may be easily deduced that metropolitans are not entitled to interfere in this matter. Concerning the form of these letters, see can. 960.

§ 2 rules that the *episcopus proprius*, unless prevented by a just reason, *should himself ordain his subjects*, and that no bishop of the Latin rite may ordain a subject of an oriental Rite lawfully without an Apostolic indult.

The Council of Trent and a Constitution of Innocent XIII mention only one reason (sickness) which would justify the *ordinarius proprius* in not ordaining his own subjects.[33] Our Code, however, is more liberal, as it admits any *iusta causa*. Hence any lawful impediment, but not mere convenience or indolence, would justify an ordinary in granting dimissorial letters.

The second clause forbids Latin bishops to ordain any one belonging to an *Oriental rite* without an Apostolic indult.[34] The text mentions only Oriental rites. Are

29 Sess. 23, cc. 3, 8, *de ref.*

30 C. 4, 6°, I, 9; Innocent XII, "*Speculatores*," Nov. 4, 1692, § 2; S. C. EE. et RR., April 8, 1859 (Bizzarri, *l. c.*, p. 662 ff).

31 S. C. P. F., April 5, 1674; Jan. 17, 1793 (*Coll.*, nn. 207, 615).

32 S. C. P. F., May 14, 1838 (*Coll.*, n. 866).

33 *Trid.*, Sess. 23, c. 3, *de ref.*; Innocent XIII, "*Apostolici ministerii*," Sept. 23, 1724, § 14.

34 Benedict XIV, "*Etsi pastoralis*," May 26, 1742, § VII, n. I, XVI, XXII; § IX, nn. XI, XIII.

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Oriental bishops [35] allowed to ordain subjects of the Latin Rite? We hardly believe that this is the intention of the legislator, because he evidently wishes to prevent confusion and a mixing of rites.[36] Why, then, does the Code not include the Oriental bishops in this prohibition? Because it does not legislate for the Oriental, but for the Latin Church only.

What about the *Ruthenians of the U. S. and Canada?* The documents [37] relating to this subject contain no special regulation with regard to ordination. Hence the common law, as formerly and now understood, must be followed.

It is certain that Ruthenians who are neither baptized in, nor live according to their particular rite may not be considered as subject to the same, but are subject to the diocesan bishop of the Latin Rite. No layman of the Latin Rite, born of Latin parents, may transfer himself to, or be ordained in, the Oriental Rite. If a Ruthenian, however, although not baptized in the Ruthenian Rite, should wish to enter a Ruthenian seminary, we believe he may be admitted without an Apostolic dispensation. He would become a subject of the Ruthenian bishop, and no bishop of the Latin Rite could ordain him without an Apostolic indult.

CAN. 956

Episcopus proprius, quod attinet ad ordinationem saecularium, est tantum Episcopus dioecesis in qua promovendus habeat domicilium una cum origine aut

35 The Maronite and the Melchite Patriarchs of Antioch may grant dimissorials to their subjects to be ordained by a Latin bishop or a bishop of another Oriental Rite; *Conc. Montis Libani* (*Coll. Lac.*, II, 240, 256).

36 Benedict XIV, "*Etsi pastoralis*," § VII, n. XX.

37 See *Am. Eccl. Rev.*, Vol. 51, pp. 580 ff., 710 ff.

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simplex domicilium sine origine; sed in hoc altero casu promovendus debet animum in dioecesi perpetuo manendi iureiurando firmare, nisi agatur de promovendo ad ordines clerico qui dioecesi per primam tonsuram iam incardinatus est, vel de promovendo alumno, qui servitio alius dioecesis destinatur ad normam can. 969, § 2, vel de promovendo religioso professo.

The *bishop competent to ordain secular priests* is the one in whose diocese the ordinand (1) was born *and* has his domicile, or (2) has only a domicile, though not born there. In the latter case he must make oath as to his intention of remaining permanently in the diocese. Exceptions will be explained further down.

This canon embodies new legislation. The new elements are: neither pure origin nor mere domicile are titles *per se* sufficient, and benefice and familiar service are no longer considered.

1. *Origin and domicile.*

(a) *Origin* here signifies birthplace, or the diocese in which one was *born.*[38] The mere fact that one was born in a certain place, however, for instance, at a summer resort, hardly suffices to call that place his place of origin. One's birthplace, properly, is the natural and common domicile of one's parents, or, the place of their habitual residence. It is no longer necessary to distinguish between accidental and natural nativity,[39] if the domicile or quasi-domicile or permanent residence of the parents is certain.[40] This rule is doubtless better adapted to present conditions, as the population, especially of cities, is in a constant flux.

As to illegitimate or posthumous children, also of con-

38 C. 3, 6°, I, 9: "*oriundus.*"

39 Cfr. Many, *De Sacra Ordinatione*, Paris, 1905, p. 84 ff.

40 See can. 90, § 1.

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verts, their *locus originis* follows the domicile or quasi-domicile of the mother; that of *vagi* and *expositi* is the place where they were actually born.[41]

(b) *Domicile* must here be understood of the true, not the quasi-domicile of the ordinand, for the clause concerning the oath excludes any other residence. But a *diocesan domicile* would certainly be sufficient in this case, because the Decretals[42] as well as the spirit of the law refer that domicile to the local or diocesan bishop. The same rule must be applied to the domicile or quasi-domicile of the parents of the ordinand.

The question may arise, whether one may have two domiciles in different dioceses, for instance, a summer and a winter domicile. The answer is, Yes, as the nature of domicile permits it. In such cases the bishops of both dioceses are competent to ordain and the choice is left to the ordinand.[43]

2. *Domicile alone,* without regard to origin, establishes the title of competency if the ordinand makes oath that he intends to remain permanently in the diocese whose bishop is to ordain him. This ruling goes back to Innocent XII.[44] The oath here prescribed may be made into the hands of the bishop himself, or of his delegate, or of the rector of a college or some other priest.

3. This *oath is not required* in three cases: (a) when the cleric to be ordained has already been incardinated in the diocese by the first tonsure; (b) when he is to be ordained *ad titulum servitii ecclesiae;* (c) when he is a religious with simple perpetual vows. The reason for *a* lies in the fact that incardination must be perpetual and absolute, and given with the required testimonials.[45]

41 *Ibid.*
42 Cc. 1, 3, 6°' I, 9.
43 Many *l. c.*, p. 97 f.
44 "*Speculatores,*" x. § 5.
45 S. C. C., July 20, 1898 (*Coll. P. F.*, n. 2011).

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The reason for *b* must be sought in the oath which is required for being ordained on that title. And *c* is explained in can. 585, which says that by taking perpetual vows one loses membership in his own diocese.

The *episcopus proprius* of such as *have no domicile* is the Ordinary in whose diocese the ordination takes place, provided the ordinand first acquires the domicile by taking oath according to can. 956. (*Irish Eccl. Record*, 1919, XIV, 330). These are the only reasons by which the competency of the bishop is now determined, neither *beneficium* nor *familiaritas* being admitted.

VICARS AND PREFECTS APOSTOLIC, PRELATES NULLIUS

CAN. 957

§ 1. Vicarius ac Praefectus Apostolicus, Abbas vel Praelatus *nullius*, si charactere episcopali polleant, Episcopo dioecesano aequiparantur quod pertinet ad ordinationem.

§ 2. Si episcopali charactere careant, possunt nihilominus in proprio territorio et durante tantum munere, conferre primam tonsuram et ordines minores tum propriis subditis saecularibus ad normam can. 956, tum aliis qui litteras dimissorias iure requisitas exhibeant; ordinatio extra hos fines ab eisdem peracta irrita est.

§ 1. *Apostolic Vicars and Prefects as well as abbots and prelates nullius*, if endowed with the episcopal character, are equal to diocesan bishops in matters of ordination.

§ 2. If they do not possess the episcopal character, they are nevertheless entitled to confer, within the boundaries of their district and whilst their office lasts, *tonsure and minor orders* on their own secular subjects, according

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to can. 956, and also on others who are provided with dimissorial letters as required by law. If they overstep the limits here drawn, any ordination performed by them is invalid.

This is a decidedly new and opportune law, which changes the discipline established by the Council of Trent.[46] Formerly the *episcopus vicinior* could confer orders on, or grant dismissorial letters to the secular subjects of a prelate *nullius*. The Vicar Apostolic could indeed confer orders on such as had the dimissorial letters from their ordinaries,[47] but this was no right, but merely a privilege granted for missionary countries only. Now the prelates mentioned, if they are *consecrated bishops,* may confer orders on all their subjects, secular as well as religious, though on the latter, if they are exempt, only upon receiving dimissorial letters from their superior. In ordaining seculars, however, these prelates are bound to observe can. 956, which defines competency. If these prelates *are not consecrated bishops,* they may confer *tonsure and minor orders,* (a) upon all their *secular* subjects, (b) upon others, religious as well as secular, who exhibit dimissorial letters either from the religious superiors or from the ordinaries of other dioceses or districts; but (c) only on condition that they adhere strictly to the limitations stated in this canon under *penalty of nullity*.

What are these limitations? There is no doubt as to the territory and duration of the term of office. Vicars Apostolic, Prefects Apostolic, and prelates *nullius,* who are not consecrated bishops, can validly confer tonsure and minor orders only within their own district and as long as their office lasts. But a doubt may arise

[46] *Trid.*, Sess. 23, c. 10; Sess. 24, c. 9 *de ref.*

[47] Can. 964, n. 2.

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concerning the *litterae dimissoriales* required by law:— are they an essential condition for valid ordination of the "others" (*alii*)? If these letters affect the validity of ordination, the aforesaid prelates cannot validly ordain a subject of another ordinary before they have received these letters. The sources [48] which Card. Gasparri quotes for can. 957, § 2 do not fully answer the question, either negatively or affirmatively, because they do not expressly mention the validity or invalidity of the ordination performed by prelates before having received the *litterae dimissoriales*. Still we believe that the mind of the legislator is to invalidate an ordination thus performed. The same clause recurs in can. 964, n. 2, where the validity of the tonsure and minor orders conferred by a governing abbot is made dependent on three conditions, although the contrary opinion prevailed at the Roman Court at the time of Benedict XIV. Besides, the *dumtaxat* of the S. C. P. F. is a rather strong indication that invalidity was intended.[49] Of course, the legislator who confers power can make the exercise thereof dependent on the fulfillment of certain conditions, especially since tonsure and minor orders are not a Sacrament in the proper sense.

CAN. 958

§ 1. Litteras dimissorias pro saecularibus dare possunt, quandiu iurisdictionem in territorio retinent;

1°. Episcopus proprius, postquam possessionem suae dioecesis legitime ceperit ad normam can. 334, § 3, licet nondum consecratus;

2°. Vicarius Generalis, ex speciali tamen Episcopi mandato;

48 C. 3, 6°, V, 7: "*nec licitum esse abbatibus.*"

49 S. C. P. F., April 5, 1674, ad 1 (*Coll.*, n. 207).

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3°. De Capituli consensu Vicarius Capitularis post annum a sede vacante; intra annum vero solis arctatis ratione beneficii recepti vel recipiendi, aut ratione certi alicuius officii, cui propter necessitatem dioecesis sine dilatione sit providendum;

4.° Vicarius ac Praefectus Apostolicus, Abbas vel Praelatus *nullius*, licet episcopali charactere careant, etiam ad ordines maiores.

§ 2. Vicarius Capitularis litteras dimissorias ne concedat iis qui ab Episcopo reiecti fuerunt.

§ 1. The following may, as long as they retain jurisdiction in their respective territory, grant *litterae dimissoriae* to their *secular* subjects:

1.° The *Episcopus proprius*, even though not yet consecrated, after having taken lawful possession of his diocese, *i.e.*, as soon as he himself or his proxy has exhibited the Apostolic letters of appointment to the diocesan chapter, or the diocesan consultors assembled *in corpore*, in the presence of the secretary of the chapter or the diocesan chancellor.[50]

2.° The *Vicar General*, but only by special command of or commission from the bishop. This command or commission may be given orally or in writing, either for one case or for several cases, during the bishop's absence, for instance, or sickness.

3.° The *Vicar Capitular* (our administrator) with the *consent* (not merely advice) of the Chapter (or the diocesan consultors) after the vacancy of the episcopal see has lasted one year. *Within the first year* of vacancy the Vicar Capitular may grant dimissorial letters only to *arctati*,[51] *i.e.*, such as have already received, or will re-

50 Can. 334, § 3. The metropolitan may give these letters before having received the pallium, although he may not ordain to sacred orders before having received it.

51 Cc. 1–4, 6°, I, 9; *Trid.*, Sess. 7, c. 10, *de ref.*

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ceive, within that year an ecclesiastical benefice (for instance, a canonicate) which requires ordination. *Arctati* are also called those who have received or are about to receive an office which, on account of the needs of the diocese, must be filled immediately. This may occur even now, especially after the late world war, in countries where there is a great want of priests or chaplains.[52] If the government — provided this right has been granted to it by the Holy See — has appointed a chaplain or nominated a pastor who is not yet a priest, the Vicar Capitular may give him the *dimissoriae*. The same is true if the deceased bishop has appointed one to an office requiring the priesthood.

4.° *Vicars Apostolic, Prefects Apostolic,* and *Abbots or prelates nullius,* even though they are not consecrated bishops, may now also grant dimissorial letters for sacred orders. This is but the logical consequence of can. 957. Formerly[53] prelates *nullius* could not grant dimissorial letters even for tonsure and minor orders, this right being reserved to the *episcopus vicinior*.

§ 2. The *Vicar Capitular* shall not grant dimissorial letters to such as were rejected by the deceased bishop. This enactment is similar to that of can. 44 concerning rescripts. The object is to protect the authority of the bishop and the unity of government, as well as to keep undesirable candidates out of the sanctuary.

Can. 959

Qui potest litteras dimissorias ad ordines recipiendos dare, potest quoque eosdem ordines conferre per se ipse, si necessariam ordinis potestatem habeat.

52 France, for instance, before the war, was short about 3,000 priests.

53 *Trid.*, Sess. 24, c. 9, *de ref.*

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Whoever is entitled to grant dimissorial letters for receiving orders may confer the same orders himself, provided he possesses the necessary power of order. Notice the subordination of the right of conferring orders to that of issuing dimissorial letters. We are allowed to invert the order: whoever may confer orders, may also grant *dimissoriae*. The granting of *dimissoriae* supposes the power of jurisdiction, but the conferring of orders supposes the power of orders for valid administration and jurisdiction for licit conferring, nay even for valid ordination, as far as inferior prelates are concerned. Hence it is that inferior prelates who lack the episcopal character are strictly limited to their territory and tenure of office, and must obtain *dimissoriae* if they wish to confer tonsure and minor orders on any subject not their own.

CAN. 960

§ 1. Litterae dimissoriae ne concedantur, nisi habitis antea omnibus testimoniis, quae iure exiguntur ad normam can. 993–1000.

§ 2. Si post datas ab Ordinario litteras dimissorias nova testimonia necessaria sint ad normam can. 994, § 3, Episcopus alienus ne ordinet, antequam eadem receperit.

§ 3. Quod si promovendus tempus sufficiens ad contrahendum impedimentum ad normam mem. can. 994 transegerit in ipsa dioecesi Episcopi ordinantis, hic testimonia directe colligat.

§ 1. Dimissorial letters shall not be granted before *all the testimonial letters* required by law have been received, according to can. 993–1000. Note that, although the text mentions dimissorial *letters*, yet since the term signifies nothing else but permission given by a bishop to one of

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his subjects to have himself ordained by another bishop, it is evident that such consent may be given *orally*. Thus, for instance, if the "other" bishop should be present in the cathedral city, he may be asked by the *episcopus proprius* or the Vicar Capitular to confer orders. However, in order to avert fraud and procure greater certainty it is always safer to give the *dimissoriae* in writing.[54]

§ 2. If new testimonials are necessary after the dimissorial letters have been issued by the Ordinary, the other bishop shall not ordain the candidate before he has received them.

§ 3. If the candidate has lived in the diocese of the ordaining bishop long enough to contract a canonical impediment, the ordaining bishop shall himself gather the necessary informations. New testimonial letters are required if a candidate has lived in the same territory for six or three months after the first testimonials were issued and ordination has not yet taken place; for six or three months suffice to contract a canonical impediment. According to § 3, this residence may be taken up in the diocese whose bishop is to ordain the candidate provided with dimissorials from his own bishop. For instance, a candidate for ordination belonging to the diocese of St. Joseph, Missouri, has been a soldier in Camp Dodge, Iowa, for four months. The bishop of Des Moines, in whose diocese Camp Dodge is located, must gather the necessary information about his fitness, *directe, i.e.*, personally and from reliable sources. The fundamental signification of *directe* is reliability. Some elucidation of this point is afforded by the decree "*Redeuntibus*," Oct. 25, 1918, concerning clerics who have returned from

[54] *Trid., Sess.* 14, c. 2, *de ref.*: "*expresso consensu aut litteris dimissoriis*"; cfr. Many, *l. c.*, p. 163.

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military service.[55] Chapt. II of this decree reads: The Ordinaries of the places where clerics and seminarians have done service for a considerable time, *i.e.*, at least three months, are called upon most urgently to give all the necessary information to the ordinaries of said clerics and seminarians, but the latter ordinaries should supply this information by others gained from other sources and persons, and finally by a personal examination of the candidates. These, when duly asked by their bishops as to their conduct, are obliged to answer truthfully. *Directe,* however, in our canon, does not exclude the assumption that the Ordinary who wishes to ordain a candidate provided with dimissorial letters may conduct the inquiry through intermediary persons of ecclesiastical rank, for instance, the Vicar-General, or deans, or the diocesan chancellor. But it certainly requires that the bishop should examine the information carefully and, if necessary, summon the candidate before him for personal examination.

RECIPIENTS OF DIMISSORIAL LETTERS

CAN. 961

Litterae dimissoriae mitti possunt ab Episcopo proprio, etiam Cardinali Episcopo suburbicario, ad quemlibet Episcopum, communionem cum Sede Apostolica habentem, excepto tantum, citra apostolicum indultum, Episcopo ritus diversi a ritu promovendi.

CAN. 962

Quilibet Episcopus, acceptis legitimis litteris dimissoriis, alienum subditum licite ordinat, dummodo ipse

[55] *A. Ap. S.*, Vol. X, 482 f.

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de germana litterarum fide dubitare nullatenus possit, salvo praescripto can. 994, § 3.

CAN. 963

Litterae dimissoriae possunt ab ipso concedente vel ab eius successore limitari aut revocari, sed semel concessae non exstinguuntur resoluto iure dantis.

The first of these three canons repeats the old rule that any bishop in communion with the Holy See may accept dimissorial letters from the *episcopus proprius* or a suburbicarian cardinal bishop, but not from a bishop of a different rite. It is generally understood that the *litterae dimissoriales* are granted in favor of the ordinand, not of the ordaining bishop.[56] The privilege is now extended to the six *suburbicarian* cardinal bishops, who formerly could grant dimissorial letters only to the Cardinal Vicar of Rome.[57] The *exception* is made manifestly in order to avoid confusion of rites; but *litterae dimissoriae* may be sent to a bishop of a different rite if an Apostolic indult has been obtained for the purpose.[58]

Can. 962 permits every bishop (in communion with the Holy See), upon having received the lawful dimissorials, to ordain a candidate not subject to his jurisdiction, provided he has no reason to doubt the genuineness of the letters, and provided also he observe the ruling of can. 994, § 3, concerning additional testimonials. Authenticity is beyond doubt if the signature and seal of the issuing bishop are attached to the documents, though forgery is never absolutely excluded.

Can. 963 rules that the dimissorial letters may be

56 Many, *l. c.*, p. 163.

57 Alexander VII, "*Apostolica sollicitudo*," Aug. 7, 1662, § 2.

58 Benedict XIV, "*Etsi pastoralis*," granted an indult to the Calabrian bishops.

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limited or revoked either by the grantor himself or by his successor, but do not expire, even if the grantor should lose his power.

A *limitation* may be made concerning the bishop, who may be personally designated in the letter, or concerning the time, which may be restricted to three or four months. There may also be limitation regarding examination (cfr. can. 997). Thus the letters may be worded: "If he is found fit after examination." If this is a real condition, clearly expressed as such in the letter, the dimissorial would become null if the candidate failed to pass the examination.

Revocation must be duly intimated either to the candidate to whom the letters were given, or to the bishop to whom they were addressed.

The last clause of canon 963 enacts that the dimissorials remain in force, even if the grantor loses the right of issuing them after they are issued. The reason is that dimissorial letters contain a favor, and every favor is valid *a die datae*.[59] Thus if a sick bishop had signed the *litterae dimissoriae,* and the candidate could not be ordained until after the bishop's death, the letters would be valid. Thus also, if the Vicar Capitular, according to can. 958, § 1, n. 3, had issued *litterae dimissoriae,* and the new bishop would take possession of the diocese in the meanwhile, the letters of the Vicar Capitular would remain effective. Lastly, not even a penal privation of office or a censure can render invalid dimissorial letters previously granted.

59 S. C. EE. et RR., Nov. 21, 1600. (Bizzarri, *l. c.*, p. 232; Reg. iuris 16 in. 6°).

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RIGHTS OF RELIGIOUS SUPERIORS

CAN. 964

Quod attinet ad ordinationem religiosorum:

1°. Abbas regularis de regimine, etsi sine territorio *nullius,* potest conferre primam tonsuram et ordines minores, dummodo promovendus sit ipsi subditus vi professionis saltem simplicis, ipse vero sit presbyter et benedictionem abbatialem legitime acceperit. Extra hos fines, ordinatio, ab eodem collata, revocato quolibet contrario privilegio, est irrita, nisi ordinans charactere episcopali polleat;

2°. Religiosi exempti a nullo Episcopo ordinari licite possunt sine litteris dimissoriis proprii Superioris maioris;

3°. Superiores professis votorum simplicium, de quibus in can. 574, litteras dimissorias concedere possunt dumtaxat ad primam tonsuram et ordines minores;

4°. Ordinatio ceterorum omnium alumnorum cuiusvis religionis regitur iure saecularium, revocato quolibet indulto Superioribus concesso dandi professis a votis temporariis litteras dimissorias ad ordines maiores.

As to the ordination of religious:

1.° A *governing abbot of regulars,* even though he be not an *abbot nullius,* may confer tonsure and minor orders on such as are subject to him by virtue of at least simple profession, provided the Abbot himself be a priest and have lawfully received the abbatial blessing. Outside these limits ordination is invalid unless the abbot possesses episcopal character, and all contrary privileges are hereby revoked.

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This canon ends the controversy [60] concerning the validity of ordinations performed by an abbot, either *benedictus ab episcopo* or endowed with a special privilege, on a candidate not his subject. The relevant points of this section are:

(a) The abbot must be an *abbas regiminis,* that is to say, one actually governing, whether for life or for a certain number of years. Hence a *titular abbot* or a commendatory abbot, or an abbot who has entirely renounced his office, may neither validly nor licitly confer tonsure and minor orders.[61] An abbot who has a coadjutor is still a governing abbot, and is therefore entitled to perform the aforesaid ordinations. Whether the *coadjutor* can validly confer them depends entirely on his letters of appointment from Rome.

(b) The abbot must be a *priest,* as the II Council of Nice and the Decretals clearly state,[62] otherwise the ordination is invalid.

(c) He must have been *lawfully blest, i.e.,* he must have received the abbatial benediction. The *Pontificale Romanum* prescribes that the *benedicendus* must be provided with an *Apostolic mandate* which commits the blessing to a bishop.

The bishop is the one in whose diocese the monastery is located, unless the mandate permits the abbot-elect to choose one according to his good pleasure. The *Pontificale* also prescribes that two abbots should assist the bishop in that function. By the way it may be added

60 This controversy was justified by conflicting decisions of the S. C. C. (Richter, *Trid.,* p. 198); cfr. Benedict XIV, *De Syn Dioec.,* II, 11, 13, Gasparri, *De S. Ordinatione,* n. 955 ff; Many, *l. c.,* p. 135 ff.

61 S. C. C., Sept. 20, 1788; S. O., July 15, 1903 (*A. S. S.,* 33, 167); S. C. EE. et RR., Sept. 20, 1697 (Bizzarri, *Coll.,* p. 282).

62 C. 1, Dist. 69; c. 11 X, I, 14; c. 3, 6°, I, 7.

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that the abbatial blessing, though an imposing ceremony, is not a Sacrament,[63] but merely a sacramental.

(d) Those upon whom abbots may validly and licitly confer tonsure and minor orders are the *subditi vi professionis saltem simplicis, i.e.,* his own subjects by religious profession, which is always made into the hands, or at least in the name, of the governing abbot. This too is ancient doctrine.

When any one of these four conditions is wanting, the ordination is invalid. But if a religious who is a consecrated bishop, *e.g.,* a titular bishop, would ordain religious who are not his subjects, these orders would be validly conferred, since, as it seems, the episcopal order would supply the defect of jurisdiction.

2.° *Exempt religious* can not be *licitly* ordained by *any bishop* without dimissorial letters from their own higher superior. This ruling, too, was insisted upon by ancient synods and in many papal decrees,[64] from which sources it may be seen that exemption as well as the obedience due to the lawful superiors would render the conferring of orders by any bishop grievously *illicit,* though not invalid.

3.° Religious superiors may grant dimissorial letters, but only for *tonsure and minor orders,* to such of their subjects as have taken the *simple triennial vows*[65] that precede either solemn or perpetual vows.

Who are the *superiors* who may grant these dimissorial letters? The *superiores maiores* of orders of regulars, of exempt and non-exempt religious congregations whose members take triennial vows before they pronounce

63 A pamphlet was published some twenty years ago in Rome in which it was asserted that the abbatial blessing imprints an indelible character.

64 Cfr. c. 33, C. 16, g. 1 (Syn. Agde, 506); c. 1, Dist. 5 (Greg. I); c. 5, C. 18, g. 2 (Greg. I); c. 5, X, I, 11.

65 See can. 574, § 1.

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solemn or simple perpetual vows. This ruling marks a change in the former discipline,[66] for the superiors of religious congregations with merely simple vows did not enjoy the privilege of granting such letters to their subjects.

4.° The ordination of *all other members of religious institutes* is governed by the same laws as that of seculars, and every indult granted to superiors for issuing dimissorial letters to those of their members with temporary vows who wish to receive major orders is hereby revoked. This is a reminder of the "*Auctis Admodum*," of Nov. 4, 1892, n. I and II. Formerly no religious who had not professed solemn or perpetual vows could be ordained to major orders. If an urgent case came up they were allowed to anticipate solemn or perpetual profession before the regular term had expired.

It may be asked who exactly are meant by "*ceterorum omnium alumnorum cuiusvis religionis*"? Only members of non-exempt congregations whose members are promoted to sacred orders: at least the revoking clause points to these. It is evident, then, that can. 964 must be understood as follows:

(1) *Governing abbots,* provided they are priests and duly blessed, may confer tonsure and minor orders on their own subjects only.

(2) Superiors of *exempt religious* institutes, whether regulars or otherwise exempt, must give dimissorial letters to their subjects, in order that a bishop may licitly ordain them. Such dimissorial letters must be given for tonsure and minor orders as well as for major orders, for n. 2 of our canon does not distinguish between the different orders. Therefore the religious exempt superiors, not

[66] S. C. EE. et RR., May 6, 1864 (Bizzarri, *l. c.*, p. 711); Feb. 9, 1894 (*A. S. S.*, 26, 619).

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the local Ordinary, grant dimissorial letters for all *orders*, lower and higher.

(3) *All religious superiors* of orders as well as congregations, the constitutions of which prescribe perpetual vows, may grant dimissorial letters to their *temporarily professed* members, but only for *tonsure and minor orders.*

(4) Members of *religious institutes which are not exempt* need *litterae dimissoriae* from their *own bishop* if they wish to be promoted to *major orders,* beginning with subdeaconship. Hence with regard to sacred orders these members fall under can. 956, which determines the competency of the bishop. Every indult to the contrary must now be regarded as void.

(5) *Novices* of religious orders as well as congregations must observe the law binding seculars (can. 956).

(6) *Members of religious societies* must follow the same rule (can. 956).

Here it may be asked whether a governing abbot may address dimissorial letters to *another abbot,* who is entitled to confer tonsure and minor orders on his own subjects: for instance to the Abbot President or Abbot Primate. This was possible and actually done before the promulgation of the Code. But the practice can no longer be sustained, since the legislator emphasizes the invalidity of ordination performed on a non-subject. Notice well the subject is one *vi professionis,* not by a transient transference of jurisdiction. N. 3, can. 964, does not contradict this interpretation, because it permits the superiors only in general terms to grant dimissorial letters without specifying the prelate to whom they must be directed.[67]

67 S. Rit. C., Sept. 27, 1659, n. 19, referred to by Card. Gasparri, reads: "*Reliqua pontificalia extra loca ipsis Abbatibus subiecta, vel pro servitio alienae Ecclesiae, aut in subditos pariter alienos, etiam de licentia Ordinariorum, exercere non valeant: puta Campanarum benedic-*

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THE BISHOP OF THE DIOCESE

CAN. 965

Episcopus ad quem Superior religiosus litteras dimissorias mittere debet, est Episcopus dioecesis, in qua sita est domus religiosa, ad cuius familiam pertinet ordinandus.

The bishop to whom the religious superior must direct the dimissorial letters, is the bishop in whose diocese the religious house of which the ordinand is a member, is situated.

It is not necessary to repeat the just complaints of Benedict XIV concerning some religious who apparently spent their night watches in profane things rather than in the study of the sacred canons, and boasted of privileges that existed only in their imagination.[68] The law, as stated in this canon, is an almost verbal repetition of an enactment made by Clement VIII, or, at his command, by the S. C. Concilii, on March 15, 1593. The privileges granted to the Camaldolese did not greatly help them because the S. Congregation insisted upon their adapting themselves to the actual practice,[69] as stated in the following canon.

CAN. 966

§ 1. Tunc tantum Superior religiosus ad alium Episcopum litteras dimissorias mittere potest, cum Episcopus dioecesanus licentiam dederit, aut sit diversi ritus, aut sit absens, aut non sit ordinationem habi-

tionem, Calicum, et similium, in quibus sacra adhibetur unctio, nec non Minorum Ordinum collationes."

68 "*Impositi Nobis,*" Feb. 27, 1747, repeating the enactment of Clement VIII.

69 S. C. EE. et RR., July 13, 1730 (Bizzarri, *l. c.*, p. 341 f).

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turus proximo legitimo tempore ad normam can. 1006, § 2, vel denique cum dioecesis vacet nec eam regat qui charactere episcopali polleat.

§ 2. Necesse est ut singulis in casibus id Episcopo ordinaturo constet ex authentico Curiae episcopalis testimonio.

Only in the following cases may the religious superior direct the *litterae dimissoriae* to *another* than the diocesan *bishop:* (1) If the diocesan bishop has given permission; (2) or if he is of another Rite; (3) or if he is absent; (4) or if he does not hold ordinations at the time stated in can. 1006, § 2; (5) or if the diocese is vacant or ruled by one who lacks the episcopal character. However in every such case the facts must be attested to the ordaining bishop by an authentic document of the court of the bishop competent for ordination.

Notice that the text speaks disjunctively, which signifies that any one of the enumerated reasons may be advanced and is sufficient for the religious superior to direct the *dimissoriae* to another bishop. The first and second of the five reasons mentioned are newly formulated, though implied in former rules. Thus it is evident that if a bishop is prevented from ordaining, he may entrust another bishop with this function.[70] The *difference of rite* always was acknowledged as sufficient reason for choosing another bishop.[71]

The last three reasons were officially recognized by the Roman Court.[72] A bishop must be regarded as "absent" from his diocese also if during his absence he calls in another bishop to hold ordinations.[73] The competent

70 *Reg. iuris* 68, 72 in 6°.

71 Benedict XIV, "*Etsi pastoralis,*" May 26, 1742, § VII, n. XXII f.; § IX, n. XIII.

72 Benedict XIV, "*Impositi Nobis,*" Feb. 27, 1747.

73 Many, *l. c.*, p. 382.

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bishop is supposed *not to hold ordination at the next term set by law* if he does not ordain on one of the four Ember Days, on the Saturday before Passion Sunday, and on Holy Saturday.[74] For these are the regular days for general ordinations. Hence, even though the bishop would have an ordination on another than the six known *Sabbata,* the law would permit the religious superior to direct his subject to another bishop. On the other hand, the religious superior would not be allowed to address the *dimissoriae* to another bishop, if the diocesan ordinary held general ordinations on one of the six Saturdays, not in his episcopal city, but in another place of his diocese, or if he would have the ordinations held by another bishop, provided he himself were present in the diocese.[75]

The last reason mentioned in our canon is *vacancy of the episcopal see* whose occupant would be competent for ordaining religious. This rule was established by the practice of the Roman Court.[76] Vacancy is here taken in the strict sense of the word, as the modification evidently shows. Therefore a *sedes impedita* is no true vacancy, nor would suspension or excommunication of the bishop constitute vacancy. Besides, if the Vicar Capitular or the regular Administrator, or the Administrator Apostolic were a consecrated bishop, vacancy would not be verified *in casu.*

Finally, § 2 requires *authentic attestation* by the episcopal court to the effect that one of the five cases really exists. This document may be issued by the Vicar-General, or by the Chancellor of the diocese, or by the secre-

74 Can. 1006, § 2. Although § 3 of the same canon permits the bishop to hold "general" ordinations on a Sunday or feast-day of obligation, yet our text, referring only to can. 1006, § 2, certainly intends the "six Saturdays" only, as it was understood generally.

75 S. C. C., Aug. 18, 1888 (*A. S. S.*, Vol. 21, 359 ff); Feb. 11, 1708; Many, *l. c.*, p. 383.

76 S. C. C., Tirascon., July 13, 1782.

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tary of the bishop;[77] it must be given under the diocesan seal, signed by one of the aforesaid officials, and enclosed with the dimissorial letters from the religious superior.

Can. 967

Caveant Superiores religiosi ne in fraudem Episcopi dioecesani subditum ordinandum ad aliam religiosam domum mittant, aut concessionem litterarum dimissoriarum de industria in id tempus differant, quo Episcopus vel abfuturus, vel nullas habiturus sit ordinationes.

This canon, adopting the words of the Constitution "*Impositi Nobis,*" of Benedict XIV, cautions religious superiors against committing fraud by abusing the permission granted in the foregoing canon. It would be fraudulent if they sent a religious to another house purely for the purpose of avoiding the diocesan bishop. There would be no fraud if the religious would dwell in another religious house in another diocese for the sake of study, or health, or vacation. Fraud is also committed, as the text says, if the religious superior intentionally delays the issuance of dimissorial letters to a time when the bishop is absent from the diocese or will not hold general ordinations. Of course, fraud may not be presumed, but must be proved, which, generally speaking, is not an easy thing.[78]

The reader will have noticed that there is no clause revoking the privilege which some religious (for instance, the Society of Jesus) enjoy of having their candidates ordained by any bishop. Hence if this privilege was granted after the Council of Trent, and directly, not by communication, it still holds.[79]

77 Benedict XIV, "*Impositi Nobis,*" Feb. 27, 1747.

78 Many, *l. c.*, p. 383 f.

79 "*Impositi Nobis.*"

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What if the competent or diocesan bishop refuses to ordain a religious provided with *litterae dimissoriae* from his superior? In that case the superior is not allowed to send the ordinand to another bishop, for this is not mentioned in can. 966, and hence nothing is left but recourse to the Holy See (S. Cong. Relig.).

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CHAPTER II

SUBJECT OF HOLY ORDERS

VALID AND LICIT ORDINATION

CAN. 968

§ 1. Sacram ordinationem valide recipit solus vir baptizatus; licite autem, qui ad normam sacrorum canonum debitis qualitatibus, iudicio proprii Ordinarii, praeditus sit, neque ulla detineatur irregularitate aliove impedimento.

§ 2. Qui irregularitate aliove impedimento detinentur, licet post ordinationem etiam sine propria culpa exorto, prohibentur receptos ordines exercere.

Only a baptized male can validly be ordained. In order to receive orders licitly, the candidate must, according to the judgment of the Ordinary, be endowed with the qualities required by the sacred canons and free from any irregularity or canonical impediment.

Those who have incurred an irregularity or other impediment, even after ordination and without their own fault, are not allowed to exercise the orders they have received.

§ 1 defines who are *capable* of receiving orders validly, and who may receive them licitly according to canon law. Two conditions are required for valid ordination, viz.: the male sex and Baptism. The following classes of persons are therefore *incapable of being validly ordained:*

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(1) *Women,* who are debarred from the sanctuary by divine positive law, if not by the natural law, according to reason. This has been the constant teaching and practice of the Church from the time of St. Paul [1] up to our day. The tenets of the Pepuzians or Quintillians, of Marcus Magus, and of the Collyridians, who admitted women to the priesthood and its sacrificial functions, were condemned as heretical.[2] As to the institute of *deaconesses* and *widows,* it may be admitted that they formed a special ecclesiastical corporation, or class, endowed with quasi-clerical prerogatives. Their functions were similar to those of the deacons, whom they assisted with regard to the female catechumens, the poor, and the sick. At the same time authentic historical documents, especially can. 19 of the Council of Nicaea, prove that no hierarchic or liturgical character can be attributed to these deaconesses and widows, or, in the words of the aforesaid canon 19, that they were ranked with the laity since they received no orders.[3]

Concerning *hermaphrodites,* it must be said that complete hermaphrodites, whose sex cannot be determined, may not be validly ordained; whereas those with whom the male sex prevails may be ordained validly but not licitly.[4]

(2) Incapable of validly receiving orders are also men who *are not baptized,* because Baptism is the foundation of, and the gate to, all the other sacraments. This, too, is ancient and constant ecclesiastical law.[5]

1 Cfr. I Cor. xiv, 34 f.; I Tim. ii, 11.

2 Epiph., *Haeres.*, 49, n. 2 f.; 79; Irenaeus, *Adv. Haer.*, I, 13, 2; Gelasius I, Ep. 11 (Constant, *Epp. Rom. Pont.* f., 1721, p. 85); Connick, *De Sacram. et Censuris,* disp. 20, n. 94.

3 Wieland, "*Die Genetische Entwicklung der sog. Ordines Minores,*" in *Röm. Quartalschrift,* 1897 Suppl., p. 60 ff.

4 Eschbach, *Disputationes Physiologico-Theologicae,* 1901, p. 53 f.

5 C. 19, *Conc. Nic.* I., (= c. 52, C. 1, g. 1); cc. 1–3, X, III, 43.

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Our text says *vir,* a man, which term, however, must not be pressed to the extent of assuming a full-grown man. For the ordination of *infants,* though illicit, is valid, as Benedict XIV says.[6] On the other hand, even an adult man, if physically *compelled* to receive orders, would not be ordained at all.[7] As to grave fear brought to bear upon an unwilling person, see can. 214.

The other class of persons mentioned in our canon are those who may receive orders validly, but *not lawfully.* They are either irregular or suffer from a canonical impediment. This is a new regulation, for thus far a distinction was made only between incapacity and irregularity. Now a strictly so-called canonical impediment is introduced, which is less than irregularity.

Irregularity is derived from the Latin *contra regulam,* and as a canonical term seems to occur first in a work of Peter of Blois (+ 1200).[8] It signifies general inhability established by law, for there is no irregularity except it be expressed in the law (can. 983). The *effect* of this inhability consists in forbidding one from being licitly ordained and from exercising the orders received. In this respect there is no distinction between irregularity and the simple canonical impediment, as § 2 of our canon plainly states. Where, then, *is* the difference between both? It must be sought in the higher degree of inhability and in the secondary effect attaching to irregularity. For irregularity, although *per se* no penalty,[9] yet may originate from guilt, which is followed by penalty constituted in law, for instance, in the case of homicide and others

6 "*Eo quamvis,*" May 4, 1745, §§ 20, 28.

7 C. 3, X, III, 42.

8 *Speculum Iuris Canonici* (Hinschius, *K.-R.*, I, 9, note 4).

9 Cfr. Layman, *Theol. Moral.*, l. I, tr. 5, P. 5, c. 1, n. 1. To deny every feature of penalty, as Philipps, *K.-R.*, 1845, I, 418 ff., does, seems to us labor lost. We agree that the *poena* is not intended *in recto,* but *in obliquo* it is attached to the irregularities *ex delicto,* as the latter term implies.

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mentioned in can. 985. One who is simply suffering from an impediment is not supposed to have incurred a guilt in the proper sense of the term, even though *infamia facti* might be imputable to him. The consequence is that one who, while suffering from a simple canonical impediment, receives or exercises an order, should not be punished as severely as one afflicted with irregularity.[10] Any other distinction between irregularity and the canonical impediment proper, is, we believe, difficult to establish.

It may be added that irregularity is generally distinguished into a *perpetual and a temporary* one, according to the duration or cessation of the impediment.

It may be *total* or *partial*. Total irregularity incapacitates one for the reception and the exercise of all orders, whereas *partial* irregularity merely deprives one of the right of receiving or exercising a higher order.

The distinction between an irregularity from *defect* and from *guilt* will be explained under 983, where reference is made to the origin of irregularities.

NECESSITY AND UTILITY OF THE DIOCESE

CAN. 969

§ 1. Nemo ex saecularibus ordinetur, qui iudicio proprii Episcopi non sit necessarius vel utilis ecclesiis dioecesis.

§ 2. Non prohibetur tamen Episcopus proprium promovere subditum, qui in futurum, praevia legitima excardinatione et incardinatione, servitio alius dioecesis destinetur.

10 Cfr. can. 2374; Thesaurus-Giraldi, *De Poenis Ecclesiasticis, Romae*, 1831, p. 311 (P. II, c. 10). Irregularity does not create irregularity, but the penalty is *ferendae sententiae;* c. 1, Dist. 51: "*irregularis se faciens promoveri est deponendus.*"

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True to the admonition of St. Paul "not to impose hands lightly upon any man," the Tridentine Council commanded Ordinaries to ordain only such, or as many, as would be useful to the diocese.[11] The same law is re-enacted in our canon, with the limitation that it concerns only the *secular clergy*. The bishop is to judge as to the number of priests needed or useful for his diocese. Why the *religious clergy* is *not* mentioned may be deduced from the fact that their support and conduct, being guaranteed by their constitutions, obviates the danger of their becoming a burden or a stumbling block to the diocese.

§ 2 permits the bishop to ordain any one of his subjects who may be destined for the future service of another diocese, supposing legitimate excardination and incardination.

This might happen if a diocese were well provided with priests. But the bishop, before ordaining one who is his own subject by reason of origin or domicile, must excardinate him and the bishop for whose diocese he is destined must incardinate him, according to can. 111, § 2 (Com. Int. C. I. C., Aug. 17, 1919).

FORBIDDING ORDINATION EX INFORMATA CONSCIENTIA

CAN. 970

Proprius Episcopus vel Superior religiosus maior potest suis clericis ex quavis canonica causa, occulta quoque, etiam extraiudicialiter, ascensum ad ordines interdicere, salvo iure recursus ad Sanctam Sedem, vel etiam ad Moderatorem generalem, si agatur de religiosis quibus ascensum interdixerit Superior provincialis.

11 I Tim. v, 22; *Trid.*, Sess. 23, c. 16, *de ref.*; Pius X, "*Pieni l'animo*," July 28, 1906; S. C. P. F., Aug. 1827 (*Coll.*, n. 798).

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A bishop or higher religious superior may, for any canonical, even though secret, reason, and without a formal trial, forbid his subjects to receive orders; but a subject thus interdicted retains the right of recourse to the Holy See, or in the case of religious who have been enjoined by their provincial, to the superior general.

This text is taken from the Decretals and the Council of Trent. Lucius III (1183) admonished religious that it is more becoming and safer for subjects to obey their superiors and remain in the lower ranks, than to strive after a higher rank to the scandal of their prelates.[12] The Council of Trent,[13] making these words its own, added that the prelate may forbid any one to receive a sacred order for any reason, even for a secret crime,[14] and without legal procedure. Our text simply says "*ascensum ad ordines interdicere,*" which manifestly includes all orders, also tonsure and minor orders. The bishop, therefore, may forbid a student of a clerical seminary to enter the clerical state, the religious superior may refuse to a religious subject tonsure and minor orders, and the ascent to higher orders. However, there must be a *canonical reason,* even though only an occult one. Why a reason is required is easily understood from the fact that the one thus treated may have recourse to the Holy See, which will in each case demand the reason. Besides, it would be unjust to repel from the sanctuary one whom God may have called. We hardly believe that the Holy See will now-a-days[15] ask the Metropolitan or nearest suffragan to demand of the bishop the reason

12 Cc. 5, 17, X, I, 11.

13 Sess. 24, c. 1, *de ref.*

14 The crimes mentioned in c. 17, X, I, 11 are: *adulterium, periurium, homicidium, falsum testimonium;* but with the exception of homicide the other crimes had to be notorious and proved, and penance had to precede.

15 S. C. C., April 21, 1668, quoted by Benedict XIV, *De Syn. Dioec.,* XII, 8, 4.

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for refusing ordination, but will rather obtain that information directly from the bishop. But the rule still holds that the *prelate is not bound to state the reason* for his refusal to the candidate himself.[16] The latter may have *recourse* to the Holy See (S.C. Concilii), but the appeal does not suspend the effects of the prohibition.[17] If a religious has been excluded from the reception of orders by his provincial, recourse (not appeal) may be had to the superior general. If the latter should confirm the injunction, nothing is left for the religious but to have recourse to the S. Cong. Religiosorum.

Finally note may be taken of the *causa canonica,* which does not necessarily imply a crime, but may mean an irregularity, or a canonical impediment, or lack of canonical requisites. In order to form an objective and impartial judgment it is advisable to follow the rules laid down by Benedict XIV for discerning the qualities of candidates.[18] These rules provide for (1) Great vigilance over the conduct and character of the candidates; (2) properly and honestly conducted examinations which show the intellectual and moral capacity of the aspirant; (3) spiritual exercises or retreats; (4) observance of the interstices between the various orders.

The same Pontiff gives some hints to *confessors* and retreat masters with regard to *recidivi et consuetudinarii* preparing for orders. The confessor should ponder all the circumstances and probabilities and remember that he is a spiritual physician who should prescribe the proper remedies. After having implored the divine assistance, he should proceed firmly and justly and without human respect. He may tell the candidate whom he thinks unfit

16 S. C. C., March 21, 1643 (Richter, *Trid.*, p. 87, n. 1).

17 Benedict XIV, "*Ad militantis,*" March 30, 1742, § 23.

18 *De Syn. Dioec.*, XI, 2, 16 ff.

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for the high vocation that there is no disgrace or shame attached to withdrawing from the course begun, that he had best take time for further deliberation, and that the salvation of his soul is a stronger motive than human respect.

THE CLERICAL STATE MUST BE EMBRACED FREELY

CAN. 971

Nefas est quemquam, quovis modo, ob quamlibet rationem, ad statum clericalem cogere, vel canonice idoneum ab eodem avertere.

It is criminal to compel anyone, in whatsoever manner or for whatsoever reason, to embrace the clerical state, or to turn away therefrom anyone canonically qualified.

This has always been the practice of the Church,[19] which even threatened with heavy penalties any minister who ordained one against his will. The Code inflicts *excommunication* (reserved to no one, however) for the same transgression.[20] Parents ought to know that they commit a grievous sin against their children, the Church, and society at large if they disobey this canon.

CLERICAL TRAINING IN SEMINARIES

CAN. 972

§ 1. Curandum ut ad sacros ordines adspirantes inde a teneris annis in Seminario recipiantur; sed omnes ibidem commorari tenentur saltem per integrum sacrae theologiae curriculum, nisi Ordinarius in casibus peculiaribus, gravi de causa, onerata eius conscientia, dispensaverit.

19 Cc. 1, 2, 7, Dist. 74; c. 23, C. 25, c. 2.

20 Can. 2352.

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§ 2. Qui ad ordines adspirant et extra Seminarium legitime morantur, commendentur pio et idoneo sacerdoti, qui eis invigilet eosque ad pietatem informet.

Care should be taken that those who aspire to sacred orders be received into a seminary at an early age. All candidates for the sacred ministry are obliged to live in a seminary at least throughout the entire course of their theological studies, unless the Ordinary, for grave reasons and upon due deliberation, dispenses in individual cases.

Candidates for orders who lawfully dwell outside the seminary should be commended to a pious and worthy priest, who should watch over them and train them to piety.

In former times cathedral schools were conducted under the guidance of a *scholasticus*, and monastic schools were also open to such as aspired to the clerical state.[21] The Council of Trent[22] ruled that a seminary be established in every diocese, if possible. The Febronians and Josephinists tried to remodel the clerical seminaries after a pattern unacceptable to the Church. Equally unacceptable was the plan of certain university professors and rectors, who insisted that clerical students should attend the public State universities on the ground that it was necessary to raise the educational standard of the clergy.[23] Pius X centralized the many (about 300) diocesan seminaries of Italy into provincial seminaries.[24] This measure had become necessary to insure greater efficiency. All these, the so-called liberal no less than the conservation movements prove the importance of the clerical semi-

21 C. 1, C. 12, c. 2.

22 Sess. 23, c. 18, *de ref.*

23 H. Schell, *Der Katholizismus als Prinzip des Fortschrittes*, 1907, p. 28 ff.

24 Pius X, "*La Ristorazione*," May 5, 1904; *Pio X, Suoi Atti e Suoi Intendimenti*, 1905, p. 13 f.

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nary. Modern conditions require greater attention to this matter, as may be seen from an Instruction of the S.C. of Bishops and Regulars,[25] where the rules for frequenting non-ecclesiastical institutes are laid down. If at all possible, the young candidates should enter a Catholic college to be educated for the priesthood. As to frequenting secular universities, taking a post graduate course may be permitted after the philosophical and theological courses have been completed in a Catholic school. But no more clergymen are to be sent to secular universities than is necessary for the diocese. While they study at the university, they should dwell in a seminary, or, if this is impossible, live with an elderly priest or in a community. If the university is located outside the diocese, the Ordinary shall recommend his students to the Ordinary in whose diocese the university is, and the students must present themselves to, and obey the latter. Both Ordinaries should entrust the students to the care of a priest of approved virtue, learning, and knowledge of the young. This priest shall frequently inform the Ordinary of the conduct of the clerical students at the university, and the Ordinary himself shall demand frequent communications from the students. This regulation was inculcated anew and made universal by the *Motu proprio* of Pius X, "*Sacrorum Antistitum,*" of Sept. 1, 1910, which especially warned the students against Modernism.[26] Our canon permits the Ordinary to make an occasional exception from the rule of taking the full theological course in a clerical seminary, but it does not exempt him from the obligation of entrusting such students to the

25 July 21, 1896 (*Coll. P. F.*, n. 1948); cfr. S. C. P. F., Oct. 18, 1883, IV, 1 (*Coll.*, n. 1606) recommended, especially for China, receiving youths from the 10th to 14th year of age, and have them pass a preparatory term of about two years.

26 *A. Ap. S.*, II, 658 f.

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vigilance of a pious priest. This does not precisely mean that the student must live in the priest's house, although to do so would be highly commendable. He may, according to the said Instruction, live, *e. g.*, with his parents, provided only that a certain kind of spiritual guidance is proffered.

It may be added that the Ordinary has full power to demand compliance with these regulations, and no appeal therefrom is permissible.[27]

ARTICLE I

REQUISITES OF CANDIDATES FOR ORDINATION

CAN. 973

§ 1. Prima tonsura et ordines illis tantum conferendi sunt, qui propositum habeant ascendendi ad presbyteratum et quos merito coniicere liceat aliquando dignos futuros esse presbyteros.

§ 2. Ordinatus tamen qui superiores ordines recipere recuset, nec potest ab Episcopo ad eos recipiendos cogi, nec prohiberi a receptorum ordinum exercitio, nisi impedimento canonico detineatur aliave gravis, iudicio Episcopi, obsit causa.

§ 3. Episcopus sacros ordines nemini conferat quin ex positivis argumentis moraliter certus sit de eius canonica idoneitate; secus non solum gravissime peccat, sed etiam periculo sese committit alienis communicandi peccatis.

§ 1. Tonsure and inferior orders should be given only to such as have the intention to ascend to the priesthood and give reason to hope that they will one day be worthy priests.

27 Benedict XIV, "*Ad militantis*," March 30, 1742, § 34.

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§ 2. If, however, one who has been ordained (say to subdeaconship) refuses to receive higher orders, he cannot be compelled by the bishop to receive such higher orders, nor be forbidden the exercise of the orders he has received, unless a canonical impediment or some other grave cause, in the judgment of the bishop, should intervene.

§ 3. The bishop shall not confer sacred orders on any one unless he has positive proof, amounting to moral certainty, of the candidate's canonical fitness; otherwise he not only commits a grievous sin, but exposes himself to the danger of sharing in the guilt of another.

§ 1 is taken partly from the Council of Trent and subsequent papal constitutions.[28]

§ 2 forbids forcing one into an ecclesiastical rank which he perhaps thinks himself unworthy to hold. To prevent a cleric from exercising an order which he has duly and canonically received would be tantamount to declaring him irregular. A canonical impediment, *i. e.,* one strictly so-called, or an irregularity, must be proved in order to justify such a prohibition. The other *grave reason* for which one may be forbidden to exercise an order received, is a crime which, though as yet occult, is liable to be divulged.

The *moral certainty* mentioned in § 3, as to the proofs for the fitness of an aspirant to the sacred ministry may be gathered from information given by the director of the seminary and from the report of the synodal examiners. These suffice to exonerate the conscience of the Ordinary. It will not surprise the reader that the legislator here speaks in the tone of a severe preacher, if he remembers

28 *Trid.*, Sess. 23, c. 4, *de ref.*; Innocent XIII, "*Apostolici ministerii*," May 23, 1723, § 2; Benedict XIII, "*In supremo*," Sept. 23, 1724, § 2.

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that a great canonist and a great pastor, Benedict XIV and Pius X, in their first encyclical letters drew the attention of the bishops to this important matter. Benedict XIV, among other things, says it is better to have few priests, but righteous, fit and useful, than many who contribute nothing to the edification of the mystic body of Christ.[29] Pius X tells the bishops to carefully ponder the fact that the faithful generally will be as good or as bad as those whom they destine for the priesthood, and reminds them of St. Paul's warning not to be partakers of other men's sins.[30]

CAN. 974

§ 1. Ut quis licite ordinari possit, requiruntur:

1°. Recepta sacra confirmatio;

2°. Mores ordini recipiendo congruentes;

3°. Aetas canonica;

4°. Debita scientia;

5°. Ordinum inferiorum susceptio;

6°. Interstitiorum observatio;

7°. Titulus canonicus, si agatur de ordinibus maioribus.

§ 2. Quod pertinet ad consecrationem episcopalem, servetur praescriptum can. 331.

§ 1. That candidates *may be licitly ordained* the following conditions *are required:*

1.° They must have received the Sacrament of Confirmation;

2.° Their moral conduct must be conformable to the order they wish to receive;

3.° They must have attained the canonical age;

29 "*Ubi primum,*" Dec. 3, 1740, § 1.

30 "*E supremi,*" Oct. 4, 1903 (*Anal. Eccl.*, XI, 378).

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4.° They must have the necessary knowledge;

5.° They must have received the inferior orders;

6.° The canonical intervals must be observed;

7.° They must be in possession of a canonical title, if they wish to receive higher orders.

§ 2. As to episcopal consecration, can. 331 must be observed.

These points call for no comment here, as most of them will be explained in connection with the following canons.

THE CANONICAL AGE

CAN. 975

Subdiaconatus ne conferatur ante annum vicesimum primum completum; diaconatus ante vicesimum secundum completum; presbyteratus ante vicesimum quartum completum.

No one shall be ordained subdeacon before he has completed his twenty-first year; deaconship cannot be received before the twenty-second year is completed, and the priesthood cannot be received before the twenty-fourth year is completed.

For tonsure and minor orders no age is prescribed, but the following canon establishes a certain limit.

THE KNOWLEDGE REQUIRED

CAN. 976

§ 1. Nemo sive saecularis sive religiosus ad primam tonsuram promoveatur ante inceptum cursum theologicum.

§ 2. Firmo praescripto can. 975, subdiaconatus ne conferatur, nisi exeunte tertio cursus theologici anno;

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diaconatus, nisi incepto quarto anno; presbyteratus, nisi post medietatem eiusdem quarti anni.

§ 3. Cursus theologicus peractus esse debet non privatim, sed in scholis ad id institutis secundum studiorum rationem can. 1365 determinatam.

§ 1. Neither seculars nor religious may receive the tonsure before they have *begun the course of theology*.

By the term *cursus theologicus* is to be understood theology proper, which presupposes a course in the classics and philosophy. It had been previously decided that the theological course would not be legally acknowledged unless preceded by a collegiate and philosophical course.[31] Consequently, although hermeneutics or an Oriental language may be taught in the two year's philosophical course, these would have to be considered as secondary or accessory branches which follow the principal branch, *i. e.*, philosophy. Note that *religious* are expressly included in this law and no exception is made for religious who only make a promise, not strictly so-called vows, as, for instance, the Eudists.[32] The consequence for religious is that their clerics cannot be ordained before they have begun their theological course. Beginning, however, may lawfully be taken even for the first month of the theological course.

§ 2. With due regard to the ruling concerning age (can. 975), *subdeaconship* may be conferred only towards the end of the *third year* of the theological course, *deaconship* only after the beginning of the *fourth year*, and the *priesthood* only in the second term of the *fourth year* of theology.

The school year should last at least nine months, and

31 S. C. Rel., Sept. 7, 1909, ad IV (*A. Ap. S.*, I, 702); can. 1365, § 2.

32 S. C. Rel., May 31, 1910 (*A. Ap. S.*, II, 449 f).

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these must be reckoned according to the calendar. The feasts of Pentecost or Trinity cannot be taken as the end of the school year because they are movable. If the school starts about Sept. 10, it should last until June 10 of the following year and close with a final examination.[33]

Post medietatem signifies the second term, or semester, during the whole of which the priesthood may be received. But ordination to the priesthood does not dispense a candidate from completing his course. Therefore, one who is ordained on Holy Saturday must continue his studies until the end of the school year and then pass the examination (*cum examine finali feliciter emenso*).[34]

§ 3. The theological course must be taken, not privately, but in a school conducted according to can. 1365. A *private course* made outside a properly instituted school, even under the direction of a professor, is not legal, nor may the Ordinary accept it as sufficient for the *litterae testimoniales*.[35] However, the same S. Congregation has also declared that private studies may be permitted in rare individual cases, but only for the secondary branches. Which branches of a priest's education are primary, and which secondary, the Code does not state, but we may deduce from can. 1365, § 2, that dogmatic and moral theology are the main branches, whereas holy Scripture, Church history, Canon Law, liturgy, sacred eloquence and ecclesiastical music may be considered accessory. A more satisfactory division may be derived from a decision given in 1912. There dogmatic and moral theology, Scripture, Church history, and Canon Law are styled main branches, whilst Biblical Greek, Hebrew, homiletics, Patrology, liturgy, archaeology, ecclesiastical art, and the

[33] S. C. Consist., March 24, 1911, ad 1 (*A. Ap. S.*, III, 181).
[34] *Ibid.*
[35] S. C. Rel., Sept. 7, 1909, ad V (*A. Ap. S.*, I, 702 f).

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Chant are called accessory branches.[36] According to the declaration of 1909, if private study embraces only a secondary branch, an examination made before the examiners will suffice. This examination may be taken at the end of the school year together with the students who have studied that branch in the school-room. In the first part of the decision mentioned it is laid down that a theological student who has missed school on account of sickness or military service, may, if the time lost amounts to no more than three months, supply the deficiency by private study, but he must pass the regular examination.[37]

ORDINATIONS PER SALTUM NOT PERMITTED

CAN. 977

Ordines gradatim conferendi sunt ita ut ordinationes per saltum omnino prohibeantur.

Orders must be conferred successively, and ordinations *per saltum* are entirely forbidden.

Per saltum means by leaps and bounds, without keeping the necessary intervals, or skipping an inferior order which should precede the reception of a higher one. The Council of Sardica (can. 13) prescribes that the ascent to the priesthood should be made by degrees, in order that the candidate may be tested as to his faith, modesty, character and reverence. The object of successive or gradual ordination, therefore, is to ensure due preparation and sufficient knowledge.[38] An apprenticeship precedes every profession, and higher degrees are not con-

36 S. C. Consist., July 16, 1912 (*A. Ap. S.*, IV, 491).

37 S. C. Rel., March 1, 1915, ad 2 et 1 (*A. Ap. S.*, VII, 123 f.). Although this is not expressly stated in the code, the latter certainly is not opposed to our explanation.

38 Cfr. c. 1, Dist. 52; cc. 1, 4, 7, Dist. 61; Propp. 51, 53 *Syn. Pistor. damnatae*, "*Auctorem fidei*," Aug. 28, 1794 (Denzinger, n. 1414, 1416).

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ferred on such as are barely initiated. Besides, there is also the succession of orders to be observed, as stated in the *Pontificale Romanum:* tonsure (*de clerico faciendo*), ostiariate, lectorate, exorcistate, acolythate, subdeaconship, deaconship, priesthood.[39]

The text says "*prohibeantur,*" thereby intimating that this law is prohibitive, but not invalidating. Therefore the diaconate is validly conferred, even though the subdeaconship was omitted.[40] The priesthood could be validly received by one who had never been ordained a deacon[41] or ordained to deaconship invalidly. The H. O., in 1842, decided a case in point. One who had been invalidly ordained to the subdiaconate and the diaconate because of lack of consent, was finally ordained a priest. He received the priesthood with the right intention, but the question arose: Was he ordained validly? The Holy Office decided yes, but enjoined that he be secretly ordained to subdeaconship and deaconship.[42] Attention may be drawn to the *penalty* of suspension. This is not incurred unless the ordination *per saltum* is performed maliciously,[43] which, for instance, was not the case in the instance mentioned.

THE INTERSTICES

CAN. 978

§ 1. In ordinationibus serventur temporum interstitia quibus promoti in receptis ordinibus, secundum Episcopi praescriptum, sese exerceant.

§ 2. Interstitia primam tonsuram inter et ostiariatum vel inter singulos ordines minores prudenti Epis-

39 *Trid.*, Sess. 23, cc. 11, 14 *de ref.*

40 C. 1, Dist. 52 (Alex. II).

41 C. nn. X, V, 29.

42 S. O., March 2, 1842 (*Coll. P. F.*, n. 946).

43 Can. 2374.

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copi iudicio committuntur; acolythus vero ad subdiaconatum, subdiaconus ad diaconatum, diaconus ad presbyteratum ne antea promoveantur, quam acolythus unum saltem annum, subdiaconus et diaconus tres saltem menses in suo quisque ordine fuerint versati, nisi necessitas aut utilitas Ecclesiae, iudicio Episcopi, aliud exposcat.

§ 3. Nunquam tamen, nisi de peculiari licentia Romani Pontificis, minores ordines cum subdiaconatu duove sacri ordines uno eodemque die, reprobata quavis contraria consuetudine, conferantur; imo nec primam tonsuram conferre licet una cum aliquo ex ordinibus minoribus, neque omnes ordines minores una simul.

§ 1. In ordaining, the intervals of time during which the respective orders should be exercised, according to episcopal prescription, must be observed.

The meaning of this law is that clerics should "exercise" the orders they have received, and although the minor orders are generally not "practised," except in religious institutions, yet our text, speaking as it does of all intervals and all orders, certainly intends to inculcate some kind of practice or exercise, at least of the higher orders.[44] This is the very purpose of observing the interstices. How the "practice" is to be made is left to the bishop.[45]

§ 2. It is left to the bishop also to *determine the intervals between the tonsure and the ostiariate,* and between the several minor orders. The interval between the acolythate and subdeaconship must last one year;[46]

44 Many, *l. c.*, p. 281 f., denies the necessity of exercising the orders, saying that the *ratio legis non cadit sub lege*. Yes, if the *ratio* is not stated in the law itself, the term *exerceant* is expressly used in the new Code.

45 *Trid.*, Sess. 23, c. 11, *de ref.*

46 A year, according to can. 32, § 2, means 365 days. But the eccle-

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the interval between the subdiaconate and the diaconate, as also the interval between deaconship and the priesthood, must last at least three months, unless the bishop deems it necessary or useful for his diocese to shorten these intervals. Any plausible reason is sufficient. It may be added that it is the ordaining *bishop* who grants dispensation also in case of religious who may enjoy the privilege of being ordained without regard to the interstices.[47] The bishop, in ordaining such as are not his subjects, may also dispense from the intervals.[48]

§ 3. Minor Orders and subdeaconship, or two sacred orders, may never be conferred on the *same day,* without the express permission of the Roman Pontiff. Every contrary custom is hereby reprobated. Neither is it allowed to confer tonsure together with one of the minor orders, or all the minor orders at the same time.

The first clause is more severe than the second. For to receive two higher orders on one and the same natural day — for this is here to be understood — was always forbidden to all, exempt regulars not excepted.[49] The Code adds the reprobating clause in order at least to render contrary customs less admissible.

The second clause concerning tonsure and some or all minor orders repeats a Decretal, but apparently admits the contrary custom, which, as far as we are aware, was in vogue in several countries. The rule not to confer several sacred orders simultaneously also concerns the Oriental Rites.[50]

siastical year may here be admitted, on account of the *sacra tempora,* and was always acknowledged by Roman practice. (Many, *l. c.,* p. 280.)

47 S. C. C., May 17, 1593; May 31, 1597; Sept. 12, 1609 (Richter, *Trid.,* p. 200, n. 4 f.).

48 S. C. Sacr., Aug. 15, 1909 (*A. Ap. S.,* I, 656).

49 C. 2, X, V, 20.

50 S. C. P. T., April 13, 1807, n. XI; July 31, 1902, n. 8 (*Coll.,* nn. 692, 2149).

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TITULUS ORDINATIONIS

CAN. 979

§ 1. Pro clericis saecularibus titulus canonicus est titulus beneficii, eoque deficiente, patrimonii aut pensionis.

§ 2. Hic titulus debet esse et vere securus pro tota ordinati vita et vere sufficiens ad congruam eiusdem sustentationem, secundum normas ab Ordinariis pro diversis locorum et temporum necessitatibus et adiunctis dandas.

For the secular clergy the canonical title is that of an ecclesiastical benefice, or, where this is wanting, that of a patrimony or pension.

This title must be secure for the life-time of the ordinand, and entirely sufficient to support him properly, according to the regulations established by the Ordinaries to meet the needs and circumstances of places and times.

Title (*titulus*) originally signified an inscription placed on a house or property to show its owner, or the name of the place.[51] *Ecclesiastical language* has evolved two special meanings of the term, *viz.*, name for an oratory or a sepulchre of martyrs (*e.g., titulus pastoris* — S. Pudenziana). This name was later transferred to certain (25, then 49) churches of Rome, which in course of time became the so-called titular churches of the cardinals. As these churches had assigned to them a determined number of priests and clerics who lived from the revenues of these titles, the clergy itself was said to be "*intitulatus*" or "*incardinatus*."[52] Hence in this particular sense

51 Cfr. l. c. 2, 3, Cod. X, 10.

52 Armellini, *Lezioni di Archeologia Cristiana*, 1905, p. 192, 208, 269 f.; *Decreta Auth. S. Rit. C.*, Vol. IV, 342 f.

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the word *title* meant service in a determined church which entitled a cleric to a decent living or support. This is the origin of the first and only exclusively ecclesiastical title called *beneficium*.

Later, especially in the 12th century, the practice arose of admitting aspirants to orders (from subdeaconship onward) on the *titulus* of means of their own, which title was known and canonically acknowledged as *patrimony*.[53] After the Council of Trent there were added to the two titles mentioned the *titulus pensionis*,[54] and others approved by custom and formally sanctioned by the later discipline of the Church.

A title may, therefore, be *defined* as a security given to a clergyman to insure his honorable maintenance, thereby enabling him to be promoted to higher orders. A title is thus needed for every order from subdeaconship onward. And from this general law no cleric, secular or religious, is excepted, for it is not becoming that those who devote themselves to the divine service should disgrace their sublime vocation by begging or exercising a trade not becoming to their state.[55]

Our code mentions *three titles* on which a *secular clergyman* may be ordained, but calls that of benefice *the canonical title par excellence*. This is quite intelligible, for although the other two titles were also admitted by the Church, they were extraordinary and tolerated only when a dispensation was granted. This at least was the Roman practice, as Benedict XIV says.[56] Now-a-days, however, no dispensation is required if there is no benefice available.

53 Cfr. cc. 4, 16, X, III, 5; Migne, *P. L.*, 210, 477; Benedict XIV, *De Syn. Dioec.*, XI, 2, 14.

54 Wernz, *Jus Dec.*, II, 114 (ed. 1).

55 *Trid.*, Sess. 21, c. 2, *de ref.*; c. 6, *Conc. Chalced.*

56 *De Syn. Dioec.*, XI, 2, 14.

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1. The term *benefice* is to be understood of an ecclesiastical prebend which supplies its holder with a sufficient income to insure a permanent livelihood. A benefice must, according to our text, be *secure* and *sufficient*.

(a) It is judged to be *secure* if possessed actually, pacifically, and permanently, according to the requirements established by the Council of Trent.[57] The beneficiary, therefore, must not only be appointed to, but have actual possession of, his benefice. Besides, there must not be any litigation or dubious claims to the prebend, and, finally, it must be permanent.[58]

(b) A benefice must be *sufficient* to support its incumbent decently. The amount required to constitute a *congrua* is left to diocesan regulation. This was also the view taken by the Roman Court.[59] And most justly, for circumstances of time and place differ widely. Who could live now-a-days on forty scudi (forty dollars) per year?[60]

Residential and non-residential benefices are estimated differently. The amount of income accruing from a *residential benefice* depends on the regulations of the diocese in which the benefice is located, whereas that of a *non-residential benefice* depends on the rules of the diocese in which the beneficiary is to live.[61]

It may be added that *benefice* is here to be taken in its strictly canonical sense, and does not apply to most American parishes, unless they be considered as benefices.

57 Sess. 21, c. 2, *de ref.*; Many, *l. c.*, p. 337 f.

58 A benefice was considered permanent if bestowed for life, or at least for the respective order; S. C. C., July 8, 1690; April 14, 1696 (Richter, *Trid.*, p. 113, n. 2 f.).

59 S. C. C., July 1723 (Richter, *l. c.*, n. 4).

60 Benedict XIV, *Institut.*, 26, n. IV.

61 S. C. C., May 27, 1723 (Richter, *l. c.*, p. 112, n. 1). A deficient benefice could be supplied by a patrimony; S. C. C., Oct. 1589 (Richter, *l. c.*, n. 13).

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2. *Patrimony,* properly speaking, is an inheritance received from one's ancestors, especially parents. Here it means a subsidiary title, admitted for the needs or advantage of the Church. The conditions required are the same as those demanded for a benefice. Hence the patrimony must be secure and sufficient. A secure patrimony would be one consisting of real estate or other stable and interest-bringing property, provided it is not mortgaged. Mortgaged property is unsafe as it may be sold at any time. The mere promise of parents or friends to provide a patrimony would not be considered secure,[62] nor the fact that the ordinand is by profession an artist, a musician, a teacher, or possesses a doctor's degree.[63] Much less would manual Mass stipends be considered a source of secure income. Government, State, and municipal bonds, and shares in reliable and conservative firms and companies [64] are in a different category. Live-stock, grain and cotton or any marketable produce may also be lawfully taken for patrimony.

As to *sufficiency,* what was said concerning the quantity or amount of a benefice also applies to a patrimony. If the interest on a certain capital is assigned, the latter must amount to about $15,000 or $20,000, which, invested at 5%, would bring $750 or $1000 a year, which now-a-days would just about afford a decent living.

If the ordinand assigns a portion of his own property as a patrimony, this must clearly be determined and set aside for the *titulus ordinationis,* and becomes inalienable. If *parents,* relatives, or friends furnish a patrimony, they must draw up a title-deed, donation, or note in legal form, without fraud, condition, or liability. In other words,

62 S. C. C., Oct., 1589; Oct. 2, 1717 (Richter, *l. c.,* n. 16).

63 S. C. C., Oct., 1589; May 23, 1609 (Benedict XIV, *Institut.,* 26, n. VII).

64 Many, *l. c.,* p. 345.

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the claim must be clear and complete, so that it cannot be attacked under the civil law.[65]

A Roman decision says that the title of patrimony can not be used if one is to be ordained only for the solace and spiritual comfort of his parents, and there is no need or advantage on the part of the diocese to recommend his ordination.[66]

3. The *titulus pensionis* is of the same nature as that of patrimony, and must offer the same guarantees of security and sufficiency. Some writers take *pensio* in the sense of ecclesiastical pension only, excluding civil pensions,[67] though neither the Council of Trent nor our text restricts the term to a pension derived from an ecclesiastical benefice. Therefore other authors justly admit *any* pension, provided it is secure and sufficient.[68] This view is supported by a decision of the S. C. C., which admits an annual pension, if founded on immovable property and secure.[69] The main underlying idea always is safety and sufficiency. Hence even a State pension, provided it is sufficient, may be accepted as a *titulus ordinationis,* because such a title ordinarily is as safe as any other.

LOSS AND LACK OF A TITLE

CAN. 980

§ 1. Ordinatus in sacris, si titulum amittat, alium sibi provideat, nisi, iudicio Episcopi, eius congruae sustentationi aliter cautum sit.

65 S. C. C., 1573, 1598, Nov. 29, 1670 (Richter, *Trid.*, p. 114, nn. 16, 17, 19); Benedict XIV, *Institut.*, 26, nn. XIII, XXVIII f.

66 S. C. C., Sept. 9, 1679 (Richter, *l. c.*, n. 14).

67 Many, *l. c.*, p. 348.

68 *Trid.*, Sess. 21, c. 2, *de ref.*; v. Scherer, *l. c.*, I, p. 362; Wernz, *l. c.*, II, n. 92, p. 115, who adds "*super bonis immobilibus fundatus sit,*" according to S. C. C., Oct. 2, 1707 (Richter, *l. c.*, n. 20).

69 Cfr. S. C. C., June 21, 1629; S. C. P. F., April 27, 1871, ad 2 (*Coll.*, n. 1369).

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§ 2. Qui, citra apostolicum indultum, suum subditum in sacris sine titulo canonico scienter ordinaverint aut ordinari permiserint, debent ipsi eorumque successores eidem egenti alimenta necessaria praebere, donec congruae eiusdem sustentationi aliter provisum fuerit.

§ 3. Si Episcopus aliquem ordinaverit sine titulo canonico cum pacto ut ordinatus non petat ab ipso alimenta, hoc pactum omni vi caret.

§ 1. If a clergyman in holy orders *loses the title to which he was ordained,* he must procure another, unless in the judgment of the bishop, he is well provided for in some other way.

The title to which one is ordained is mentioned at the act of ordination and is not liable to alienation, as has been repeatedly declared by the S. Congregation.[70] Hence a change of whatever kind must be notified to the local Ordinary, whose subject the clergyman is. If we say *clergyman,* we include religious, for the text simply says: *ordinatus . . . si titulum amittat,* thus including all titles: benefice, patrimony, pension, service, mission, *mensa communis,* and religious profession. Hence (1) if one loses the title of benefice he must procure another title, *i.e.,* any one of those just mentioned. (2) This must be done with the *express permission of the bishop,* even though it is certain that the clergyman has a sufficient livelihood.[71] (3) The bishop may and should compel a clergyman who has lost the *titulus missionis* to procure another,[72] as stated above. (4) A religious who was ordained *ad titulum mensae communis* or *ad religiosam professionem* and loses this title must procure another; but in missionary countries such clergy-

70 Cfr. Richter, *Trid.*, p. 113 f.

71 S. C. C., Feb. 9, 1726; Nov. 28, 1686; July 1687 (Richter, *Trid.*, p. 113 f., nn. 7, 29).

72 S. C. P. F., April 27, 1871 n. 11 (*Coll.*, n. 1369).

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men are only obliged to prove that they have sufficient means to live.[73] (5) If a patrimony assigned is changed into a benefice, the bishop's consent must be obtained, otherwise the change has no ecclesiastical effect.[74]

§ 2. Those who, without a previous Apostolic indult, have knowingly ordained, or permitted to be ordained, one of their subjects without a canonical title, are obliged to support the needy clergyman until he is otherwise provided with a living. This obligation also binds the successor of the prelate.[75]

The bishop who is here put under obligation is not the one who ordained the cleric, but the one of the subject ordained without a canonical title. The ordination must have been performed with full knowledge of the fact that there was no canonical title, *i.e.*, one acknowledged by the Church. If the bishop has been deceived by the ordinand or his parents, he is not obliged to support the cleric. On the other hand, if he was aware of the want of a canonical title, not only he himself, but his successor, is under that obligation. The term *successor* here includes the chapter, the Vicar Capitular or Administrator as well as the next bishop.[76] The obligation is limited by the condition of the clergyman and also as to duration. If the clergyman is *not really in need*, but has some other means of sustenance, no matter of what kind, so it be but becoming to the clerical state, the obligation ceases. It also ceases as soon as the state of need ceases. The bishop must defray this expense either from his personal income or from the *mensa episcopalis*, if there is such a one attached to his see.

73 *Ibid.* and S. C. EE. et RR., Dec. 20, 1838 (Bizzarri, *Collect.*, p. 83 f).

74 S. C. C., July 20, 1619; Nov. 16, 1686 (Richter, *l. c.*, nn. 21, 28).

75 Cfr. c. 6, *Conc. Chalced.*, c. 1, Dist. 70; cc. 4, 16, X, III, 5.

76 Reiffenstuel, l. I, tit. 11, n. 191 ff.

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§ 3. If a bishop has ordained a cleric without a canonical title, with the mutual *agreement* that the ordinand should not demand any support of him, the stipulation is void.

Such a practice would savor of simony, and the text from which the Code took this law, actually belongs to the title on simony.[77] The penalty is suspension from conferring orders for one year and is reserved to the Holy See.[78]

TITULI SERVITII ET MISSIONIS

CAN. 981

§ 1. Si ne unus quidem ex titulis de quibus in can. 979, § 1, praesto sit, suppleri potest titulo servitii dioecesis, et, in locis Sacrae Congregationi de Prop. Fide subiectis, titulo missionis, ita tamen ut ordinandus, iureiurando interposito, se devoveat perpetuo dioecesis aut missionis servitio, sub Ordinarii loci pro tempore auctoritate.

§ 2. Ordinarius presbytero, quem promoverit titulo servitii ecclesiae vel missionis, debet beneficium vel officium vel subsidium, ad congruam eiusdem sustentationem sufficiens, conferre.

If none of the three titles,— benefice, patrimony, pension,— is available the title of the *service of the diocese,* or, in the provinces subject to the S. C. Propanda, the *titulus missionis* may be substituted. However, in both cases the ordinand must make oath that he will permanently serve the diocese or mission under the jurisdiction of the respective local Ordinary. The Ordinary owes to the one promoted to the title of service or mission either

77 C. 45, X, V, 3. 78 See can. 2373, n. 3.

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a benefice or an office or a subsidy affording him sufficient support.

The *titulus servitii Ecclesiae* was first introducted under Eugene IV (1431–1447), who granted this privilege to the metropolitan of Florence. Later it was also permitted to the City of Mexico, under the title of administration, and as such was acknowledged by the Latin American Council of 1899.[79] The *titulus missionis*, which is only another form of the *titulus servitii Ecclesiae*, was first granted to the Irish College in Rome and then extended to other colleges under the Propaganda.[80] It was the usual title to which the clergy of the U. S. were ordained while we were under the jurisdiction of the said Congregation. When the S. C. Consistorialis, A.D. 1909, transferred the American, Irish and Scotch colleges in Rome to its own jurisdiction, it changed the *titulus missionis* into *titulus servitii*.[81] Since 1908, America and Great Britain also belong to the jurisdiction of the S. C. Consistorialis, and the *titulus missionis* is changed into that of service of the diocese, acknowledged not as canonical in the strict sense, but as legal or ecclesiastical; therefore no special faculties are needed to ordain one on this title.

1. Both the *titulus servitii* and the *titulus missionis* are *subsidiary* or extraordinary titles, which may only be used when there is none of the other three (benefice, patrimony, pension) available, and consequently should be employed only with discretion and for candidates who give manifest signs of a priestly vocation.[82]

79 Lingen-Reuss, *Causae Selectae*, p. 3; *A. S. S.*, 12, 569; *Acta et Decreta Conc. Lat. Am.*, 1900, p. 254, n. 582.

80 Urban VIII, "*Sacrosanctae*," April 12, 1631; May 18, 1638.

81 S. C. Consist., Nov. 12, 1908; Aug. 6, 1909 (*A. Ap. S.*, I, 148 ff; 678 ff.).

82 S. C. P. F. April 27, 1871, nn. 3, 6, 7 (*Coll.*, n. 1369).

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2. Before they are ordained *subdeacons,* the ordinands must promise under *oath* to devote themselves to the permanent service of the diocese or mission for which they are ordained.

3. This oath, the formula of which has been remodelled,[83] *excludes entrance into a religious community* without the special permission of the Holy See, which is granted either by the S. Cong. Consist., if one was ordained to the title of service, or by the S. Cong. Propaganda, if ordained to the title of mission.

4. By common law both titles are restricted to the respective diocese or the mission for which one was ordained, and the oath also is limited. In consequence no one could formerly, without a special indult from the S. Congregation, pass from one diocese or mission to another.[84] However, the bishops of England obtained an Apostolic indult that permitted one ordained for a certain diocese to be transferred to another diocese of the same ecclesiastical province without taking a new oath and without recourse to the Holy See. This indult was later extended to the dioceses of the U. S. and may still be made use of in both countries because it has not been expressly revoked by our canon.[85]

5. Either title may be *supplanted by another,* for instance, patrimony or pension. However, this change requires permission from the Holy See. If the title on which a priest was ordained is lost, and not supplanted by another, he is not suspended, but the Ordinary must compel him to procure another title.[86]

83 S. C. Consist., Aug. 6, 1909 (*A. Ap. S.*, I, 686).

84 S. C. P. F., April 27, 1871, n. 13; Feb. 4, 1873, ad 4 (*Coll.*, nn. 1369, 1394).

85 S. C. P. F., Aug. 18, 1885.

86 S. C. P. F., Aug. 18, Nov. 30, 1885 (*Coll.*, n. 1641); can. 4.

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TITLES FOR RELIGIOUS

CAN. 982

§ 1. Pro regularibus titulus canonicus est sollemnis religiosa professio seu titulus, ut dicitur, paupertatis.

§ 2. Pro religiosis votorum simplicium perpetuorum est titulus *mensa communis, Congregationis* aliusve similis, ad normam constitutionum.

§ 3. Ceteri religiosi, etiam ad ordinationis titulum quod attinet, iure saecularium reguntur.

§ 1. For *regulars,* the *canonical title* is that of *solemn religious profession,* or, as it is called, poverty.[87]

The Council of Chalcedon (can. 6) called this title *titulus monasterii,*[88] which is a juridical term, because under Justinian law[89] the monastery was a corporation responsible for the maintenance of its members. When the more centralized orders of the Mendicants arose, this title was necessarily transferred either to the province or to the order, and called religious poverty. *Salva reverentia* it may be permitted to say that this term has little justification in juridico-canonical language. It is for this reason, no doubt, that our Code adds: *ut dicitur.*

The title *paupertatis* is strictly limited to *regulars,* to wit, members of religious orders with solemn vows, and to solemn profession. Hence clerics belonging to orders whose members are only simply or temporarily professed, cannot be ordained on the title of religious profession.[90] This applies also to regulars working on the missions that are under the jurisdiction of the Propaganda.[91]

87 S. C. P. F., April 27, 1871, n. 11 (*Coll.*, n. 1369).

88 C. 1, Dist. 70.

89 *Cod. Just.*, I, 3.

90 *Auctis admodum,* Nov. 4, 1892, n. 1.

91 S. C. P. F., April 27, 1871, n. 4 (*Coll.*, n. 1369).

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§ 2. For *religious* of *simple perpetual vows,* the title is that of *mensae communis,* or *congregationis,* or a similar one, according to their own Constitutions.

This title is not called canonical in our text, but is legalized or acknowledged as valid for all congregations whose members take simple perpetual vows. Formerly it needed a special privilege or indult, for which each religious congregation, even though exempt, had to apply to the Holy See.[92]

This title signifies the same as that of religious profession, to wit, the claim to decent support. If it is lost, either by dismissal or withdrawal from the community, the Ordinary may suspend such an ex-religious, unless he has acquired another title sufficient for decent support.[93]

§ 3. All *other religious* fall under the common law of the Church, so far as the title of ordination is concerned. Hence

1.° Religious with purely *temporary vows* cannot be ordained subdeacons unless they have a canonical title, or one acknowledged by law, as prescribed for the secular clergy;[94]

2.° Novices are bound by the same law as the secular clergy;

3.° Members of religious societies without vows must obey the law laid down for the secular clergy, unless they have a special privilege.[95]

92 S. C. P. F., *ibid.*, Leo XIII, "*Conditae,*" Dec. 8, 1900, § 2, n. 6.

93 S. C. EE. et RR., Dec. 20, 1838 (Bizzarri, *Coll.*, p. 84).

94 S. C. super Statu Regul., Jan. 20, 1860 ad 1 (Bizzarri, *l. c.*, p. 858 f.).

95 As to the penalty, see can. 2373, 3°.

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ART. II

IRREGULARITIES AND OTHER IMPEDIMENTS

CAN. 983

Nullum impedimentum perpetuum quod venit nomine *irregularitatis*, sive ex defectu sit ex delicto, contrahitur, nisi quod fuerit in canonibus qui sequuntur expressum.

No permanent impediment which comes under the name of *irregularity*, whether it arises from a mere defect or from a crime, is incurred, unless it is expressly stated in the following canons.

The legislator has laid down (can. 968) a distinction between irregularity and simple canonical impediment. Now he determines the *source or origin* whence irregularity may be known or gathered — the *fons cognoscendi*. This is the Code, and the Code only. Indirectly this canon insinuates the power that may set up an irregularity. It is the common or *universal law*, or the Sovereign Pontiff, the legislator of the universal Church, who alone can lay down laws for all the clergy. The clergy is the same wherever the Church exists, and requires essentially the same qualities in all its members, and uniformity of discipline in this very important matter is absolutely required, lest some should seek exemption or admission into a laxer province.[96] The proposition that the Pope is the sole competent law-giver must not be understood as implying that custom[97] or particular synods did not contribute to the establishment of irregularities. For,

[96] Phillips, *K.-R.*, 1845; Vol. I, 411 f.

[97] Wernz, *Ius Decret.*, Vol. II, n. 97, p. 124 f. (ed. 1).

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like any other merely ecclesiastical law, that concerning irregularities had its genesis and development. Since the completion of the Decretals no new irregularities have been added.

The enumeration of irregularities in our Code is to be understood *taxative, i.e.,* as full and complete. No others are admitted; nor can new ones be established by any bishop, for single bishops are not competent to make laws for the universal Church. And irregularities belong to universal or common law.

The canon distinguishes between irregularity *ex defectu* and *ex delicto.* This distinction is first found in a decretal of Innocent III, where the note or mark of crime, and the mark of mere defect, are clearly kept apart.[98]

Irregularities are, first and above all, a safeguard of the *dignity of the sacred ministry,* not a penalty. It is true that the cause of an irregularity may be a crime, and that the irregularity itself may therefore *appear* as a penalty. But still the penal element attached to an irregularity is not primarily intended by the Church, but only accessorily or secondarily[99] and *per modum concomitantiae.* The primary intent is to safeguard the sacred ministry from profanation, as stated above. This primary intention appears more clearly in the irregularities *ex defectu,* which are not imputable to those affected by them. The Church wants her ministers to be blameless in every respect, like the bodyguard of a king, whose members are "drafted" from among the most capable of his subjects.

Concerning the *historical development,* it may be noted that some irregularities were established from the very

98 C. 14, X, V, 34, *de purgatione canonica.*

99 Wernz, *l. c.,* II, n. 96, p. 121.

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beginning of the Church, as the pastoral letters of St. Paul testify. No doubt the Mosaic Law furnished some prototypes for the priesthood of the New Testament, although the old ceremonial law could not essentially influence the New Dispensation.

IRREGULARITIES EX DEFECTU

CAN. 984

Sunt irregulares ex defectu:

1°. Illegitimi, sive illegitimitas sit publica sive occulta, nisi fuerint legitimati vel vota sollemnia professi;

2°. Corpore vitiati qui secure propter debilitatem, vel decenter propter deformitatem, altaris ministerio defungi non valeant. Ad impediendum tamen exercitium ordinis legitime recepti, gravior requiritur defectus, neque ob hunc defectum prohibentur actus qui rite poni possunt;

3°. Qui epileptici vel amentes vel a daemone possessi sunt vel fuerunt; quod si post receptos ordines tales evaserint et iam liberos esse certo constet, Ordinarius potest suis subditis receptorum ordinum exercitium rursus permittere;

4°. Bigami, qui nempe duo vel plura matrimonia valida successive contraxerunt;

5°. Qui infamia iuris notantur;

6°. Iudex qui mortis sententiam tulit;

7°. Qui munus carnificis susceperint eorumque voluntarii ac immediati ministri in exsecutione capitalis sententiae.

Irregular in consequence of a defect are:

1.° Those of *illegitimate birth, no matter whether their*

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illegitimacy be public or occult, unless they have been legitimated or made solemn profession.

The tenth and eleventh centuries are known for disciplinary relaxation and for a low conception, or at least an imperfect practice, of sacerdotal celibacy. To check the evil, the *filii presbyterorum* were first excluded from entering the clerical state, or at least from succeeding their progenitors in ecclesiastical benefices.[1] Gradually, however, the note of illegitimacy was extended to all born out of lawful wedlock.[2] What illegitimacy means, as well as the mode of legitimation, has been explained elsewhere.[3]

Excepted from this rule are those who have been *legitimated* either by a subsequent marriage, or by a papal rescript. Note, however, that legitimation does not permit one to become a bishop or Cardinal,[4] whereas inferior prelacies are not excluded from its effects.

Besides, as the Decretals had already enacted, *religious profession* removes the stain of illegitimacy. But this effect only follows *solemn* profession and extends only to the priesthood inclusively, all, even regular prelatures being excluded.[5]

The text says: no matter whether the *illegitimacy be public or occult.* We here take these two terms in the same sense as public and occult impediments; the difference lying in the fact whether it can or cannot be proved in court.[6] The mere fact is sufficient to debar one from receiving orders. The judgment of the Church is milder if illegitimacy is *doubtful,* and canonists hold that *expositi* or foundlings, for instance, are not to be re-

1 C. 12, Dist. 56.
2 Cfr. X, I, 17; C. 13, X, IV, 17.
3 Cfr. can. 1114 f.
4 Cfr. can. 331, § 1, n. 1; can. 232, § 2, n. 1.
5 C. 1, X, I, 17: "*praelationem vero nullatenus habeant.*"
6 Can. 1037.

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garded as illegitimate. Yet the practice rather favors *dispensatio ad cautelam.*[7] Illegitimacy is not to be extended to the second generation. If the son was born legitimately, it makes no difference whether his father was born legitimately or illegitimately.[8]

2.° Men who are *defective in body* or who, on account of weakness, cannot *safely,* or on account of deformity, cannot *becomingly* perform the functions of the altar. A greater defect is required to prohibit one from exercising an order already lawfully received, than for receiving a new order, nor are clerics forbidden by reason of such a defect to perform functions which they can properly perform.

The reason for this *defectus corporis* is incapability of ministering at the altar properly and the danger of exciting derision on the part of those present. The text simply says *corpore vitiati,* and refers every function to the ministry of the altar. Some examples may illustrate the text.

(a) If one has not the necessary stature to reach the altar properly, he would certainly be irregular.[9]

(b) One who is minus a *hand or a finger* which are necessary for handling the sacred species, is irregular. This is the case if thumb and index finger are missing. In cases where the hand was complete, but a great stiffness of the arm, caused by apoplexy or paralysis, rendered the breaking of the host or the making of the sign of the cross impossible, the S. Congregation denied a dispensation.[10]

7 C. un. X, V, 11; Phillips, *l. c.,* I, p. 530; Wernz, *l. c.,* II, n. 132, p. 184.

8 S. C. C., Nov. 9, 1647; Jan. 23, 1610 (Richter, *Trid.,* p. 465, nn. 6, 7).

9 Barbosa, *De Off. et Pot. Epi.,* P. II, alleg. 42, n. 53; but the S. C. C., July 12, 1721 (Richter, *l. c.,* 340, n. 13) in one case left it to the judgment of the bishop.

10 S. C. C., May 6, 1775; Dec. 19, 1772; July 28, 1770 (Richter, *l. c.,* nn. 18, 17, 16).

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(c) Concerning the *eyesight,* irregularity certainly exists where there is complete blindness or loss of the *vis visiva.* Thus, if one had such feeble eyesight as not to be able to read the Missal, and if the defect were incurable, no dispensation for receiving holy orders would likely be granted, even though the petitioner would be useful and his services needed for the diocese or some charitable institution.[11] If the left or "canonical eye" is strong and sound, irregularity can not be asserted, but a man having the use of only one eye is certainly irregular.

(d) As to the sense of *hearing,* those who are completely deaf or dumb are irregular. The same is true of those who stammer in a very offensive manner.[12]

(e) A special class is that of the *deformed,* who are destitute of a limb and thereby rendered abnormal. To this class belong all who lack the nose, or an arm, or a leg, or who suffer from gout or paralysis so that they appear stooped or are unable to make a genuflection; also those who limp considerably, or are lame. In this latter case the degree of scandal or ridicule must be considered.[13]

The text says that the *defect* must be *greater* if one has been already promoted to sacred orders, to inhibit the exercise of that order.[14] But if the defect is too great, neither permission nor dispensation may be expected. Thus a dispensation was denied to a priest who

11 S. C. C., Sept. 17, 1814 (Richter, *l. c.,* n. 25); May 19, 1906 (*Anal., Eccl.,* XIV, 199 f.); see c. 7, X, I, 20; c. 2, X, III, 6.

12 S. C. C., April 14, 1832 (Richter, *l. c.,* n. 28): ***notabiliter balbutiens,*** fit neither for administering the Sacraments nor for teaching; S. C. C., Jan. 25, 1806 (Richter, *l. c.,* n. 22): "***auditus et vocis vitio,***" unfit for chanting the Mass or hearing confessions.

13 S. C. C., Jan. 20, 1798; Jan. 28, 1832; May 25, 1833 (Richter, *l. c.,* nn. 20, 27, 29).

14 S. C. C., May 5. 1775, ***et pluries*** (Richter, *l. c.,* n. 12).

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could stand on his feet only during the consecration,[15] whereas another who was blind and could say Mass with the assistance of another priest was granted a dispensation, since there was no other church to say Mass and the priest was poor.[16]

3.° *Epileptics, the insane and possessed, who are now or have formerly been in this condition.* If they have become afflicted after ordination and recovered their health, the Ordinary may permit them again to exercise the orders they had received. As to *epilepsy,* the medical authorities[17] tell us that it has many and different forms: convulsions in which patients fall down, attacks which occur only at night, epilepsy in which the physical signs are almost entirely lacking, ambulatory epilepsy, etc. All are attributable to nervous disease. The same is true of insanity.

Diabolic possession was in former times often confounded with epilepsy.

As to epilepsy, the S. Congregation, as a general rule, demanded the testimony of a conscientious physician regarding the nature and progress of the disease, and subsequent freedom from attacks, which has to continue from one to two years at least. In cases where the attacks occurred only at long intervals, dispensation was sometimes granted, sometimes refused.[18] Hence the rule stated above is safe to follow. The same may be applied to insanity and possession, though in one case the S. C. denied a dispensation even though the patient had had no attack for three years.[19] The term Ordinary here

15 S. C. C., Dec. 18, 1841 (*ibid.*, n. 31).

16 S. C. C., Aug. 23, 1727 (*ibid.*, 15).

17 See O'Malley-Walsh, *Essays in Pastoral Medicine,* p. 251 ff.

18 S. C. C., Aug. 25, 1905; Nov. 24, 1906 (*Anal. Eccl.*, L, XIII, 370 f.; L. XIV, 436 f).

19 S. C. C., Dec. 2, 1724 (Richter, *l. c.*, p. 340, n. 10); in one instance the S. C. C., April 27, 1816 (*Richter,*

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includes the major superiors of exempt religious.

4.° *Bigamists,* who have validly and successively contracted two or more marriages. The reason for this law is stated in can. 1142. Note, however, that *bigamia interpretativa* or *simultanea* no longer entails irregularity. Those only are called bigamists, who after the first valid marriage has been dissolved, either by a dispensation *a matrimonio rato,* or by death, have married a second time and oftener. Whether the application of the Pauline Privilege would also count, seems doubtful.[20]

5.° *Those who have incurred infamia iuris,* loss of reputation or good name as stated in the law. *Infamia iuris* is a penalty inflicted on certain crimes expressly mentioned in the law,[21] either ecclesiastical or civil. The ecclesiastical law mentions several crimes as involving infamy *ipso facto.*[22] If a declaration is required to the effect that one is looked upon as infamous, infamy is not actually incurred until this declaration has been expressly made.[23] Infamy induced by civil law doubtless entails irregularity.[24]

6.° *A judge who has pronounced sentence of death.*

7.° *Those who have held the office of executioners and all their voluntary and immediate helpers in the execution of capital punishment.*

These two irregularities are styled *ex defectu lenitatis,* as they are supposed to indicate a lack of gentleness. It seems meet that the representatives of Christ, who was the meekest and gentlest of men, should be endowed with this preëminently Christian quality, which appears

n. 11) required ten years' freedom from attack, but the petitioner had followed a military career.

20 Because Baptism wipes out every stain, and bigamy certainly must be considered a personally contracted stain.

21 Can. 2293.

22 Canons 2320, 2328, 2343, 2351, 2356, 2357.

23 Canons 2314, 2359.

24 Cfr. Wernz, II, n. 130, p. 177; Gasparri, *l. c.,* n. 240 f.

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notably wanting in all who coöperate, although without any fault of their own, in the infliction of capital punishment.[25] The Code restricts the defects formerly enumerated under this heading to strict coöperation in carrying out the death sentence. The assistants must act as helpers of the hangman or electrocutioner voluntarily, *i.e.*, of their own accord, and immediately, whereas the job of the hangman is itself sufficient to involve irregularity. Soldiers or policemen who guard the place of execution do not incur irregularity; neither do priests and ministers of justice who assist or witness the act.[26]

IRREGULARITIES EX DELICTO

The pastoral letters of St. Paul form the foundation of the ecclesiastical discipline, which, however, wavered and changed considerably in course of time. "Having no crime,"[27] was the warning of the Apostle to Timothy when ordaining ministers of the New Dispensation. A crime in legal parlance always supposes a public or at least externally committed deed, which for one reason or another disturbs the public order and is offensive to those who witness it. Crime and sin must be and were distinguished from the beginning.[28] Baptism indeed wipes out sin and crime, but the *fomes peccati* remains. It seemed unbecoming that men who had committed one of the grosser crimes that were punished with special penances in the early Church, should be elevated to the sacred ministry. Three crimes (*apostasia, moechia,* and *homicidium*) were singled out as deserving of public

25 Cfr. c. 8, Dist. 50; c. 1, Dist. 51; S. C. C., April 22, 1673, Zamboni, *Collect.*, II, 320, n. 3; May 14, 1825 (Lingen-Reuss, *Causae Selectae*, p. 113).

26 Soldiers are here not mentioned, but they may fall under the following heading.

27 Cfr. I, Tim. III, 10; Tit. 1, 6 f.; Phillips, *K.-R.*, I, 550 f.

28 See the *Dictum Gratiani ad Dist. 25.*

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penance, which latter almost automatically excluded one from embracing the ministry.[29] As the Church spread, her discipline grew milder and many aspirants to the clerical state did not measure up to the primitive, rather severe requirements. This compelled the Church to mitigate her former restrictions with regard to admission to the priesthood. Yet the principle of decency and blamelessness was retained intact.

CAN. 985

Sunt irregulares ex delicto:

1°. Apostatae a fide, haeretici, schismatici;

2°. Qui, praeterquam in casu extremae necessitatis, baptismum ab acatholicis quovis modo sibi conferri siverunt;

3°. Qui matrimonium attentare aut civilem tantum actum ponere ausi sunt, vel ipsimet vinculo matrimoniali aut ordine sacro aut votis religiosis etiam simplicibus ac temporariis ligati, vel cum muliere iisdem votis adstricta aut matrimonio valido coniuncta;

4°. Qui voluntarium homicidium perpetrarunt aut fetus humani abortum procuraverunt, effectu secuto, omnesque cooperantes;

5°. Qui seipsos vel alios mutilaverunt vel sibi vitam adimere tentaverunt;

6°. Clerici medicam vel chirurgicam artem sibi vetitam exercentes, si exinde mors sequatur;

7°. Qui actum ordinis, clericis in ordine sacro constitutis reservatum, ponunt, vel eo ordine carentes, vel ab eius exercitio poena canonica sive personali, medicinali aut vindicativa, sive locali prohibiti.

Irregularity arising from crime is incurred by

[29] Cfr. c. 4, Dist. 81 (Conc. Nic. I, can. 9).

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1. *Apostates from the faith, heretics, and schismatics.* These three classes were always barred from holy orders. Remark that the canon mentions only actual apostates, etc., and that can. 986 determines the extent of this crime.

2. *Whoever has allowed himself in any way to be baptized by non-Catholics, except in case of extreme necessity.* This cause of irregularity, which is now considerably modified, was formerly called *abusus baptismi.* The text says *siverunt,* who have permitted themselves,—which supposes that they were at least aware of the non-Catholic character of the Baptism. Therefore we may safely say that *adults* only are here to be understood. But the word "adults" must be interpreted according to can. 745, § 2, n. 2, which says that with regard to baptism all those are called adults who have attained the use of reason.[30] The term *siverunt* also excludes violent or fraudulent Baptism administered by a non-Catholic.

The expression *non-Catholic* includes the members of every heretical or schismatical sect, ministers as well as laymen, men and women, *vitandi* and *non-vitandi.*[31] *Quovis modo,* in whatever manner, refers to the mode of baptism, whether it be solemn or private, public or secret.

Extreme necessity is certainly present where there is danger of death and no other person than a non-Catholic is available. But even in that case the danger of perversion must be absent, or at least very remote.[32]

3.° *Those who have attempted marriage, or got married before the civil court whilst they were bound by marital ties, or by sacred orders, or by religious, even*

30 Cfr. c. 3, c. 1, q. 4.
31 Wernz, *l. c.*, II, n. 134, p. 191.
32 Thesaurus-Giraldi, *De Poenis Eccl.*, 1831, p. 107 (P. II, c. 5, *Baptis*).

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though only simple or temporary vows, and also those (otherwise free) *who have attempted marriage before the civil court with a woman bound by the matrimonial tie or by a religious vow.*

This canon, as formulated, is to some extent new, though similar to the old law regarding *bigamia interpretativa* and *similitudinaria,* which were enumerated among the irregularities *ex defectu.* The two classes thus rendered irregular comprise:

(a) *Married* men who attempt marriage with another woman, whether a virgin or a widow, or legally divorced. The attempt, however, must be serious, and possess the semblance and figure of marriage. Note that the text does not require consummation of the marriage.[33] On the other hand mere concubinage does not constitute irregularity on this score.[34]

(b) *Clergymen in sacris,* or religious with simple, even only temporary, vows, who attempt marriage or to get married before the civil court. This was called *bigamia similitudinaria,* being a carnal marriage [35] contracted after a spiritual espousal. Here, however, a distinction must be made. Whereas the clergy in sacred orders and solemnly professed religious cannot validly contract, but at most *attempt* a marriage, *i.e.,* have the civil act performed, those with simple vows may contract validly, but incur irregularity unless they are dispensed from the simple vows and get married *in facie Ecclesiae.* It would be irreconcilable with the discipline of the Church, who dispenses from simple vows, to hold that irregularity follows religious who are lawfully dispensed from their vows, or who contract marriage after

33 This was implied in most of the ancient texts; c. 15, Dist. 34; c. 1, X, I, 21.

34 C. 6, X, I, 21.

35 Wernz, II, p. 101, justly observes that the texts are not sufficiently clear to establish this irregularity.

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the lapse of temporary vows (can. 637). Therefore the term *ligati* must be taken *in sensu composito,* not *in sensu diviso,* to use a well-known distinction.

(c) Men who attempt to contract marriage with any *woman* who is under religious or marital obligation to the same extent, *i.e.,* a religious with solemn or simple vows, as long as these bind, or a married woman, as long as the marital tie has not been duly dissolved. We say *men,* not clergymen, or religious, or married men, but men who are otherwise free to marry. This regulation was made for the preservation and honor of the sacred ministry no less than for that of the religious and the married state. Here, too, the old idea of similitudinarian bigamy may be traced.

4.° *Those who have committed voluntary homicide or procured the abortion of a human fetus, if these acts were effective; also all who have coöperated in these crimes.*

The Church has always had a special horror of homicide[36] and crimes of a similar nature. Our canon mentions two kinds, *viz.:*

(a) *Voluntary homicide,* which is a morally imputable action resulting in the death of a man. This definition includes within its scope all who, either personally or by command, kill another human being. Morally imputable means that the act was committed with deliberation and for a reason which cannot stand before the court of conscience.[37] Hence a mere accidental killing (*homicidium casuale*) cannot be imputed to the human agent. If a boy awkwardly handles a shotgun, which goes off and kills his sister, the boy is not irregular.[38]

36 Cfr. X, V, 10–12; cc. 36 ff., Dist. 50; Gasparri, *l. c.,* n. 405 ff.

37 Cc. 2, 3, 10, X, V, 12; c. 3, 6°, V. 4.

38 S. C. C., July 3, 1677 (*Anal. Eccl.,* XIII, 134); cfr. c. 48, 51, Dist. 50.

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But if one inflicts a wound with a knife, and the injured person dies from the effects of that wound, homicide must be imputed, because death immediately resulted from an illicit and unjust act, even though the intention of killing was absent.[39] If a man kills another in *self-defence*, if he neither intended the other's death nor could ward it off by any other expedient, he does not incur irregularity. However, since there is danger of excesses being committed in self-defense (*cum excessu moderaminis inculpatae tutelae*), provisional dispensation must be asked for in such cases. This is more readily granted if the assault was not provoked and no other way of escape was open.[40] But revengeful killing, although provoked by the assailant, would hardly be considered worthy of a dispensation. Irregularity is also incurred by knowingly and unnecessarily performing a dangerous action or engaging in a perilous amusement which results in the death of another.[41]

(b) Those who perform an *abortion* on a human being incur irregularity, provided, of course, the act is committed, not accidentally or unawares, but intentionally or through grievous culpability, even though by accident.[42] The aborted fetus must be a *fetus humanus*, and, as is generally added, *animatus, i. e.*, a living human fetus. We were surprised to see no reference, among Card. Gas-

39 S. C. C., May 21, 1763 (Richter, *Trid.*, p. 92 f. n. 2). A passage reads: "*Homicidium voluntarium non est solum, quando occidens explicite vult occidere, sed etiam quando eius voluntas tendit in eum actum, ex quo per se ac immediate mors sequitur, non per accidens, uti contingit in eo, qui alium percutit, volens ei iniuriam irrogare, sed non occidere; si enim ex percussione mors sequatur, dicitur homicida voluntarius, cum voluntas percutientis feratur in percussionem, et in omne id quod immediate fuit secutum.*"

40 S. C. C., March 12, 1763; May 18, 1726; Aug. 6, 1808 (Richter, p. 92, nn. 6, 8, 9).

41 S. C. C., Sept. 24, 1718; April 19, 1738 (Richter *l. c.*, nn. 7, 10).

42 Sixtus V, "*Effraenatum*," Oct. 29, 1588, § 2.

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parri's quotations, to the Constitution of Gregory XIV, "*Sedes Apostolica,*" of May 31, 1591, which restricted irregularity and penalties to the *fetus animatus,* as the old law had it.[43] However, said Constitution is quoted under can. 2350, § 1. We believe that the unanimous teaching of the school should not be set aside, especially since the wording *fetus humanus* can only signify a living fetus. Animation, as stated before, takes place within the first week after conception.[44] Theologians as well as canonists admit that the old theory concerning animation may still be held as far as the incurring of penalties and irregularities is concerned. This theory is that between the conception and the animation of a male fetus forty days, and of a female fetus, eighty days elapse. As long as no authentic declaration has been issued, the strict interpretation applied to penal laws may be followed here, and the period of forty, respectively eighty days be admitted.[45] At any rate, we cannot scientifically speak of a human fetus before the lapse of six days after conception.

(c) *Effectu secuto* means that death must have actually resulted from the act of killing or abortion, because there must be a connection between cause and effect.

(d) The *cooperantes* are those who formally, not merely in a material way, command, counsel or assist in the act of homicide or abortion. The coöperation must, therefore, be deliberate and external, and death must be foreseen. The excuse that he did not intend to kill would not free anyone from the guilt of coöperation if his action

43 C. 2, X, V, 12 (quoted by Card. Gasparri).

44 Cfr. can. 746 f. We cannot accept Eschbach's assertion (*Disp. Phys.-Theol.,* p. 192) that there is no distinction between conception and animation; for it takes at least from four hours to six days until segmentation is complete, and only after six days the embryo becomes a fetus.

45 Cfr. c. 12, X, V, 12; Wernz, II, n. 147, p. 208.

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was such that he could have foreseen that it would cause death. But the *cooperantes* incur irregularity only if their coöperation was efficacious, *i. e.,* if it really helped to bring about the death of the victim.[46] Physicians or druggists who give or sell medicine for the purpose of causing abortion are *cooperatores,* and in an even higher degree surgeons who perform an operation solely for that purpose. A midwife, husband, or father are guilty of cooperation if they give poison or strong medicine to a pregnant woman or beat or burden her so as to cause abortion.[47] On the other hand, the manufacture and sale of contraceptives, though criminal, does not induce irregularity. If several persons would plot against the life of another, but only one would actually kill him, all would be irregular if it were unknown who was the murderer.[48]

5. *Those who have mutilated themselves or others or have attempted suicide.* By mutilation authors generally understand the cutting off of a member which has a specific function to perform in the human body, *e. g.,* the nose, or an eye, or an ear, or a hand, or a foot. Hence it would not be mutilation to cut off a finger, or a knuckle, or to knock out a tooth.[49] By self-mutilation is here understood the *castratio sui ipsius,* which was so severely reprimanded in Origen.[50] But the term *seipsos* must not be pressed, as if irregularity would be incurred only if a person actually performed the operation on himself. To have it done by a physician is just as imputable, nor does it matter for what motive one perpetrates this foolish act. The "religious zeal" that inspires such an

46 Reiffenstuel, V, tit. 12, nn. 27 ff.; cfr. can. 2209.

47 Sixtus V, "*Effraenatum,*" Oct. 3, 1588, § 3.

48 C. 5, X, V, 12; can. 2211, 2231; Wernz II, n. 147, p. 209. An operation performed for the purpose of preventing pregnancy does not induce irregularity.

49 Reiffenstuel, V, 12, n. 55 ff.

50 C. 7, Dist. 55 (*Conc. Nic. I.,* c. 1); c. 4 f., Dist. 55; c. 4, X, I, 20.

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act is deleterious. Yet we believe, in view of can. 986, which excuses from irregularity [51] when no mortal sin is involved, one who has castrated himself might *de facto* be declared immune from irregularity. But provisional dispensation would certainly be advisable.

As to attempts to commit *suicide* no comment is required except what we have just said in connection with can. 986. An attempt at suicide committed in an abnormal mental or nervous state, would be unimputable, and therefore would not involve irregularity.

It may have surprised the reader that not a word is said about *soldiers,* especially clergymen who served as such in the recent war. A decree of the S. C. Consistorialis, Oct. 25, 1918 (*"Redeuntibus"*), says the *defectus lenitatis* attaches to clergymen who were compelled to kill and mutilate,[52] but the Ordinary may grant a dispensation from it, unless the clergymen *volunteered* for active service in the war, in which case dispensation is reserved to the Holy See. By volunteering for military service these clerics have tacitly also resigned their office or benefice. The decree draws no distinction between just and unjust, offensive and defensive war. Formerly [53] it was generally thought that in an unjust war all soldiers, laymen as well as clerics, were irregular, if any one was killed. However, common soldiers are not easily persuaded that they are fighting in an unjust cause, and who is to be the impartial judge in such a case? It is therefore more reasonable to say that neither lay soldiers nor clergymen soldiers incur irregularity by the mere fact of fighting and killing if compelled to do so by

51 Formerly this action induced irregularity *ex defectu,* and it may still involve it, if the two reasons hold; but *castratio* could not be styled such a defect.

52 *A. Ap. S.,* X, 481 ff.

53 Cfr. Benedict XIV, *Institut.,* 101, n. 16 f.

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the public authorities, but a general *dispensatio ad cautelam* should be asked for or given as is done in the aforesaid decree. Can. 141 is not to be neglected, however.

6. *Clerics who practice medicine or surgery, both of which are forbidden to them, if death results from their practice.*

Can. 139, § 2, requires an Apostolic indult for the exercise of the medical profession by clerics. If they practice without an indult, they transgress the law of the Church, and therefore act illicitly. Hence if they kill any one, even accidentally and after due preparation, they become irregular.[54] Clerics who have obtained an Apostolic indult cannot be said to practice unlawfully, and therefore, even if death should occur at their hands, no irregularity would follow.

7. *Those who, without having received an order, perform an act which is reserved to clerics in higher orders, or who, without having received an order, or having been forbidden to exercise an order duly received, either by a canonical sentence inflicted on their person by a censure or vindictive penalty, or on the place where they exercise it.*

This number comprises the two irregularities called *abusus ordinis* and *ex capite violatae censurae*.

a) *Abuse of orders* is here strictly limited to *higher orders*, from subdeaconship onward. Hence if a layman exercises one of the minor orders, he is not now [55] irregular. A lector who exercises the office of acolyte is not irregular, even though he has not yet received the acolytate.[56] On the other hand if a layman, or a cleric in minor orders, would knowingly, solemnly, and seri-

54 Cfr. c. 7, X, I, 14; c. 19, X, V, 12.

55 Formerly he was; c. 1, X, V, 28; Gasparri, *l. c.*, n. 233 f.

56 Cfr. cc. 1, 2, X, V, 28.

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ously act as subdeacon; or if a subdeacon not yet ordained to the diaconate would act as deacon, they would incur irregularity. To serve as subdeacon without the maniple, or to serve as deacon at Mass without the stole, would not incur irregularity, because these vestments are the proper insignia of the respective orders.[57]

The *actus ordinis* is an act of a higher order. Such acts (priestly functions) are forbidden to clergymen in lower orders. Thus saying Mass is a strictly sacerdotal function. So is hearing confession, though it also involves an act of jurisdiction, and therefore a cleric not yet ordained a priest would be irregular if he were to attempt it.[58] A deacon solemnly baptizing without permission from the Ordinary or pastor would not be irregular.[59]

b) Irregular by violation of a *censure* or *vindictive penalty* are those who are *personally* under a canonical sentence. *Censures* are: excommunication, suspension from orders, and personal interdict. However, suspension may also be inflicted as a vindictive penalty.[60] But even in that case it must be declared as a suspension from orders, or as total suspension, *i. e.,* suspension simply so-called.[61] An interdict may affect *personally* a clergyman *in sacris,* inasmuch as this censure follows him everywhere. Or again the interdict may be local, affecting a certain territory only, and persons only indirectly. If the interdict is local only, can. 2271 f. must be consulted. If a local interdict permits the celebration of divine services, the priest who says Mass in accordance with said canons would certainly not be irregular, whereas a per-

57 How such clerics in minor orders should conduct themselves when acting as ministers of solemn Mass, see can. 1306.

58 C. 1, X, V, 28; Layman, *l. c.*

59 Gasparri, *l. c.*, n. 339; Wernz, *l. c.*, n. 137, p. 198

60 Can. 2298.

61 Can. 2278, § 2.

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sonal interdict forbids the celebration of the divine office in any and every place. If, then, a clergyman *in sacris* thus censured or punished would seriously and solemnly exercise his order, he would incur irregularity.[62] This is also true if he were suspended *ex informata conscientia* and would exercise an act of orders while an appeal was pending, because such an appeal is permissible only *in devolutivo*.[63] But if a clergyman suspended *in sacris*, for instance, a deacon, would be ordained to the priesthood while suspended, he would not become irregular.[64]

HOW IRREGULARITY EX DELICTO IS INCURRED

CAN. 986

Haec delicta irregularitatem non pariunt, nisi fuerint gravia peccata, post baptismum perpetrata, salvo praescripto can. 985, n. 2, itemque externa, sive publica sive occulta.

These crimes do not produce irregularity, unless they are of the nature of a grievous sin committed after Baptism, and external, either public or occult, with due regard, of course, to can. 985, n. 2.

Hence *no* irregularity is incurred if the acts enumerated in can. 985 do not amount to a *grievous sin*,[65] as defined by theologians. For irregularity being a very serious, and if not a direct, at least an indirect penalty, the legislator naturally supposes a grievous fault. The text adds, "*committed after Baptism*," because Baptism wipes out every crime and sin.[66] The text makes an ex-

62 Cfr. c. 1, 6°, II, 14; cc. 1, 18, 20, 6°, V, 11; Gasparri, *l. c.*, n. 356 ff.

63 S. C. P. F., Oct. 20, 1884 (*Coll.*, n. 1628).

64 Layman, *l. c.*, c. 3, n. 5.

65 C. 1, Dist. 81 (S. Aug.): "*crimen est peccatum grave, accusatione et damnatione dignissimum.*"

66 C. 60, Dist. 50.

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ception in favor of Baptism, which one may have administered to himself by a non-Catholic. But even this supposes a grievous fault, though naturally it could not be wiped out by Baptism, which has not yet been received.

The text further says: an *external* sin. Every crime is by its very nature external; *i. e.,* deserving of or liable to accusation. Hence one may be an apostate, a heretic, a schismatic and sin grievously in his heart,— as long as he does not manifest his apostasy or heresy by an external act, he is not irregular. It is *not* required, however, that the crime be *public, i. e.,* liable to be proved in an ecclesiastical court; even an occult crime suffices.[67]

Can. 987

Sunt simpliciter impediti:

1°. Filii acatholicorum, quandiu parentes in suo errore permanent;

2°. Viri uxorem habentes;

3°. Qui officium vel administrationem gerunt clericis vetitam cuius rationes reddere debeant, donec, deposito officio et administratione atque rationibus redditis, liberi facti sint;

4°. Servi servitute proprie dicta ante acceptam libertatem;

5°. Qui ad ordinarium militare servitium civili lege adstringuntur, antequam illud expleverint;

6°. Neophyti, donec, iudicio Ordinarii, sufficienter probati fuerint;

7°. Qui infamia facti laborant, dum ipsa, iudicio Ordinarii, perdurat.

67 The reason lies in the requirement of personal worthiness of the minister, which indirectly affects the public welfare of the Church; besides, an external act is liable to become known.

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The following persons are incapable of receiving orders:

1.° *The sons of non-Catholics, as long as their parents remain in their error.* This was formerly called the *defectus fidei confirmatae* and comprised all male descendants of the paternal line to the second degree, and of the maternal line to the first degree. This was the Roman practice and obtained also in Germany and other countries where the prevailing religion was sectarian.[68] The Code, however, limits this impediment, which no longer involves irregularity, to the first degree, *i. e.,* to the parents. If the parents have become converted to the Catholic faith at the time when their son is to be ordained, no impediment prevents him from receiving orders. But it certainly is required that *both* be converts, for the name *parents* comprises father and mother.[68a]

The question may arise: What if the parents died as heretics before the ordination of their son? It would seem that the impediment still exists, because a decision of the Holy Office says: "and the sons of heretics who remain in heresy or who died in heresy." [69] But this very decision permits us to adopt a milder view. It, like our text, says *permanent, i. e.,* remaining or enduring until the time of the ordination. But when the parents are dead, their error cannot be said to remain. Besides the danger of perversion or returning to heresy by reason of filial attachment to the parents is precluded by their decease.

68 Clement VIII, *ad ep. Pac.,* Oct. 6, 1593 (Richter, *Trid.,* p. 339, n. 2); S. O., Dec. 4, 1890; March 6, 1891; Feb. 3, 1898, ad 2 et 3 (*Coll. P. F.,* nn. 1744, 1748, 1990).

68a This is now certain by decree of Oct. 16, 1919 (*A. Ap. S.,* XI, 478).

69 S. O., Dec. 4, 1890 (*Coll.,* n. 1744).

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Non-Catholic means any sect, Christian, pagan, or Jewish.[70]

2.° *A man who has a wife* cannot embrace the clerical state while the wife lives. We say, the *clerical state,* because a married man may not even receive the tonsure, unless his wife consents.[71] This impediment, which is part of the former irregularity *ex defectu libertatis,* exists only in the Latin Church and is connected with the law of celibacy.[72]

The consent of the wife must be freely given, and she must, moreover, herself enter the religious state, if she is not yet advanced in years, and make profession there, to enable the husband to receive higher orders.[73] As tonsure and minor orders should not be conferred unless the subject intends to ascend to higher orders, it may be said, broadly, that the wife must make religious profession if her husband wishes to enter the clerical state with her express consent. But if she is of advanced age, say past fifty, she may remain in the world, provided she takes the simple vow of chastity, and provided also the husband is not suspected of incontinency.[74] The Holy Office refused to dispense a man of thirty-six who appeared to have all the necessary qualifications for the clerical state because his wife could not enter the religious state, there being no convent in that country.[75] The Holy See must declare whether the conditions are all verified in any given case, and if the decision is favorable, the wife must make the simple vow of chastity into the hands of the Ordinary or his delegate.[76]

70 C. 1, Dist. 48; c. 10, Dist. 61; S. C. C., Jan. 25, 1749, etc. (Richter, *Trid.*, p. 339, nn. 3 ff.).

71 C. 4, 60, I, 9.

72 Cfr. c. 1, Dist. 77.

73 C. 5, X, III, 32 mentions only higher orders.

74 Benedict XIV, *De Syn. Dioec.*, XIII, 12, nn. 14 ff.

75 S. O. Feb. 12, 1857 ad 4 (*Coll. P. F.*, n. 1057).

76 Benedict XIV, *l. c.*, n. 16.

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3.° *Those who are engaged in an office or administration forbidden to clerics, and of which they have to render an account, until they have given up the office and administration, settled their accounts, and thus become free.* This, too, is part of the former irregularity *ex defectu libertatis.* A chapter[77] of the Decree of Gratian mentions the *curiales, i. e.,* officers or rather employees of the various departments of civil administration who were engaged by the magistrates. To this class belonged also the mayors of small towns, who were responsible to the *fiscus* or State treasury. These Emperor Mauritius forbade to become clerics, and although Gregory I opposed the law on principle, he approved it, as far as rendering accounts was concerned. This is the idea underlying our canon; for the rest we refer to can. 139.[78]

4.° *Slaves, properly so-called, before they are given their liberty.* This belongs to the same *defectus libertatis.* Regarding slaves in the proper sense, *i. e.,* men who belong bodily to a master, the Church ordained that they should not enter the clerical state, partly because their admission would lower its dignity, and partly because they were not their own masters.[79]

5.° *Men bound to common military service by the civil law, before they are fully discharged.* This means all who are compelled by the law of the land to do military service.[80] Leave of absence, no matter whether for a definite or an indefinite time, does not free one from the military obligation. But if one is unconditionally discharged, his military duties may be regarded as "fully discharged," even though it is possible that the State will

77 C. un., Dist. 53 (Greg. I): c. 3, Dist. 54.

78 Vol. II, p. 88 ff.; see cc. 2, 4, X, III, 50.

79 Cfr. Dist. 54, *passim;* can. 1083, § 2 and our commentary on the same.

80 Cfr. Vol. II, p. 64 f.; p. 94, of our commentary.

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call him again in case of necessity. The text of our canon certainly presumes that a soldier was discharged; extraordinary cases are not affected by this law.

6.° *Neophytes, until the bishop thinks their faith sufficiently tried.* The early ecclesiastical laws demanded a long and severe trial of neophytes, to prove their constancy and faith.[81]

Formerly the so-called *clinici* were also excluded from the clerical state. These were converts who delayed the reception of Baptism until they were sick.[82] Our canon leaves it to the discretion of the bishop to try converts and obtain moral certainty as to their sincerity and steadfastness.

7.° *Those who suffer from infamy* (not by law but) *in fact, as long as this blemish remains on the person according to the judgment of the Ordinary.* Infamy is here taken in a wider sense than *infamia iuris,* in can. 984, 5°, and signifies the loss of honor or the good reputation which men enjoy in the estimation of their fellows. The term may also signify the legal status of a person convicted of an infamous crime. This supposes a juridical sentence, or at least a crime branded as infamous by law. There are crimes which, though they do not entail legal infamy, are regarded by honest people generally as infamous.[83] Besides, there is a popular conviction that certain professions are mean or unbecoming to the clerical state. This is what was called the *levis nota.* Thus in former times actors (*histriones*) were branded with this stain.[84]

This infamy arising from *levis nota* cannot be meant in

81 Cfr. 1, Tim. III, 6; c. 1, Dist. 48.

82 Cfr. Benedict XIV, *De Syn. Dioec.,* XII, 6, 7; Armellini, *Lezioni del' Archeologia Crist.,* p. 290.

83 Cfr. c. 17, c. 6, q. 1, which would include any sin against the Decalogue.

84 Cfr. cc. 15, 16, X, III, 1.

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our canon, as it was never looked upon as an irregularity in the proper sense, but rather as incompatible with the clerical state. Infamy must therefore be based upon a personal fact which degrades the perpetrator, and includes in its range those whom the civil law declares infamous,[85] or who have lost their civic rights. *Infamia facti,* says our Code, is contracted on account of a crime committed or because of immoral conduct which has deprived one of his good name among the faithful. This stain can only be removed by enduring amendment by which the lost reputation is re-established. *When* this is the case must be left to the judgment of the Ordinary.[86] But it may be added that infamy afflicting the parents or relatives of an ordinand does not affect the ordinand himself. Thus, if the father had been condemned to the galleys or capital punishment, the son would not be irregular on that account.[87]

IGNORANCE NO EXCUSE

CAN. 988

Ignorantia irregularitatum sive ex delicto sive ex defectu atque impedimentorum ab eisdem non excusat.

Ignorance of irregularities, whether resulting from defect or crime, and of impediments, does not excuse from incurring them.

Some authors held that certain irregularities were not incurred if one was ignorant of them. Thus it was maintained that the violation of the censure (can. 985, 7.°) would not render one irregular who had no knowledge of

85 C. 2, c. 6, q. 1: "*omnes vero infames esse dicimus, quos leges saeculi infames appellant.*"

86 Cfr. can. 2293, 2295.

87 S. C. C., Aug. 11, 1759 (Richter, *Trid.*, p. 340, n. 8); can. 2293, § 4.

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the same.[88] This may be true in the court of conscience. But a logical application of the principle that irregularities are not properly called penalties would really seem to exclude this opinion. All irregularities are directly intended to safeguard the dignity and reverence due to the sacred ministry, and therefore the exterior fact, *i. e.*, the quality of the minister as it ought to be in the face of the Church, is considered, not his internal disposition. The Code therefore says that ignorance, whether culpable or inculpable, does not excuse from incurring the irregularities or contracting the canonical impediments. However, it must be added that can. 986 requires a grievous sin to induce an irregularity *ex delicto*. Therefore infants or those who are not responsible for their acts cannot incur irregularity from crime.[89]

MULTIPLIED IRREGULARITIES AND IMPEDIMENTS

CAN. 989

Irregularitates et impedimenta multiplicantur ex diversis eorundem causis, non autem ex repetitione eiusdem causae, nisi agatur de irregularitate ex homicidio voluntario.

Irregularities and impediments are multiplied if their causes are different, but not by a repetition of the same cause, except in case of irregularity from voluntary homicide.

The fundamental reason here again is the dignity of the sacred ministry. If it is jeopardized or lost, the loss cannot be undone. The defect or crime may grow by degrees. A deliberate homicide increases the number of

88 Thesaurus-Giraldi, *De Poenis Eccl.*, P. I, c. 15 (ed. 1831, p. 15).
89 *Ibid.*, c. 17, p. 18; Suarez, *De Censuris*, disp. 40, sect. 5, n. 9 f.; Gasparri, *l. c.*, n. 202; Wernz, *l. c.*, II, n. 100, p. 129.

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irregularities because of the peculiar horridness of the crime. Hence if one has committed two homicides or two or more abortions, he has incurred as many irregularities as he has committed crimes.

The *cause* here understood is the *causa materialis, i. e.,* the occasion or *causa proxima*[90] of irregularity. This *causa materialis* or *proxima* is either a defect or a crime upon which the law has placed the penalty of irregularity. Such causes may differ either specifically or numerically. Thus one who is irregular by reason of illegitimacy may also become irregular on account of bigamy; one who is irregular because of apostacy may also contract irregularity by committing homicide; for all these are *specifically* different causes. The *numerical* difference consists in the repetition of the same act, for instance, if a judge inflicts the death sentence more than once, and thereby, as it were, multiplies or increases the irregularity. Here the Code adopts a different and more logical view than some canonists[91] by ruling that, with the exception of deliberately committed homicide, no irregularity is multiplied by repeated acts of the same species. In other words, the Code admits specific but rejects numerical multiplication, with the exception of homicide. Nevertheless those who are *corpore vitiati* (thus at least it seems to us), suffer from as many irregularities as there are defects, for instance, one deprived of an arm and deaf and blind is irregular for three separate and distinct causes. Therefore, these defects must all be mentioned in the petition for a dispensation, as per can. 991.

90 Collet, *De Irregularitatibus,* in Migne, *Cursus Theol.,* Vol. XVII, col. 199.

91 Suarez, *l. c.,* sect. 7, n. 5, ed. Paris 1861, XXIII, 362 seems to admit multiplication analogously to suspension.

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THE ORDINARY'S DISPENSING POWER

CAN. 990

§ 1. Licet Ordinariis per se vel per alium suos subditos dispensare ab irregularitatibus omnibus ex delicto occulto provenientibus, ea excepta de qua in can. 985, n. 4 aliave deducta ad forum iudiciale.

§ 2. Eadem facultas competit cuilibet confessario in casibus occultis urgentioribus in quibus Ordinarius adiri nequeat et periculum immineat gravis damni vel infamiae, sed ad hoc dumtaxat ut poenitens ordines iam susceptos exercere licite valeat.

This canon is a repetition of chapter 6, *Liceat,* Sess. 24, of the Council of Trent. The meaning is that *Ordinaries,* either by themselves or through delegates, may dispense from all irregularities arising from an *occult crime,* except the one mentioned in can. 985, n. 4, or any other brought before the ecclesiastical court.

a) The Ordinaries here mentioned are all those named in can. 198, including the higher superiors of exempt clerical institutes, who, of course, can make use of this power only in favor of their subjects. The special privileges accorded by various Pontiffs to diverse orders are not included in this power, but neither are they declared void by our canon. Pius V granted considerable faculties to the Theatines [92] and the Cassinese Congregation of the O.S.B.,[93] enabling the superiors to dispense even from homicide. This latter faculty, however, was valid only for the court of conscience. It would certainly not be advisable to stretch the privilege so as to include homicide. Besides, most authors exempt from these privi-

92 "*Ad immarcescibilem,*" Feb. 6, 1567.

93 "*Dum ad Congregationem,*" June 15, 1571.

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leges dispensation from a notable bodily or mental defect. Furthermore this privilege would not avail for removing the inability for prelacies.[94]

Our text also says that Ordinaries who are entitled to dispense may either do so themselves or *delegate* some one to dispense in their name. For this is ordinary jurisdiction, which may be delegated to others, either habitually or for individual cases.[95] Therefore the Ordinary, the Vicar-General and the Vicar-Capitular (who needs no special faculties from the chapter)[96] enjoy the power of dispensing from these irregularities and may delegate another priest, either secular or regular, to impart it.

b) The canon mentions only *irregularities arising from an occult crime*. An *occult* crime, as stated elsewhere, is one which cannot be proved in an *ecclesiastical court*. The action of a civil court makes no difference. One declared guilty by a civil court but discharged as innocent by the ecclesiastical court would not be irregular and therefore would need no dispensation.[97] *All* irregularities arising from an occult crime may be dispensed from; this includes heresy, as to which a different opinion prevailed before the promulgation of the Code.[98]

c) Excepted are *homicide and abortion*, as explained under can. 985, n. 4, and any other irregularity from an occult crime which has been brought before the ecclesiastical court (*deducta ad forum iudiciale*, or *ad forum contentiosum*, as the Tridentine Council has it). An ecclesiastical trial begins when the summons (*citatio*) is duly made or the parties of their own accord appear be-

94 Cfr. Ballerini-Palmieri, *Opus Theol. Moral.*, Vol. VII, p. 341; Piatus M., *Praelectiones Juris Regul.*, ed. 2, Vol. I, p. 578.

95 Can. 199, § 1.

96 Thus in S. C. C., Dec. 4, 1632 (Richter, *Trid.*, p. 338, n. 1).

97 S. C. C., Jan. 25, 1726 (Richter, *l. c.*, p. 93, n. 4).

98 S. C. C., June 18, 1796; Dec. 4, 1632 (Richter, *l. c.*, p. 339, n. 1); Gasparri, *l. c.*, n. 230.

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fore the tribunal.[99] Mere accusation or denunciation is not sufficient to constitute a *casus deductus ad forum iudiciale*. But as soon as the ecclesiastical judge has properly issued a summons, the matter has "taken a legal turn," and after that the Ordinary can no longer dispense from an irregularity arising from the crime which now forms the matter of an ecclesiastical trial. With the exception of these cases, however, Ordinaries may dispense their *subjects* from said irregularities, not only at home, but anywhere.

§ 2 extends this *same faculty* to all *confessors,* who consequently can absolve penitents in all occult *cases* of a very *urgent nature,* when the Ordinary cannot be approached and there is danger of a great loss or infamy. But the dispensation is valid only in that it enables the penitent to exercise an order already received. Notice the term, *eadem facultas,* which doubtless means that the confessors are subject to the same restrictions as the Ordinary, to wit, that this faculty cannot be applied in case of deliberate homicide and abortion, or of a crime that has been brought before the ecclesiastical tribunal. What *adire Ordinarium* signifies has been explained elsewhere.[1] It is to be understood of the usual and safe way of communication by letter, messenger or personal call. A *grave damnum* may be either material or spiritual, for instance, a *pingue stipendium* needed for support, or the opportunity of gaining a plenary indulgence, or overcoming a great temptation, or the chance of consulting a wise and enlightened confessor. *Infamia* is loss of reputation, which might be incurred by a pastor or curate if he could not say Mass on a festival day or a day appointed. Note that the canon does not require a *recursus* to the Ordinary or to the Holy See after dispensation has been

99 Can. 1725.

1 See Vol. V, p. 108, p. 294.

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granted.[2] But this holds good only when there is question of exercising an order already received, not for ascending to a higher one.

PETITIONS FOR DISPENSATION

CAN. 991

§ 1. In precibus pro irregularitatum ac impedimentorum dispensatione, omnes irregularitates ac impedimenta indicanda sunt; secus dispensatio generalis valebit quidem etiam pro reticitis bona fide, iis exceptis quae in can. 990, § 1 excipiuntur, non autem pro reticitis in mala fide.

§ 2. Si agatur de irregularitate ex homicidio voluntario, etiam numerus delictorum exprimendus est sub poena nullitatis concedendae dispensationis.

§ 3. Dispensatio generalis ad ordines valet pro ordinibus quoque maioribus; et dispensatus potest obtinere beneficia non consistorialia etiam curata, sed renuntiari nequit S. R. E. Cardinalis, Episcopus, Abbas vel Praelatus *nullius*, Superior maior in religione clericali exempta.

§ 4. Dispensatio, in foro interno non sacramentali concessa, scripto consignetur; et de ea in secreto Curiae libro constare debet.

§ 1 rules that in petitions for dispensation from irregularities and impediments, *all existing irregularities and impediments* must be mentioned; else the general dispensation has no effect for those concealed if the concealment was made in bad faith, but only for such as have been concealed in good faith, except, however, homicide,

[2] Neither was there a condition attached to the decision of the S. O., of Sept. 6, 1909 (*A. Ap. S.*, I, 677).

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abortion, and other crimes brought before the ecclesiastical court.

The bodily defects must be mentioned as distinctly as the case permits, and especially must illegitimacy be explained as to its cause (*naturales, spurii, sacrilegi*) because the S. Congregation deals more severely with the latter than with the merely *naturales*. If a trial has taken place before the master of ceremonies, this fact, together with the judgment or opinion of the bishop, should be mentioned in the petition. But the dispensation proper is granted by the Holy See.[3]

If there is more than one irregularity all must be mentioned, and the rescript extends only to those expressly mentioned, unless a *bona fide* omission was made, in which latter case the irregularity which was not mentioned or forgotten is included in the dispensation, with the exception, however, of homicide and abortion or some other crime for which one was summoned before the ecclesiastical court. A wilful or deliberate omission of an irregularity would affect the rescript in so far as the concealed irregularity would remain, and consequently another dispensation would be required.

§ 2 requires that the *number* of homicides be mentioned under penalty of nullity of the rescript. Whether this affects also the number of abortions is not quite certain. The Roman practice includes abortion.[4] When the precise number cannot be given, an approximate one should be set down, or the plural number in general.

§ 3. A general dispensation is valid also for higher orders, and the one thus dispensed may obtain benefices which are not usually conferred in consistories, but he

[3] Cfr. Pyrrhus Corradus, *Praxis Dispensationum Apostolicarum*, l. III, c. 1; c. 6 (Migne, *Cursus Theol.*, t. XIX, p. 123, 161).

[4] *Idem*, l. V, c. 1 (*ed. cit.*, p. 287).

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cannot be promoted to the cardinalate, the episcopate, an abbacy or prelacy *nullius,* nor to the office of higher superior in an exempt clerical institute.

A *general dispensation* is one granted for all orders and benefices or favors to be obtained, whereas a *particular* dispensation extends only to certain benefices or orders.[5] Thus a dispensation granted from the impediment of *defectus natalium ob haeresim parentum* (can. 987, n. 1) for tonsure and minor orders also avails for major orders,[6] and for the offices or benefices of pastor, curate, and canon. But a consistorial benefice, *i. e.,* one conferred in a public consistory, cannot be obtained in virtue of such a general dispensation. This is nothing else but the application of an old principle,[7] namely, that those affected with a blemish should not ascend to higher dignities.

§ 4. A dispensation granted in the internal forum but extrasacramentally, must be given in writing, and the diocesan court should keep a record thereof in a secret book. This rule is, or may be, of importance in cases where litigation concerning an office or benefice threatens or an accusation is brought before the ecclesiastical court.

REMARKS ON DISPENSATIONS FROM IRREGULARITIES[8]

1. The *sovereign Pontiff* may dispense from *all* irregularities, but is himself subject to none. The reason is because all irregularities exist by, and rest upon, positive ecclesiastical law. Dispensations from irregularities *pro foro externo* are granted by the *S. Congregatio pro Re Sacramentaria,* those for the internal forum by the *S.*

5 *Id.,* l. I, c. 3 (*ed. cit.,* p. 20).

6 S. O., Dec. 6, 1906 (*Coll. P. F.,* n. 2241).

7 Cfr. cc. 1, 18, X, I, 17; *Reg. Juris* 87 in 6°.

8 Cfr. Collet, *De Irregularitatibus* (Migne, *Cursus Theol.,* Vol. 17, coll. 317 ff.); Wernz, *l. c.,* II, n. 105, p. 133 ff.

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Poenitentiaria. We must add that the *Roman Pontiff alone* is competent to grant dispensations, because all irregularities concern the common law of the Church. The *faculties* of *Ordinaries*[9] formerly granted in virtue of Form I, art. 2, can no longer be applied for the *external forum;*[10] and those *pro foro interno* are contained in can. 990. But we believe can. 81 may be lawfully applied here, provided the three conditions therein set forth are verified.

2. Some irregularities *ex defectu* cease if the cause entirely ceases. Thus if a bodily defect is cured or healed, the irregularity also ceases, because this was set up to safeguard the dignity of the sacred ministry and insure the physical ability of performing the sacred functions. Thus if one's eyesight is restored by an operation, the irregularity ceases *ipso facto,* and no dispensation is required. However, if a *doubt* exists as to the completeness of the cure, or the degree of deformity which may cause scandal or ridicule, the case must be referred to Rome, together with the statement of the master of ceremonies.[11] Dispensations are not easily granted if the applicant uses artificial limbs, even though the danger of scandal be remote.[12] Hence in every case of real doubt an authentic statement should be obtained from the S. Congregation.

The irregularities arising from bigamy, *infamia iuris,* or *defectus lenitatis,* can be removed only by dispensation

9 Cfr. Putzer, *Comment in Facult. Apost.*, ed. 4, p. 150 ff.

10 S. C. Consist., April 25, 1918.

11 Cfr. S. C. C., June 15, 1878 (*A. S. S.*, Vol. 11, 423). The S. C. required a photograph in case of a hunchback, whose size was 153 centimeters (= 5 feet), which was considered sufficient; but the S. C. also inquired into the moral qualities which were in favor of the petitioner. Hence the decision "*arbitrio et conscientiae episcopi, cum facultate dispensandi et habilitandi oratorem ad omnes ordines usque ad presbyteratum inclusive, facto verbo cum Ssmo.*"

12 S. C. C., Dec. 19, 1772; May 6, 1775; Nov. 18, 1837 (Richter, p. 340, nn. 17, 18, 30).

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proper. However, if the *infamia iuris* arises from civil law, it ceases of itself as soon as the civil authority restores the subject to civil or civic rights.

Illegitimacy requires a dispensation, unless, as stated in the canon, it has been removed by subsequent marriage or solemn religious profession.

3. Irregularities *ex delicto,* if of a public nature, can be dispensed only by the Apostolic See; if *occult,* can. 990 applies. Clergymen who practice medicine or surgery with an Apostolic indult must abide by the conditions of time, place, or person laid down in the rescript. If they have extended the faculty beyond the time allowed, a provisional dispensation would be required for the period during which they practiced medicine unlawfully, even though they are morally certain that they caused no death.[13] In case of a *doubtful fact of homicide, i. e.,* when a cleric is uncertain whether he or another was the cause of a homicide, it is the common opinion of theologians that he must conduct himself as irregular,[14] and therefore abstain from exercising acts of the orders which he has received and in the meantime apply for a dispensation.

4. With regard to *impediments properly so-called,* it is evident that five of them (nn. 1–5) are conditional, *i. e.,* last only as long as the impediment itself. This is clearly expressed in the wording of the text. Concerning these, then, the attestation or proof of cessation is sufficient and no dispensation is needed. The two others depend on the finding or judgment of the bishop, who is the arbiter in such cases.

We may add that *infamia facti* is often removed by change of domicile combined with a lasting amendment of conduct.

13 S. C. C., Dec. 12, 1761 (Richter, *l. c.,* p. 342, n. 34).

14 Collet, *l. c.,* p. 215.

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CHAPTER III

PREREQUISITES OF ORDINATION

CAN. 992

Omnes tum saeculares tum religiosi ad ordines promovendi per se ipsi vel per alios Episcopo aliive qui Episcopi hac in re vices gerat, suum propositum ante ordinationem opportuno tempore aperiant.

All who wish to be ordained, seculars as well as religious, must either themselves or through others manifest their intention at some opportune time before ordination to their bishop or whoever holds his place with regard to ordination.

The Council of Trent[1] had ordered that the *ordinandi* should present themselves before the bishop one month before ordination. This rule was enacted so that the bishop might have time to give orders to the parish priest to make the public announcements and to select the examiners. But *manifestare propositum* may have another signification, namely, to make sure that the ordinand is not compelled to embrace the clerical state. The process is somewhat similar to the *exploratio voluntatis* required for female religious and may be called the first of the three scrutinies which were formerly demanded. The text says this manifestation of intention may also be made to the one who represents the bishop in the matter of ordination. In former centuries this was the archdeacon,

[1] Sess. 23, c. 5, *de ref.*

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still mentioned in the *Pontificale*.[2] His place is now taken by the Vicar General, or in some dioceses by the Chancellor. The Code is not explicit on this point.

TESTIMONIALS

CAN. 993

Promovendi saeculares aut religiosi qui, quod pertinet ad ordinationem, saecularium iure reguntur, afferant:

1°. Testimonium ultimae ordinationis aut, si de prima tonsura agatur, recepti baptismatis et confirmationis;

2°. Testimonium de peractis studiis, pro singulis ordinibus, ad norman can. 976, requisitis;

3°. Testimonium rectoris Seminarii, aut sacerdotis cui candidatus extra Seminarium commendatus fuerit, de bonis eiusdem candidati moribus;

4°. Testimoniales litteras Ordinarii loci in quo promovendus tantum temporis moratus est ut canonicum impedimentum contrahere ibi potuerit;

5°. Testimoniales Superioris maioris religiosi, si cui religioni promovendus adscriptus sit.

CAN. 994

§ 1. Tempus quo promovendus potuit canonicum impedimentum contrahere est, regulariter, pro militibus trimestre, pro aliis semestre post pubertatem; sed Episcopus ordinans pro sua prudentia exigere potest litteras testimoniales etiam ob brevius commorationis tempus, et ob tempus quoque quod pubertatem antecessit.

[2] Cfr. cc. 5, 9, X, I, 23, *de off. archidiaconi.*

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§ 2. Si loci Ordinarius neque per se neque per alios promovendum satis noverit, ut testari possit eum, tempore quo in suo territorio moratus est, nullum canonicum impedimentum contraxisse, aut si promovendus per tot dioeceses vagatus sit ut impossibile vel nimis difficile evadat omnes litteras testimoniales exquirere, provideat Ordinarius saltem per iuramentum suppletorium a promovendo praestandum.

§ 3. Si post obtentas litteras testimoniales et ante peractam ordinationem, promovendus praedicto temporis spatio in eodem territorio rursus moratus sit, novae litterae testimoniales Ordinarii loci necessariae sunt.

CAN. 995

§ 1. Etiam Superior religiosus suis litteris dimissoriis non solum testari debet promovendum professionem religiosam emisisse et esse de familia domus religiosae sibi subditae, sed etiam de studiis peractis, deque aliis iure requisitis.

§ 2. Episcopus, acceptis iis litteris dimissoriis, aliis testimonialibus litteris non indiget.

Seculars as well as those religious who in matters of ordination are governed by the rules laid down for seculars, must produce:

1°. A certificate of the *order they have received* last, or if tonsure is to be received, their baptismal and confirmation record;

2°. A certificate showing that they have completed the *studies* required for the several orders according to can. 976;

3°. Testimonials from the *rector* of the *seminary*, or from the priest to whose care the candidate had been en-

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trusted during his stay outside the seminary, as to his good character;

4°. Testimonials from the *Ordinary* of the diocese in which the candidate has lived sufficiently long to contract a canonical impediment;

5°. Testimonials from the *higher superior,* if the candidate belongs to a religious community.

Can. 994, in § 1, determines the *time* which may be considered sufficient for one to contract a canonical impediment. It is, as a rule, *six months after the age of puberty,* and three months for those engaged in military service. However, the bishop may, if he thinks it prudent, demand testimonials for a shorter time, and also for the time before the age of puberty.

§ 2. If the Ordinary himself, or other responsible men of his surroundings or diocese, do not know the candidate sufficiently well to be able to testify to his freedom from canonical impediments for the time spent in the diocese, the Ordinary shall demand a supplementary oath from the candidate. This same oath shall also be demanded if the candidate has lived in so many dioceses that it is impossible, or extremely difficult, to obtain all the testimonials required.

§ 3. If, after the testimonials have been obtained and before the candidate is ordained, he again lives in the same territory for a space of time which may suffice for contracting a canonical impediment, new testimonials from the local Ordinary are required.

Can. 995 regulates the matter with regard to *religious superiors.* These, when giving the *litterae dimissoriae,* must testify that the candidate has made religious profession, and that he is a member of the religious house subject to the resp. superior, and has completed the re-

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quired studies and complied with the other conditions demanded by law. Upon having received the *litterae dimissoriae* thus described, the bishop needs no other testimonials.

The first of these canons mentions (1°) the *certificate of ordination,* which was formerly called *litterae formatae,* or written statement of the order received. In Rome the Cardinal-Vicar issues such *litterae* after each ordination. The document contains the name of the ordaining bishop and the place and date of ordination. A similar attestation must be issued after tonsure has been conferred, and for receiving tonsure, the baptismal and confirmation certificates must be exhibited either to the *episcopus proprius* or to the ordaining bishop, together with the dimissorials. But after tonsure has been received and the certificate properly issued, the baptismal and confirmation records are no longer required.

(2°) The *contents* of the testimonials for the secular clergy refer to the studies, the moral character and freedom from canonical impediments.

(a) The *studies* must have been completed according to can. 976, and the testimonials must state that the terms required by law have been adhered to, unless a special indult permits one to be ordained to the priesthood after a three years' theological course, which fact should, we believe, be mentioned.

(b) The testimonials concerning *moral behavior* contain what was formerly called *de moribus et vita.*[3] Hence what we call conduct must be testified to, or, as the Council of Trent says, the candidates must be "*ita pietate ac castis moribus conspicui, ut praeclarum bonorum operum exemplum et vitae monita ab eis possint exspec-*

[3] Innocent XII, "*Speculatores,*" Nov. 4, 1694, §§ 3–6.

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tari." [4] This testimony may be based upon the usual reports made by the director of the seminary.

(c) *Freedom from canonical impediments* means absence of the irregularities and canonical impediments mentioned in can. 987, and freedom from any censure or vindictive penalty which would prohibit the receiving of, or ascent to, a higher order.[5] Hence the phrase in these letters: "*et nullis, quantum scimus, censuris irretitum.*"

(3°) *Who are to give these letters?* The *certificate of orders* received should be issued by the bishop who conferred the same, or by his diocesan chancellor. The *baptismal certificate* is issued by the parish priest in whose parish the ordinand was baptized. The *confirmation certificate* by the bishop who confirmed the ordinand or by his officials. The testimonials concerning *studies* must be issued by the Ordinary in whose diocese these studies were made.[6] In that case, however, the director of the seminary shall testify to the time spent in the seminary, together with the result of the examinations passed by the candidate. To these the *director of the seminary* may add the testimonials concerning the *conduct* of the candidate, though these testimonials need not be given in writing, but may be given orally.

For the testimonials touching *canonical impediments several Ordinaries* may be required. The old law and practice insisted that the *episcopus proprius ratione originis* give the testimonials,[7] although any other competent bishop might ordain the candidate. Our Code, as far as we understand it, does not demand this, either in can.

4 *Trid.*, Sess. 23, c. 14, *de ref.*, concerning the priesthood.

5 An excommunicated Catholic cannot licitly receive the Sacraments, cfr. can. 2260, § 1.

6 Many, *l. c.*, p. 323.

7 Innocent XII, "*Speculatores*," § 4; S. C. C., April 27, 1720; Feb. 7, 1733; May 29, 1824 (Richter, *Trid.*, p. 190 f., nn. 11, 16, 26).

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956, or in can. 993, but, on the contrary, only states (can. 994, 1°) that the time for contracting a canonical impediment begins after the fourteenth year is completed. It makes no reference to the *episcopus originis*. Hence only those Ordinaries in whose dioceses the candidate has lived for six months after his 14th year, must give the testimonials; or in case of a soldier, the Ordinaries in whose dioceses the candidate has spent at least three months.[8] Note the term, "*pro militibus*," for soldiers, which sounds somewhat different from the wording found in the decree of the S.C.C., of Jan. 26th, 1895, which reads: "*pro clericis ordinandis iam militiae addictis*."[9] This meant that only clergymen soldiers had to bring testimonials from every Ordinary in whose diocese they had spent at least three months. The Code demands this of *all soldiers* whether they are about to receive tonsure or are already tonsured. The reason is palpable: they are supposed to have commenced their theological studies according to can. 976, 1°.

The Code, however, foresees the difficulty which was proposed in the above-mentioned decision of 1895, to wit, how to obtain the testimonials of all these Ordinaries. This may be impossible morally or physically, for lack of knowledge of the ordinand, or because of difficulties of communication, interrupted travel, etc. In that case the Ordinary competent for ordination must require a *supplementary oath* from the ordinand. This is taken upon the gospel book. Its object is to make sure of the candidate's freedom from canonical impediments, nothing more. The bishop is no longer[10] obliged to recur

8 *Trimestre* signifies a continuous sojourn of three months. Therefore, strictly speaking, Ordinaries are not obliged to ask for testimonials if a soldier clergyman would have stayed in various dioceses for less than three months; but they may ask for information.

9 *Urgelitana* (*Coll. P. F.*, n. 1886).

10 Formerly he needed a special

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to the Holy See for taking the oath under such circumstances.

The text (can. 993, 4°) says "*ordinarii loci,*" by which name are understood all those mentioned in can. 198. Therefore the Vicar-General and the Vicar-Capitular may issue these testimonials.

(4°) As to the testimonials required of *religious,* the following remarks may suffice (compare with can. 964):

(a) *Exempt religious superiors of higher rank, i. e.,* generals or provincials, are exclusively competent to grant testimonials to those who are subject to them, *for all orders.* They grant dimissorials, and with these may include the testimonials. No other testimonials are needed if the candidates have not been engaged in military service or made their studies outside their own study house.[11] The certificates of Baptism and Confirmation are not expressly required, because aspirants to the religious state must bring them along when they enter.

But if a religious has to undergo *military service* (as in France and Italy) the religious superior must obtain *litterae testimoniales* from each and every Ordinary in whose diocese the candidate spent at least three months.[12] However, in the case mentioned in can. 994, 2°, namely, when it is impossible or difficult to obtain all these testimonials, the religious superior — for he is the Ordinary of the *ordinandus* — may demand a supplementary oath from the candidate as to his freedom from canonical impediments. If the candidate has made his studies *outside* the study house of his order or congregation, the superior must ask for a *certificate of studies* properly completed, as required by can. 976, and *testimonials from the director*

faculty from the Ap. See; S. C. C. Jan. 26, 1895.

11 See can. 544, § 1.

12 *S. C. super Disciplina Regulari,* Nov. 27, 1892 (*A. S. S.,* Vol. 25, 638); this was issued for Italy, but may be applied to all countries with compulsory service for clergymen.

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of the seminary or study house as to the moral character of the candidate. After the exempt religious superior has collected all these informations, *de quibus conscientia eius oneratur,* he may draw up *one document* containing the dimissorials and testimonials and present the candidate to the diocesan bishop, or to another if can. 966 admits. If the *episcopus proprius* ordains at the house of the religious, no writing is required, because everything may be done orally.

(b) *Non-exempt religious superiors* proceed similarly, with some little difference. Since they are allowed to grant dimissorials only for tonsure and minor orders, whilst for higher orders the competent bishop is the one according to can. 956, "*domicilii una cum origine aut domicilii solius,*" the onus of gathering the testimonials would seem to rest on the *episcopus proprius.* Yet it appears to be more conformable to the wording and intention of the law, as laid down in can. 993, 5°, and can. 995, that the religious superior perform this task, and then he has to proceed as stated above under (a). For the bishop may be satisfied with the testimonials presented by the religious superior, as can. 995, 2°, expressly states.[13]

(c) The *contents of these testimonials* are outlined in the same can. 995, 1°. They must contain the statement that the candidate has made simple temporary profession for tonsure and minor orders, or perpetual or solemn profession for major orders. The superior must furthermore testify that the candidate is an habitual,[14] not only a temporary, member of the community of which he is superior. Besides, the course of studies, as set forth in can. 976, must be testified to. And finally *de aliis iure*

13 Cfr. S. C. EE. et RR., March 1, 1895 (*apud* Many, *l. c.*, p. 425 f.).

14 *De conventu*, or *de familia*, to prevent fraud, see can. 967.

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requisitis. This term indicates what we stated under (a) concerning military service and course; in other seminaries, from which latter the ordinand must have testimonials of the director as to his moral conduct. No other testimonials are required.[15]

EXAMINATIONS BEFORE ORDINATION

CAN. 996

§ 1. Quilibet promovendus sive saecularis sive religiosus debet praevium ac diligens examen subire circa ipsum ordinem suscipiendum.

§ 2. Promovendi vero ad sacros ordines in aliis quoque de sacra theologia tractationibus periculum faciant.

§ 3. Episcoporum est statuere qua methodo, coram quibus examinatoribus et quibus in tractationibus sacrae theologiae promovendi periculum facere debeant.

CAN. 997

§ 1. Hoc examen sive pro clericis saecularibus sive pro religiosis recipit loci Ordinarius qui iure proprio ordinat, aut dat dimissorias litteras; qui tamen potest quoque, ex iusta causa, illud Episcopo ordinaturo committere qui id oneris suscipere velit.

§ 2. Episcopus alienum subditum sive saecularem sive religiosum ordinans cum legitimis litteris dimissoriis, quibus asseritur candidatum examinatum fuisse ad norman § 1, et idoneum repertum, potest huic attestationi acquiescere, sed non tenetur; et si pro sua

15 Thus testimonials from the bishops in whose dioceses they lived for six months before entering religion, are not required, being supplied by the testimonials required for entrance.

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conscientia censeat candidatum non esse idoneum, eum ne promoveat.

A synod of Nantes[16] set up the rule that those who wished to enter the sacred ministry should present themselves, accompanied by their archpriest, before the bishop on Wednesday before ordination day. The bishop should choose from among his priests and other prudent men some examiners well versed in divine and ecclesiastical law, who should carefully examine the *ordinandi* concerning their faith, morals, and education. The substance of this canon entered the decrees of the Council of Trent,[17] whence it was adopted into our Code.

§ 1 of can. 996 enacts that all seculars as well as religious must, before ordination, be carefully examined concerning the order they are going to receive. This information can best be obtained from the *Pontificale Romanum,* which should therefore be studied, together with the practical exercises.

§ 2. Those to be promoted to higher orders shall also undergo an examination in the one or other theological discipline which they studied in school.

§ 3. The bishop has the right to determine the method, the examiners and the subject-matter of these examinations. The prelate before whom the secular as well as religious clergy have to pass this examination (can. 997, 1°) is the *competent ordinary,* who either himself ordains them or grants them dimissorials. The competent ordinary may, for a just reason, entrust the ordaining bishop with this examination, provided the latter is willing.

Note that no distinction is made between exempt and

16 C. 5, Dist. 24 (held probably in 658, Hefele, *Conc.-Gesch.*, III, 97; IV, 537).

17 Sess. 23, c. 14, *de ref.*

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non-exempt religious. All have to undergo the examination, not before their religious superior, but before the examiners appointed by the bishop, and in his presence. Even those who claimed to be exempt, and who enjoyed many privileges, were told that the examination for ordination must be made either before the competent or the ordaining bishop.[18] The Council of Trent enjoined bishops to suspend from the exercise of orders all those who were presented as fit but were found to be unfit.[19]

§ 2°, can. 997, *permits* the bishop who ordains one not his subject, either secular or regular, to *abide by the attestation* of the *episcopus proprius*. But this statement, which is given together with the dimissorials, supposes that the candidate was duly examined according to § 1 of this canon and found fit. Yet the ordaining bishop is *not bound* to accept the attestation, and should not ordain the candidate if he in conscience regards him as unfit.

The question was once proposed to the S. Congregation [20] whether an auxiliary bishop may examine a candidate who has received dimissorials from his own bishop (or, *sede vacante,* from the Vicar-Capitular, after a year's vacancy), and reject him, if he finds him unfit. The answer was as stated in the text: he is not obliged to, but may, examine him. In that case the candidate may appeal to his bishop, who would be entitled to try another bishop, or have recourse to the S. Cong. Consistorialis. But if a religious, whether exempt or non-exempt, is rejected by his own bishop, *i. e.,* the bishop, in whose diocese the religious house is located, the superior is not allowed to send the religious to another bishop;[21] he may, however, appeal to the S. C. Religiosorum.

18 S. C. EE. et RR., July 13, 1730 (Bizzarri, *Coll.,* p. 341 f).

19 Sess. 14, c. 3, *de ref.*

20 S. C. C., Aug. 2, Aug. 23, 1720; Jan. 16, 1595; Jan. 17, 1693 (Richter, *Trid.,* p. 190 f. n. 12).

21 S. C. C., March 14, 1620; S. C. EE. et RR., Feb. 13, 1838; Piatus

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PUBLICATION OF THE ORDINATION

CAN. 998

§ 1. Nomina promovendorum ad singulos sacros ordines, exceptis religiosis a votis perpetuis sive sollemnibus sive simplicibus, publice denuntientur in paroeciali cuiusque candidati ecclesia; sed Ordinarius pro sua prudentia potest tum ab hac publicatione dispensare ex iusta causa, tum praecipere ut in aliis ecclesiis peragatur, tum publicationi substituere publicam ad valvas ecclesiae affixionem per aliquot dies, in quibus unus saltem dies festus comprehendatur.

§ 2. Publicatio fiat die festo de praecepto in ecclesia inter Missarum sollemnia aut alia die et hora quibus maior populi frequentia in ecclesia habeatur.

§ 3. Si sex intra menses candidatus promotus non fuerit, repetatur publicatio, nisi aliud Ordinario videntur.

CAN. 999

Omnes fideles obligatione tenentur impedimenta ad sacros ordines, si qua norint, Ordinario vel parocho ante sacram ordinationem revelandi.

The Council of Trent [22] made a rule which was never put into practice or forgotten in many dioceses,[23] namely, that the names of *candidates for ordination should be publicly announced* in their respective parish churches. This rule the Code re-inforces for all aspirants to *higher orders,* with the exception of religious with either simple or solemn vows. The *church* in which these publications

M *l. c.*, II, p. 297; Many, *l. c.*, p. 389.

22 Sess. 23, c. 5, *de ref.*

23 Many, *l. c.*, p. 306; neither was it observed in the U. S., and the contrary custom cannot be styled unreasonable.

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are to be made is the *parish church* of the candidate, to which he belongs by reason of domicile or quasi-domicile on his own part or that of his parents. The *time* for these publications is the parochial service on some feast of obligation or any other day or hour when there is a large gathering of people.

If the candidate is not ordained within six months from the date of the publication, the latter must be repeated. The bishop may, for a just reason, dispense with this announcement, but he has a right to demand that the publication be made not only in the parish church of the candidate, but also elsewhere, or that, instead of a public announcement, the names be posted at the church door and left there for some days, one of which should be a holy-day of obligation.

Can. 999 enjoins *upon all the faithful the obligation* of revealing to the Ordinary or pastor, before the day of ordination, any impediments they may happen to know of.

The reader will readily perceive the similarity between these announcements and the publication of the banns (see can. 1022 ff.).

SPECIAL INFORMATION

CAN. 1000

§ 1. Parocho qui publicationem peragit, et etiam alii, si id expedire videatur, Ordinarius committat ut de ordinandorum moribus et vita a fide dignis diligenter exquirat, et litteras testimoniales, ipsam investigationem et publicationem referentes, ad Curiam transmittat.

§ 2. Idem Ordinarius alias percontationes etiam privatas, si id necessarium aut opportunum iudicaverit, facere ne omittat.

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The Ordinary may ask the pastor who has made the publication, or, if he deems it expedient, any other person, to investigate the conduct and life of the candidate by questioning trustworthy persons, and to transmit the testimonial letters containing the results of that investigation and publication to the diocesan court.

The Ordinary may and should, if he deems it necessary or advisable, also make private inquiries.

The text is plain, and we need only add that, as the matter is a serious one, all who are called upon to give information should feel bound in conscience to testify faithfully and impartially.

SPIRITUAL EXERCISES OR RETREAT

CAN. 1001

§ 1. Qui ad primam tonsuram et ordines minores promovendi sunt, spiritualibus exercitiis per tres saltem integros dies; qui vero ad ordines sacros, saltem per sex integros dies vacent; sed si qui, intra semestre, ad plures ordines maiores promovendi sint, Ordinarius potest exercitiorum tempus pro ordinatione ad diaconatum reducere, non tamen infra tres integros dies.

§ 2. Si, expletis exercitiis, sacra ordinatio qualibet de causa ultra semestre differatur, exercitia iterentur; secus iudicet Ordinarius utrum iteranda sint, necne.

§ 3. Haec spiritualia exercitia religiosi peragant in propria domo vel in alia de prudenti Superioris arbitrio; saeculares vero in Seminario aut in alia pia vel religiosa domo ab Episcopo designata.

§ 4. De peractis spiritualibus exercitiis Episcopus certior fiat testimonio Superioris domus, in qua peracta

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fuerint; vel, si de religiosis agatur, attestatione proprii Superioris maioris.

What was formerly prescribed for the clergy to be ordained in Rome, for the suburbicarian and Italian clergy,[24] and was by way of pious custom observed elsewhere, has now become general law, *viz.:*

1. That a *retreat of three full days* precede tonsure and minor orders, and one of *six full days* each sacred order. If three major orders are received within a semester, or six months, the ordinary may reduce the time of the retreat for the diaconate to three days, but no less.

2. If for any reason ordination is *put off more than six months,* the retreat must be repeated; if the delay is less than six months, it is for the Ordinary to decide whether the retreat must be repeated.

3. *Religious* must make the retreat in their own house, or in such other place as the superiors deem proper; seculars, in the seminary or in a religious institution, convent, or monastery appointed by the bishop.

4. The bishop must be informed of the retreat by an attestation of the superior of the house in which the exercises took place; and in the case of religious by an attestation of their superiors.

We surmise the bishop who is entitled to be informed is the one who is to ordain the candidate. If he is not at the same time the *episcopus proprius,* he may abide by the attestation of the latter.

The candidate himself should see to it that all his papers are in proper shape, he being the one who should ask for the testimonials, unless this is done by the director of the seminary.[25]

24 Alex. VII, "*Apostolica Sollicitudo,*" Aug. 7, 1662; S. C. EE. et RR., Oct. 9, 1682 (Bizzarri, *Coll.,* p. 374 f).

25 Many, *l. c.,* p. 323 f.

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CHAPTER IV

RITES AND CEREMONIES OF S. ORDINATION

CAN. 1002

In quovis conferendo ordine, minister proprios ritus in Pontificali Romano aliisve ritualibus libris ab Ecclesia probatis descriptos, adamussim servet, quos nulla ratione licet praeterire vel invertere.

The minister, in conferring orders, must carefully observe the rites prescribed in the *Pontificale Romanum* and other liturgical books approved by the Church, and he is not allowed to omit or change anything.

The venerable age [1] of these rites commands the greatest respect and the danger of exposing the Sacrament to nullity [2] by omitting an essential part of the form should caution the minister to follow the *Pontificale* closely. He should adhere scrupulously to the words and rubrics of the *Pontificale,* no matter what his personal opinion may be concerning the matter of the Sacrament of Orders. The Greeks must use their *Euchologia,* although these do not contain all the minor orders in vogue among the Latins.[3]

The *minister is not allowed to omit an order,* or any part of the prayers and ceremonies, nor to *invert* the order

1 The oldest decuments relating to the rite of ordination are the *Sacramentarium Leonianum* and the *Gregorianum* (VIth and VIIth century) and the *Ordines Romani,* of the VIIIth and IXth.

2 Leo XIII, *"Apostolicae curae,"* Sept. 13, 1896; Many, *l. c.,* p. 530.

3 Benedict XIV, *"Etsi pastoralis,"* May 26, 1742, § VII, n. VI.

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of the Roman *Pontificale*. Therefore, also, the anointings (*unctiones*) must be performed according to the rubrics. Thus if the Pontifical says: "*ungit totaliter palmas*," the whole interior palm of the hand together with the fingers is to be anointed.[4] It is not necessary to add the different requisites for conferring orders, as they are stated plainly enough in the liturgical books.[5]

THE ORDINATION MASS

CAN. 1003

Missa ordinationis vel consecrationis episcopalis semper debet ab ipsomet ordinationis vel consecrationis ministro celebrari.

The Mass of ordination or episcopal consecration must always be celebrated by the minister of ordination or consecration himself.

This law was so vigorously insisted upon that the S. Congregation never permitted an exception, though repeatedly requested to do so. Thus an old bishop afflicted with the gout asked to confer orders sitting on the *scamnum*. But though there was no other bishop within a radius of 300 miles, the S. Rit. C. answered: *nihil*, and the second time, *nihil indulgendum fere*.[6] Another bishop in the same condition was told: *non licere*.[7] Hence when a bishop is unable to say the ordination mass, nothing else remains to be done than either to call in another bishop or to send the candidate to another. Now-a-days there is no great difficulty in doing so, except perhaps in China and "darkest" Africa.

4 S. Rit. C., Jan. 12, 1917 (*A. Ap. S.*, IX, 351 f.).

5 See the very practical *Manual of Episcopal Ceremonies* by A. Stehle, O. S. B., 1916, p. 353 ff.

6 S. Rit. C., June 8, 1658; Jan. 24, 1660 (*Dec. Auth.*, nn. 1070, 1150).

7 S. Rit. C., Sept. 23, 1837 (*Dec. Auth.*, n. 2712).

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We may add two other decisions of the same S. Congregation concerning the *rubrical Mass*. On Holy Saturday the ordination mass, even if the bishop confers orders in his domestic chapel, must commence with the prophesies. On the six Saturdays on which general ordinations are held, the *Missa* must always be *de feria occurrente*, even though the bishop may say Mass privately and without chant. The custom of saying the *Missa de Sancto* is not to be tolerated.[8]

ORIENTAL AND LATIN RITES

CAN. 1004

Si quis, ritu orientali ad aliquos ordines iam promotus, a Sede Apostolica indultum obtinuerit superiores ordines suscipiendi ritu latino, debet prius ritu latino recipere ordines quos ritu orientali non receperit.

If one has received some orders in an *Oriental rite* and afterwards obtained an Apostolic indult to receive the higher orders according to the Latin rite, he must first receive in the Latin rite those orders which he did not receive in the Oriental rite.

To understand this canon it must be remembered that the Greek *Euchologion*, as published in 1754, and more lately in 1873, by the Propaganda, contains no special formularies except for conferring the tonsure or clericate and the lectorate[9] among minor orders. But the Latin subdiaconate includes not only this order proper, but also the acolythate and ostiariate. Hence,— says Benedict XIV, from whose Constitution, "*Etsi pastoralis*," May

8 S. Rit. C., March 21, 1744; Feb. 11, 1764 (*Dec. Auth.*, nn. 2375, 2473).

9 Two orders, lectorate and cantorate, are almost identical.

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26, 1742, our text is taken,— if one has received the clericate and lectorate according to the Greek rite, and afterwards obtains an Apostolic indult to receive the major orders according to the Latin rite, he must, before he can receive subdeaconship, receive the ostiariate, the exorcistate, and the acolythate. But if he was ordained in the Greek rite as far as subdeaconship inclusively, it is sufficient that he receive the exorcistate, since the acolythate and the ostiariate are included in the Greek subdiaconate. The same rule applies if one was ordained according to the Greek rite as far as the diaconate or presbyterate; to wit, only the exorcistate must be supplied according to the Latin rite.[10] The other Oriental rites, like those of the Syrian Maronites and Copts, all have the same number of minor orders as the Greek, whereas the Armenians, whose ritual was published officially in 1807, have the full number of the Latin rite.[11]

HOLY COMMUNION IN S. ORDINATION

CAN. 1005

Omnes ad maiores ordines promoti obligatione tenentur sacrae communionis in ipsa ordinationis Missa recipiendae.

What the *Pontificale Romanum* prescribes, the Code here emphasizes as a universal law, *viz.:* that all who receive *major orders* are obliged to go to holy Communion in the ordination mass.

10 See § VII, n. VI.

11 Many, *l. c.*, p. 479 ff.

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CHAPTER V

TIME AND PLACE OF ORDINATION

DAYS ON WHICH ORDINATIONS MAY BE CONFERRED

CAN. 1006

§ 1. Consecratio episcopalis conferri debet intra Missarum sollemnia, die dominico vel natalitio Apostolorum.

§ 2. Ordinationes in sacris celebrentur intra Missarum sollemnia sabbatis Quatuor Temporum, sabbato ante dominicam Passionis, et Sabbato Sancto.

§ 3. Gravi tamen causa interveniente, Episcopus potest eas habere etiam quolibet die dominico aut festo de praecepto.

§ 4. Prima tonsura quolibet die et hora conferri potest; ordines minores singulis diebus dominicis et festis duplicibus, mane tamen.

§ 5. Reprobatur consuetudo contra ordinationum tempora praecedentibus paragraphis praescripta; quae servanda quoque sunt, cum Episcopus latini ritus ordinat ex apostolico indulto clericum ritus orientalis aut contra.

§ 1. *Episcopal consecration* must be conferred during the solemnity of the Mass on a Sunday or the feast of an Apostle.

According to the Roman Pontifical,[1] a *missa cantata* is not required, hence a low Mass is sufficient.

1 De Consecratione Electi in Episcopum *si* Missa cantatur.

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The *days* on which consecration may take place are the *Sundays* and the feastdays of the Apostles. This term is to be interpreted strictly, and hence episcopal consecration on a holyday of obligation during the week or on a suppressed feastday, is not permitted without a special Apostolic indult. The expression, "*feast of an Apostle,*" is also to be taken in its strict sense, to the exclusion of the feasts of SS. Luke, Mark, and Barnabas.[2]

§ 2 and § 3. *Higher Orders* should be conferred during holy Mass on the four Ember Saturdays, on the Saturday "*Sitientes,*" before Passion Sunday, and on Holy Saturday. However, the bishop may ordain to higher orders also on any Sunday or holyday of obligation if there be a grave reason for so doing.

The practice here mentioned dates back to the fifth century, at least as far as it concerns the four Ember days and Saturday before Passion Sunday, for these are mentioned in a decree of Gelasius I (492–496), part of which has found a place in Gratian's Decree.[3] Holy Saturday is mentioned only once, in a Decretal of Alexander III, but was assigned as Ordination Day[4] in Rome already by Pelagius II (579–590). The reason for assigning these days was that the solemn fast was protracted to midnight of the following Sunday, on which, as the first day of the week, God commenced to create the world, Christ arose and sent the Holy Ghost upon the disciples.[5] From this it may be understood why Sunday or a feastday is permitted.

The Code requires a *gravis causa* for conferring sacred orders on any other day besides the six Saturdays. The judgment as to the gravity of the reason is left to the

2 S. Rit. C., April 4, 1913 (*A. Ap. S.*, V, 186).
3 See c. 7, Dist. 75.
4 C. 3, X, I, 11.
5 C. 4, Dist. 75; Migne, *P. L.*, 54, 625; Many, *l. c.*, p. 238 f.

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bishop. We may be permitted to add that the inconvenience of a "*magro*" (fast) could hardly be styled a grave reason.

Note that the Code is silent about the *fast,* which the *Pontificale Romanum* says should fitly be observed on the day before episcopal consecration. No such obligation is insinuated in our text. It is understood, of course, that ordination on one of the six Saturdays does not *per se* constitute an excuse for violating the fast. If a feast of obligation, together with the office, is by a special indult transferred to a Sunday, ordination may be held on that day.[6]

We note a few important decisions of the S. Congregations on kindred topics. The S.C. Concilii has always insisted that the bishop should not ordain candidates who have the privilege or an indult allowing them to be ordained *extra tempora,* on a day which is not a holyday of obligation.[7] The Congregation of Bishops and Regulars once answered, concerning exempt regulars who enjoyed the privilege of being ordained *extra tempora,* that the bishop may, but is not obliged to, ordain them on odd days.[8] However, even for exempt religious § 5 of our canon is binding.

§ 4. *Tonsure* may be given on any day and at any hour of the day, in the forenoon or in the afternoon.[9] *Minor Orders* may be conferred on *Sundays* and weekdays which have a feast celebrated or marked in the diocesan calendar as *duplex.* At least this seems the ob-

6 S. Rit. C., March 6, 1896, I, 3 (*Dec. Auth.,* n. 389); but the bishop is not allowed to ordain on the *dies a quo.*

7 Jan. 15, 1689. On half holidays the S. C. permitted ordination if an indult was given; S. C. C., May 11, 1782 (Richter, *Trid.,* p. 186, nn. 2, 3, 4); S. O., March 5, 1712 (*Coll. P. F.,* n. 280). Our text excludes such days.

8 S. C. EE. et RR., July 18, 1732 (Bizzarri, *l. c.,* p. 343).

9 S. C. C., April 13, 1720 (Richter, *l. c.,* n. 5).

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vious sense of the term *festis duplicibus,* although it is true that certain decisions of the S. Rit. C. admit only feastdays of obligation or "double" feasts which were feastdays of obligation before they were suppressed; in other words feasts of Apostles and other suppressed holy-days.[10] However, the legislator, by using the term "*festa duplicia*" certainly wishes us to understand it in a general sense, and in this sense all the feasts marked as *duplicia* are days on which minor orders may be conferred. *Mane tantum* properly signifies an early morning hour, but in view of a decision which permitted the conferring of tonsure and minor orders in the afternoon,[11] we may safely say that *mane* includes the whole of the time during which it is permitted to say Mass.

§ 5. The *custom* of ordaining outside the times prescribed in the preceding sections is *reprobated.* These times must also be observed when a *bishop* of the *Latin Rite,* in virtue of an Apostolic indult, ordains a clergyman of an *Oriental rite,* and conversely. The reason for this latter enactment is the contrary practice of the Oriental bishops, who never received the decrees and decretals of the Western Church and still ordain on any day of the year.[12]

The *reprobation of the custom* of ordaining on other than the prescribed days also concerns our bishops, who must therefore relinquish the old custom. The faculties[13] which they formerly enjoyed are abrogated, even though they were granted as late as Jan. 1, 1918. The decree of April 25, 1918, has abolished them *in foro externo.* Exempt religious must also abide by this law.

10 S. Rit. C., Nov. 12, 1831, ad 1; March 16, 1833; Feb. 18, 1843 (*Dec. Auth.,* nn. 2682, 2705, 2852).

11 S. C. C., April 13, 1720 (Richter, *l. c.,* p. 186, n. 5).

12 Many, *l. c.,* p. 262.

13 See Putzer, *Comment.,* p. 144 ff.

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DEFECTIVE ORDINATION

CAN. 1007

Quoties ordinatio iteranda sit vel aliquis ritus supplendus, sive absolute sive sub conditione, id fieri potest etiam extra tempora ac secreto.

Whenever ordination has to be repeated, or a rite has to be supplied, either absolutely or conditionally, this may be done outside of the appointed time and secretly.

This brief canon raises a number of incidental questions. Repetition of ordination may become necessary either by reason of a fault committed by the ordaining prelate or by reason of the candidate's disposition. Since ordination in the Latin Church *now* consists of the double *matter* of the imposition of hands and the delivery of the instruments, the question naturally arises whether both are essential to the validity of the episcopate, presbyterate, and diaconate. The answer is that, *theoretically* speaking, only one, namely, the imposition of hands, is essential. However, since in the administration of the Sacraments the safer view (*tutior opinio*) must be followed, it has been the practice of the Roman Court to order ordination to be repeated if an essential part either of the imposition of hands or the delivery of instruments has been omitted or corrupted. The same rule holds good also with regard to the form. Below we shall rehearse several decisions which illustrate the essential parts of the priesthood and the diaconate. As to the episcopate and the subdiaconate, decisions are scarce, but the practice of the Church may be deduced from analogy.

The *matter* of ordination to the *priesthood* comprises the imposition of hands and the delivery of the instruments.

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(a) There are three *impositions* of hands. The first one, by the bishop and the priests present, is made silently by physical contact with the head of each ordinand; the second is made by the bishop and priests present with extended hands, but without physically touching the heads of the *ordinandi,* whilst the bishop recites: *"Oremus, fratres carissimi,"* etc. The last one is performed after Communion, when the bishop, sitting in the middle of the altar, puts both hands upon the head of each ordinand and says: *"Accipe Spiritum Sanctum."*

The first imposition must be made by physically touching the head of the ordained, *i.e.,* the bishop at least must touch the head, or hair, or skullcap of the ordinand; if no physical contact has taken place, the whole rite must be repeated conditionally.[14]

In the *second imposition* the hands must be extended over the *ordinandi,* at least for a moment, otherwise the whole ceremony must be repeated conditionally.[15]

If the *third imposition* was made without physical contact, this one imposition, together with the prayer, must be repeated, but not the whole ordination.[16]

If the first and second impositions were omitted in their proper place, and supplied after Communion, before the *"Iam non dicam,"* the whole ordination must be repeated conditionally.[17]

The same rule applies to the *diaconate.* If the imposition was made without physical contact, the whole ceremony must be repeated conditionally[18]

(b) Concerning the *delivery of the instruments* the

14 S. O., Aug. 19, 1851; Jan. 20, 1875; Jan. 26, 1898; July 4, 1900 (*Coll. P. F.*, nn. 1066, 1431, 1989, 2086).

15 S. O., July 6, 1898; July 19, 1899 (*ibid.*, nn. 2009, 2058).

16 S. O., Aug. 19, 1851 (n. 1066).

17 S. O., Aug. 22, 1900 (*ibid.*, n. 2092).

18 S. O., Jan. 20, 1875; Jan. 26, 1898 (*l. c.*).

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following decisions may be cited: If this ceremony was *entirely* omitted, the whole ordination must be repeated.[19] In one case the imposition was duly made, but the ordinand had forgotten to touch the instruments. The rite had to be repeated.[20]

If the instruments were offered to the ordinand not by the bishop himself, but by another, for instance, the master of ceremonies, the whole ordination must be repeated conditionally.[21]

As to *touching the instruments,* the Holy Office, has answered in several instances with "*Acquiescat,*" *i.e.,* the ordination is valid if the chalice and paten were touched, even though the host was not; or if the chalice only was touched, and not the paten; or if the paten only was touched, or the host only, without the paten; or if the ordinand touched the chalice first and then the paten, but not at the moment when the bishop pronounced the words; or if the bishop, when reaching the chalice and paten, for some moments interrupted the ceremony.[22]

As to the *diaconate,* the delivery of the Gospel Book, or the Missal[23] in its place, is required, together with the formula: "*Accipe potestatem legendi Evangelium.*" If this is omitted, or if no moral (not even a dubiously moral) connection was made between the delivery of the book and the act of pronouncing the words, this rite, and it alone, must be repeated secretly; the repetition may be made at the next ordination or, if it is inconvenient for the deacon to wait for the next ordination at any other time.[24]

19 *De Syn. Dioec.*, VIII, 10, 1.

20 S. O., Aug. 1, 1697; cfr. Many, *l. c.*, p. 563.

21 S. O., Jan. 17, 1900; July 6, 1898; Jan. 11, 1899; Sept. 7, 1892 (*Coll. P. F.*, nn. 2075, 2008, 2032, 1811).

22 S. O., Jan. 17, 1900; March 7, 1897; Dec. 14, 1898; April 20, 1898 (*Coll. cit.*, nn. 2075, 1963; *A. S. S.*, Vol. 30, 286, 750).

23 S. Rit. C., Sept. 27, 1873 (*Dec. Auth.*, n. 3315).

24 S. Rit. C., June 16, 1837 (*Dec. Auth.*, n. 2767).

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Concerning the *episcopate,* the imposition of the hands with physical contact is required; but if this was omitted only by the co-consecrators, nothing is to be repeated or supplied. If the act of placing the Book of the Gospels on the neck of the bishop elect was omitted, it would be advisable to supply this ceremony.[25]

As to the *subdiaconate,* the delivery of the empty chalice and paten cannot be omitted without endangering the validity of the order. If the physical touch has been forgotten, the whole ordination must be repeated conditionally. But if a chalice containing wine or water would be reached instead of the empty chalice, nothing would have to be repeated.[26]

2. With regard to the *form* of ordination, it may be observed that the essential form of the *episcopal consecration* consists either in the prayer "*Propitiare,*" or, more probably, in the preface said after the "*Propitiare.*" The form for the *priesthood* probably is also contained in the preface, certainly not in the "*Propitiare.*" It is probable that the "*Exaudi nos*" may be considered as at least the partial form. For the *diaconate* the form is either the "*Accipe Spiritum Sanctum ad robur,*" or the Preface "*Emitte.*" But nearly every one of these points is controverted.[27] For the *subdiaconate* there is no imposition of hands, but only a delivery of the instruments, accompanied by certain formulas. The same holds good concerning minor orders.

From these controversial views it may be seen why the Church insists upon having everything performed according to the *Pontificale Romanum.* Any essential change of the form would render the ordination invalid.

25 Many, *l. c.,* p. 568.
26 *Ibid.,* p. 569.
27 See Pohle-Preuss, *The Sacraments,* III, p. 67; Many, *l. c.,* p. 499 ff.

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If the formula for conveying the power of forgiving sins were mispronounced, this part would have to be supplied, but the whole rite of ordination would not have to be repeated. In one case a distracted bishop said: "Quorum *remiseris* peccata *retenta* sunt, et quorum *retinueris remissa* sunt," and the Holy Office decided that any bishop pontifically garbed should supply the words wrongly pronounced, and that this might be done at any time and in the bishop's private chapel.[28]

It may be added that the Holy Office, when answering questions as to the possible invalidity of an ordination which was ordered to be conditionally repeated, always employed the phrase: Let the ordination be secretly and conditionally repeated on any day, *facto verbo cum Ssmo.*, in order that he might supply the Masses celebrated [29] out of the treasury of the Church, as far as necessary. Therefore, the bishop [30] should use the conditional form, or have the intention of ordaining conditionally at the beginning, and then perform the whole ceremony as usual. The second part of the clause is added to assure the priest that he is not obliged to say again the Masses said during his dubious state.

If the *defects* are only *accidental,* and consequently do not affect the validity of the ordination, they are simply to be supplied. Thus if the anointings were omitted at an *episcopal consecration,* they must be supplied.[31] But if the anointings were performed and the mode only was defective, or if one kind of oil was mistaken for another, nothing is to be supplied. The same may be said concerning the *priesthood.* Thus if the master of cere-

28 S. O., May 27, 1840; S. Rit. C., May 22, 1841 (*Dec. Auth.*, n. 2836) S. O., Dec. 9, 1897 (*Coll. P. F.*, n. 1987).

29 For instance, S. O., July 4, 1900 (*ibid.*, n. 2086).

30 The clause "*a quocumque episcopo*" is sometimes added.

31 Cfr. c. 1, X, I, 15.

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monies would offer the chrism instead of the *oleum catechumenorum,* and the bishop used the former instead of the latter, the ordination would not only be valid, but nothing need be supplied.[32] If the formula was slightly mutilated, for instance, by using the singular instead of the plural, or the feminine instead of the masculine gender, or if any words were needlessly repeated, there is no reason for entertaining scruples. In one case, where the bishop had forgotten to pronounce the words "*et nostram benedictionem*" at the anointing of the hand, the Holy Office answered: "*Acquiescat.*"[33]

3. As to the *other orders, the following ceremonies are not to be supplied:* for deacons, the putting on of the stole and dalmatic; for subdeacons, the handing of the cruets and putting on of the amice, maniple, and tunic; for ostiaries the opening of the gate and ringing of the bells.[34] But if the epistle book would not have been touched at the ordination of a subdeacon, this omission would have to be supplied.[35]

The validity of ordination furthermore depends on the *mental attitude of the ordinand. Compulsion* renders ordination null and void. *Grave fear* does *per se* not render it invalid, but conveys the right of having oneself declared free of the obligations attached to higher orders, as stated under can. 214. Fear may, moreover, be the cause of *not having the right intention.* For although a habitual intention is sufficient, fear may preclude even this, because the actual intention caused by fear of not being willing to be ordained, is contrary to the habitual intention. In one case a mother morally compelled her son to have himself ordained by threaten-

32 S. O., July 22, 1871 (*Coll. P. F.*, n. 1421).

33 S. O., Nov. 28, 1900 (*A. S. S.*, Vol. 33, 374).

34 Many, *l. c.*, p. 572.

35 S. C. C., Jan. 10, 1711 (Richter, *Trid.*, p. 178, n. 7).

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ing to disinherit him. The son presented himself on the day of ordination together with the other *ordinandi,* and out of human respect permitted the ceremonies to be performed over him, though firmly determined all the while not to receive orders. He bowed his head to the imposition and touched the instruments, but with a reluctant jerk. This was a plain case of lack of proper intention, and the S. Congregation ordered conditional reordination.[36] If sufficient proofs could have been furnished, the S. Congregation would doubtless have decided in favor of absolute re-ordination. A surprising answer was given to a scrupulous priest by his confessor, who said: The external act was sufficient, because the candidate *in casu* had approached the bishop without compulsion to receive orders. *Distinguo:* there was no compulsion, *concedo;* there was the intention to receive orders, *nego.*

We said that a habitual intention is sufficient. We may add that it is also required. This means that the candidate must have *the will or desire to receive the Sacrament,* or the will to receive the respective order with its obligations. However, if he wishes the order, he also wishes the obligation, for the two cannot be separated. That the intention is required of receiving the Sacrament, and not the merely external rite, may be made evident from the necessity of distinguishing one Sacrament from another. And since the intention is absolutely required for Baptism[37] and other Sacraments, it follows that the intention must be directed towards the Sacrament of order. Thus if one positively refuses to receive an order now, although he desires to receive it

[36] S. C. C., Melivet., June 18, 1792 (Richter, *l. c.,* p. 175, n. 6).

[37] C. Majores 3, III, 42; Hallier, *De Sacris Electionibus et Ordinationibus,* P. I, Sect. 5, c. 1 (Migne, *Cursus Theol.,* t. XXIV, p. 407 ff).

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later on, and permits the ceremonies to be performed over him, such a one would not be ordained, but would have to be reordained, at least conditionally, says the Holy Office.[38] If one would make up his mind not to receive orders as a Sacrament, but merely as a natural ceremony, because he looked upon the rites and Sacraments of the Church from a theosophic or a merely natural point of view, he would not be ordained, for the Sacrament of Orders cannot *de facto* exist without the supernatural order. It is not, of course, required that an ordinand think explicitly of the supernatural order in the course of the ceremony of ordination.

The *intention of the ordaining bishop* must be virtually, if not actually, directed towards doing what the Church does. If this intention is present and virtually exerts its influence, ordination is valid, even though the bishop may not believe in ordination as a Sacrament or in the Church. The public announcement of the archdeacon that those suffering from a canonical impediment should not present themselves for ordination, has no effect on the validity of ordination, even of those who are irregular. However, if the bishop really had the intention not to ordain those who are irregular, the latter would not be validly ordained, provided it could be proved by a careful investigation that the ordaining prelate had this negative intention, and had not revoked it before or during the act of ordination.[39]

38 S. O., Nov. 28, 1900 (*Coll. P. F.*, n. 2096).

39 S. C. C., Feb. 13, 1682; Jan. 11, 1710, *apud* Bened. XIV, *De Sacrificio Missae*, l. III, c. 10, nn. 6–10.

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ORDINATION OUTSIDE THE DIOCESE

CAN. 1008

Episcopus extra proprium territorium, sine Ordinarii loci licentia, nequit ordines conferre, in quorum collatione pontificalia exercentur, salvo praescripto can. 239, § 1, n. 15.

A bishop is not allowed, without the permission of the local Ordinary, to confer outside his own diocese any orders which require the exercise of pontificals.

This ruling, taken from the Council of Trent,[40] is as ancient as the local organization of the Church. The Oriental synods [41] were as rigorous as the Latin Church with regard to the exercise of pontifical rights. The reason is not far to seek, for the use of such rights presupposes jurisdiction, which (with some exceptions) is restricted to the territory of each Ordinary, and overlapping would cause confusion. Besides, there might be danger of intrusion on the part of candidates for ordination who were rejected by their own Ordinaries. Therefore our canon requires the *permission* of the bishop in whose diocese the pontificals are to be exercised. *Pontificals* in the strict sense are exercised only when sacred orders are conferred; for tonsure and minor orders may be conferred in rochette, stole, and simple mitre.[42] If clerics of another diocese join those of the diocese in which a strange bishop confers orders with the permission of the local Ordinary, they may be ordained, provided they have dimissorials from their own bishop.[43]

40 Sess. 6, c. 5, *de ref.*

41 Cfr. cc. 6, 7, 9, C. 9, q. 2; (c. 28, C. 7, q. 1, (Pseudo-Anaclete).

42 *Pont. Rom.*, "*De Ordinibus Celebrandis.*"

43 Benedict XIV, "*Ad Audientiam,*" Feb. 15, 1753, § 5 f.; S. C. C., 1753; June 25, 1599 (*ibid.*).

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Cardinals, in virtue of can. 239, 1°, n. 15 enjoy the privilege of pontificating everywhere outside the city of Rome; but if they wish to exercise pontifical functions in a cathedral church, they must first inform the bishop of the diocese. If they wish to confer tonsure and minor orders in a cathedral church they must also demand dimissorials from the bishop.[44]

The suburbicarian cardinal bishops are not allowed to confer orders in their private chapels in Rome without the permission of the Cardinal Vicar.[45]

PLACE OF ORDINATION

CAN. 1009

§ 1. Ordinationes generales in cathedrali ecclesia, vocatis praesentibusque ecclesiae canonicis, publice celebrentur; si autem in alio dioecesis loco, praesente clero loci, dignior, quantum fieri poterit, ecclesia adeatur.

§ 2. Non prohibetur autem Episcopus, iusta suadente causa, ordinationes particulares habere in aliis etiam ecclesiis itemque in oratorio domus episcopalis aut Seminarii aut religiosae domus.

§ 3. Prima tonsura et ordines minores conferri possunt etiam in privatis oratoriis.

§ 1. *General ordinations* should be held publicly in the *cathedral church,* and the canons of that church should be called to and be present thereat. If these ordinations are held elsewhere in the diocese, a more prominent church should be selected and the local clergy should be present.

§ 2. The bishop, for a just reason, may hold *par-*

44 Can. 239, § 1, n. 22.

45 Benedict XIV, *Const. cit.,* § 1.

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ticular ordinations in some other church, or in the chapel of the episcopal residence, or in the oratory of a seminary or convent.

§ 3. Tonsure and minor orders may also be conferred in private oratories.

By *general ordinations* were always understood those conferred on the six Saturdays assigned by law for conferring higher orders. However, can. 1006, § 3, apparently states that these general ordinations may now also be held on a Sunday or holyday of obligation, and therefore a general ordination may be defined as one which should [46] be held on the six Saturdays, but may be transferred to another day for a grave reason. A *particular* or special ordination is one held *extra tempora, i.e.,* outside the prescribed time. But can. 1006, § 3. does not exclude the time-honored practice and view of the school that general ordinations are really only those held on the six Saturdays, because said canon only says, ordinations for higher orders may be held on a Sunday or holyday of obligation. Therefore the bishop, to say the least, would have to state clearly that an ordination to be held on any other day than one of the six Saturdays, is a general one.

The reason why this must be made clear and manifest lies in the *compulsory presence of the canons or clergy.* For the Tridentine text [47] which has passed into the Code, as well as several decisions of the S. Congregation,[48] speak only of general ordination at which the clergy must be present. To such an ordination, if held in the cathedral church, the bishop may call the canons under threat of censures.[49] If the ordination is held in some

[46] Cfr. cc. 2, 3, X, I, 11; *Trid.*, Sess. 23, c. 8, *de ref.*

[47] *L. c.*

[48] S. C. C., Aug. 2, 1727; June 19, 1728 (Richter, *Trid.*, p. 184, n. 1).

[49] *Ibid.*, ad IX; the canons should chant their office at such a time

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other prominent church of the diocese, the local clergy should be present, for the sake of honoring the bishop and out of respect for the sacred ceremony. But compulsory presence cannot be read into the text. The *Caeremoniale Episcoporum* prescribes that the Blessed Sacrament should be removed from the main altar, if preserved there,[50] during the ordination ceremony.

§ 2 is evident. Any reason may be called *just* which the bishop considers to be such. By the chapel of the episcopal residence is understood the oratory which bishops, like cardinals, are allowed to have in their residence. The *domus episcopalis* is the house in which the bishop habitually resides, but the term is not to be interpreted rigidly, as custom permits the bishop to make use, for instance, of a summer residence.[51] The *religiosa domus* is the one described in can. 488, 5.°, of our Code. Hence we translate it with *convent, viz.:* a house which belongs to any religious organization. By the name of *seminary* may be understood the preparatory as well as the grand (theological) seminary. The latter is *the* seminary *par excellence,* of course; but since the wording is general, the term may be taken in its broadest sense. What is meant by *private oratories* is explained in can. 1188, § 2.

as not to interfere with ordination; *ibid,* ad III.

50 Lib. I, c. 12, n. 8 (Ed. Typ. Pustet, 1886, p. 47).

51 Barbosa, *De Officio et Potestate Episcopi,* P. II, Alleg. 11, n. 24.

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CHAPTER VI

ROSTER OF ORDINANDS AND ATTESTATION OF ORDINATION

CAN. 1010

§ 1. Expleta ordinatione, nomina singulorum ordinatorum ac ministri ordinantis, locus et dies ordinationis notentur in peculiari libro in Curia loci ordinationis diligenter custodiendo, et omnia singularum ordinationum documenta accurate serventur.

§ 2. Singulis ordinatis detur authenticum ordinationis receptae testimonium; qui, si ab Episcopo extraneo cum litteris dimissoriis promoti fuerint, illud proprio Ordinario exhibeant pro ordinationis adnotatione in speciali libro in archivo servando.

After ordination the names of those who have been ordained, as well as that of the ordaining minister, together with the place and day of the ordination should be entered in a *special book,* which must be carefully kept in the court of the place of ordination. Besides, all documents relating to the individual ordinations should be carefully preserved.

Each one who has been ordained should be given an authentic attestation of the order received. In case the candidates were ordained by a strange bishop, with dimissorials from their own ordinary, they must show the certificate to the letter, in order that it may be registered in the special book to be kept in the archives.

"*Curia loci ordinationis*" may have a twofold meaning: the diocesan court and the court of the place of

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ordination. That these two denominations are not entirely identical is evident from can. 1009, § 1, which mentions, besides the cathedral, some other prominent church of the diocese. Hence the obvious interpretation would be that in the place of ordination a book should be kept for the purpose of entering therein the names of the *ordinati,* the *ordinans,* and the place and date.

The Code, however, mentions another book to be kept in the *diocesan archives.* This book is intended not only for the ordinations performed by a strange bishop, but also for the ordinations which the diocesan bishop confers. Hence we may call it the *Liber Ordinandorum* or *Ordinationum.* It may also serve the purpose mentioned in § 1, but the Curia of the place where ordination takes place would not on that account be excused from keeping a separate record of its own.

CAN. 1011

Praeterea loci Ordinarius, si agatur de ordinatis e clero saeculari, aut Superior maior, si de religiosis ordinatis cum suis litteris dimissoriis, notitiam celebratae ordinationis uniuscuiusque subdiaconi transmittat ad parochum baptismi, qui id adnotet in suo baptizatorum libro ad normam can. 470, § 2.

In the case of the secular clergy the local Ordinary, and in case of religious ordained with his dimissorials, the religious superior must inform the pastor of the church in which the ordinand was baptized of his ordination to subdeaconship, in order that said pastor may enter the fact in the baptismal register.

The religious superior here mentioned is a superior of exempt religious, because none other can give dimissorials for sacred orders.

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PROCEDURE IN ORDINATION CASES

(Lib. IV, Tit. 21)

For the sake of convenience and to complete the treatise on ordinations, six canons from Book IV may here find a place.

THE COMPETENT COURT

Can. 1993

§ 1. In causis quibus impugnantur obligationes ex sacra ordinatione contractae vel ipsa sacrae ordinationis validitas, libellus mitti debet ad Sacram Congregationem de disciplina Sacramentorum vel, si ordinatio impugnetur ob defectum substantialem sacri ritus, ad Sacram Congregationem S. Officii; et Sacra Congregatio definit utrum causa iudiciario ordine an disciplinae tramite sit pertractanda.

§ 2. Si primum, Sacra Congregatio causam remittit ad tribunal dioecesis quae clerico propria fuit tempore sacrae ordinationis, vel, si sacra ordinatio impugnetur ob defectum substantialem sacri ritus, ad tribunal dioecesis in qua ordinatio peracta fuit; pro gradibus vero appellationis standum praescripto can. 1594–1601.

§ 3. Si alterum, ipsamet Sacra Congregatio quaestionem dirimit, praevio processu informativo peracto a tribunali Curiae competentis.

§ 1. If the obligations arising from sacred ordination, or the validity of the ordination itself, are disputed, a petition must be filed with the *S. C. of Sacraments.* If

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the validity is disputed because of a substantial defect in the holy rites, the S. C. of the *Holy Office* is competent and shall decide whether the case is to be tried in a judiciary or disciplinary manner.

§ 2. If the *judiciary form* is chosen, the S. Congregation shall refer the case to the court of the diocese to which the clergyman belonged at the time of his ordination, or, if the case turns about a substantial defect of the holy rites of ordination, to the court of the diocese in which he was ordained. As to the various instances of appeal, canons 1594–1601 must be observed.

§ 3. If the case is to be settled in the *disciplinary way,* the S. Congregation itself shall render the decision, after having received the necessary documents from the competent diocesan court.

A petition may be filed to get rid of the obligations attendant upon valid ordination, or to impugn the validity of the ordination itself. In either case *vis et metus* may be alleged. Yet even *grave fear,* as can. 264 says, does not render an ordination invalid.

The validity of ordination may, however, be attacked on another score; namely, because of lack of intention, either in the person ordained or in the minister. However, as this defect is difficult to prove, the S. Congregations are very reluctant to declare ordination invalid on that score, although they sometimes take the obligations away. Here the *S. C. Sac.* is competent.

The question of validity is more readily answered if the *sacred rites* can be proved to have been defective, because the rites are outward and generally performed in the presence of witnesses. In such cases the *Holy Office* is competent, because the matter is connected with faith and morals.

Either congregation has first to decide how the peti-

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tion should be answered. Our text mentions two ways: the *disciplinary* and the *judiciary*. The former belongs strictly to the Roman congregations, because it concerns the discipline of the Church. But this is not the only or chief point of distinction between the two ways of settling a question concerning ordination. Another, and the principal one is the fact that an ordination is *contested* by the person ordained or by a third party interested in the case. When no one is particularly interested, or the matter has no far-reaching consequences in the sacramental discipline, the question is generally settled by the Congregation itself. A plenary session of the Cardinals of the Congregation is required to give the decisive vote, and very important matters furthermore require the ratification of the Pope (*Ssms. approvavit*).

If either of the S. Congregations, namely, that of the Sacraments or the Holy Office, declares in favor of the *judiciary* way, the matter is referred to the S. R. Rota,[1] which proceeds according to special norms. It may be noted that neither the S. Congregation nor the S. R. Rota easily pronounce in favor of the nullity of an ordination. The reason is that, with the exception of physical compulsion, it is difficult to furnish convincing proofs. In regard to dispensing from the obligation of celibacy Cardinal Albitinus says of his time: "When I was assessor I saw several pontiffs dispense from celibacy in favor of subdeacons, but hardly ever in favor of deacons, and never in favor of priests, let alone bishops."[2] This, we may safely say, is equally true to-day.

Diocesan courts are requested to note that the Apostolic See always expects either a verdict or at least documents

1 Pius X, "*Sapienti consilio*," June 29, 1908 (*A. Ap. S.*, I, pp. 11, 87 ff.).

2 *De Inconstantia in Fide*, c. 36, n. 134; S. C. C., Jan. 25, July 12, 1721 (Richter, *Trid.*, p. 202 ff., n. 2).

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relating to the case. A *verdict* or sentence is required if the Roman tribunal is to take up the case. But no verdict is to be given before the S. Congregation has notified the diocesan court that the case should be settled *ordine iudiciario*. This must be expressly stated in the document sent from Rome.

A noteworthy distinction is made in our text when it says that if an ordination is impugned because of a substantial defect in the sacred rites (*i.e.,* the matter and form of the Sacrament), the competent tribunal is the *court of the diocese in which the ordination was performed*. This is very logical and judicial, and we might call the diocesan court *forum competens ratione delicti*.

But if the obligations or the validity of the ordination are assailed, the competent court is the one of the diocese to which the plaintiff belongs.

As to the various *instances of appeal,* the canons mentioned in our text should be observed. Can. 1597 says the second instance is the metropolitan court. But this does not preclude the plaintiff from appealing directly to the Holy See.

For exempt religious the first instance is the provincial, and the second the general, and the proper congregation to appeal to is the S. C. Relig.

Note that if the case appertains to the Holy Office, the religious superior may not interfere.

§ 3 refers to decisions rendered by the S. Congregation itself in the disciplinary way. Such a decision may be couched either in the form of a solution of a doubt, or a favor exempting from the obligations. The latter is the more usual and the less expensive way. But even in that case the diocesan court must furnish the necessary documents (*processus informationis*), *i.e.,* the depositions of witnesses, the petition, and the recommendation of

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the Ordinary. No verdict must accompany these papers, but the diocesan court may suggest or insinuate its opinion.

THE PLAINTIFF

CAN. 1994

§ 1. Validitatem sacrae ordinationis accusare valet clericus peraeque ac Ordinarius cui clericus subsit vel in cuius dioecesi ordinatus sit.

§ 2. Solus clericus, qui existimet se ex sacra ordinatione obligationes ordini adnexas non contraxisse, potest declarationem nullitatis onerum petere.

The clergyman himself, as well as the Ordinary to whom he is subject, or in whose diocese he was ordained, may attack the validity of an ordination.

No one but the clergyman who thinks that he has not contracted the obligations arising from sacred ordination, is entitled to ask for exemption from these obligations.

The two propositions are evident. The validity of ordination touches the public good, as the Sacrament of Orders is intended not so much for the individual cleric, as for the Christian populace at large. The assumption of the obligations involved is personal *in recto,* although secretly benefiting *in obliquo*. Hence the validity of an ordination may be attacked not only by the clergyman directly concerned, but also by the Ordinary, whereas exemption from the obligations of the clerical state may be asked for only by the cleric himself.

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MODE OF PROCEDURE

CAN. 1995

Ea omnia, quae tum in Sectione Prima huius Partis, tum in peculiari titulo de processu in causis matrimonialibus sunt dicta, servari etiam debent, congrua congruis referendo, in causis contra sacram ordinationem.

CAN. 1996

Defensor vinculi sacrae ordinationis iisdem gaudet iuribus iisdemque tenetur officiis quibus defensor vinculi matrimonialis.

These two canons enact the same rules for the trial of cases concerning ordination which are laid down in the first section of Book IV for matrimonial cases, as far as they can be adapted for this purpose.

A novelty in Canon Law is the *defender of the ordination tie,* who, as can. 1996 rules, has the same rights and duties as the *defensor vinculi matrimonialis.* There was no text or papal constitution which demanded a defender in ordination trials, though it was customary with the S. Congregatio Concilii to employ a *defensor* as often as it proceeded *ordine iuris servato, i.e.,* in a judiciary way. The rights and duties of the defender are laid down in can. 1967–69 and have been explained in Vol. V of our Commentary.

SUSPENSION PENDING THE TRIAL

CAN. 1997

Quamvis actio instituta fuerit non super ipsamet sacrae ordinationis nullitate, sed super obligationibus

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tantum ex ipsa sacra ordinatione exsurgentibus, nihilominus clericus est ad cautelam ab exercitio ordinum prohibendus.

A clergyman who brings suit for the purpose of being freed from the obligations arising from sacred ordination, even though he does not attack its validity, is provisionally suspended from the exercise of orders. This suspension or rather prohibition is not one in the strict sense of the word, *i.e.*, it is not penal, and consequently the cleric affected by it would not become irregular if he were illicitly to exercise the functions proper to his order.[3]

TWO SENTENCES REQUIRED

CAN. 1998

§ 1. Ut clericus liber sit ab obligationibus quae a vinculo ordinationis manant, requiruntur duae sententiae conformes.

§ 2. Quod ad appellationem attinet, in his causis serventur praescripta can. 1986–1989 de causis matrimonialibus.

Two identic sentences are required to free a clergyman from the obligations attached to sacred orders. Concerning *appeals,* canons 1986-1989 must be observed.

As is evident from these few canons, a trial in the proper sense of the word requires an appeal, which the defender has to make when the nullity of an ordination or freedom from its obligations has been declared. However, after the second court has ratified the sentence of the first, the defender is not obliged to appeal unless he is convinced, or morally certain (for absolute certainty is neither required nor always possible), that the de-

[3] See can. 985, n. 7.

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cisions rendered were wrong, or if there has been a gross disregard of technicalities.

Having dealt with the Sacraments as far as it seemed necessary and opportune from the viewpoint of Canon Law, we now add the Title on the Sacramentals, because it is closely connected with the same subject.

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TITLE VIII

THE SACRAMENTALS [1]

DEFINITION

CAN. 1144

Sacramentalia sunt res aut actiones quibus Ecclesia, in aliquam Sacramentorum imitationem, uti solet ad obtinendos ex sua impetratione effectus praesertim spirituales.

The Sacramentals are objects or actions resembling the Sacraments which the Church makes use of by way of intercession to obtain especially spiritual effects.

The word Sacramentals, it appears, was brought into use by Alexander of Hales. The Sacramentals resemble the Sacraments in this that they ordinarily consist of matter and form, or external signs which produce a spiritual as well as a temporal effect, though the former is chiefly intended. They differ from the Sacraments inasmuch as they do not convey sanctifying grace nor produce their effects *ex opere operato,* but *ex opere operantis* or through the intercession of the Church. But there is another even more important difference: unlike the Sacraments, the Sacramentals, though traceable to remote antiquity, cannot, as such, claim divine institution.

1 See Arendt, S. J., *De Sacramentalibus,* Rome 1900; Pohle-Preuss, *The Sacraments,* Vol. I, p. 111 ff.

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INSTITUTION, INTERPRETATION, CHANGE

CAN. 1145

Nova Sacramentalia constituere aut recepta authentice interpretari, ex eisdem aliqua abolere aut mutare, sola potest Sedes Apostolica.

The Apostolic See alone can institute Sacramentals, authentically interpret those in use, or abolish or change some of them.

This is not a dogma, as the Council of Trent[2] has not defined this power directly, but only negatively determined that the rites accompanying the administration of the Sacraments may not be arbitrarily condemned, omitted, or changed.

Our text claims the *exclusive power* of instituting Sacramentals for the *Holy See*. This is not surprising if we remember the general saying: *Lex orandi, lex credendi*. The Sacramentals are the living expression of the faith and hope that is in the Church. However, this does not mean that no Sacramentals were instituted without the concurrence of the Apostolic See. For more than one of them, especially the rites surrounding the administration of Baptism, are undoubtedly of Apostolic origin. This explains why the Holy See has consistently refused to depart from such practices as anointings, spittle, breathing, even among nations who were opposed to these rites.[3]

The legislative and ministerial power of the Church alone can declare which rites by their external sign signify the blessing or favor that God wishes to bestow.

2 Sess. 7, can. 13, *de sacr.*
3 S. O., Sept. 12, 1645 n. 2; March 23, 1656; Nov. 13, 1669; Bened. XIV, "*Omnium sollicitudinum*" Sept. 12, 1744, § 14 (*Coll. P. F.*, nn. 114, 126, 189, 347).

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And it is the intercession of the Church which produces the effects of Sacramentals. That the supreme power invested in the Church is claimed for the Holy See does not, of course, conflict with the idea that God is the efficient cause.[4]

MINISTER OF THE SACRAMENTALS

CAN. 1146

Legitimus Sacramentalium minister est clericus, cui ad id potestas collata sit quique a competente auctoritate ecclesiastica non sit prohibitus eandem exercere.

The legitimate minister of the Sacramentals is any clergyman duly empowered and not forbidden to exercise his power by the competent ecclesiastical authority.

The general rule is that the minister of a Sacramental is the *priest,* although it is quite true that the sacerdotal character is not required for all Sacramentals.[5] What is absolutely necessary is power granted by the Church, because the latter by her intercession obtains the effects. Another requirement is the *clerical* state. Therefore a lay catechist cannot administer a Sacramental, for instance, bless a corpse or grave.[6] Much less is a woman, even though she be an abbess, entitled to function as minister of the Sacramentals. Hence the blessings of female religious superiors cannot be Sacramentals in the proper sense of the word.[7]

The power is withdrawn from the legitimate minister by complete suspension from office or excommunication, or the personal interdict.[8]

4 Somewhat confused is Arendt's argumentation, *l. c.*, p. 385.

5 *Rit. Rom.*, tit. VIII, c. 1, n. 1; *Pont. Rom.*, "*De Ordinatione Presbyt.*"

6 S. Rit. C., July 5, 1892 (*Coll. P. F.*, n. 1801).

7 Arendt, *l. c.*, p. 390, n. 362: *mera oratio et gratiarum actio.*

8 Cfr. can. 2260, 2275.

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DIVERSE CONSECRATIONS AND BLESSINGS

CAN. 1147

§ 1. Consecrationes nemo qui charactere episcopali careat, valide peragere potest, nisi vel iure vel apostolico indulto id ei permittatur.

§2. Benedictiones autem impertire potest quilibet presbyter, exceptis iis quae Romano Pontifici aut Episcopis aliisve reserventur.

§ 3. Benedictio reservata quae a presbytero detur sine necessaria licentia, illicita est, sed valida, nisi in reservatione Sedes Apostolica aliud expresserit.

§ 4. Diaconi et lectores illas tantum valide et licite benedictiones dare possunt, quae ipsis expresse a iure permittuntur.

§ 1. No one who lacks the episcopal character can validly perform *consecrations,* unless he is allowed to do so by law or in virtue of an *Apostolic indult.*

A consecration is a blessing accompanied by anointing with holy oils, *e.g.,* of a church, an altar, a chalice and paten, a bell, etc. To perform such a consecration *validly requires* either the episcopal character, or a grant by law or papal indult. Consequently:

(a) *All* bishops may validly consecrate the objects mentioned above; but a titular bishop needs the permission or consent of the local Ordinary.[9]

(b) *Cardinals may by law* consecrate churches, altars, and sacred vessels anywhere, with the consent of the local Ordinary.[10] The same applies to *vicars Apostolic* and *prefects Apostolic,* even though they are not consecrated bishops, as well as to *proprefects and provicars,* who may consecrate chalices, patens, and portable altars

9 Can. 1157.

10 Can. 239, § 1, n. 20; can. 1157.

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within the boundaries of their territory and during their term of office.[11]

By law, finally, *abbots or prelates nullius* may consecrate sacred vessels, churches, and altars, portable as well as immovable.[12]

(c) By *apostolic indult* all those may consecrate who have obtained the privilege directly and not by way of communication.

What about *governing abbots?* Our answer to this question is given in Vol. III, p. 353. A decree of the S. Rit. C., Sept. 27, 1659, as well as other decrees state that abbots who, according to can. 625, enjoy the right to use pontificals, provided they are *abbates regiminis* (to the exclusion therefore of titular abbots) may bless bells, chalices, and similar objects in which anointments are used, *but only for the use of their own churches.*[13] Nothing is said of altars, nor was this privilege ever included in the general grant;[14] it was not even given to chorepiscopi,[15] because consecration has always been considered a strictly episcopal function.[16] If the privilege has been directly granted to some order or congregation, it is indeed not taken away by the present code, but it remains to be seen whether communicated privileges will stand the test when they are brought up for examination. Here another decision may find a place. The Primate of Hungary had asked the S. Congregation whether in cities far removed from the episcopal residence, which have a bell-foundry, one of the dignitaries

11 Can. 294, § 2; can. 310, § 2.

12 Can. 323.

13 *Dec. Auth.*, 1133, n. XIX; S. Rit. C., Aug. 31, 1737, referring to a decree of Sept. 27, 1659, says: "*In decisis et amplius* [*non proponatur*]" for the Cistercians of Stams in the Tyrol; S. Rit. C., May 16, 1744 (*Dec. Auth.*, n. 2377)

14 Benedict XIV, "*Ex tuis precibus*," Nov. 16, 1748.

15 C. 4, Dist. 68.

16 C. 1, Dist. 25; cc. 2, 9, 11, 12, Dist. 1, de Consecr.

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of the chapter or a prelate may be delegated to bless bells without anointing. The answer was, No, if the bells are intended for the use of churches and for announcing sacred functions.[17]

§ 2. *Any priest may perform blessings which are not reserved to the Roman Pontiff, to the bishops, or to others.*

§ 3. The blessing given by a priest, if given without the necessary permission, though reserved, is valid, but illicit, unless the Apostolic See has added an invalidating clause in the reservation.

Blessings *reserved to the Pope* are: those of the pallium, the Agnus Dei, the Golden Rose, and the swords of princes.[18] Blessings *reserved to bishops* are: the blessing of abbots, the consecration of virgins, the blessing of holy oils and chrism, the dedication of churches, the consecration of altars and sacred vessels (not vestments), the blessing of bells. These blessings are properly called *reserved.*[19]

Blessings *reserved to others* are those reserved to the pastor, as stated in can. 462.

The *benedictio mulieris post partum* is not a strictly parochial right, but may be imparted by any priest in any church or public oratory.[20]

Blessings reserved to religious orders and congregations are those contained in the appendix of the typical edition of the Roman Ritual.[21]

Not reserved are the blessings mentioned in the same

17 S. Rit. C., May 9, 1857 (*Dec. Auth.*, n. 3042).

18 Van der Stappen, *S. Liturgia*, Vol. IV, p. 342 ff.

19 We refer the reader to what will be said in Vol. VI and to the *Rit. Rom.*, tit. VIII, cc. 20–21; but cc. 20–22 are no longer reserved.

20 S. Rit. C., Nov. 20, 1893, ad II (*Dec. Auth.*, n. 3813).

21 Ed. Pustet, 1913, p. 95.

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Ritual under title VIII, c. 1–19, and in the Appendix under: "*Benedictiones Non Reservatae.*"[22] Any priest may give these.

Observe that neither bishops nor vicars general are entitled to grant faculties to priests to impart all the blessings described as reserved in the Roman Ritual, and in which no anointment is employed. This would exceed their ordinary or customary power.[23] Nor may bishops, without an Apostolic indult, impart or delegate other priests to impart the blessings reserved to religious orders.[24] But if reservation is not explicitly accompanied by an *invalidating* clause, a blessing given without permission is valid, though illicit. An invalidating clause would be: "*aliter non valeant,*" or one expressed by a conditional apposition, or in the form of an ablative absolute. Therefore the rescripts must be carefully read. The clause, "*de consensu tamen Ordinarii loci,*" necessitates the (at least presumed) consent of the Ordinary for the valid use of the faculties. If only the words, "*de consensu Ordinarii,*" without the additional "*loci,*" are found in the rescript, the consent of the religious superior is sufficient for exempt religious, even though the clause contains the former formula, "*de consensu Ordinarii loci,*" provided the faculty is to be used only for the convent, not for a public church or public oratory.[25]

§ 4. *Deacons and lectors* may validly and licitly perform only such blessings as are allowed them by law. When a deacon confers solemn Baptism, he is not allowed to bless the salt and water.[26] Hence these must be blessed

22 *Ibid.*, p. 220–233; App., p. 26–71.

23 S. Rit. C., April 2, 1875 (*Dec. Auth.*, n. 3343).

24 S. Rit. C., Dec. 2, 1884 (*Dec. Auth.*, n. 3533).

25 See can. 198; Putzer, *Comment. in Fac. Ap.*, p. 74, n. 54.

26 S. Rit. C., Feb. 10, 1888 (*Dec. Auth.*, n. 3684).

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for the purpose by the pastor or another priest. A deacon is not allowed, even though he has the permission of the parish priest, to bless houses on Holy Saturday with stole and surplice.[27] Although, if a priest can be had, a deacon is not allowed to accompany the funeral and bless the grave,[28] yet if no priest is at hand, and the Ordinary grants permission, a deacon may perform the funeral service, especially in private houses.[29] A right peculiar to deacons is the solemn blessing of the Easter Candle, after the five grains of incense have been blessed by a priest.

RITES TO BE OBSERVED

CAN. 1148

§ 1. In Sacramentalibus conficiendis seu administrandis accurate serventur ritus ab Ecclesia probati.

§ 2. Consecrationes ac benedictiones sive constitutivae sive invocativae invalidae sunt, si adhibita non fuerit formula ab Ecclesia praescripta.

In performing or administering Sacramentals, the rites approved by the Church must be carefully observed.

Consecrations and blessings, those called constitutive, as well as those called invocative, are invalid if the formulas prescribed by the Church have not been employed.

Constitutive consecrations or blessings are those by which persons or objects are dedicated to the ministry or service of God or religion and become permanently separated from profane use, having received, as it were, a higher or sacred existence.[30] Thus, for instance, persons

27 S. Rit. C., Aug. 8, 1835 (*ibid.*, n. 27, 29).

28 S. Rit. C., Sept. 11, 1847, ad. 10 (*ibid.*, n. 29, 51).

29 S. Rit. C., Aug. 14, 1858 (*ibid.*, n. 3074).

30 Van der Stappen, *l. c.*, IV, p. 340, n. 321; *Reg. Juris 51 in 6°*.

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become sacred by a blessing, as abbots and consecrated virgins.[31] Material objects, such as churches, chalices, and cemeteries, become sacred by being blessed and are withdrawn from common or profane use.

Invocative blessings are intended to confer a spiritual or temporal favor, through the bounty of God, upon persons or objects, without, however, changing their condition or natural state. Thus, *e. g.*, the nuptial blessing is given to a person, women are "churched," machines, ships, etc., are blessed, and so forth.

For most of these blessings the Church has prescribed certain rites or formulas, which are all contained in the Roman Ritual, and should be carefully and accurately followed, without any admixture of frivolous ceremonies or the use of unsuitable objects.[32] This applies especially to the prayers prescribed for exorcisms. Stole and surplice are prescribed for most of these blessings. Those who have the privilege of wearing the rochette may use it, together with the surplice and stole.[33] The priest who imparts the general absolution to secular Tertiaries — and we suppose also to Oblates of St. Benedict — must use the purple stole.[34]

SUBJECT OF SACRAMENTALS

CAN. 1149

Benedictiones, imprimis impertiendae catholicis, dari quoque possunt catechumenis, imo, nisi obstet Ecclesiae prohibitio, etiam acatholicis ad obtinendum fidei lumen vel, una cum illo, corporis sanitatem.

31 The *consecratio virginum* is only imparted to *moniales* with solemn vows, and is, as far as we know, not customary in our country.

32 Benedict XIV, "*Sollicitudini*," Oct. 1, 1745, § 43.

33 S. Rit. C., March 11, 1871, ad II; July 11, 1892, ad I et II (*Dec. Auth.*, nn. 3237, 3784).

34 S. Rit. C., Dec. 22, 1905 (*ibid.*, n. 4176).

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Blessings are to be bestowed chiefly upon Catholics; they may also be given to catechumens, and, unless the Church prohibits it, to non-Catholics in order to obtain for them the light of faith, or, together with it, bodily health.

Concerning the blessings which may be given to *non-Catholics* note that these persons should be instructed not to expect an absolutely sure effect from the use of them. Any superstition based on the number of words employed, or the kind of paper on which they are written, or some special hour must be discountenanced.[35] Relics or objects touched with the holy oils must not be left in the hands of unbelievers.[36] Priests may also bless the houses of schismatics or non-Catholics.[37] Non-Catholics may be admitted to public blessings, for instance, to receive candles, ashes, palms, etc.[38]

EFFECT OF CONSTITUTIVE BLESSINGS

CAN. 1150

Res consecratae, vel benedictae constitutiva benedictione, reverenter tractentur neque ad usum profanum vel non proprium adhibeantur, etiamsi in dominio privatorum sint.

Objects consecrated or blessed by a constitutive blessing should be treated reverently, and not be used for profane or foreign purposes, even though they may be in the possession of private persons.

This is true especially of churches, chapels, sacred vessels, and vestments, as will be seen under the proper heading.

35 S. O., Dec. 11, 1749 (*Coll. P. F.*, n. 374).

36 S. O., Aug. 11, 1768 (*ibid.*, n. 468).

37 S. C. P. F., April 17, 1758 (*ibid.*, n. 411).

38 S. Rit. C., March 9, 1919 (*Ephemerides Lit.*, Vol. 33, p. 771).

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EXORCISMS

CAN. 1151

§ 1. Nemo, potestate exorcizandi praeditus, exorcismos in obsessos proferre legitime potest, nisi ab Ordinario peculiarem et expressam licentiam obtinuerit.

§ 2. Haec licentia ab Ordinario concedatur tantummodo sacerdoti pietate, prudentia ac vitae integritate praedito; qui ad exorcismos ne procedat, nisi postquam diligenti prudentique investigatione compererit exorcizandum esse revera a daemone obsessum.

CAN. 1152

Exorcismi a legitimis ministris fieri possunt non solum in fideles et catechumenos, sed etiam in acatholicos vel excommunicatos.

CAN. 1153

Ministri exorcismorum qui occurrunt in baptismo et in consecrationibus vel benedictionibus, sunt iidem qui eorundem sacrorum rituum legitimi ministri sunt.

These three canons deal with exorcisms. That the influence of demons over men is real, Holy Writ abundantly proves, most particularly the Gospel of St. Mark. But no less do historical documents prove the power of the Church over the spirits of darkness. The activity of the latter explains not only the peculiar charisma, but also the development of the exorcistate in the Latin and the lectorate in the Oriental Church during the third century. Early writers recommend the invocation of the name of Jesus of Nazareth, warn against unnecessary and curious questioning of the demons, and recommend fasting and

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prayer. As to the rites or ceremonies the same writers mention *exsufflatio,* laying on of hands, and reading portions of Holy Writ. Classes of obsessed or possessed were distinguished and a special discipline for *energumeni* was developed.[39]

Our Code says that no one who is endowed with the faculty or power of exorcizing, is allowed to pronounce an exorcism over a possessed person unless he has obtained special and express permission to do so from the Ordinary. The Ordinary may grant this permission only to such priests as are distinguished for their piety, prudence, and integrity of life. No priest shall pronounce an exorcism until he has by a careful and prudent investigation ascertained the fact of real obsession.

The *Ordinary* who is to give this permission is the one in whose diocese the exorcism is to take place, or the one to whom the priest is subject. For exempt religious he is the immediate *superior major,* for the text simply says: *Ordinarius.* That the exorcising priest should be irreproachable and endowed with the necessary qualities follows from the astuteness of the demons and the awful task laid upon the exorcist. The text employs the term *obsessos,* but we hardly believe that it means only those obsessed by demons in the strict sense of that term, *i. e.,* attacked bodily from without, but includes *possession, i. e.,* control of man's body from within.[40] A conscientious medical expert should be consulted before exorcism is decided upon.

Exorcisms, continues the Code, may be pronounced not only over faithful Catholics and catechumens, but also over non-Catholics [41] and excommunicated persons. The

39 Cfr. Wieland, *Die Genetische Entwicklung der sog. Ordines Minores,* 1897, p. 114 ff.; Arendt, *l. c.,* p. 347 ff.

40 See *Cath. Encycl.,* s. v. "Possession" (Vol. XII, 315 f.).

41 S. O., Sept. 17, 1681 (*Coll. P. F.,* n. 225).

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ministers of the exorcisms employed in Baptism, consecrations and blessings, are the same persons who administer these sacred rites. Hence for these cases no special permission from the Ordinary is required.

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LATITUDES

DATES		0°	5°	10°	15°	20°	25°	30°	35°	40°	45°	50°	55°	60°	65°
		h.m.	h.m.	h.m.	h.m.	h.m.	h.m.	h.m.	h.m.	h.m.	h.m.	h.m.	h.m.	h.m.	h.m.
JANUARY	1	1.16	1.16	1.16	1.18	1.20	1.23	1.27	1.32	1.39	1.48	2. 1	2.19	2.48	3.42
	16	1.15	1.15	1.15	1.17	1.19	1.21	1.25	1.30	1.37	1.46	1.58	2.14	2.39	3.22
	31	1.13	1.13	1.14	1.15	1.17	1.20	1.23	1.28	1.34	1.43	1.54	2. 9	2.30	3. 3
FEBRUARY	15	1.11	1.12	1.12	1.14	1.15	1.18	1.22	1.26	1.32	1.40	1.50	2. 4	2.23	2.51
MARCH	12	1.10	1.11	1.11	1.13	1.14	1.17	1.21	1.25	1.31	1.39	1.49	2. 3	2.21	2.49
	17	1.10	1.10	1.11	1.12	1.14	1.17	1.21	1.26	1.32	1.40	1.51	2. 5	2.26	2.58
APRIL	1	1.10	1.10	1.11	1.13	1.15	1.18	1.22	1.27	1.34	1.43	1.55	2.13	2.41	3.35
	16	1.11	1.11	1.12	1.14	1.17	1.20	1.25	1.31	1.39	1.49	2. 5	2.30	3.22	(1)
MAY	1	1.12	1.13	1.14	1.16	1.19	1.23	1.28	1.35	1.45	1.59	2.21	3. 7	(1)	(1)
	16	1.14	1.15	1.16	1.18	1.22	1.26	1.32	1.41	1.53	2.11	2.47	(1)	(1)	(1)
	31	1.15	1.16	1.18	1.20	1.24	1.29	1.36	1.45	2. 0	2.25	3.45	(1)	(1)	(1)
JUNE	15	1.16	1.17	1.19	1.21	1.25	1.31	1.38	1.48	2. 5	2.35	(1)	(1)	(1)	(1)
	30	1.16	1.17	1.19	1.21	1.25	1.30	1.38	1.48	2. 4	2.34	(1)	(1)	(1)	(1)
JULY	15	1.15	1.16	1.18	1.20	1.24	1.28	1.35	1.45	1.59	2.23	3.25	(1)	(1)	(1)
	30	1.14	1.14	1.16	1.14	1.21	1.25	1.32	1.40	1.51	2. 9	2.41	(1)	(1)	(1)
AUGUST	14	1.12	1.13	1.14	1.16	1.19	1.22	1.28	1.34	1.44	1.57	2.18	2.58	(1)	(1)
	29	1.11	1.11	1.12	1.18	1.17	1.20	1.24	1.30	1.38	1.49	2. 4	2.27	3.12	(1)
SEPTEMBER	13	1.10	1.10	1.11	1.13	1.15	1.18	1.22	1.27	1.34	1.43	1.55	2.12	2.38	3.26
	28	1.10	1.10	1.11	1.12	1.14	1.17	1.21	1.25	1.32	1.40	1.50	2. 5	2.25	2.56
OCTOBER	13	1.10	1.11	1.11	1.13	1.15	1.17	1.21	1.25	1.31	1.39	1.49	2. 3	2.21	2.48
	28	1.12	1.12	1.12	1.14	1.16	1.18	1.22	1.26	1.33	1.40	1.51	2. 5	2.24	2.52
NOVEMBER	12	1.13	1.13	1.14	1.16	1.17	1.20	1.24	1.28	1.35	1.43	1.54	2. 9	2.31	3. 4
	27	1.15	1.15	1.15	1.17	1.19	1.22	1.26	1.30	1.37	1.46	1.58	2.15	2.40	3.24
DECEMBER	12	1.16	1.16	1.16	1.18	1.20	1.23	1.27	1.32	1.39	1.48	2. 1	2.19	2.48	3.44
	27	1.16	1.16	1.17	1.18	1.20	1.23	1.27	1.32	1.39	1.49	2. 1	2.20	2.49	3.47

(1) The sun does not go down at 18° below the horizon

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CAN. 816

UNLEAVENED OR LEAVENED BREAD*

In Missae celebratione sacerdos, secundum proprium ritum, debet panem azymum vel fermentatum adhibere ubicunque Sacrum litet.

This canon recalls part of the history of the Eastern Schism begun under Photius (IXth century) and completed under Michael Caerularius (XIth century), the latter of whom styled the Latins "Azymites" because they used unleavened bread for the Holy Eucharist. It is certain that unleavened bread was commonly used in the Western, or rather Latin, Church since the ninth century, and that the Churches of the Latin Rite made use of such bread also at Constantinople, where the controversy became accentuated under the Patriarch Michael.[1] The question whether leavened or unleavened bread should be employed for the Holy Eucharist affected every attempt at re-union between the Latin and the Greek Church, although there was no dogma directly involved. Indirectly, indeed, an article of faith is implied, inasmuch, namely, as the Greeks and all Orientals who make use of leavened

1 See Hefele, *Conciliengeschichte*, IV, 733 f.; Hergenröther, *Photius*, III, 727 ff; *Cath. Encycl.*, II, 172. The historico-critical question concerning the dogmatical point at issue is whether Christ celebrated the Last, respectively the Eucharistic, Supper with unfermented bread. This is confidently asserted by Benedict XIV (*De Sacrif. Missae*, l. II, c. 10, n. 8). It depends on whether Christ died on the 14th or the 15th of Nisan; for on the latter day the observance of the azymes began; see Smith-Cheetham, *Dictionary of Christian Antiquities*, 1893, Vol. II, 601 f.; Valitutti, *Chronology of the Life of Christ*, 1918.

* By an oversight this canon was not inserted in its proper place.

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bread *must believe* that leavened as well as unleavened bread is valid matter for the Sacrament.[2] This article of faith, of course, also concerns the Latins, *suo modo*. But in order not to mix up the different rites, the Church has, ever since the fight became acute, insisted that each Church should follow its own rite, provided only that the belief stated above was firmly held. At the same time the Popes always demanded that the Greeks should everywhere use the bread prescribed by their rite, *i. e.*, leavened bread, and that the Latins should everywhere use unleavened bread, as prescribed by their rite.[3] This is what our canon states when it says that *the priest in the Holy Sacrifice of the Mass, wherever he says Mass, must use either unleavened or leavened bread, according as his rite prescribes.* The obligation is *gravis*.[4] Since this matter plays quite a conspicuous part in the Oriental Churches, the S. Congregation of the Propaganda has laid down a rule for those of the Oriental Church who wish to be *transferred from one Oriental rite to another Oriental rite.* If the transfer concerns a change from a rite with unleavened bread to a rite with leavened bread, an Apostolic indult is required. Therefore, if a Melchite, a Copt, a Syrian or a Chaldaean wishes to be transferred to the Armenian or Maronite rite, he needs an indult of the Holy See (*S. C. pro Ecclesia Orientali,* can. 257). But where no such difference exists, the two bishops (*a quo*

2 Benedict XIV, "*Etsi pastoralis,*" May 26, 1742, § I, n. II; "*Allatae sunt,*" July 26, 1755, § 22; "*Nuper ad nos,*" Mar. 16, 1743, § 5. The Armenians and Maronites, like the Latins, use unleavened bread; "*Allatae,*" § 23; *S. C. P. F.*, July 31, 1902, n. 1 (n. 2149).

3 "*Etsi pastoralis,*" § VI, n. X.

4 *Constit. cit., l. c.,* enforced it under penalty of perpetual suspension. Lehmkuhl, II, n. 121, 3, says: "*A quo [praecepto] vix ulla ratio unquam excusat, exceptâ necessitate complendi sacrificium, si panis adhibitus deprehenditur corruptus, neque alius panis, qualem ritus requirit, potest haberi.*"

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and *ad quem*) can settle the transfer.[5] This canon does not, of course, do away with special privileges or temporary papal indults.[6]

[5] *S. C. P. F.*, Nov. 20, 1838 (Coll., n. 878). But the decree says nothing concerning a transfer from an Oriental to the Latin Rite.

[6] Thus the Benedictines of the Greek College are permitted to say Mass in the Greek or Latin Rite; this privilege had already been granted formerly to other colleges; see Bened. XIV, "*Allatae*," § 20.

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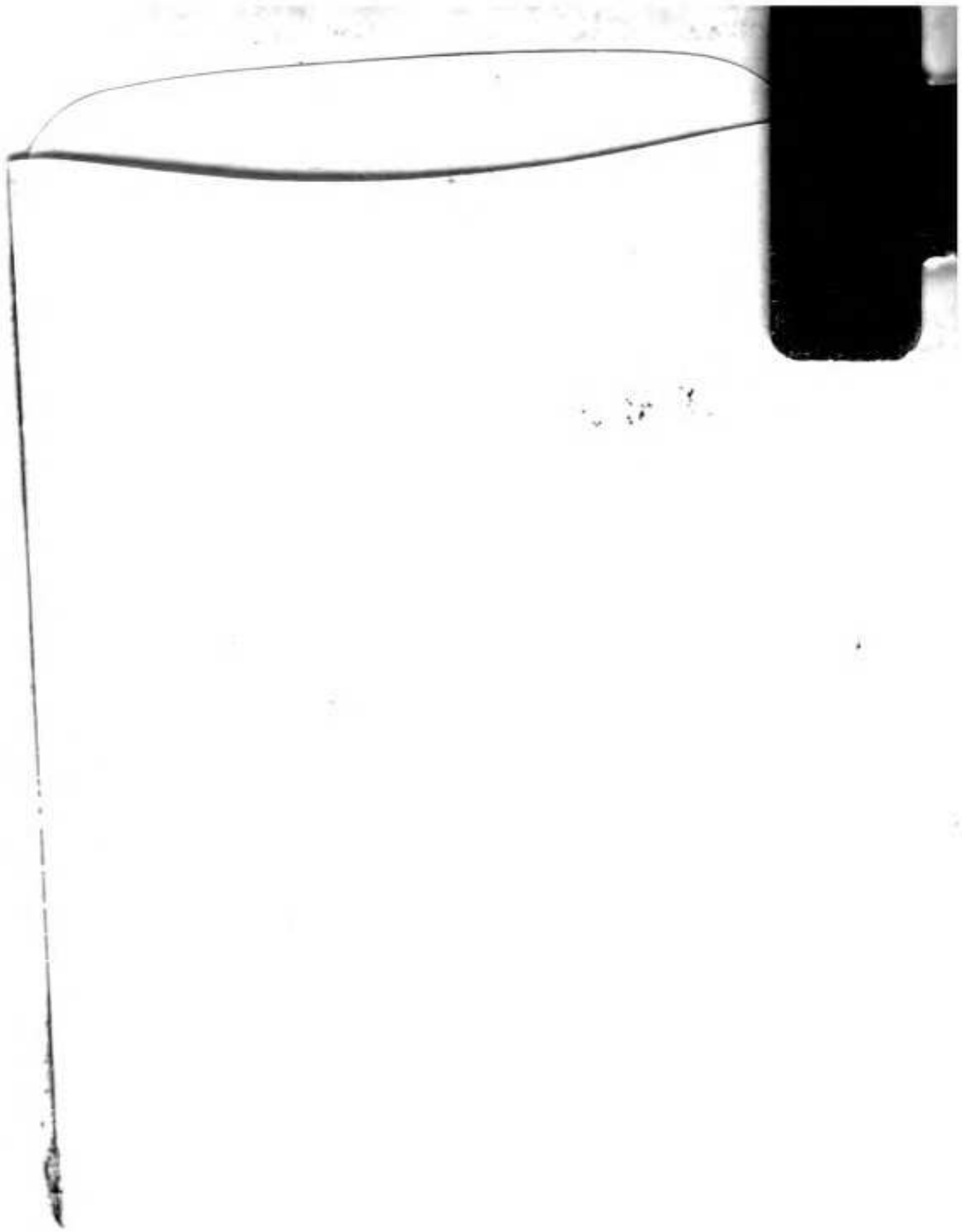
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A COMMENTARY ON THE NEW CODE OF CANON LAW

By THE REV. P. CHAS. AUGUSTINE, O.S.B., D.D.
Professor of Canon Law

BOOK III
De Rebus, or Administrative Law

VOLUME V
Marriage Law (can. 1012-1143)
Matrimonial Trials (can. 1960-1992)

SECOND, REVISED EDITION

B. HERDER BOOK CO.
17 SOUTH BROADWAY, ST. LOUIS, MO.
AND
68 GREAT RUSSELL ST. LONDON, W. C.
1920

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FOREWORD

This Volume of our Commentary (the fifth) is published before Volume Four because of the great practical importance of the matrimonial law and because some of my clerical friends strongly urged that it be issued as soon as possible.

We have added the canons from Book IV treating of "Matrimonial Trials," not with the intention of correcting the logical order of the Code, but solely for the sake of convenience. This will, we believe, be appreciated especially by those who have to occupy themselves frequently with matrimonial matters,— we mean the diocesan court officials.

A word concerning the *sources*. The reader may perhaps be surprised at not finding a large array of secondary sources, *i.e.*, authors cited. There were two reasons which prompted moderation in this respect. The first is that we have given prominence to the primary sources as quoted by Cardinal Gasparri, which we have consulted and made discreet use of. The other reason is a practical one. The English reader does not care to cast his eyes to the bottom of the page for every assertion in the text, and we did not deem it proper to swell the bulk of the book with endless quotations.

For the rest the authors chiefly used have been mentioned among the literary sources.

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THE NEW CODE OF CANON LAW

THE LAW OF MARRIAGE

PRELIMINARY REMARKS

Marriage, from the medieval Latin word *maritaticum* (old French *mariage*), corresponds to the old Latin *matrimonium*, and signifies, in general, the union of man and woman for the purpose of procreation. This indicates the original and primary end of marriage; the difference of sex is the foundation of procreation and union is the source of generation. However this union is one of peculiar character and properties, and has been acknowledged as such by the long-standing tradition of mankind. It is not merely a mating of male and female, but a union based upon consent, such as only a human being is capable of giving.

We do not intend to enter upon an ethnographical or anthropological study of matrimony [1] or to relate the vicissitudes which it underwent among the Hebrews, Greeks, and Romans. True, Church Law has borrowed impediments from the Sacred Writings of the Chosen People [2] and also embodied Roman laws in its Code.[3] Yet, in

1 The literature may be consulted in the *Catholic Encyclopedia*, Vol. IX, 693 (by Prof. J. Ryan), and in the *New International Encyclopedia*, 1904, Vol. XIII, 86 ff.

2 For instance, the impediments of consanguinity and mixed religion.

3 The impediment of adoption is based on that law.

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spite of these borrowings, Christian, more specifically, *Catholic Marriage* stands out quite singularly. First and above all, the *character* of Christian marriage is raised to the supernatural sphere through its elevation to the dignity of a sacrament. However, it would be wrong to imagine that this dignity destroyed its essential natural characteristics. For, as grace does not destroy nature but lifts it up, so neither does the sacramental character destroy Christian marriage but rather perfects it.

The primary end for which matrimony was instituted is the *procreation of children* or the propagation of the human race. This end is achieved by the means which nature dictates, *i. e.*, by the intercourse of husband and wife. Therefore, matrimony is called a union. Now a union between human beings postulates mutual *consent.* Nowhere is sexual union regarded as marriage unless it is in some way socially sanctioned,[4] and social sanction presupposes an agreement between the parties concerned. It is therefore a hazardous attempt[5] to prove from scattered texts that sexual intercourse (*copula*) alone constitutes the formal element of matrimony. This opinion confuses the essential, elementary constituent of marriage with its primary and most important purpose. That there are *secondary purposes* connected with marriage is evident. They are two: mutual help and companionship and a lawful remedy against concupiscence.[6] But these two purposes are *subordinate* to the first and primary end, which is the propagation and continuation of the human race. These three ends of marriage seem to be alluded to in the definition of Modestinus: "*Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et*

4 *New International Encyc.*, XIII, 87.

5 Freisen did this in the first edition of his *Geschichte der Quellen des Kan. Eherrechts*, but he modified his position in the second edition, 1892, p. xix.

6 Gen. II, 18; 1 Cor. VII, 9.

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humani iuris communicatio." [7] *Nuptiae* indicated a marriage performed according to the Roman law, which strictly required mutual consent.[8] But there is another definition in Roman Law, *viz.: Nuptiae sive matrimonium est viri et mulieris coniunctio, individuam vitae consuetudinem retinens,*[9] *i. e.,* a union of man and woman retaining the individual custom of life. To us there seems little doubt that this definition expresses *two essential properties,* namely, unity and indissolubility. *Unity* is indicated by the singular: man and woman, not men and women. It means that this union is to be entered upon by one man with one woman, and hence polyandry as well as polygyny are deviations from the Roman as well as the Christian law of marriage, and from its typical form. *Polyandry,* or the union of several husbands with one wife, existed among some primitive tribes,[10] but in most instances was the exceptional form of conjugal union. *Polygamy* or *polygyny, i. e.,* the union of several women with one husband, existed among some ancient peoples, including the Hebrews, and still exists among some civilized nations and the majority of savage tribes. However, as has truly been observed, the great majority of peoples are monogamous, and the other forms of marriage are usually modified in a monogamous direction.[11] The Greeks and Romans show no traces of polygamy. The latter also prove the *indissoluble* character of matrimony as opposed to complete divorce. For up to the year 520 A. U. C. there was no divorce in Rome, and Sp. Carvilius Ruga greatly surprised his fellow-citizens by departing from the ancient custom.[12] At Athens divorce was more easily ob-

7 L. 1, Dig. 23, 2, *de ritu nuptiarum.*
8 L. 2, ib.; pr. Iust., I, 10.
9 L. 1, Inst., I, 9.
10 Cfr. *Cath. Encyc.,* ix, 694.
11 Westermarck, *The History of Human Marriage,* 1891, p. 510.
12 Cfr. Savigny, *Vermischte Schriften,* 1850, Vol. I, p. 81 ff.

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tained, especially by the husband, whereas Sparta long maintained the purity of marriage.[13] The early Christian emperors, Constantine, Theodosius, and Justinian, legalized divorce, but before the tenth century the Catholic teaching on the indissolubility of marriage had become embodied in the civil legislation of every Christian country.[14] At the time of the Reformation, the Protestant Churches of the Continent rejected the sacramental character of marriage and admitted divorce.[15] Luther regarded matrimony as a purely secular matter, which should be regulated by civil law. This was done, and in the nineteenth century, the State took marriage entirely under its control, though civil marriage had already been imposed in Holland in 1580, Cromwell had introduced it in England and Ireland in 1653, and France required it for the Huguenots in 1685. But these are rather solitary examples. The nineteenth century, ushered in by the French Revolution, produced a wholesale civil legislation concerning marriage.

A civil marriage is one contracted according to the laws of the country before a civil magistrate and having a legal status without regard to ecclesiastical legislation.[16] Not all countries prescribe civil marriage in the same manner, but three kinds may be distinguished:

(1) *Optional* or *facultative civil marriage,* which leaves the parties free to contract marriage *either* before the civil magistrate *or* before the ecclesiastical authorities. This, we may safely say, is the statutory law in the U. S. And here it may be added that Lord Hardwicke's Act[17] was never applied to the colonies and therefore never be-

13 Müller-Bauer, *Die griech. Privat- und Kriegsaltertümer,* 1893, pp. 152, 142.

14 *Cath. Encyc.,* IX, 696.

15 *New International Encyclopedia,* XIII, 90.

16 De Smet, *De Sponsalibus et Matrimonio,* ed. 2, 1910, p. 304.

17 Acts Geo. II, c. 33.

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came a part of the common law of the United States. This Act demanded that a church marriage be preceded by the publication of banns, except when a special license was secured, and declared any other form of marriage invalid. This act was modified for *England* by Lord Russell's Act, and supplemented by others.[18] This legislation left a choice between marriage according to the forms of the Established Church, marriage according to the forms of other registered denominations, and civil marriage before a registrar. But a registrar's certificate is required also for Catholics. In nearly all the *States of the Union* statutes have been enacted providing for a ceremonial marriage, and in most cases requiring also a license granted by a properly constituted officer. The ceremony is to be performed in the presence of two or more witnesses by a priest or clergyman of some church, or by certain civil magistrates, such as judges of courts of record, justices of the peace, police justices, mayors, aldermen of cities, and county clerks. Where the State[19] does not require this formality for a valid marriage, an informal marriage would be valid, though liable to prosecution. It follows that a clergyman, either Catholic or non-Catholic, who can prove his ordination by credentials, is a public civil official when he assists at marriage and in this regard is in no wise distinguished from a judge of the superior or county court or a justice of the peace.[20] It is evident that the State has the right to demand certain qualifications and conditions in the minister[21] of matrimony as

18 Acts Vict., c. 21 and 19, 20, Vict., c. 119.

19 According to the *New Intern. Ency.* (*l. c.*, p. 92), the following States insist on this formality under an invalidating clause: Cal., Ky., Md., Mo., Mass., N. C., Vt., Wash., W. V.

20 K. Zollmann, *American Civil Church Law*, 1917, p. 332.

21 The term *minister* is here used in its legal, not its ecclesiastical, sense.

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well as in the contracting parties. Civil marriage in this sense can hardly be called objectionable.[22]

(2) *Necessary civil marriage* is that conditionally required by the State if the contracting parties belong to no religious sect or suffer from an ecclesiastical (not civil) impediment. Such a law exists in Austria since May 25, 1868.

(3) *Civil marriage* is called *obligatory* if it is prescribed by the State as an absolutely necessary condition to obtain civil acknowledgment of the matrimonial status with all its effects. The countries which have introduced it deny any civil effect or consequence to the religious ceremony and disregard ecclesiastical legislation. Obligatory civil marriage is in force in Belgium (Code, art. 109), France (Code civ., tit. 2), Germany (Bürgerl. Gesetz-Buch, §§ 1316–1322), Holland (Const. of 1833), Hungary (law of Dec. 9, 1894), Italy (Codice Civile, lib. I, tit. 5, art. 93–99), and Switzerland (Dec. 23, 1875, art. 29–43).

Against this abuse the Catholic Church, for obvious reasons, has never ceased to raise her voice. Her chief objections to obligatory civil marriage are: it deprives marriage of its sacred character, obstructs the legislation of the Church concerning her Sacraments, encourages divorce, and fosters religious indifference.[23]

ECCLESIASTICAL LEGISLATION

The Code speaks of ecclesiastical legislation in two different places. One canon [24] says that matrimony among baptized persons is governed not only by divine, but also by canon law. Another text [25] states that the supreme ecclesiastical authority alone has the right to judge

22 England has optional civil marriage since 1836; Ireland since Aug. 29, 1844; Scotland since Aug. 7, 1854; Spain since 1883.

23 Leo XIII, "*Ci siamo*," June 1, 1879.

24 Can. 1016.

25 Can. 1038, 1040.

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whether divine law prohibits or invalidates matrimony, and to establish ecclesiastical impediments, and that no inferior authority may abrogate or derogate from such impediments or dispense from them. It would, however, be unhistorical to assert that this centralized legislation has been in force always. The fact is that the Council of Trent [26] first defined as an article of faith the power of the Church to establish impediments. The different impediments were determined gradually, as will be seen further on. Gratian [27] says that in his time marriages were governed not by civil, but by ecclesiastical law, as bishops and metropolitans decided matrimonial cases, especially at synods. This particular, local or provincial, legislation did not, however, prevent appeals to the Roman See, particularly from princes and nobles, as Lothair II (855–869) and Robert I (922–923).

Matrimonial laws were issued by Nicholas I (858–87) in his answers to the questions proposed by the Bulgarians.[28] The same Pope also stated the principle which should govern the application of civil laws to this subject. These, he says, must not be used for settling ecclesiastical controversies, especially if they are contrary to the evangelical teaching and canons.[29] The same view is expressed with regard to the civil law admitting divorce by SS. Ambrose [30] and Jerome. The latter says: The laws of Christ differ from those of the Caesars, and what Paul prescribes differs from what Papinianus says.[31] Hippolytus reproaches Pope Callistus for permitting noble Roman ladies to marry slaves, which was against the civil law.[32]

26 Sess. 24, cc. 3, 4, *de Mat.*

27 Dictum ad c. 7, C. 2, q. 3: *"Cum Matrimonia hodie regantur iure poli, non iure fori."*

28 C. 2, C. 27, q. 2; c. 3, C. 30, q. 5.

29 C. 1, Dist. 10.

30 C. 2, C. 33, q. 2; ep. 60, c. 8 (Migne, 16, 1185).

31 *Ep. ad Ocean.*, 77, 3.

32 Döllinger, *Hippolytus und Kallistus*, 1853, p. 158 f.

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Justin Martyr condemns concubinage and divorce as admitted by the civil law and says that those who practice polygamy, even though they may be in accord with human law, are sinners in the eyes of the Church.[33] From these few scattered testimonies it may be seen that the Church maintained her own matrimonial regulations and opposed civil enactments contrary to her teaching. The chief and most important laws were those upholding the unity and indissolubility, which are the main properties of Christian marriage, as understood by the Church. She authoritatively interpreted many texts of Holy Writ,[34] and from her interpretation important conclusions were drawn in the realm of Canon Law.

Properly speaking, there are no *sources of matrimonial law,* because it was a part and parcel of ecclesiastical legislation. Thus *Gratian* refers to marriage in the Causae XXVII to XXXVI of his "*Decretum*" with the exception of q. 3, C. XXXIII *de Poenitentia.* The *Quinque Compilationes* as well as the Decretals treat of Matrimony in Book IV. After the Tridentine Council the decisions of the S. C. Concilii were of great help to the canonist. Many of these decisions are found in John Baptist Pittono's "*Constitutiones Pontificiae et Rom. Congregationum Decisiones ad Matrimonium Spectantes,*" Venice, 1735; in Gallemart's "*Concilium Tridentinum,*" Venice, 1780; in Zamboni's "*Collectio Declarationum S. C. Concilii,*" Atrebati, 1860; in Richter's "*Canones et Decreta Concilii Tridentini,*" 1853. A very important collection containing much matter on our subject is the "*Collectanea S. C. de Prop. Fide,*" Rome, 1907, 2 vols. Since Pius X's decree "*Ne temere*" (Aug. 2, 1907) the decisions on the same given by the S. C. Concilii and the S. C. Pro Re

[33] *Apol.*, I, 15.
[34] Gen. 2, 23; Matth. XIX, 4 ff.; Eph. V, 25, 32; 1 Cor. VII, 11 ff.

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Sacramentaria are valuable sources of information.

As to the *literary apparatus,* the following works may be profitably consulted: "*Lex Dei sive Mosaicarum et Romanarum Legum Collatio*"[35] of the fifth century; "*Lex Romana Canonice Compta*" (§ 27–32), interesting as a monument of the eighth century for reckoning the degrees of relationship;[36] the collections of Burchard of Worms, "*Decretum*" (lib. VII and IX) and Ivo of Chartres, "*Decretum*" (lib. VIII) and "*Panormia*" (lib. VI). A very interesting monograph is the work of Hincmar of Rheims, "*De Divortio Lothari Regis et Theutbergae Reginae.*"[37] Rhabanus Maurus composed a "*Tractatus de Consanguinorum Nuptiis.*"[38]

Noteworthy are the "*Summae de Matrimonio*" of BernardusPapiensis,[39] Robert of Flamesbury,[40] and Tancred,[41] and Roffredus de Epiphanio's "*Libelli de Iure Canonico,*"[42] especially book III. John Andreae compiled a "*Summa de Sponsalibus et Matrimonio cum Arbore Consanguinitatis.*"[43]

Works of authors chiefly consulted by us are the commentaries of Fagnani, Engel, Reiffenstuel, Schmalzgrueber, Boeckhn, Wernz (fourth book). A classical work is the Jesuit Thomas Sanchez's "*De S. Sacramento Matrimonii*" (Nuremberg, 1706). Besides these the manuals of Heiner (1905), Leitner (1912), Smith's *Marriage Process* (1892), Gasparri's *De Mat.*, ed. 3; Feije's *De Imped. et Dispensat. Matrim.*, ed. 3; v. Scherer's *K.-R.*, vol. II, have proved a great help in the making of this commentary. Of course, these sources and authors,

35 Freisen, *l. c.*, p. 2.
36 Published by M. Conrat (Kohn), Amsterdam, 1904, pp. 29–35.
37 Migne, *P. L.*, 125, 619 ff.
38 *Ibid.*, 110, 1085 ff.
39 Ed. Laspeyres, 1860, Appendix, pp. 287 ff.
40 Cfr. Schulte, *Quellen*, I, 208 f.
41 Ed. Wunderlich, 1841.
42 Cfr. Schulte, *l. c.*, II, 75 f.
43 Friedberg, *Decretum Magistri Gratiani*, p. 426.

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though still useful, are now somewhat antiquated. Concerning dispensations and procedure mention may be made of Giovine, *De Dispensationibus Matrimonialibus,* 1863; Joder, *Formulaire Matrimonial,* 1891; Zitelli, *De Dispensationibus Matrimonialibus,* 1884; Mansella-Solieri, *De Causis Matrimonii,* 1906. For *historical researches* we used Esmein, *Le Mariage en Droit Canonique,* 1891, and Freisen, *Geschichte des Kan. Eherechts,* 2nd ed., 1902. On the *physiological* and *medical* aspects we consulted Antonelli, *Medicina Pastoralis,* 1909; Eschbach, *Disputationes Physiologico-Theologicae,* 1901; and O'Malley-Walsh, *Essays in Pastoral Medicine,* 1911.

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TITLE VII

ON MATRIMONY

CAN. 1012

§ 1. Christus Dominus ad sacramenti dignitatem evexit ipsum contractum matrimonialem inter baptizatos.

§ 2. Quare inter baptizatos nequit matrimonialis contractus validus consistere, quin sit eo ipso sacramentum.

The Lord Christ himself has raised the marriage contract between baptized persons to the dignity of a Sacrament, and hence there can be no valid marriage contract between baptized persons which is not at the same time a sacrament.

This canon enunciates two truths which no Catholic is at liberty to deny, *viz.*: (1) that matrimony is a Sacrament, and (2) that the marriage contract is the sacrament. To which must be added (3) that both statements apply only to baptized persons.

1. *Marriage is a Sacrament,* that is, as Dogmatic Theology proves, a visible sign instituted by Christ as a means of sacramental grace. The sign consists of matter and form, which are described by Benedict XIV as follows: The mutual and lawful surrender of the bodies indicated by words or signs expressing the interior consent is the ***matter*** of the Sacrament, whilst the mutual

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and lawful acceptance of the bodies is its *form.*[1] Hence the *remote matter* are the bodies of the contracting parties. Bodies, we say, as far as they are apt for generation, which is the primary end of marriage. A contract is made by two persons fit for marriage, and this contract is expressed by the mutual *consent,* which is an essential condition of a valid marriage.

The visible sign or nuptial consent conveys *sacramental grace,* according to the teaching of St. Paul, Eph. V, 25–32, where the matrimonial contract is represented as a symbol of the union between Christ and His Church. When Christ raised marriage to the dignity of a Sacrament is a matter of theological speculation.[2] Some say, at the wedding feast of Cana in Galilee; others, when He uttered the words recorded in Matt. XIX, 8, on His journey to Jerusalem; others, after the Resurrection.

The *grace* attached to the sacrament of matrimony corresponds to the threefold effect which usually follows marriage: (a) the *bonum sacramenti,* or sacramental effect, which is potential indissolubility or inseparability in a higher degree accruing to marriage by reason of the Sacrament; (b) the *bonum fidelitatis,* which touches the secondary purpose of marriage, *viz.:* mutual help and restriction of concupiscence; for the sacrament conveys the title to the actual graces necessary in the discharge of the duties of the married state; (c) the *bonum prolis,* or offspring, which is quasi-sanctified by a Christian marriage. Out of Christian wedlock are born children for the propagation of the Church.[3] Lastly, the education and bringing up of the children is ennobled by sanctified love.

1 *"Paucis abhinc,"* March 19, 1758 (*Bull.,* Prati, t. IV, app., p. 495).

2 Cfr. Pohle-Preuss, *The Sacraments,* Vol. IV, p. 151.

3 Cf. 1 Cor. 7, 14.

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Matrimony being one of the Sacraments of the living, supposes the state of sanctifying grace. Should there be an obstacle (*obex*) at the time the contract is made, the sacramental grace is received as soon as this obstacle is removed.

That Marriage is a Sacrament conveying grace is an article of faith.[4] The Church condemned the tenets of the Gnostic Encratites, the Manichaeans, and the Albigenses, as well as that of the Protestants, who regard marriage as a purely worldly matter.

2. That contract and Sacrament cannot be separated is not strictly *de fide,* but "common and certain teaching," because the contrary proposition was condemned in the Syllabus of Pius IX (1864).[5] The Gallicans and Josephinists maintained that the sacramental character is purely adventitious and may be separated from the contract, and that the sacrament is constituted by the nuptial blessing.[6] This sounds very pious, but the purpose actuating these authors was obviously to subject the contract to the State and leave the nuptial blessing alone to the Church. We do not wish to say, however, that the theory was entirely destitute of a theological prop, because Melchior Canus (1560) and Tournely of the Sorbonne had defended the opinion that the sacerdotal blessing constituted the form of matrimony and that, consequently, the assisting priest was the real minister of Marriage. This opinion was novel. St. Thomas[7] and the *Decretum pro Armenis*[8] plainly state that the efficient cause of Matrimony is the mutual consent expressed by words in the present tense. It follows that the *priest* is not the minister of the Sacrament, but merely an *authorized witness.* But this view

4 Trid., sess. 24, can. 1 de mat.

5 Nn. 66, 73.

6 The names of Antonio de Dominis, Launoy, Theimer, Ziegler, J. N. Nuitz, Professor of Turin, are known.

7 *Suppl.*, III, q. 42, art. 1, ad 1.

8 Denzinger, n. 702.

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involves a difficulty. If the matter and form of Matrimony essentially consist in the mutual surrender and acceptance of the bodies, as expressed by conclusive signs, how could the Church have dared to add something to the essential elements by requiring the presence of the priest for the validity of Marriage? The answer is that the Church, while preserving the matter and form of the Sacraments, is empowered to add new conditions of validity if the public welfare or other grave reasons advise such a course.[9] In doing so she does not change the essentials of the contract, but for the sake of public utility or necessity surrounds the contract with certain formalities that must be observed. Similarly the State prescribes certain formalities which must be observed before a contract receives official sanction and obtains juridical effects.

3. The Code adds in both paragraphs: "*matrimonium inter baptizatos,*" *i. e.,* only among baptized persons is the nuptial contract a Sacrament. The reason lies in the character of Baptism, which impresses on the soul the indelible mark of Christian initiation or dedication, and is therefore a *conditio sine qua non* of the Sacrament of Matrimony, though not its *causa efficiens,*[10] which is the mutual consent of the contracting parties.

Here two questions occur: (a) is *Marriage between a non-baptized person and a baptized person a Sacrament?* The answer, according to the more probable opinion, is no, because an infidel is absolutely incapable of receiving sacramental grace, and since the Sacrament is numerically one in both parties, as is the contract, when one party is incapable of receiving the Sacrament, the other is also in-

9 Cfr. St. Thomas, *Quaestiones Quodlibetales,* V, q. 8, art. 15, ad 1; Benedict XIV, "*Paucis abhinc,*" March 19, 1758.

10 Thus Leitner, *Eherecht,* 1902, p. 61.

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capable.[11] The argument from the jurisdiction which the Church claims over such marriages is unsound because this jurisdiction is claimed by reason of one person belonging to the Church.

(b) *Does the Marriage of an unbaptized couple become a Sacrament if they receive Baptism without renewing their consent?* Sanchez and the majority of authors answer in the *affirmative,* and most logically, because the matrimonial consent endures and by the reception of Baptism the contract becomes a sacramental union symbolizing the union of Christ with His Church.[12] The same holds good concerning Matrimony by *proxy.* Such a marriage, if duly contracted, does not differ substantially from any other, and since the Sacrament cannot be severed from the nuptial contract, a marriage by proxy is a true Sacrament.[13]

We will add a note on the different Latin names given to Marriage.

Matrimonium is derived from the office (*munus*) of the mother (*mater*), because the principal purpose which a woman should have in getting married is to become a mother.[14]

Connubium is derived from *nuptiae* (*nubere*), to veil, and meant, according to Roman law,[15] the rite of marriage, and also the privileged Marriage of Roman citizens among themselves; marriage between slaves they called *contubernium.* Nuptials in the Christian sense also signified a rite because, as St. Ambrose observes, brides veiled themselves as a sign of modesty.[16]

Coniugium, or wedlock, denotes the conjugal union,

11 Sanchez, l. II, disp. VIII.
12 *Ibid.*, l. II, disp. IX.
13 Cfr. Pohle-Preuss, *l. c.*, p. 163.
14 See the explanation in c. 2, X, III, 33.
15 Dig. 23, 2.
16 Cfr. *Catech. Conc. Trid.*, P. II, c. 8.

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the effect of the marital consent being to make the two one flesh.[17]

Christian Marriage may therefore be *defined* as the lasting conjugal union between a capable man and a capable woman, raised to the dignity of a Sacrament.

CAN. 1013

END AND PROPERTIES OF MARRIAGE

§ 1. Matrimonii finis primarius est procreatio atque educatio prolis; secundarius mutuum adiutorium et remedium concupiscentiae.

§ 2. Essentiales matrimonii proprietates sunt unitas ac indissolubilitas, quae in matrimonio christiano peculiarem obtinent firmitatem ratione sacramenti.

1. As stated in the preliminary remarks, the *primary end of Marriage* is the procreation and education of offspring, while its secondary purposes are mutual help and allaying concupiscence. The latter are entirely subordinate to the former. The consequences of this proposition will be seen more palpably under can. 1068, can. 1086, § 2, and can. 1092.

2. The *essential properties* of Marriage are unity and indissolubility, which obtain a special firmness or stability in Christian Marriage by reason of its being a sacrament. This firmness must be traced to the typical union between Christ and His Church and also to the sacramental grace attached to Christian Marriage. The Code therefore distinguishes between marriage as a natural contract and Christian Marriage. But this distinction, as stated in the preceding canon, does not touch the consent or its properties essentially, but merely in

17 Sanchez, *l. c.*, Prooem., n. 4.

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degree. A Marriage between non-baptized persons is as essentially *one and indissoluble* as between baptized persons, but there are degrees of stability in so far as a non-consummated Marriage can be more easily dissolved and Christian Marriage represents the typical union between Christ and His Church and through its sacramental character possesses greater firmness, although it is not completely indissoluble.

Unity is another essential property of every Marriage, whether Christian or non-Christian. An objection here naturally arises as to the Old Testament. Lamech, a great-grandson of Cain, took two wives,[18] and the holy patriarchs followed his example. Therefore *polygamy* (or polygyny) and divorce seem to have been legalized by the law of Moses.[19] How was such a deviation from the natural law — if the latter prohibits polygamy — possible? This question was solved by Innocent III, and we have not yet discovered a better solution. He says that the Patriarchs and the Chosen People as a whole had by divine revelation obtained permission to have several wives.[20] The reason for this permission was the more rapid increase of God's people, and, in general, of the human race. However, under the new dispensation, after Christ had restored [21] the original idea of marriage, this concession ceased.

Now the further question arises: How could Yahweh dispense from the natural law? Here it is necessary to make a distinction. The natural law pure and simple ("do good and avoid evil"), in other words, the primary natural law, cannot be proved to condemn either polygyny or divorce. But if we take natural law as meaning the

18 Gen. 4, 19.
19 Deut. 17, 17; 21, 15 f.; 24, 1 ff.
20 C. 3, *Gaudeamus*, X, IV, 19, *de divortiis*.
21 Matth. 19, 4 ff.

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conclusions or deductions drawn from the original or primary law, it is opposed to polygyny and divorce. The reasons are given by St. Thomas [22] as follows:

(a) *The certainty of offspring* is jeopardized by polyandry, which therefore must be rejected altogether. Polygamy impedes the training of children, which not only belongs essentially to the purpose of marriage, but also forms a substantial care of the father. Where there is unity of marriage, as a rule, there is also uniform and tender care of offspring.

(b) The *equality of woman,* especially as to mutual rights and love, is lessened by polygamy, the wife is little more than a slave, and the dignity of womanhood is lowered. This reason, we believe, will appeal strongly to modern women.

(c) *Divided love* cannot be so intensive and lasting as love centred on one. This reason also touches the indissolubility of the marriage tie and the education of children.

(d) Baptismal records prove that the *numerical distribution* of the sexes is about *equal,* at least in normal times. Add to these reasons the social equality of men; for to have several wives is expensive and only the rich could afford this luxury.

As to *indissolubility,* the reasons just stated may be alleged in a modified way also against complete divorce. St. Thomas [23] says that:

(a) The uniform and constant *care of offspring* requires permanency of the marital bond or the continued cohabitation of father and mother.

(b) The right of the wife to desert her husband is neu-

22 *Summa contra Gentiles,* III, c. 124; *Suppl.,* III, q. 65, a. 1, ad 8. Sanchez, *l. c.,* l. VII, disp. 80.

23 *Summa contra Gent.,* III, c. 123.

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tralized by the fact of her subjection to him; and if the wife is not allowed to leave her husband, he is not allowed to leave his wife, else there would be *inequality of rights*.

(c) The *more intense mutual love is,* the more enduring and lasting will it be; and thus loyalty is fostered by a permanent union, which, moreover, prevents serious dissensions and quarrels and diminishes the occasions for adultery or unlawful unions.

We need not dwell further on this subject, as the divorce evil, especially in our large cities, is constantly producing effects which confirm the wisdom of the Catholic attitude.

In view of these facts it is plain that the Church was right in anathematizing those who, like Luther and Melanchthon, admitted simultaneous polygamy,[24] and in proscribing divorce in these severe terms: "If any one saith that on account of heresy, or irksome cohabitation, or feigned absence of one of the parties, the bond of marriage may be dissolved, let him be anathema." [25]

CAN. 1014

FAVOR IURIS

Matrimonium gaudet favore iuris; quare in dubio standum est pro valore matrimonii, donec contrarium probetur, salvo praescripto can. 1127.

The law always favors Marriage, and hence if a doubt arises as to the validity of any particular Marriage, the presumption is in its favor until the contrary is proved (excepting the case of the *Privilegium Paulinum;* see can. 1127).

24 *Trid.*, sess. 24, can. 2, *de sac. mat.*
25 *Ibid.*, can. 5.

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The reason for this ruling lies in the fact that Marriage is a public, not a private, institution, and that consequently the legislator always intends to favor it by his dispositions, which are therefore of the nature of a favorable law (*lex favorabilis*).[26] However the presumption mentioned, while called "*praesumptio iuris,*" is not a *praesumptio iuris et de iure*. Solid proofs are admissible against it if a doubt should arise as to whether a Marriage is valid. If the reasons against the validity of a Marriage are such as to convince the mind of the judge, he must pronounce accordingly. For although the law favors the validity of Marriage, yet, as law it pertains to reason, and hence is subject to the demands of reason. Where conviction is complete, the law ceases to exercise its force. The Holy Office[27] has given a decision to the purpose. A girl whose precise age was unknown wanted to marry or was married. Was it valid? The Vicar Apostolic was instructed to procure undoubted testimonies as to the natural capacity of the girl for marriage. "*Malitia supplet aetatem,*" and only if the marks of puberty were missing and the necessary age (twelve years) was lacking the Marriage was certainly invalid. In other words, the natural impediment of age ceases as soon as there is a natural capacity for generation.

The *privilegium fidei* will be explained under can. 1027.

CAN. 1015

SPECIES OF MARRIAGE

§ 1. **Matrimonium baptizatorum validum dicitur *ratum*, si nondum consummatione completum est;**

26 Sanchez, l. I, disp. I, n. 4; Reiffenstuel, *De Reg. Iuris in 6°*, reg. 15, n. 2 f.

27 March 18, 1903, referred to by Card. Gasparri (see *Coll. P. F.*, n. 2165); S. O., Dec. 10, 1885 (*Coll. cit.*, n. 1645). But can. 1067 is not affected thereby.

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ratum et consummatum, si inter coniuges locum habuerit coniugalis actus, ad quem natura sua ordinatur contractus matrimonialis et quo coniuges fiunt una caro.

§ 2. Celebrato matrimonio, si coniuges simul cohabitaverint, praesumitur consummatio, donec contrarium probetur.

§ 3. Matrimonium inter non baptizatos valide celebratum, dicitur *legitimum*.

§ 4. Matrimonium invalidum dicitur *putativum*, si in bona fide ab una saltem parte celebratum fuerit, donec utraque pars de eiusdem nullitate certa evadat.

§ 1. A valid marriage, contracted between baptized persons, is called ratified (*ratum*) as long as it has not been consummated by conjugal intercourse; *ratified and consummated*, if perfected by the conjugal act to which matrimony is by nature directed and by which the partners become one flesh.

§ 2. If the parties have lived together after the celebration of marriage, *consummation is presumed*, until the contrary is proved.

§ 3. A marriage validly contracted between unbaptized persons (*e. g.*, Mohammedans, Jews, Gentiles) is *legitimate* but not sacramental.

§ 4. An invalid marriage is called feigned (*putativum*) if contracted in good faith by at least one party, until both become aware of its invalidity.

As to the first paragraph, note the requirement of consummation, which, the Code says, must be a *conjugal act*. Carnal intercourse before marriage is fornication, not a conjugal act. Nor can onanistic[28] intercourse be re-

[28] Thus called from Onan; see Gen. 38, 9 f.

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garded as a consummation,[29] though it is not required that the wife should cooperate actively in the act.[30] Other questions connected with this matter will be discussed in connection with impotence.

In § 2 the Code requires strict proof as to the non-consummation of a Marriage if the parties have lived together after the wedding. This proof must be obtained by inspection on the part of two physicians or competent nurses or midwives, unless circumstances render such inspection unnecessary,[31] as when, for instance, it could be established by trustworthy witnesses that one of the parties left the other immediately after the matrimonial celebration,[32] or if the woman had been a prostitute.

That a valid Marriage between unbaptized persons is simply called legitimate (§ 3) points to a natural contract to which no sacramental character is attached.

Can. 1016

THE LAW OF MARRIAGE

Baptizatorum matrimonium regitur iure non solum divino, sed etiam canonico, salva competentia civilis potestatis circa mere civiles eiusdem matrimonii effectus.

The Marriage of baptized persons is governed not only by the divine law, but also by canon law, with due regard to the competency of the civil power concerning the merely civil effects of Matrimony.

Note the *two powers* mentioned in the text: the ecclesiastical and the civil, and remember that the text says,

29 Cfr. c. 36, C. 27, q. 2; c. 11, C. 35, q. 2 and 3; Sanchez, l. II, disp. 21, nn. 1, 5.

30 Sanchez, *l. c.*, n. 11, says that this is the more common opinion, although he maintains that the *seminatio* of both parties is required for consummation.

31 Cfr. can. 1976 ff.

32 S. C. Prop. Fide, May 10, 1801.

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baptizatorum matrimonium, the marriage of baptized persons. The Church therefore claims jurisdiction over the Marriages of baptized persons. What is the reason for this claim? The scope of Marriage is the generation or procreation of offspring. This has a threefold aim: (1) the perpetuation of the human race, which is embodied in nature itself, because nature inclines towards it; (2) the continuation of civil society, and as such marriage is subject to the State; (3) the peopling of the City of God and increase of the number of the faithful, and from this point of view Marriage is subject to the Church.[33]

However, the last-mentioned consideration would not be sufficient to vindicate to the Church the power of controlling Marriage to the full extent to which she claims it, namely, in every respect excepting its purely civil effects. Whence has she this power? Her claim is based upon the view she takes of Marriage as a Sacrament. As the sacramental character of marriage cannot be separated from the underlying natural contract, and as all *strictly spiritual matters,* such as the Sacraments, belong to the exclusive sphere of ecclesiastical legislation, the Church logically claims full and unhampered power over the Marriages of baptized persons. As these *persons*[34] are themselves, by reason of valid Baptism, subject to the Church, it is evident that she has a legal right to regulate their matrimonial union.

As to the *extent* of this power, it embraces the whole range of the nuptial contract, aside from its purely civil effects. Thus *engagement* or betrothal, as a preliminary to marriage,[35] falls under the legislation of the Church.

33 St. Thomas, *Summa contra Gentiles,* IV, 78.

34 Cfr. *Trid.,* sess. 7, can. 7; can. 8, *de baptismo.*

35 "*Tametsi,*" *Trid.,* sess. 24, c. 1, *de ref. mat.*; "*Ne temere,*" Aug. 2, 1907, n. I.

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Marriage as a *contract in fieri,* or the transient act of matrimonial consent, is also subject to the Church, as long as the substance of the natural consent is not essentially changed. Therefore, the Church may add accidental formalities to the wedding ceremony, as she has done by demanding a public act,[36] and she may set up *impediments,* either prohibitive or invalidating marriage, touching the persons themselves or the solemnity of the contract.

Of course, the Church could never abolish or supply the conditions of the natural contract. Neither could she declare persons who are incapable of contracting marriage to be capable. For she has no right to change the natural law, although she may interpret it as well as the divine positive law.

It is not our task to prove from history the power of the Church to establish matrimonial impediments. We merely note that ecclesiastical impediments, being established by human authority, are liable to change, because the power of the Church is not for destruction but for edification and the welfare of society, and what may suit one age may be useless and even detrimental in another.

Finally the power of the Church extends to the *vinculum perdurans* or marriage as a legal status. With regard to that enduring union, only ratified marriages, not those consummated, may be solved by the Church for weighty reasons. Here enter the "*Privilege of faith,*" the separation from bed and board, the prohibition of the use of the conjugal act as a punishment for crimes committed, and finally the legitimation of offspring.

What has been said so far must be accepted as the *common* and *certain doctrine* of the Catholic Church

[36] Benedict XIV, *De Syn. Dioec.,* IX, 9, 4; Wernz, *Ius Decretal.,* IV, ed. 2, 1911, Vol. 1, pp. 78 ff.

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uttered in solemn form at the Council of Trent[37] and in papal constitutions.[38]

We again draw attention to the text: "*matrimonium baptizatorum,*" the marriage of baptized persons. Notice that we use the genitive, instead of saying, "between" baptized persons. The reason for this distinction is: when we say: *between baptized persons,* we mean that both parties are baptized; while if we say: *of baptized persons,* we do not necessarily intend to say that both parties are baptized. Thus James may be baptized, whereas his bride Gemma is not. May the Church dictate what James has to do? Or, in other words, has the Church any power to legislate concerning mixed marriages, taking the word "mixed" in the wider sense as including disparity of religion? The answer is *affirmative* if we accept the view taken by several popes. Thus Innocent III and Honorius III say that the Sacrament of Matrimony exists among the faithful as well as among infidels.[39] Leo III, after citing these texts, concludes that since marriage is by its very nature a sacred thing, it is meet that it be regulated and directed, not by civil rulers, but by the divine authority of the Church, who is the sole teacher in sacred matters. The underlying idea is that Marriage, having God for its author, foreshadowed the Incarnation of the Word, and is therefore something sacred both by its institution and as a type.[40] However, with all due respect to these utterances, it must be stated that the Church never claimed legislative power over Marriages in which both parties were not baptized. This is

37 *Trid.*, sess. 24, can. 3, 4, 9, 12, *de sacr. mat.*

38 Benedict XIV, "*Singulari nobis,*" Feb. 9, 1749; Pius VI, "*Auctorem fidei,*" Aug. 28, 1794, nn. 59, 60; Pius IX, *Syllabus,* nn. 68, 69, 70, 71, 72, 74; Leo XIII, "*Arcanum,*" Feb. 10, 1880.

39 C. 8, X, IV, 19, *de divort.*; c. 11, X, I, 36, *de transact.*

40 "*Arcanum.*"

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the plain meaning of our canon, which vindicates the right of ecclesiastical legislation only for Marriages of baptized persons. Therefore the "*res sacra*" must not be urged too rigidly.[41] Marriage as a merely natural contract is not a sacred thing, properly so-called, because things sacred are such either by a blessing, or consecration, or a special dedication to the service or worship of God.[42] But the natural nuptial contract receives no blessing at all. Wherefore we should be careful not to urge a double-edged argument.

A more solid argument is that derived from the purpose of marriage as a means of propagating the Church. If one of the contracting parties is, by Baptism, a member of the Christian community, he is subject to the Church, whose sign and seal he has received, and therefore must obey her laws, which bind and oblige all her members, whether they are willing or not. For the Church not only is entitled, like any other society, to defend her own interests, but she is also obliged to repel dangers from individuals. And, as sad experience teaches, many dangers attend mixed marriages. Therefore, both by reason of her jurisdiction over her members and in virtue of her divine calling, the Church is empowered to regulate Marriages, even if only one of the contracting parties belongs to her pale.

A most important question, which reflects on the whole range of ecclesiastical impediments in general, and on that of disparity of worship in particular (can. 1070), must here be touched. *Who are meant by the term baptized?* For the text says "*Matrimonium baptizatorum.*" The answer can be deduced from the text itself. But

41 Wernz, *l. c.*, IV, Vol. I, p. 85, insists too strongly on this argument.

42 Reiffenstuel, *Reg. Iuris in Quinto*, 7, n. 1; we miss a definition in the Code.

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we shall first attempt to sum up the doctrine of the Church held up to the moment of the promulgation of the Code.

(a) Valid Baptism *per se* incorporates a person in the body of the Church, and by Baptism all are subject to the laws of the Church.[43]

(b) Hence *heretics,* too, if validly baptized, were bound by the *impediments of ecclesiastical law,* for instance, disparity of worship.[44]

(c) An express exception was made with regard to non-Catholics when they marry among themselves, because they are not obliged to observe the *form* prescribed.[45]

(d) Our Code appears to restrict *disparity of worship* to Catholics, as will be seen under can. 1070. Hence from May 19, 1918, this impediment *de facto* touches only Catholics.

So far our statements are borne out by the common doctrine of the Church and the present Code. But are the other impediments *iuris ecclesiastici* also abolished by the Code? It is certain that the Code legislates only for Catholics, but that it is the intention of the legislator to declare all baptized non-Catholics free from other ecclesiastical laws and impediments, we cannot maintain.[46]

COMPETENCE OF THE CIVIL AUTHORITY

Canon 1016 grants to civil or secular law a certain competency in matrimonial matters, which, however, touches only the civil effects of marriage contracted by

43 *Trid.*, sess. 7, can. 7 f., *de bapt.*

44 Bened. XIV, *"Singulari Nobis,"* Feb. 9, 1749, § 1; *"Magnae Nobis,"* June, 1748; *"Ad tuas manus,"* Aug. 8, 1748; S. O., Inst. of March 20, 1860 (*Coll. P. F.*, n. 1318); S. C. C. 1903 (*Anal. Eccl.*, XI, 284 ff.), etc., etc.; can. 87.

45 *"Ne temere,"* Aug. 2, 1907; Can. 1099, § 2.

46 This is also the view of a Roman professor of Canon Law.

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baptized persons. These civil effects have to do with the dowry, the right of succession, the division of property between husband and wife, the right of children to titles and property, and similar merely material matters. For the Church, says Leo XIII, is not unaware, and never calls in doubt, that the Sacrament of Marriage, being instituted for the preservation and increase of the human race, has a necessary relation to human affairs, but a relation which concerns the civil order only; and concerning such things the State is justified in making laws and giving decisions.[47]

Is that all the State has to say concerning Marriage? As to the Sacrament, this is undoubtedly all. The rest the State may confidently leave to the Church. However, we must not shut our eyes against the circumstances of the time. To-day, by reason of an almost general indifference in matters religious and the so-called parity of religion granted by the State to a hundred and more sects, nearly every State contains a large percentage of citizens who, practically at least, escape the enforcement of ecclesiastical laws. Should we, then, entirely deny to the State the power of framing marriage-laws? No, the State is deeply interested in marriage and the family and hence must assert a certain control, not only over the civil effects of marriage, but also over the contract itself, or at least its formalities. However, before we explain this power we must lay down some self-evident rules.

1. No State, whether Christian or infidel, has any right to legislate concerning Marriage as a Sacrament, for this is a purely spiritual matter. This proposition is, though

47 *"Arcanum,"* Feb. 10, 1880; J. J. Wynne, S.J., *The Great Encyclical Letters of Leo XIII*, 1903, p. 78; cfr. Gasparri, *De Matrimonio*, ed. 3, n. 278; Wernz, *Ius Decretalium*, ed. 2, IV, Vol. I, p. 96 ff.; De Smet, l. c., p. 292.

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not *de fide*, certain and common doctrine of the Catholic Church.[48] Therefore,

2. The State is not empowered to set up impediments, either prohibitive or invalidating, with regard to Christian Marriages vested with the sacramental character. This power belongs exclusively to the Church.[49] Some[50] have distinguished between prohibitive and invalidating impediments set up by the State, but this distinction is groundless.[51] For to determine the time and circumstances proper for the reception of the Sacraments is an ecclesiastical right. Neither can an appeal to the recognition by the Church of civil laws, for instance, concerning adoption, justify this interference. These civil laws bind, not as civil, but as ecclesiastical laws acknowledged or "canonized" by the Church.

3. The State may frame laws governing the civil effects of matrimony and prescribe a civil form to be followed by the contracting parties under penalty.[52]

4. Besides, the State may for a time and for weighty reasons prohibit Marriage or its consummation, at least indirectly, *e. g.*, to soldiers.

5. But the State may never, under any condition, claim the right to enact laws that clash with the natural or the divine law, no matter whether there be question of a Marriage of baptized or unbaptized persons. For the State is not above these laws. Thus laws favoring divorce or polygamy in any shape or form are looked upon by the Church as antagonistic to the divine law and she

48 Gasparri, *l. c.*, n. 283.

49 *Instructio S. C. Prop. Fide*, 1753 (*Coll.*, n. 385).

50 Thus Schulte, *Eherecht*, 1855, p. 327.

51 The S. C. C. rejected the assertion of the provincial council of Rouen, 1855, that no one should get married ecclesiastically before evidence is given of the civil marriage; cfr. Wernz, *l. c.*, ed. 1, p. 1127.

52 Gasparri, *l. c.*, n. 288.

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never fails to denounce them. Moreover, laws "regulating the *birth rate*" or affecting parties previously to marriage are unjust, because unnatural. A recent writer [53] has expressed his view of the suggestion that only the healthy shall be permitted to marry, in the following energetic language: "I am nauseated by this blithering rot about the scientific breeding of human beings as if they were cattle and hogs. The State has no right to select your wife. This privilege belongs to the realm of personal liberty where the individual is king [to a certain extent, of course]. Laws cannot impart love. Compulsion breeds rebellion." We may add another reason: As Marriage is intended and directed by nature, the author of which is God, no human power has the right to interfere with it. There is only one impediment that can prevent men or women generally from getting married, and that is absolute and incurable impotence. This is an impediment set up by nature, and no other impediment equals it.

Having said this much by way of general principles, we now proceed to determine *what rights may be claimed by the State concerning the Marriages of unbaptized persons.* When we say the *State,* we mean the authority which rules any autonomous commonwealth. Autonomy or sovereignty, however, need not be complete. Thus our American States and the cantons of Switzerland are sovereign to some extent, but not completely. In the U. S. marriage laws are made not by the Federal but by State authority. Unfortunately there is no uniformity of legislation. Whether our State legislatures may be called Christian or not, does not matter, as long as the laws they

53 Windle, *Word Pictures,* 1918, p. 48. This language is justified by the proposal of some laws to that effect in the State of Illinois. But the war has made such precautions superfluous.

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make are based, to a great extent at least, on Christian principles. "Christianity is not the legal religion of the State as established by law. If it were, it would be a civil or political institution, which it is not; but this is not inconsistent with the idea that it is in fact and ever has been the religion of the people. This fact is everywhere prominent in all our civil and political history and has been from the first recognized and acted upon by the people as well as by constitutional conventions, by legislatures and by courts of justice." [54]

This much premised, we say that *the State is entitled to legislate concerning Marriages of non-baptized persons.*[55] For whatever belongs to the State, by reason of persons or matter, is subject to the State's power to make laws. And since Matrimony, as a public institution of great importance, interests the State, and the contracting parties, as citizens, are subject to it, the competency of the civil authority is evident. We need not dwell upon this argument. As to the first premise, every one will readily concede that the range of civil legislation is as wide as the end for which the State is established. This end is the temporal welfare and prosperity of men, and therefore the State must be competent in all such matters. Marriage, too, as far as it is merely a natural contract, falls in this category because it is, as St. Thomas says, a means of propagating the political society, which is maintained by family life. A family is founded by the union of a man and a woman, and this union is effected by the consent of both or the nuptial contract. Hence the civil authority is empowered to surround this contract with such safeguards as are apt to guarantee a well or-

54 K. Zollmann, *American Civil Church Law*, 1917, p. 12 f.

55 We follow here Resemans, *De Competentia Civili in Vinculum Conjugale Infidelium*, Rome, 1887.

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dered and prosperous relation. But the State, no more than the Church, has the right to supply, essentially alter or abolish the mutual consent, because it is the essence of the matrimonial contract. Besides, since Marriage has been established by the Author of nature for a well-defined purpose, which precedes all human intervention, the State has no power to limit or prevent the scope of Marriage. Lastly, since indissolubility and unity of marriage are dictated at least by secondary conclusions drawn from natural law, the civil authority ought to refrain from framing contrary laws.

Another argument for our thesis may be derived from the fact that the *contracting parties are withdrawn from the sphere of ecclesiastical legislation*. As the Church has no jurisdiction over the unbaptized, either the individuals or civil society as such must regulate their Marriage. To leave this important matter in the hands of individuals is impracticable, because selfish and sensual motives would cause them to pervert the true notion of Marriage. Hence only the legitimate civil authority can impartially and equitably moderate and direct the sacred institution according to the dictates of public welfare and common exigencies.

The *extent* of the legislative power of the State over the marriages of the non-baptized has been stated at the beginning of this section. One thing should be added. We except no *impediments*, unless, of course, they clash with the natural or the positive divine law. Concerning the authentic *interpretation* of the divine law, the Code states that it lies exclusively with the supreme ecclesiastical authority [56] to determine whether it invalidates or impedes marriages. As the text here does not add, "of baptized persons," it seems to include *all* marriages.

[56] Can. 1038, § 1.

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Therefore it is safe to say that authentic declarations must be expected from the Church alone. Of course, the Church will not give decisions in cases that are not brought before her tribunal. But it is not asking too much of the civil authorities that they should take cognizance of her views and laws.

Is the *thesis we defend safe to hold?* It is undoubtedly safe, because the majority of eminent canonists [57] propose and Roman decisions plainly admit it. Thus the S. C. Prop. Fide says: "Marriages of infidels must be governed by natural and civil law." [58]

This would be sufficient for the explanation of our canon. However, as we have adverted to civil laws, it may not be amiss to add a word or two about *our State laws* concerning Marriage. Broadly speaking it is safe to say that our civil laws do not interfere with the laws of the Catholic Church, if we except divorce. Polygamy is suppressed and punished, but the law is indifferent to the theological doctrine of polygamous marriage "for eternity," such as the Mormons propose.[59] For the greater part of marriage law turns about the class (race) and conditions of parties to a marriage, the prohibited degrees of kindred, the marriage license, and the duties of the solemnizing clergymen. It would exceed the limits of this commentary to cite the laws of the different States. We may refer the reader to the *Ecclesiastical Review Year Book* for 1910, and to the *Ecclesiastical Review*, Vol. 42, pp. 586 f.

57 Cavagnis, De Angelis, Gasparri, Laurin, Santi-Leitner, Wernz; cfr. Resemans, p. 54.

58 Cfr. *Coll. P. F.*, Vol. I, p. 435; n. 71; n. 744.

59 Zollmann, *l. c.*, p. 12.

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BETROTHAL OR ENGAGEMENT

After determining certain preliminary questions and notions in regard to Matrimony the Code discusses the preparatory act, *i. e.*, betrothal. Note that engagement is not put under Ch. I, which treats of the things that *must* precede Marriage. This shows that it is not essential to marriage. Too much importance should not be attributed to it. A few *historical observations,* however, may not be amiss.

1. *Engagement* is a promise of marriage, the Latin term, *sponsalia,* being derived from *spondere,* to promise or to stipulate. The ancient *Greeks* employed the term *sponthai,* which originally signified drink-offerings made to the gods in the act of betrothal. The modern Greeks call them *mnesteia* instead of *progameia* or *proteleia.*[60] With the *Hebrews* a certain solemnity preparatory to Marriage was in vogue. These were the *thenaim* or *schidduchim,* which terms properly signify the promise of the parents or guardians to give the girl in marriage. The more elaborate ceremonies described by the Mishnah of Rabbi Raba,[61] are of a later date.

Engagement occupies a prominent place in the *Roman Law,*[62] from which we gather that *sponsalia* were made by consent at an age when the parties knew what they were doing. A breach of promise was severely punished in the bride, but not in the bridegroom,[63] and a second promise, if broken, entailed infamy.[64] Formerly the privilege of a lawsuit (*actio in id quod interest*) was

60 Cfr. Cironius, *Paratitla,* l. IV, tit. 1, n. 4; Milasch-Pessic, *K.-R. der abendländ. Kirche,* 1905, p. 587. Nicholas I defines sponsalia as *"futurarum nuptiarum promissa foedera"* (c. 3, C. 30, q. 5).

61 Benedict IV, *"Postremo mense,"* Feb. 28, 1747, §§ 62 ff.

62 Dig., l. 23.

63 L. 13, § 3, Dig. 48, 5.

64 L. 13, Dig. § 3, Dig. 3, 2.

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granted before the judge, but later on this was prohibited.[65]

The *Germanic tribes* (Alamanni, Bavarians, Franks, Lombards, Saxons) admitted a promise made by the father or guardian of the bride, when she was delivered into the power (*mundium*) of the groom. The latter had to pay a stipulated sum and to promise to marry her. From this promise followed the obligation of loyalty and the right to punish the bride as if she were guilty of adultery. An engagement could be dissolved for leprosy, insanity, or blindness befalling the bride. If it was broken off without a just cause, a fine was imposed upon the bridegroom or the guardian of the bride.[66]

There can be no doubt that the early Christians, following the Roman law, observed a time of preparation or engagement before Marriage. The first known document touching ecclesiastical legislation on betrothal is a canon of the synod of Ancyra (314). The matter is more plainly mentioned in a letter of Pope Siricius (384–398) to Bishop Himerius, which speaks of the sacerdotal blessing accompanying the act.[67] In the eleventh or twelfth century we find an impediment called "*quasi-affinitas*" or public honesty attached to engagement. This impediment at first concerned only the bride,[68] but Innocent III extended it to the groom and to the fourth degree.[69] Boniface VIII limited this law to certain engagements excluding all spurious and conditional ones as long as the condition was not fulfilled.[70] The Council of

65 L. 15, § 24, Dig. 47, 10; Gellius, *Noctes Atticae*, l. 24, c. 4.

66 *Lex Visigoth*, III, 1, 2; III, 4, 2; III, 6, 3; *L. Roth. Longob.*, c. 179; *Lex Salica*, 12, 10; *Lex Alam. Hlothwic., Lex*, 52; *Lex Bojuv.*, 8, 16; *edict. Roth.*, cc. 179, 180, 192; *Lex Luitp.*, c. 119.

67 Coustant, *Epp. R. Pontt.*, 1721, coll. 627 f.; c. 50, C. 27, q. 2.

68 C. 3, Comp. I, IV, 1.

69 C. 5, X, IV, 2; c. 8, X, IV, 14.

70 C. un. 6°, IV, 1.

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Trent restricted this impediment to the first degree.[71] Now it is abolished.

As to the *formalities* of betrothal, no law was ever universally introduced to oblige the parties to observe any special ceremonies. Spain had a peculiar law since Charles III's Pragmatic Sanction, which provided that a valid engagement had to be set down in writing.[72] This statute was at first tolerated by the Church and is now formally established as a universal law.

CAN. 1017

§ 1. Matrimonii promissio sive unilateralis sive bilateralis seu sponsalitia, irrita est pro utroque foro, nisi facta fuerit per scripturam subsignatam a partibus et vel a parocho aut loci Ordinario, vel a duobus saltem testibus.

§ 2. Si utraque vel alterutra pars scribere nesciat vel nequeat, ad validitatem id in ipsa scriptura adnotetur et alius testis addatur qui cum parocho aut loci Ordinario vel duobus testibus, de quibus in § 1, scripturam subsignet.

§ 3. At ex matrimonii promissione, licet valida sit nec ulla iusta causa ab eadem implenda excuset, non datur actio ad petendam matrimonii celebrationem; datur tamen ad reparationem damnorum, si qua debeatur.

§ 1. A promise of marriage, made either by one party or by both, is void of effect in the court of conscience as well as in the external forum, unless it is made in *writing and signed by the parties* themselves *and* by the parish

71 Sess. 24, c. 3, *de ref.* *oeces.*, XII, 5, 1; *A. S. S.*, I, 528;
72 Benedict XIV, *De Syn. Di-* XIII, 185 ff.

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priest, or the diocesan Ordinary, *or* at least two witnesses.

This paragraph lays down the requisites of a valid betrothal and its consequences.

(1) The promise may be made unilaterally (by one) or bilaterally (by both). This distinction refers to contracts. A contract is an agreement between two or more persons to do or not to do a particular thing.[73] A *unilateral contract* (*pactum nudum*) is one that obliges one person only, as if James would say: "I will marry you, Gemma," without any obligation on Gemma's part to marry James. Such a contract is hardly imaginable, and the English law[74] looks upon unilateral promises of this kind, without a consideration of some sort or other, as totally void of juridical effect. Our Code, according to the views of most canonists, admits such a contract, provided it complies with the necessary requisites. The whole question is speculative rather than practical. A *bilateral contract* obliges both parties equally and belongs to the species of *contractus innominati,* more especially those called *facio ut facias,* when a man agrees to do something for another, provided the other does something for him. A marriage promise, therefore, is an agreement of future marriage between two determined persons.

(2) These *persons* are not described in our Code. But it stands to reason that they must be *capable* of making a contract, as the Gloss says: All persons who understand the nature of a contract, and are not prohibited

73 Cfr. Blackstone-Cooley, *Comment.*, II, 442; cfr., l. 1, Dig. II, 14: *"Duorum vel plurium in idem placitum consensus"*; on contracts in general see X, I, 35, *de pactis*, and the commentators.

74 Herein the English law follows the Roman; but Canon Law differs from both as to the moral obligation; Engel, I, 35, n. 10.

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by law, may enter upon an agreement.[75] This excludes those who are actually or habitually deprived of the use of reason or of the necessary senses, unless the latter are supplied by artificial means.[76] As to *age,* the Code determines nothing except so far as marriage itself is concerned.[77] But no restriction is made or year fixed, and hence if reason and senses are not wanting, any age is admissible. As to freedom from compulsion we refer to can. 103, which renders any act done under external compulsion, invalid. *Fear* would, according to the same canon, not render a betrothal invalid, but merely rescindable.

(3) As regards the *contract itself,* it must be an external manifestation of internal consent. Hence a frivolously or fictitiously given consent would be invalid. Such a thing is now almost excluded, and if it is not entirely excluded, the alleged motive would require strict proof.[78] The consent may be given, as formerly, by *proxy,*[79] for neither the "*Ne temere*" nor the Code excludes this mode. But the proctor would have to show his credentials and be instructed by the respective parties *ad hoc* and for a determined person.

(4) The *object of the promise* is future marriage, not the promise itself; wherefore if James and Gemma would merely intend to make the promise without any intention of marrying one another, it would be null and void. But there may be a real intention of marriage with an *impediment* blocking the way of its fulfilment; for instance, consanguinity. Is it permissible to contract an engage-

75 Ad c. 23, X, IV, 1.

76 Cfr. Wernz, *l. c.,* IV, Vol. I, p. 124, n. 93.

77 Cfr. can. 1067.

78 S. C. C., Dec. 18, 1728; March 12, 1729 (Richter, *Trid.,* p. 222); *A. S. S.,* I, 342; III, 304; VII, 667.

79 Cc. 1, 11, X, IV, 2; c. 9, 6°, I, 19; l. 2, Dig. II, 24; this extension is made from the parents to the proctor.

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ment notwithstanding such an impediment? And if contracted, would it be valid? Supposing the prescribed form to have been duly observed, the answer is as follows:

(a) If the impediment is one that cannot be removed by a dispensation, the promise is both invalid and illicit, because the object of the promise being marriage, and marriage being impossible, forbidden, and therefore sinful, the promise has a sinful object and is therefore destitute of the necessary moral and juridical qualities, namely: liceity, honesty, possibility.[80]

(b) If the impediment is of a kind that may be and generally is removed by a dispensation, the nature of the promise depends on the intention of the contracting parties. If they conclude the engagement without regard to the permission to be obtained, or with the intention of forcing the authorities to grant a dispensation, their promise would be sinful and, we believe, invalid, because no one may bind himself to commit a sin. If the parties enter upon the engagement with the express condition, "provided we can obtain a dispensation," the promise is valid and the parties would be bound to apply for a dispensation and await the grant. In case of refusal, both would be free to enter a new engagement with some other party not subject to an impediment.[81] However, these hypotheses are now-a-days rather futile, because if the pastor is present, he will tell the parties to abstain from an engagement until the dispensation is obtained. The required witnesses, too, would probably be aware of the impediment and caution the parties.

80 Cfr. l. 137, Dig. 45, 2; *A. S. S.*, I, 78, 81, 121; S. C. C., Jan. 26, 1709; Dec. 12, 1733 (Richter, *Trid.*, p. 220); v. Scherer, II, 130.

81 Wernz, *l. c.*, IV, 1, p. 127 f., pays too much attention to a decision of a nameless congregation quoted by Giovine.

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The same distinction applies if the *impediment* is only a *prohibitive one,* for instance, mixed religion. If the parties engage themselves *unconditionally, i. e.,* without the explicit mention of the condition, "Provided we can obtain a dispensation," or, "Provided you become converted," or, "Provided the impediment ceases," the promise is invalid, because the contract is illicit as promising a dishonorable thing.[82] But if the condition is added, the promise holds good and is licit, since the parties wish to abide by the decision of the Church and therefore, what they promise each other is not dishonorable.

If *parents* (not relatives or guardians) are, for weighty reasons, opposed to an engagement, for instance, because of danger to the faith or to the peace of the family, the promise is invalid unless made with the condition: "If the parents consent," because it violates the natural law, which dictates submission to parents in all lawful matters.[83] If the parents' opposition is unreasonable, for instance, based merely on considerations of money, social standing, or personal dislike, the promise is valid and licit.[84]

Soldiers may lawfully and licitly contract engagements during military service, for in time they may marry.

(5) The *form* of betrothal is now strictly prescribed. The engagement must be made *in writing.* And here we may add what § 2 of can. 1017 says: *"In case both parties or one of them, does not know or is unable to write, it is required for the validity of the act that this fact be noted in the document itself and another witness be added, who, together with the pastor or the Ordinary of the diocese or the other witnesses, shall sign the document."*

82 Cfr. ll. 26 f. Dig. 45, 1; § 24, *Inst.,* III, 19; c. 8, X, I, 35.

83 Sanchez, l. IV, disp. 23, n. 11; Gasparri, *l. c.,* n. 62.

84 C. un. C. 31, q. 3; cc. 1, 4, 11, X, IV, 2.

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From these two paragraphs it follows:

(a) That writing is *absolutely necessary;* but no specific form is prescribed, provided the intention is clearly manifested. And here we must return to the "*unilateral*" promise. If James wants to make a promise on his part only, without obliging Gemma to marry him, he may do so. But in that case what necessity is there for Gemma's signing her name to such an informal contract, which leaves her free to marry? So far it has generally been held that the promise of one party must be followed by the promise of the other, which was called *repromissio,*[85] because the object was marriage between two determined or designated persons.[86] Such written engagements are not likely to become popular.

(b) If both contracting parties, or one of them, does not know how, or is unable to write, a *substitute* must be employed and the fact be set down in the paper embodying the engagement. The Code adds to the decree "*Ne temere*" the words: "*vel nequeat.*" Hence the inability to write may be either intellectual (*nesciat*) or physical (*nequeat*). The one indicates illiteracy, the other may be caused by sickness, for instance, paralysis or bodily weakness. In all such cases a substitute or additional witness must be employed, who shall sign his own name, not that of the parties, and the fact must be expressly noted.

(c) Besides the contracting parties and the additional witness, where such a one is required, there must be official witnesses and private witnesses to every canonical engagement.

85 Boekhn, IV, 1, n. 53; Gasparri, *l. c.*, n. 52; the "*Ne temere*" has no such "unilateral" term.

86 S. C. C., April 14, July 13, 1725 (Richter, *Trid.*, p. 222, n. 6). If one party said "I take thee and none else," it was considered insufficient.

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α) The *official witnesses* are either the pastor or the Ordinary of the diocese. The *pastor* may be anyone whom the Code describes as such.[87] It is not necessary that he be the pastor of either of the parties, as the apposition "*proprius*" is not found in the text.[88]

Delegation is not admissible either for the pastor or the Ordinary.[89]

Distinct from delegation is the office of *vicar* or assistant (*oeconomus*), *i. e.*, a priest who has entire charge of a parish *ad interim*.[90]

As to *military chaplains*, their faculties must be consulted.[91]

An assistant (*cooperator;* see can. 476), though he may have general delegation to assist at marriages, may not be official witness at a betrothal, because the interpretation given to the text excludes all delegation, hence also habitual delegation.

β) The *private witnesses*, if pastor and Ordinary are absent, must be at least *two*. Concerning the *qualities* of these witnesses nothing is said in the text, but it is evident that they must be able to write and to understand what they are doing. For the rest, it does not matter whether they are men or women or what their moral character or religious belief may be.

(d) The parties or their substitute, *i. e.*, the additional witness and the other witnesses, *i. e.*, the pastor, the Ordinary, or the two private witnesses, should sign the engagement contract in the *presence of one another*.[1] Hence they must all be present at the same time. The certificate must show the day, month, and year of the

87 Cfr. can. 451.
88 S. C. C., March 30, 1908, ad VII. Cfr. can. 334, § 2.
89 S. C. C., March 30, 1908, ad VI.
90 Can. 451, § 2, n. 2.
91 *Ibid.*, n. 3.
1 S. C. C., July 27, 1908, ad I.

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engagement in order to be valid.[2] The place may conveniently be added, but is not required for validity.

6. The *effects* arising from a valid betrothment are the following:

(a) The parties are bound by a grievous obligation to *contract matrimony*. The time is left to their own prudent judgment, but it should not be unreasonably protracted.

If the engagement contract was made with the explicit stipulation of a certain date for the marriage,— *ad finiendum contractum,*— the engagement contract becomes null and void after the lapse of that time, and both parties are free. If the date is not set as a condition proper, but only in order to accelerate the fulfillment,— *ad urgendum contractum,*— the parties should get married within a reasonable time.[3] In the latter case the ecclesiastical judge may, of his own accord, determine the time within which the marriage must take place. Thus the Ordinary may appoint a term of six months on condition that if the marriage is not performed within this period, the betrothment becomes void.[4]

(b) *An engagement made with another person* whilst a former engagement is still valid, is without effect, even if made under oath.[5]

(c) A third effect is *moral*. If one of the contracting parties has carnal intercourse with a third person, the act involves a sin against justice.[6] However, since not a few moralists contradict this statement, especially concerning the groom, it is difficult to admit a change in the species of the sin.[7]

2 *Ibid.*, ad II.

3 Cfr. l. 14, Dig. 50, 17; l. 14, Dig. 45, 1; Gasparri, *l. c.*, n. 121.

4 S. C. C., Oct. 2, 1723 (Richter, *Trid.*, p. 223, n. 20).

5 *Reg. Iuris 69 in. 6°*; c. 18, X, II, 24; Boekhn, IV, 4, 1.

6 Thus Boekhn, IV, 4, n. 103; Benedict XIV, *Inst.*, 46, n. 19.

7 Thus Noldin, *De Sexto Praecepto*, 1905, p. 21.

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(d) A fourth effect is the negative one mentioned in § 3 of can. 1017, which reads thus: *From the promise of marriage,* although this be valid and no just reason excuses, *no action is admissible to compel the celebration of marriage.* However, an action to recover damages is permitted. Because marriage should be freely entered upon, and forced marriages seldom have a happy issue,[8] the legislator forbids any lawsuit to be brought against the recalcitrant party. For the same reason various decisions of the Roman Congregations admonish ecclesiastical judges not to threaten unwilling parties, especially women,[9] with censures. However, if damage was done, especially in case of pregnancy or contracted illness, or if expensive preparations were made for the marriage, the party guilty of a breach of promise can be sued for an amount sufficient to cover the expenses. A *penalty* or fine added to an engagement contract for the party violating the same has no juridical effect, since such a penal sanction would be unlawful.[10] Small presents[11] given on the occasion of an engagement may be either reclaimed or condoned.

Note that all these effects follow only betrothments made in writing, as prescribed by the Code. No other form of engagement, no matter how pompously celebrated, produces any of these effects, either before the tribunal of the ecclesiastical judge, or in the court of conscience. Hence confessors have no right to oblige anyone to anything arising from a broken informal engagement, though it goes without saying that a man who has damaged a young lady's reputation by undue famili-

8 Cc. 2, 17, X, IV, 1.

9 S. C. C., March 30, 1748 (Richter, *Trid.*, p. 223, n. 18); S. C. P. P., Nov. 22, 1790 (*Coll.* n. 603).

10 See the gloss on c. 29, X, IV, 1 *s. v.* "gemma"; Sanchez, IV, 1, 140.

11 *Arrhae,* from the Hebrew *arab,* or Greek *arrabon, i.e.,* pawn, are given as a token and proof of engagement; Forcellini, *Lexicon, s. v.*

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arities is bound in conscience to make restitution, or if no remedy can heal the damage, to marry her. This obligation arises not from the betrothal, but from the natural law and has nothing to do with the form of engagement. If a valid engagement has preceded a breach, caused, for instance, by a marriage with another person, the *competent judge* to decide in a damage suit is either the ecclesiastical or the civil court. But a lawsuit for recovery of damages does not suspend the marriage with another, neither has it any effect on the merits of the cause that brought about the breach and the new marriage. In other words, the suit must be strictly limited to the recovery of damages sustained by the breach of a legally valid betrothal.

To this authentic interpretation a remark must be added. The Code has abolished the impediments which formerly followed valid betrothal. Hence no prohibitive or invalidating impediment,— public honesty (can. 1078), — arises even from a valid engagement. It was but natural that a doubt should arise as to the retroactive force of the Code (can. 10) with regard to impediments contracted before the new law went into effect. The papal Commission for the Authentic Interpretation of the Code [12] has decided that no retroactive force must be attributed to the Code concerning betrothal and marriage, but that both are governed by the present law when they are already contracted or shall be contracted, excepting only the action mentioned in can. 1017, § 3. This means in plain English that a betrothal, though made before May 19, 1918, produces no impediment to a marriage contracted after that date. Therefore James, validly engaged to Gemma before said date, may marry her sister, daughter, or mother without any dispensation.

12 June 2–3, 1918 (*A. Ap. S.*, X, 345).

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Our *civil laws* do not differ much in this point from the ecclesiastical law. Thus the different States of the Union acknowledge no strict obligation of marriage, nor do they grant legal action on account of a betrothal, but allow the party suffering from a breach of promise to bring a damage suit.[13] In England, 26 Geo. II, c. 33 enacts that no suit shall be heard in any ecclesiastical court to compel a celebration of marriage *in facie ecclesiae* for or because of any contract of matrimony whatsoever.[14]

7. *Dissolution of Engagements.* "For the cancelling of an engagement contract," says a recent commentator[15] on the decree "*Ne temere*," "no new rules have been made in this decree. The reasons, therefore, heretofore commonly held to be sufficient by moralists and canonists will suffice also now for the breaking of the engagement contract." This remains true after the promulgation of the Code, because no special provisions are made to that effect. Neither does Bk. IV mention betrothal in treating of marriage procedure, nor is it touched in the chapter on dispensations. All this is but the logical consequence of the present legislation, which has removed all impediments that formerly arose from valid betrothal. The reasons proposed by canonists as permitting the solution of an engagement were briefly these:

(a) An engagement may be cancelled by *mutual consent* according to the *Regula Iuris:* "By whatever causes a thing is produced, it may be dissolved by the same."[16] Thus engagements made by *impuberes* may be cancelled by them after they have reached the age of puberty, even though made under oath.[17]

13 Bishop, *New Commentaries on Marriage*, 1891, I, § 226 f.

14 Blackstone-Cooley, *l. c.*, III, 94.

15 S. Woywod, *Marriage Laws*, 1913, p. 9.

16 *Reg. Iuris in 5°* (c. 1, X, V, 41).

17 Cc. 7, 10, X, IV, 2.

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(b) An engagement is cancelled *by marriage with another*. Thus if James, after having been engaged to Gemma, marries her sister, the prior engagement is broken, and Gemma is free to marry another. Nor does that obligation ever revive,[18] especially now, since there is no impediment attached to betrothal, it seems but natural that the obligation should cease altogether after the marriage.

(c) An engagement is cancelled if one of the parties *embraces the religious state,* or rather makes profession, for the latter act implies the religious state. Formerly religious profession and solemn vows were considered equal, and older canonists, like Panormitanus[19] and Sanchez,[20] attributed the power of cancelling a betrothal only to solemn, not to simple, vows. However, the present tendency and the view sustained by our Code favors equalization of religious vows on that point. The Code[21] makes the act of embracing the religious state a prohibitive impediment without distinction. Hence it is safe to say that if both parties would make religious profession, the engagement would be dissolved. It is also certain that if one of the parties makes solemn profession, the betrothal is dissolved.[22] Finally, the present practice of the Church favors the view that even temporary profession, made in either a papal or diocesan institute, cancels a marital engagement. For every engagement is understood to contain the implied condition: "Unless I choose a more perfect state."[23] The religious state, honored and distinguished by the Church, enjoys the favor of law and preference. Of course, a resulting damage

18 Thus Sanchez, v. Scherer, Wernz, etc., whose views are, theoretically speaking, the only correct and moral ones.

19 Ad c. 5, X, 6, n. 6.

20 *De Mat.*, I, disp. 46 f.

21 Can. 1058.

22 Cc. 2, 7, X, III, 33.

23 Wernz, IV, 1, n. 113, note 118.

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suit would have to be settled either peaceably or in court.

(d) An engagement may be cancelled *for personal reasons.* A valid personal reason would be, (α) If one of the engaged persons would *absent* himself from the other for a long time without giving notice.[24] (β) If the *moral character* of one of the parties has considerably deteriorated. Hence, any attempt at making another engagement or having sexual intercourse with a third person would justify the innocent party in withdrawing from the engagement. Sexual intercourse with another than the engaged person, made known only after the engagement, but had before it, is a sufficient reason for breaking the contract,[25] unless it has been condoned. If both parties have committed fornication either before or after their engagement, and no pardon has been given, both may recede from the engagement.[26] A considerable *deterioration in character* would take place if one became a spendthrift or drunkard, or had to face an accusation in a criminal court.[27] (γ) If *a physical or mental change* has taken place in both or either of the engaged persons. Mental derangement, especially if incurable, or a contagious and lasting sickness, or a noticeable deformity of the body, would be a sufficient cause for breaking an engagement.[28] (δ) If a *change of fortune* or *social condition* should occur in one of the parties, the other would have reason to withdraw from the engagement. Thus if a poor fellow or girl should receive a rich legacy or bequest, or if a social or political or commercial event would raise him

24 C. 5, X, IV, 1.

25 Boekhn, IV, 1, n. 150: *"paria sunt in iure nunc scire et nunc esse."*

26 Cc. 6, 7, X, IV, 16; v. Scherer, II, p. 134.

27 S. C. C., Nov. 14, 1725 (Zamboni, *Coll.*, n. 17, *s. v.* *"Sponsalia"*); S. C. C., May 29, 1852 (Lingen-Reuss, *Causae Selectae,* 1871, pp. 881 f.).

28 S. C. C., May 14, 1729 (Zamboni, *l. c.*, n. 20); c. 25, X, II, 14.

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to "higher" social rank, there might be a reason for breaking the engagement, not only on the advantaged side, but on both. For too great disparity in fortune and social position often causes marriages to be unhappy.[29]

(e) Finally, *family reasons* may render the dissolution of an engagement advisable, *e. g.*, if serious enmities, hatred, dissension, aversion are apt to result from the contemplated marriage, as is sometimes the case in feudally inclined nations and countries. The S. C. of the Council has repeatedly cancelled engagements for this reason. Another cause would be strong parental opposition, but not in all instances, even if threats of disinheritance are employed.[30]

Whether engaged parties are *obliged to manifest to each other their secret defects* is a debated question. Justice certainly obliges one to reveal such defects as would prove very injurious to the other, for instance, pregnancy, contagious disease, etc.[31] Concerning *juridical procedure* nothing need be added, since the ecclesiastical courts would hardly occupy themselves with a damage suit, or if they did, would decide it summarily.[32]

CAN. 1018

INSTRUCTIONS ON MARRIAGE

Parochus ne omittat populum prudenter erudire de matrimonii sacramento eiusque impedimentis.

Before turning to the chapter on immediate preparations for marriage, the Code exhorts pastors to instruct

29 Wernz, *l. c.*, IV, 1, n. 116.

30 S. C. C., Feb. 28, 1733; Nov. 29, 1783; July 31, 1728 (Zamboni, *l. c.*, nn. 28, 41, 23).

31 De Smet, *l. c.*, p. 25 f.

32 The Roman Pontiff, and he alone, may dissolve engagements; but they are hardly ever brought before him.

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their people on the Sacrament of Marriage and its impediments. It does not say how often such instructions should be given or on what occasions. Instructions may be public or private.

(a) *Public instructions* (given, for instance, on the second Sunday after Epiphany) should be couched in general terms and deal with the nature and dignity of the Sacrament, the duties of the married towards each other and their children, and their respective rights. Leo XIII, addressing chiefly the bishops, says: "Let special care be taken that the people be well instructed in the precepts of Christian wisdom, so that they may always remember that marriage was not instituted by the will of man, but, from the very beginning, by the authority and command of God; that it does not admit of a plurality of wives or husbands; that Christ, the author of the New Covenant, raised marriage from a rite of nature to a Sacrament, and gave to His Church legislative and judicial power with regard to the bond of union." [33] The evil of divorce, illustrated by statistics, may also form a topic of public instruction.

(b) *Private instructions* should be given to those who are about to enter the married state by the *pastor,* along the lines laid down in Pastoral Theology and in the canons which immediately follow the present one. The *confessor,* too, may, if he is asked or finds that the parties are ignorant, instruct them on the lawfulness and the obligations of marriage. He may tell them that everything is permitted that is conducive to the end and purpose of Matrimony, and that, generally speaking, sins against chastity among married people are not grievous, unless illicit means are employed.[34]

33 "*Arcanum,*" Feb. 10, 1880, ed. Wynne, *l. c.,* p. 79 f.
34 Cfr. De Smet, *l. c.,* p. 461.

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CHAPTER I

ON THE PRELIMINARIES OF MATRIMONY AND ESPECIALLY THE BANNS

This chapter deals with certain preparatory acts, especially the examination of the candidates and the proclamation of the banns.

CAN. 1019

§ 1. Antequam matrimonium celebretur, constare debet nihil eius validae ac licitae celebrationi obsistere.

§ 2. In periculo mortis, si aliae probationes haberi nequeant, sufficit, nisi contraria adsint indicia, affirmatio iurata contrahentium, se baptizatos fuisse et nullo detineri impedimento.

Before a marriage may be celebrated, certainty must be had as to whether there exists an obstacle to its validity or liceity, for, as will be explained further on, a Marriage may be contracted validly, yet unlawfully, because prohibited by the Church. From this the distinction between prohibitive and invalidating impediments appears. Pastors are sometimes called to a sickbed, or rather deathbed (*periculo mortis*), to "straighten out" a marriage. The couple is alone, without witnesses and papers, perhaps strangers in a far off country; what is to be done? When there is danger of death, and no other proof can be procured, and signs do not point to the contrary, the sworn statement of the parties that they are

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baptized and suffer from no impediment will suffice to admit them to the celebration of marriage. Note the requirement of *baptism,* which is not further determined, wherefore valid, nay presumably valid, Baptism suffices. Of course, if the parties should wish to be baptized conditionally, this would settle the first requisite. But the time may be very precious. We believe that, if possible, a witness should be called to hear their sworn testimony.

THE BRIDAL EXAMINATION (EXAMEN SPONSORUM)

After having glanced at the quotations in Cardinal Gasparri's edition of the Code and searched for the instructions which were said to be universal law by some authors,[1] we were surprised not to find any reference to those which emanated from Rome in 1658, 1665, and especially 1670. The last-named instruction is a rather extensive document.[2] Traces of such questioning may be found in a *Capitulare Regum Francorum* and allusions to it in Gratian's *Decretum* and the Decretals.[3] But of a previously existing universal law we could discover nothing. The Code now prescribes such an examination in

CAN. 1020

§ 1. Parochus cui ius est assistendi matrimonio, opportuno antea tempore, diligenter investiget num matrimonio contrahendo aliquid obstet.

§ 2. Tum sponsum tum sponsam etiam seorsum et caute interroget num aliquo detineantur impedimento, an consensum libere, praesertim mulier, praestent, et

1 Cfr. Wernz, *l. c.*, IV, 1 ed., p. 189.

2 *Collect. P. F.*, I, n. 192.

3 Cap. 35; also in the *Liber Canonum*, Cod. Vat. 1339, fol. 254, l. V, c. 4; c. 13, C. 32, q. 6; c. 19, C. 35, q. 2 and 3; c. 3, X, IV, 3 (Lat. Counc. IV); v. Scherer, *l. c.*, II, p. 145.

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an in doctrina christiana sufficienter instructi sint, nisi ob personarum qualitatem haec ultima interrogatio inutilis appareat.

§ 3. Ordinarii loci est peculiares normas pro huiusmodi parochi investigatione dare.

§ 1. The pastor who is entitled to assist at a marriage shall, at a convenient time, carefully investigate whether there is an obstacle to the marriage to be contracted. He may delegate another, for instance, his assistant, to make this investigation. But the personal obligation remains, insofar as negligence on the part of the delegate would recoil on the pastor. If the parties belong to his parish, the parochial books should be consulted and relatives who know the parties asked. If the parties are strangers, the investigation is more difficult, but should be conducted by means of a friendly correspondence between the pastors. Here the value of properly kept registers appears. Of course, if the pastor is certain as to the perfect freedom of the parties from impediments, no investigation is necessary; in the case of an elopement or a hurried marriage, it is often impossible. This is the previous and, we might say, *informal investigation*.

§ 2. At a fixed date follows the *examination proper*. The pastor who is entitled to assist at the marriage, should question the bridegroom and bride separately and cautiously as to the possible existence of an impediment, ascertain whether both, especially the woman, consent freely to the marriage, and whether they are sufficiently instructed in Christian Doctrine. The last question may be omitted where the character and standing of the parties renders it useless.

The formal examination has two parts: the juridical questioning and the doctrinal examination. If we say

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juridical questioning, this term must be understood as far as it relates to the juridically free status. Benedict XIV in his "*Nimiam licentiam,*" May 18, 1743, from which our text is almost verbally taken, says: "*seorsim caute et, ut dicitur, ad aurem explorare,*" that is to say, in a very cautious and strictly private and secret way. The reason is obvious: the matter is of a delicate nature and therefore requires prudence. Unnecessary questioning, especially about illicit familiarities, might lead to serious consequences, and the parties might make use of it in order to get a dispensation more readily. Benedict XIV (*l. c.*) advises pastors to ask whether there be an impediment, and if so, of what kind, whether there was a former engagement (this is no longer absolutely necessary), and whether the parents consent to the proposed marriage. About defamatory impediments, such as crime or public honesty, the pastor should inquire by way of instruction rather than by direct questioning, or he may omit this point entirely.[4]

The *doctrinal examination* should be held to ascertain whether the parties are sufficiently instructed concerning the commandments of God and of the Church, the Apostles' Creed, the "Our Father," "Hail Mary," the acts of faith, hope and charity, and contrition.[5] However, says the Code,—and this is a mitigation of the former practice,[6]—if the pastor knows that questioning would be useless, he may omit it with a certain class of persons. What is meant by *personarum qualitas?* Such qualities may be of the laudable sort, for instance, in the case of a well-educated layman who is a prominent Catholic, or who has written books which prove his doctrinal sound-

4 De Smet, *l. c.*, p. 453 f.

5 *Rituale Romanum,* tit. VII, c. 1, n. 1.

6 Benedict XIV, *"Etsi minime,"* Feb. 7, 1742, § 11; *De Syn. Dioec.,* VII, 14, 3–6.

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ness, or of a lady who has taught Sunday School in a Catholic parish, or who is regular in attending the sermons and catechetical instructions, etc. But there is another class of persons who have barely a smack of Christian doctrine. These, says the authentic interpretation,[7] the pastor should diligently instruct, at least in the elements of Christian doctrine (as set forth above), but if they refuse to be taught, he may nevertheless admit them to marriage, in accordance with can. 1066.

§ 3. It is the business of the diocesan Ordinary to issue special regulations to pastors on the instruction of nupturients. This may be done in an appendix to the "Diocesan Statutes," unless the Ordinary himself wishes to compose or recommend a manual for the purpose.

The S. Poenit., Sept. 5, 1899, says that, besides the witnesses, the parties themselves may be asked as to the existence of impediments.

CAN. 1021

§ 1. Nisi baptismus collatus fuerit in ipso suo territorio, parochus exigat baptismi testimonium ab utraque parte, vel a parte tantum catholica, si agatur de matrimonio contrahendo cum dispensatione ab impedimento disparitatis cultus.

§ 2. Catholici qui sacramentum confirmationis nondum receperunt, illud, antequam ad matrimonium admittantur, recipiant, si id possint sine gravi incommodo.

§ 1. Unless Baptism was conferred in his own parish, the pastor must demand a *baptismal certificate* from both parties, or from the Catholic party only if the marriage

[7] June 2–3, 1918, n. 3 (*A. Ap. S.*, X, p. 345).

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is to be contracted with a dispensation from the impediment of disparity of worship.

The S. C. Sac. had previously insisted on such a certificate whenever one or both of the parties were baptized outside the parish whose pastor was to assist at the ceremony.[8] If they were baptized in his own parish, he should look up the baptismal record.

§ 2 is new because it demands the reception of *Confirmation* before marriage, provided this Sacrament can be received conveniently. The reason for this regulation consists in the sacramental grace of Confirmation, which strengthens the faith and enriches the state of grace.

THE BANNS

The fourth Lateran Council[9] alludes to a custom prevailing in some places, of publicly proclaiming an intended marriage. This custom was observed in Italy and France.[10] Odo of Soliac is said to have introduced it into the latter country about the year 1198. The Council of Trent prescribed a threefold publication of the banns.[11] The Code determines by whom, when, and where the publication is to be made, the obligation of the faithful to reveal existing impediments, and finally the required dispensations.

CAN. 1022

Publice a parocho denuntietur inter quosnam matrimonium sit contrahendum.

8 S. C. Sacr., March 6, 1911, ad I (*A. Ap. S.*, III, 102).

9 C. 3, X, IV, 3. Banns is from *bannum*, a public edict or proclamation; Du Cange, *Glossarium, s. v.*; *Cath. Encyl.*, Vol. II, *s. v.*

10 v. Scherer, *l. c.*, II, 146.

11 Sess. 24, c. 1; *"Tametsi," de ref. mat.*

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The pastor must publicly announce between whom a marriage is to be contracted.

Stress is laid on *publicly*. A public announcement means one that can be understood by the hearers. Therefore it should be made with an audible voice, distinctly, and in the vernacular language. *Inter quos* signifies the parties between whom the marriage is to take place. The baptismal (and also any colloquial) name, the family name, the condition of the parties, whether married before or not and the number of publications must be stated. The age or social condition of the parties need not be stated, and injurious or ludicrous remarks must be omitted.[12]

CAN. 1023

PUBLICATION TO BE MADE BY THE PASTOR

§ 1. Matrimoniorum publicationes fieri debent a parocho proprio.

§ 2. Si pars alio in loco per sex menses commorata sit post adeptam pubertatem, parochus rem exponat Ordinario, qui pro sua prudentia vel publicationes inibi faciendas exigat, vel alias probationes seu coniecturas super status libertate colligendas praescribat.

§ 3. Si aliqua sit suspicio de contracto impedimento, parochus etiam pro breviore commoratione consulat Ordinarium, qui matrimonium ne permittat, nisi prius suspicio, ad normam § 2, removeatur.

§ 1. The publication of the banns is to be made by the parties' own pastor (*parochus proprius*), *i. e.*, the pastor in whose parish the parties have their domicile or quasi-domicile. The diocesan domicile cannot be alleged in the case of banns, else all the pastors of a diocese would

12 *Rituale Rom.*, tit. VII, c. 1, n. 7; De Smet, *l. c.*, p. 42 f.

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be competent to make the announcements. But the question naturally arises: Is a pastor *parochus proprius* of those who have been only one month in his parish? Can. 1097 allows him to assist at the marriage, and hence it would seem that he should also be entitled to publish the banns. Yet we cannot adopt this view [13] because the law itself as well as a decision of the S. Congregation of the Council [14] restricts the monthly stay precisely in regard to the celebration of marriage. Besides, the purpose of the law, which is to discover possible impediments, can scarcely be attained by proclaiming the banns in a place where the parties have resided only for one month. Lastly, the Code itself manifestly favors our interpretation, because in § 2 of our canon it speaks of a six months' stay in another place. Therefore, with regard to the banns only domicile and quasi-domicile [15] are to be considered. Now it may happen that James has his domicile in one parish, and Gemma in another. In that case the banns must be published in both parishes. The same rule holds concerning quasi-domicile. We may even stretch the possibilities. If James has a winter and a summer domicile, and Gemma also has two domiciles different from those of James, the banns must be published in all four parishes. Also, if James has a domicile and Gemma only a quasi-domicile, both in different parishes, the banns must be published in both. As to *vagi,* or vagabonds, the pastor of the parish in which they live here and now, must make the announcement.

But what if they have *recently left* their domicile or quasi-domicile? This question is answered in § 2. If a

13 Vermeersch, *De Forma Spons. et Mat.*, n. 59.

14 S. C. C., March 28, 1908 ad V.

15 Cfr. can. 92, Vol. II, p. 14 f., of this Commentary.

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party has lived in *a place other than the parish of the parochus proprius* for *six months* after the age of puberty, the pastor shall report the matter to the Ordinary, who may prudently order either the banns to be published in that place or else proofs or conjectures to be gathered which establish the party's free status.

§ 3. If the pastor suspects the existence of an impediment, he should report to the Ordinary, even though the party has lived less than six months in the other place, and the Ordinary shall not give permission to marry until the suspicion has been removed by the means mentioned in the preceding paragraph (§ 2).

The question concerning a recently abandoned domicile is *touched* at least indirectly. For *alius locus,* the other place, plainly has reference to a change of domicile or quasi-domicile.[16] Therefore the Ordinary's decision must be sought, and he should make inquiries through the respective chanceries and from the pastors and also the civil magistrates, if possible. *Conjectures* would be probable indications, for instance, from travels or sojourns, as also from the moral character of the party. After he is morally certain the parties are free, the Ordinary may either order the banns to be published or instruct the pastor to proceed with the marriage ceremony. Hence it might happen that the banns would have to be published in several places, if the bishop insisted.

How is *pubertas* to be understood? We believe it is the age required for marriage according to can. 1067, *i. e.,* sixteen and fourteen years, respectively, because an instruction of the Holy Office[17] mentions that age, although

16 Benedict XIV, *"Paucis abhinc,"* March 19, 1758. The Holy Office, Aug. 22, 1890, ordered that the banns be published in the place of birth, and in every place where the parties lived for ten months after having reached the age required for marriage (*Coll. P. F.*, n. 1376).

17 See the preceding note.

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according to can. 88 the age would be fourteen and twelve, respectively.

Concerning *soldiers* we have not seen the faculties granted to our *Episcopus Castrensis*. In the camps, as a rule, the banns would have to be proclaimed by the pastor in whose parish the camp or barracks are located and by the pastor of the bride. In some countries [18] it is the office of the military chaplain to proclaim the banns of soldiers.

In addition to what we have said about the six months in another place, an authentic interpretation has been issued concerning a stay of that length of time in very distant and remote parts (*in longissimis et dissitis oris*), probably on account of soldiers and legionaries or colonial troops.[19] The answer is that in such cases the Ordinary may content himself with the oath of the party and the statement of two witnesses, or at least one, who has lived with the party, though other proofs may also be demanded.

CAN. 1024

TIME AND PLACE OF PUBLICATION

Publicationes fiant tribus continuis diebus dominicis aliisque festis de praecepto in ecclesia inter Missarum sollemnia, aut inter alia divina officia ad quae populus frequens accedat.

The banns are to be proclaimed in church on three successive Sundays or holydays of obligation during the solemnity of the Mass or at other services which are frequented by the people.

18 Thus in Austria; cfr. Aichner, *l. c.*, § 164.

19 *Pont. Com. Auth. Int.*, June 2–3, 1918 (*A. Ap. S.*, X, 345).

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CAN. 1025

Potest loci Ordinarius pro suo territorio publicationibus substituere publicam, ad valvas ecclesiae paroecialis, aliusve ecclesiae, affixionem nominum contrahentium per spatium saltem octo dierum, ita tamen ut, hoc spatio, duo dies festi de praecepto comprehendantur.

The Ordinary may, however, substitute for said publication the public posting of the names of the contracting parties at the doors of the parish church or some other church; the announcement must remain posted for eight days, including two holydays of obligation.

(a) The *Sundays and holydays of obligation* are those celebrated *in foro externo* by the hearing of Mass and abstaining from servile labor.[20] It matters nothing whether these feast-days fall within the prohibited time, for the publication of banns is not forbidden during that period.

They are *successive* if one follows another without interruption through another Sunday. If, for instance, Christmas immediately follows Sunday, the publication is to be made on these days as they follow each other. But an interruption by ferial days is not only allowed, but even desirable.[21]

In church (*in ecclesia*) says the text, following the Tridentine Council, which intended first and above all the parish church. Hence the publications may not be made in a public or semi-public oratory. However, if a public oratory serves as a temporary church for the people, the

20 In the U. S. the holydays of obligation are: Immac. Conc. B. M. V.; Christmas, New Year, Ascension, Assumption (Aug. 15), and All Saints.

21 S. C. C., June 17, 1780 (Richter, *Trid.*, p. 225); Gasparri, n. 213.

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banns may be published there.[22] Semi-public oratories are not churches.[23]

The term *missarum sollemnia* is also taken from the Council of Trent and implies, not precisely a solemn High Mass or *Missa Cantata,* but such a one as is generally regarded as a conventual or parochial Mass. The law now permits, as a rule and not only in exceptional cases,[24] that the banns be published at services other than the Mass, provided they be well attended by the people, *e. g.*, at Vespers or evening service if there is a large gathering on these occasions. This will be a welcome opportunity, especially if the last publication has been forgotten.

Can. 1025, permitting the *posting of the banns* at the church-door, is new, although the practice had been previously permitted, not, however, as a substitute, but as an additional mode of publication.[25]

Can. 1026

Publicationes ne fiant pro matrimoniis quae contrahuntur cum dispensatione ab impedimento disparitatis cultus aut mixtae religionis, nisi loci Ordinarius pro sua prudentia, remoto scandalo, eas permittere opportunum duxerit, dummodo apostolica dispensatio praecesserit et mentio omittatur religionis partis non catholicae.

The publication of the banns is to be omitted in marriages contracted with a dispensation from either dis-

22 S. C. C., 1901 (*Anal. Eccl.*, 1901, p. 58); this, however, is a particular decision not to be generalized; it was a case of church repairs.

23 S. C. C., Aug. 19, 1702 (Zamboni, *l. c., s. v. Mat.*, § VI, n. 6).

24 S. C. C., Oct. 25, 1586 (Richter, *Trid.*, p. 226, n. 30).

25 *Coll. Lac. Conc.*, t. I, 198; v. Scherer, II, 147.

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parity of cult or mixed religion, unless the Ordinary discreetly permits it, provided no scandal is given, and provided that the apostolic dispensation has been obtained, and no allusion is made to the non-Catholic party's religion. Apostolic dispensation is here to be understood of the dispensation from the impediment of worship or mixed religion.

Scandal might arise among the people because of the non-Catholic party's aversion to the Catholic religion, or because of a Catholic's marrying a non-Catholic, especially in preponderantly Catholic parishes.

CAN. 1027

OBLIGATION OF THE FAITHFUL TO DIVULGE IMPEDIMENTS

Omnes fideles tenentur impedimenta, si qua norint, parocho aut loci Ordinario, ante matrimonii celebrationem, revelare.

All the faithful are bound in conscience to reveal, either to the pastor or to the bishop, any impediment they may have knowledge of, before the celebration of the marriage.

As the parish priest could not be absolved from grievous guilt were he to omit the publication of the banns,[26] so the faithful are under a grave obligation to manifest impediments known to them.[27] This obligation is based, if not on positive law,[28] at least on the nature and scope of the publication, and consequently on the public welfare, and therefore obliges *all* Catholics. Consequently

26 Benedict XIV, *"Paucis abhinc,"* March 19, 1758: *"Non idcirco denuntiationum omissionem gravi culpa carere."*

27 *Rituale Rom.*, tit. VII, c. 1.

28 Gasparri, n. 221. Wernz, IV, p. 204 (1 ed.), assumes a positive law besides the natural obligation.

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all are included, none is excluded, as the Gloss says.[29] The only persons exempt from this general obligation are those bound by professional or privileged secrecy, such as confessors, physicians lawyers, counsellors, midwives. If one knows of an impediment but under secret which he has promised to keep, perhaps under oath, he would nevertheless be bound to divulge it, unless by doing so he would incur great danger to his soul or body, or give scandal.[30] But if the impediment is notorious, it may and must be manifested by anyone who has knowledge of it (except the confessor), even those who are bound by secrecy.[31] If the pastor has extra-sacramental knowledge of what he believes to be an impediment, he must stop the publication of the banns until he has convinced himself that no impediment exists.[32]

CAN. 1028

DISPENSATION FROM THE BANNS

§ 1. Loci Ordinarius proprius pro suo prudenti iudicio potest ex legitima causa a publicationibus etiam in aliena dioecesi faciendis dispensare.

§ 2. Si plures sint Ordinarii proprii, ille ius habet dispensandi, in cuius dioecesi matrimonium celebratur; quod si matrimonium extra proprias ineatur dioeceses, quilibet Ordinarius proprius dispensare potest.

The diocesan Ordinary may, according to his discretion, dispense from the publication of the banns in his own diocese or in a strange diocese, provided there is a lawful reason. If the parties belong to different dio-

29 Ad c. 3, X, IV, 3, *s. v.* "*voluerit.*"

30 Lehmkuhl, *Theol. Moral.*, II, n. 677.

31 Gasparri, n. 226.

32 C. 27, X, IV, 1; v. Scherer, II, 148.

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ceses the bishop in whose diocese the marriage is to be celebrated, is entitled to dispense; if the marriage takes place in neither of the two dioceses, either of the Ordinaries may dispense. The Council of Trent[33] left it to the prudent judgment of the Ordinary to dispense, if he sees fit, from some or all of the banns. By *Ordinary* is understood the bishop, the vicar-general, or the vicar-capitular, even without a special commission (*administrator* and *abbas nullius*). But inferior clergymen, such as deans, *pastors,*[34] or assistants have no power to grant a dispensation. However, in case a marriage would surprise a pastor, as it were, and he is aware that it could be maliciously hindered, and certain that no impediment exists, he may omit the publication, *vi declarationis,* if no time is left for consulting the bishop. This holds especially in danger of death.[35]

The Code also mentions *causa legitima.* Such a lawful reason, in general, is one which neutralizes or counterbalances the law. When a law has a penal sanction attached, this indicates that it is considered important by the lawgiver. Still more is this the case with a *lex plus quam perfecta* or one with a nullifying sanction. Less serious is a law which has neither. To this last-mentioned class belongs the omission or dispensation of the banns, because neither is nullity of the marriage nor any other penalty pronounced in the Code. The Code simply states that there should be a legitimate reason.[36] Such a reason would be, for instance, a suspicion that the marriage would be maliciously impeded if the banns

33 Sess. 24, c. 1, *de ref. mat.*

34 S. C. C., Jan. 25, March 26, 1707 (Gallemart, *Trid.*, I, 282); the pastor is not allowed to omit the publications, even if he deems them entirely useless or thinks those made by civil authority to be sufficient; S. O., Jan. 12, 1881 (*Coll. P. F.*, n. 1545).

35 De Smet, *l. c.*, ed. 1, p. 42.

36 Stricter Benedict XIV, "*Satis nobis,*" Nov. 17, 1741; "inevitable reason"; Id., *De Syn. Dioec.*, XII, 6, 2.

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were published;[37] or if it appeared probable that the other party would break the engagement because of a protracted delay caused by the publication, or if disparity of age or unequal social condition, or inequality of wealth would make the parties a laughing-stock, or if the woman would be *enceinte*.

The Ordinary who may dispense is he in whose diocese both contracting parties have their domicile or quasi-domicile, or, if they are *vagi*, the Ordinary in whose diocese they happen to live at the time. Thus, if James belongs to the diocese of St. Joseph, and Gemma to the diocese of Kansas City, the bishop of the latter diocese dispenses if the marriage takes place in that diocese; because ordinarily the bridegroom follows the bride in this matter. Should James insist on being married in the diocese of St. Joseph, the bishop of that diocese dispenses. Should the parties choose a third diocese for their marriage, for instance, the archdiocese of St. Louis, either the bishop of St. Joseph or the bishop of Kansas City may dispense. No preference is here accorded to the bride. But the pastors of both parties must be notified of the granting of the dispensation (from the proclamation of the banns) by either bishop, and the episcopal chancery from which the dispensation emanates should give notice to the other, to prevent misgiving or suspicion on the part of the pastor in the other diocese.

Finally it may not be useless to add that, though no penalties are specified in the Code for the omission of the banns, the Ordinary would not exceed his power if he proceeded against pastors carelessly omitting the banns or assisting at marriages for which the banns have not been proclaimed. This right belongs to the bishop as guardian of the law, as Fagnani says.[38]

37 Gasparri, *l. c.*, n. 232 ff. 38 Ad c. 25, X, v. 1, n. 78.

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CAN. 1029

Si alius parochus investigationem aut publicationes peregerit, de harum exitu statim per authenticum documentum certiorem reddat parochum, qui matrimonio assistere debet.

Should it happen that another pastor has attended to the examination of the candidates or made the publications, he must as soon as possible authentically inform the pastor who is to assist at the marriage of the results of his inquiry.

Thus, Father Luke of a parish in the St. Joseph diocese has made the publications or conducted the examination of the contracting parties James and Gemma, or perhaps only of the former, who is his parishioner, but the marriage is to take place in Father John's parish in the diocese of Kansas City (or in the same diocese of St. Joseph, because the case remains the same). Father Luke discovered no impediment, but is nevertheless bound to notify Father John because the text simply says, *de harum exitu, i. e.,* he should advise him of the result obtained by either the examination or the publication, no matter whether that result was positive or negative, *i. e.,* no matter whether an impediment was discovered or not. Benedict XIV says [39] that the pastor who assists at marriage must ask whether the publications were duly made, and hence the pastor who published the banns is bound to inform his colleague of the fact. Of course, this obligation becomes more urgent if pastor Luke has discovered an impediment.[40] The Code imposes both investigation and

[39] *"Paucis abhinc,"* March 19, 1758 (*Bull.*, Prati, IV, p. 494): *"ad hoc, ut tuto interesse possit matrimonio."*

[40] This is the case mentioned in the instruction of S. C. Sacr., March 6, 1911, ad II (*A. Ap. S.*, III, 102).

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examination, and it may happen that one pastor performs the examination, while another publishes the banns, and a third assists at the marriage. In such a case the first two have to inform the third of the result of the investigation and publication before he may assist at the ceremony.

This information must be given by means of an *authentic document.* Can. 470, § 4, prescribes that every pastor should have a parish seal for official papers. The *Rituale Romanum* [41] distinguishes two cases: (a) if both parishes lie within the *same diocese,* Father Luke has simply to send his information under the parish seal and with his signature to Father John, who must file it and make a note of it in the Matrimonial Book, as prescribed by said *Rituale Romanum.* (b) If one of the contracting parties belongs to *another diocese,* where the banns must also be published, the mere statement of the pastor that the publications were made, is of no value, unless the paper containing the statement is signed and sealed by his bishop or vicar-general and recognized by the bishop or vicar-general in whose diocese the marriage is to take place and who must give his permission for the marriage. Therefore pastor Luke of the St. Joseph diocese must send the statement to his own bishop or vicar-general, who shall forward it, signed and sealed, to the bishop or vicar-general of the Kansas City diocese, who in turn shall transmit the paper together with his own permission to Father John. If the bishop has a chancellor to whom he wishes to entrust the matter, he may do so, because what a bishop may do himself, he may entrust to another. The *formula* is given in the Ritual and would read in English as follows: *"We hereby testify that the publications of the marriage between N. and N. have been*

41 Tit. X, c. 5 (ed. Pustet, 1913, p. 330).

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duly made by pastor N. of the parish N., to whom (he) N. or (she) N. belongs, as may be ascertained from the papers included. The first publication was made on [date], *the second on* [date], *the third on* [date: day, month, year] *during the parochial Mass, and no canonical impediment was found to be in the way. Wherefore we grant you permission to assist at said marriage.*

Signed: .....
Sealed: ....."

CAN. 1030

§ 1. Peractis investigationibus et publicationibus, parochus matrimonio ne assistat, antequam omnia documenta necessaria receperit, et praeterea, nisi rationabilis causa aliud postulet, tres dies decurrerint ab ultima publicatione.

§ 2. Si intra sex menses matrimonium contractum non fuerit, publicationes repetantur, nisi aliud loci Ordinario videatur.

To emphasize the preceding canon and make it more effective, canon 1030 provides that after the examination and the publication of the banns the pastor shall not assist at the marriage until he has received all the necessary papers, and until at least three days have passed after the last call, unless a plausible reason should dictate otherwise. Should a marriage be delayed for six months after the banns have been published, the publication must be repeated, unless the Ordinary decides otherwise.

The first clause of this canon is decidedly new and, as we have said, devised for the purpose of making sure that the candidates are free. The marriage should not take place on Monday or Tuesday if the last announcement was made on Sunday. Wednesday could be

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chosen, for Sunday may be reckoned as one of the three days, since the publication was most probably made in the forenoon. However, if the pastor has a plausible reason, he may go ahead with the marriage sooner, nor need he report the fact to the Ordinary. A plausible reason would be, for instance, if one of the parties or the pastor would have to leave before Wednesday, or if there would be an anniversary of the parents' wedding, etc.

A *report to the Ordinary* must be made if the marriage is delayed for six months after the last call. This is a necessary precaution because it might happen that meanwhile an impediment is contracted or discovered. Hence the *Rituale Romanum* [42] as well as an Instruction of the Holy Office [43] demand repetition of the banns if two or three months have elapsed since the last publication. Our Code extends the time to six months, and says that even then the Ordinary — not the pastor — may declare a repetition unnecessary if he is morally certain that the parties are free to contract Matrimony.

CAN. 1031

ASCERTAINING OF THE FREE STATUS

§ 1. Exorto dubio de exsistentia alicuius impedimenti:

1.° Parochus rem accuratius investiget, interrogando sub iuramento duos saltem testes fide dignos, dummodo ne agatur de impedimento ex cuius notitia infamia partibus oriatur, et, si necesse fuerit, ipsas quoque partes;

2.° Publicationes peraget vel perficiat, si dubium ortum sit ante inceptas vel expletas publicationes;

[42] Tit. VII, c. 1, n. 11 (*ed. cit.*, p. 212).

[43] Aug. 22, 1890, ad VI (*Coll. P. F.*, n. 1740).

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3.° Matrimonio ne assistat, inconsulto Ordinario, si dubium adhuc superesse prudenter iudicaverit.

§ 2. Detecto impedimento certo:

1.° Si impedimentum sit occultum, parochus publicationes peragat vel absolvat, et rem deferat, reticens nomina, ad loci Ordinarium vel ad Sacram Poenitentiariam;

2.° Si sit publicum et detegatur ante inceptas publicationes, parochus ulterius ne procedat, donec impedimentum removeatur, etsi dispensationem pro foro conscientiae tantum obtentam norit; si detegatur post primam aut secundam publicationem, parochus publicationes perficiat et rem ad Ordinarium deferat.

§ 3. Demum si nullum detectum fuerit impedimentum, nec dubium nec certum, parochus, expletis publicationibus, ad matrimonii celebrationem partes admittat.

Since the examination of the nupturients and the publication of the banns all tend to ascertain their freedom from canonical impediments and since a *reasonable doubt* may arise in the pastor's mind as to the existence of an impediment, the Code lays down certain rules, which should be applied to disperse such doubts. A *reasonable* doubt is one which is not merely momentarily entertained, but clings to the mind and makes the contrary opinion appear less probable. Thus, if one of the parties was married before, and his consort died in a distant country, from which no certain notice could be gotten, there would be a reasonable doubt — a *dubium facti,* not *iuris.* Doubts of the latter kind must be settled according to the Code, and, if necessary, according to the rules of interpretation and the opinion of the School. Having premised this much, let us hear what the Code

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says *of a doubt arising as to the existence of an impediment.*

(1) In such a case the pastor shall investigate more thoroughly by querying at least two trustworthy witnesses (provided the impediment is not defamatory) and also the parties themselves, under oath, if he deems it necessary. Concerning this *examination* several instructions have emanated from the Holy Office,[44] which are summarized in that [45] of Aug. 22, 1890, from which we learn that

(a) The witnesses to be cited may be either men or women, preferably relatives of the contracting parties and citizens.[46] Non-Catholics may be admitted if they are known to be trustworthy.

(b) Before being examined the witnesses must be admonished concerning the sacredness of an oath. Then they must be asked about their name, parents, age, profession and dwelling place, whether they are citizens and how long they have lived in the place. Those who volunteer to testify are to be rejected. Those that are called as witnesses must be questioned, by whom, where, when, how, before whom, and how often they were called to testify. They must also be asked whether they received anything from anyone for acting as witnesses. Then they must be questioned whether they know the contracting parties, their character, social standing, and how long, and in what place and on what occasion the parties became known to them. If a witness says he has no knowledge, he must be dismissed; if he says he knows the parties to the contemplated marriage, he should be asked

44 *Coll. P. F.*, nn. 192, 1267, 1283, 1342, 1399, 1427.

45 *Ibid.*, n. 1740.

46 S. O., Dec. 9, 1874 (*Coll. cit.*, n. 1427, Vol. II, p. 87). *Cives* are contrasted with *exteri*, but the former must be taken as inhabitants, not citizens in the legal sense, whilst *exteri* are outsiders or foreigners who do not live in the parish or diocese.

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whether they are citizens (*i. e.*, have a domicile somewhere) or foreigners. If they are foreigners, the proceedings are to be suspended, but if they are known to the witnesses as citizens, the witnesses must be asked in what parish the parties lived or are living, whether one or both of them were ever married before, or made religious profession or received major orders, and if there be any impediment to the Marriage. If the witnesses answer all these questions negatively, they should be interrogated as to the source of their knowledge and whether there is any probability that either of the parties is married or bound by an impediment If the answer is affirmative, proceedings must be stopped, unless other witnesses conclusively prove the contrary. If the answer is negative, then the witnesses must again be asked concerning the source of their knowledge (hearsay, eye-witnesses, etc.?) in order to establish their trustworthiness. If they say that the contracting party was previously married, but that his or her partner is dead, they must be asked about the death and its circumstances and whence they got the knowledge of the former marriage and subsequent death of the other party. If they claim that the death occurred in a hospital, or that they saw the party buried from a certain church or in a certain cemetery, authentic information must be obtained from the respective authorities (hospital, church, cemetery) before permission for the wedding may be granted. If no documents can be obtained, other proofs are admissible. The witness must also be asked whether the surviving party married, or may have married, again. If the answer to the last question is affirmative, permission for the wedding is to be suspended until other witnesses testify conclusively that no marriage has taken place. If the answer is negative, the witnesses should be asked concern-

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ing the sources of their knowledge, and after due deliberation the judge or pastor may decide whether or not permission may be granted.

(c) The pastor is not allowed to assist at the marriage of *vagi,* or vagabonds, unless he has obtained the necessary documents from the Ordinaries (see can. 1032).

(d) If the contracting parties, or one of them, is *in prison,* the testimony of the prison chaplain may be admitted as proof of his status; and if this cannot be obtained, the party, if trustworthy, may be admitted to the *supplementary oath.*[47]

This detailed investigation, is, however, to be omitted if the impediment would entail defamation, or rather infamy, upon the parties or one of them. The only defamatory impediments are rape, crime, and public dishonesty.[48]

(e) Where one of these impediments is suspected, the *parties may be put under oath concerning their free state.* This oath, too, is called *supplementary* (*iuramentum suppletorium*) because it is imposed to supply deficient proof. Hence the pastor may ask the parties, or party, to swear on the gospel, or by merely holding up three fingers and calling God as a witness that they speak the truth.

(2) The pastor, says the canon, shall *continue* or *complete the publication of the banns* if the doubt arose before or during the publications, because in that case it is possible that the doubt may be cleared up or stronger proofs be brought showing the existence of an impediment.

(3) If the doubt still remains after the publications, the pastor shall not assist at the marriage before having consulted the Ordinary. An instruction of the Holy Office,

47 S. O., Feb. 28, 1866 (*Coll. cit.,* n. 1283).
48 Cf. canons 1074, 1075, 1078.

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Aug. 22, 1670, rules that the publications should not be begun until the pastor has obtained a document from the bishop or his vicar-general, testifying to the free status of the contracting parties. And although this instruction need no longer be followed in regard to time, concerning the necessary paper it is certainly advisable to follow it, since other instructions of the same Holy Office have insisted upon this requirement.[49]

§ 2 says that if the existence of an *impediment is certainly established,* then, (1), if *it is secret,* the pastor shall continue or complete the publication of the banns and refer the matter either to the Ordinary or to the S. Poenitentiaria, without naming the parties; (2) If the impediment is *public* and is (a) discovered *before* the publications are begun, the pastor shall not proceed further until the impediment is removed, even though he may know of a dispensation granted for the court of conscience; (b) if a public impediment is discovered *after* the first or second publication, the pastor shall finish the publications and then report to the bishop.

The difference between a secret and public impediment is explained in can. 1037. From *secret* impediments the Ordinary may have power to dispense, and hence they should be brought before the episcopal court. If the Ordinary cannot dispense, the matter must be referred to the Sacra Poenitentiaria. What is necessary to know concerning that power will be explained in the chapter on *dispensations.*

Reticens nomina does not mean that no names should be given, but that assumed or fictitious names may be made use of. If the *impediment is public,* the proper

49 The consequence is, as said instruction rules (*Coll. P. F.*, n. 192), that the Ordinary has to proceed like the pastor, *i.e.*, according to the rules laid down above.

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names are to be stated in the report made to the Ordinary.

The Code further says that any knowledge a pastor may have of a dispensation obtained solely for the court of conscience is tantamount to no knowledge. He may know of the dispensation through the confessional or from some other source; but as a dispensation granted for the internal forum only does not hold for the public forum, the pastor must act as if he had no knowledge at all.

§ 3. If *no impediment* was discovered, either doubtful or certain, the pastor shall, after all the banns have been published, admit the parties to the celebration of marriage.[50]

CAN. 1032

Matrimonio vagorum de quibus in can. 91, parochus, excepto casu necessitatis, nunquam assistat, nisi, re ad loci Ordinarium vel ad sacerdotem ab eo delegatum delata, licentiam assistendi obtinuerit.

No pastor shall, except in case of necessity, assist at a marriage of *vagi,* unless he has previously referred the case to the Ordinary of the diocese, or to a priest delegated by the latter, and obtained his permission.

Who are *vagi* is explained in can. 91. They are such as have neither a domicile nor a quasi-domicile, and, with regard to marriage, have not stayed for thirty days in any one place, *i.e.,* parish or diocese.[51] Hence one who has roamed about a diocese for thirty days without settling in any parish thereof, cannot strictly be called *vagus,*

50 *Trid.*, sess. 24, c. 1, *de ref. mat.; Rituale Rom.*, tit. VII, c. 1, c. 2, n. 1 (ed. Pustet, 1913, p. 211 f.).

51 S. C. Sacr., March 12, 1910, ad V: *"Nomine vagorum veniunt omnes et soli, qui nullibi habent parochum vel ordinarium proprium ratione domicilii vel menstruae commorationis."*

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and the present canon does not apply to him. Here we perceive the benefit of a "diocesan domicile."

If he is dealing with a real vagabond, and the case is one of necessity, the pastor need not report to the Ordinary, but, *servatis de iure servandis,* may proceed to the marriage. Whether the case is one of necessity is left to the pastor to judge.[52] A soldier who has to leave immediately, as also a pregnant woman, might claim necessity. If the case is not one of necessity,[53] *it must be reported to the bishop.* What the latter must do is stated in the instruction of the Holy Office, Aug. 22, 1890, which demands that the parties produce *authentic documents* from the Ordinaries in whose diocese they have lived for less than a year. If none such can be had, the parties may be admitted to the *supplementary oath* concerning the diocese from which the required documents cannot be obtained. At any rate, at least *two witnesses* must be produced to testify to the free state of the contracting parties during their vagabondage. In addition the Ordinary may, if he deems it necessary, demand a supplementary oath from the groom.

The "priest delegated by the bishop" may be one delegated for a particular case, or for all matrimonial cases (the chancellor or rural dean). If the custom prevails in a diocese that the procedure concerning the free state of nupturients is reserved to the episcopal court, this custom may be observed.[54]

CAN. 1033

Ne omittat parochus, secundum diversam personarum conditionem, sponsos docere sanctitatem sacra-

52 Wernz, *l. c.*, IV, Vol. I, p. 294.
53 *Coll. P. F.*, n. 1740 ad 8.
54 S. C. C., Feb. 1, 1908 ad 11.

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are to be thus admonished, not those who are of age.[62]

If the parents *know nothing* of the intended marriage it is the pastor's duty to inform them, whether the contracting parties like it or not. Of course, this rule applies only when conditions are normal. In many cases it will be next to impossible to notify the parents, and then [63] the pastor is excused from that duty. He is also excused, in the opinion of some canonists, if the parents live very far from the place where the marriage takes place.

If the parents know of the marriage, but *oppose it with good reason,* the pastor must consult the bishop. Before doing so, however, he should dispassionately hear the objections, in order to communicate them to the Ordinary. A *reasonable* objection would be, for instance, that the family would suffer disgrace or notable material loss, or that the marriage would cause scandal or dissension, or that one of the parties belongs to a family of low or base degree (jail-bird, irreformable drunkard, gambler), or to a different religion, or is in precarious health. Social distinctions should not weigh much in a democratic state, nor should inequality of wealth, all other things being equal, be a decisive factor.

Unreasonable objections are those inspired by personal dislike or political differences, or based on idle gossip or mere sentiment.

62 Can. 88, § 1.

63 Cfr. De Smet, *l. c.*, p. 333 f.

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CHAPTER II

IMPEDIMENTS IN GENERAL

The publication of the banns is intended to disclose impediments, if there be any, and hence the Code logically proceeds to the consideration of the obstacles which may either impede or invalidate a prospective marriage.

The technical term *impedimentum* was coined by the Glossators, and the distinction between *impedientia* and *dirimentia* occurs in the *Summa* of Magister Rolandus, who was followed by Bernardus Papiensis.[1] The *number* of the impediments was not fixed. The gloss *ad pr. C. 27, q. I,* mentions sixteen, Tancred[2] prefers the mystic number fourteen $(7+7)$, twelve "diriment" and two "impeding" impediments. Some of the impediments mentioned by these early writers are now grouped under the heading of defective consent. Thus compulsion, fear, condition, error really affect the consent. But there are other obstacles which natural, or divine, or ecclesiastical law has set up in a more particular manner. Berardi[3] has laid down a good rule for distinguishing between invalidating and prohibitive impediments. He says: Those marriages which the natural or positive-divine law reprobates in a more especial manner, are not only illicit, but invalid; marriages which the ecclesiastical law

1 Cfr. Freisen, *l. c.*, p. 222 f.

2 *Summa de Spons. et Mat.*, ed. Wunderlich, p. 17. It may be permitted to say that the term *diriment* is not well chosen. What has not yet been joined, cannot be rent asunder. But the term has the force of custom and is now sanctioned by the Code.

3 *Comment. in Ius Eccl. Universum*, t. III, dissert. IV, c. 1 (ed. Venet., 1778, Vol. II, p. 77).

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intends to invalidate must be expressly declared null and void, otherwise they are only illicit. This rule is clearly discernible in our Code.

GENERAL PRINCIPLE

CAN. 1035

Omnes possunt matrimonium contrahere, qui iure non prohibentur.

All can contract marriage who are not forbidden to do so by law.

Marriage being based upon the natural distinction of sex, and intended by the Creator for the preservation and propagation of the human race as well as for the increase of His true worshippers, is permitted to all. This does *not* mean that all men *must* marry. There is no general command that compels each and every individual to contract marriage. Nature itself prevents some from getting married; others are called by God to a state of life which compels them to devote themselves to His exclusive service. This is the doctrine preached by the Apostle of the Gentiles,[4] and it has been followed by the Church and dogmatically defined at Trent.[5] The Tridentine Council condemns those "who say that the conjugal state is to be preferred to the state of virginity or celibacy." Therefore the Code says, "All *can* contract marriage."

It adds: "*who are not forbidden to do so by law.*" The forbidding law may be either the natural or a divine or human law. The natural law, as stated above, prohibits polygamy, whence the impediment of *ligamen* or

4 I Cor. 7, 25 f., 38, 40; cfr. Matth. 19, 11 f.
5 Sess. 24, can. 10, *de sacr. mat.*

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existing marriage bond. The natural law also bars from marriage those who are absolutely *impotent, i. e.,* unable to engender children. Hither may also be referred the impediment of *age,* as far as it is connected with impotence. *Blood-relationship* in the degrees of the direct line, and in the first degree of the collateral line, are likewise generally referred to the natural and divine law. But we cannot stretch that law any further. *Human* or *ecclesiastical* law has set up other restrictions, all intended to safeguard marriage, which is preeminently a public institution.

PROHIBITIVE AND DIRIMENT IMPEDIMENTS

CAN. 1036

§ 1. Impedimentum *impediens* continet gravem prohibitionem contrahendi matrimonium; quod tamen irritum non redditur si, non obstante impedimento, contrahatur.

§ 2. Impedimentum *dirimens* et graviter prohibet matrimonium contrahendum, et impedit quominus valide contrahatur.

§ 3. Quanquam impedimentum ex una tantum parte se habet, matrimonium tamen reddit aut illicitum aut invalidum.

§ 1. A *prohibitive* impediment implies a grave prohibition of contracting marriage, but does not render it invalid if contracted.

§ 2. A *diriment* impediment both gravely forbids marriage and prevents it from being contracted validly.

§ 3. Even when the impediment exists only on one side, it renders marriage illicit or invalid.

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PUBLIC AND OCCULT IMPEDIMENTS

CAN. 1037

Publicum censetur impedimentum quod probari in foro externo potest; secus est occultum.

An impediment is considered *public* when it can be proved in the external forum; otherwise it is *occult*.

These terms are plain; the difference between prohibitive and diriment impediments lies in their effect, that between public and occult, in their liability to be proved. An occult impediment is supposed to be and remain unknown, except perhaps to one or two trustworthy persons,[6] but it becomes public if the parties concerned reveal or prove its existence. Therefore the Code naturally looks at the juridical side of the knowledge, for one may be "cocksure" about an impediment and yet at the same time unable to prove its existence. If two trustworthy persons, besides the party or parties concerned, know of the impediment, and have means to prove it, it can no longer be styled occult.[7] One authentic document (*e. g.*, a baptismal record) is sufficient to prove the existence of an impediment.

Note § 3, can. 1036, which clearly indicates the *individual character* of the marital union. "*Matrimonium claudicare nequit,*" and hence if one party is affected by an impediment, the other party, in virtue of the bilateral contract, is also affected.[8] Therefore, if James suffers from an impediment, his bride Gemma is also affected. Disparity of cult, age, *ligamen*, etc., affect not only the

6 Gasparri, *De Mat.*, n. 259 (ed. 3).

7 S. C. C., July 9, Sept. 10, 1881 (*A. S. S.*, t. 14, p. 465).

8 S. O., Sept. 16, 1824 ad 2 (*Coll. P. F.*, n. 784).

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party directly concerned, but indirectly also the other. But here a distinction must be made. If James becomes a Catholic, the impediment ceases and he may freely marry his Catholic friend, Gemma. Again, if Gemma and James are second cousins, they suffer equally from the impediment. But if James wants to marry Lola, who is not related to him, the impediment ceases for James. Therefore a distinction must be made between *absolute* and *relative* impediments. The former affects the person completely and with respect to every other person, for instance, *ligamen,* as long as it lasts, and absolute impotency; whereas the latter concerns only a certain person or class of persons. Of little practical value is the distinction between impediments *juris publici* and *juris privati,* except in so far as the right of accusing the marriage is concerned,[9] and in this sense it coincides with the distinction between public and occult impediments.

THE SUPREME ECCLESIASTICAL AUTHORITY

CAN. 1038

§ 1. Supremae tantum auctoritatis ecclesiasticae est authentice declarare quandonam ius divinum matrimonium impediat vel dirimat.

§ 2. Eidem supremae auctoritati privative ius est alia impedimenta matrimonium impedientia vel dirimentia pro baptizatis constituendi per modum legis sive universalis sive particularis.

§ 1. It belongs to the supreme authority of the Church to declare authentically when the divine law forbids or invalidates a marriage.

§ 2. To the same supreme authority belongs the ex-

[9] Thus Wernz, IV, ed. 1, p. 345; De Smet, *l. c.*, p. 288.

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clusive right to establish, for persons baptized, other impediments, prohibitive or invalidating, by way of universal or particular law.

The first section is based upon the dogmatic decree of Trent which condemns the assertion that only those degrees of consanguinity and affinity which are mentioned in Leviticus (18, 6 ff.) constitute diriment impediments and that the Church has no power to set up others.[10] Our canon also excludes the usurped power of the civil authority which undertakes, of its own accord, to enact laws concerning the dissolubility of marriage. Such an attempt is called violence to the divine and to the natural law, or rather a corruption of the law.[11] But the Church claims exclusive authority only for *declaring* whether the divine law forbids or invalidates a marriage. A palpable example is the impediment of disparity of cult vs. mixed marriage, which both certainly rest on divine law, and that of simple and solemn vows.

§ 2 is also based on the dogmatic canons of the Council of Trent,[12] as emphasized anew against the Rationalists in the *Syllabus* of Pius IX, which was aimed at the so-called Regalists, who pretended that the power of establishing impediments was given to the Church by the civil authority and that the latter ought to do away with them. The power of establishing impediments belongs inherently to the Church and is not derived from the State, as the dogmatical canons of the same council show.[13] The Church claims the right to establish impediments for *baptized persons*.[14] This right may be asserted

10 Sess. 24, can. 3, *De Sacr. Mat.*

11 S. O., July 6, 1817; Sept. 3, 1772 (*Coll.*, nn. 725, 492).

12 Sess. 24, can. 3, 4, 9, *De Sacr. Mat.*

13 Propp. 68–70.

14 There is always the same difficulty concerning the term *baptized*. If *baptized* means what the expression properly conveys, then all, whether Catholics or non-

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either by way of a universal or a particular law. A *universal* law is one that affects every province and all persons without exception; a *particular* law is one like the "*Tametsi,*" which was conditioned upon local promulgation. Particular laws were the declaration of Benedict XIV concerning mixed marriages in the Netherlands and the "*Provida*" of Pius X for Germany (1906).

But the Church does not deny the power of the State over marriages of non-baptized persons, as is evident from a decision of the S. P. F., of June 26, 1820.[15] However, civil impediments obliging baptized persons, especially that of lack of consent on the part of the parents, are discountenanced by the Church.[16]

THE POWER OF ORDINARIES

CAN. 1039

§ 1. Ordinarii locorum omnibus in suo territorio actu commorantibus et suis subditis etiam extra fines sui territorii vetare possunt matrimonia in casu peculiari, sed ad tempus tantum, iusta de causa eaque perdurante.

§ 2. Vetito clausulam irritantem una Sedes Apostolica addere potest.

The "*vetitum Ecclesiae*" was formerly one of the prohibitive impediments, but has ceased to be such, at least *ipso iure*. Yet the Code vindicates to the local *Ordinaries* the right of forbidding a particular marriage or a

Catholics, are comprised by the term, provided they are validly baptized. An authentic interpretation would not be superfluous.

15 *Coll. P. F.*, n. 744. In China certain ceremonies were prescribed either by law or custom, the non-observance of which rendered marriage invalid; the S. Congregation declared them invalid.

16 S. O., Nov. 17, 1835; S. C. P. F., April 1, 1816 (*Coll.*, nn. 842, 711).

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marriage in a particular case. Therefore their power extends only to *individual* cases and, besides, cannot be exercised except for a *just cause*. Such a cause would exist, *e. g.*, if the Ordinary would have reason to doubt the free status of one or both of the contracting parties, either because no papers were received or because papers had been refused by another bishop.[17] Another just cause would be a reasonable doubt as to the existence of an impediment,[18] or a strong presentiment of future trouble.[19] However, the bishop may not forbid a marriage indefinitely, but only for *a time*, as long as the reason lasts.[20] Therefore a certain term should be set, say two or three months, which, in ordinary times, would enable the parties to obtain the necessary papers and remove existing difficulties. Lastly, the Ordinary's power extends only to those who actually live *within his diocese* or are *his subjects, even if they dwell outside the diocese*. Therefore all Catholics who live in a diocese, no matter for how short a time, must abide by the order of the bishop if he forbids their attempted marriage. The same rule applies to subjects who have their domicile or quasi-domicile in the diocese, but momentarily live elsewhere, though in such cases it will be proper to notify the Ordinary of the other diocese.

As to the *effect* of an episcopal prohibition, it may delay a marriage, but *cannot invalidate* it, and hence a marriage contracted against the bishop's injunction is valid if the prescribed form was observed.

A bishop would not exceed his power if he proceeded

17 S. C. C., Feb. 20, 1723 (Richter, *Trid.*, p. 269, n. 112).

18 S. C. C., March 15, 1727 (*ibid.*, n. 113).

19 Cfr. *A. S. S.*, t. 8, p. 211 ff.

20 If the reason for which the prohibition was made, ceases, the prohibition also ceases *ipso facto*, and the pastor may lawfully assist and the parties lawfully contract.

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against offending parties and the assisting priest and witnesses with ecclesiastical punishments.[21]

The text ascribes this power *to the Ordinary, i. e.,* to bishops and all who go by the name of Ordinary, therefore also vicars-general. *Pastors* and their assistants, being destitute of jurisdiction *in foro externo,* cannot forbid a marriage, though a pastor may stay a marriage for a while until the case is settled by the ecclesiastical court, to which he would have to report if the contracting parties were *vagi,* or if there were doubts as to the existence of an impediment, or if the parents of a minor would oppose the marriage,[22] or if family troubles could be foreseen.

If the pastor stayed a marriage and refused permission or delegation to his curate to assist at it, the marriage would be invalid, not because of the pastor's prohibition, but on account of lack of permission or delegation. But if the pastor would simply forbid his curate to assist, without expressly restricting the general delegation previously given to him, (can. 1096), the assistant could validly assist at that marriage.[23]

§ 2 mentions the case where the *Apostolic See* forbids a marriage. Only an *invalidating clause* explicitly added to the prohibition, says Benedict XIV, would render invalid a marriage attempted against the Pope's prohibition. If the *decretum irritans* is not expressed in the prohibition, the marriage would be merely illicit. Examples of such prohibition are exceedingly rare. A famous one is that by which Stephan III endeavored to deter Charlemagne from marrying the daughter of Desiderius, King

21 S. C. C., Florentina, Feb. 17, 1629; Feije, *l. c.,* n. 549, p. 424.

22 S. C. C., March 15, 1727 (Richter, *Trid.,* p. 269, n. 113); cfr. can. 1031, §§ 1, 3; 1032, 1034.

23 S. C. C., April 22, 1719 (Richter, *l. c.,* n. 110 f.).

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of the Lombards, and the son of Desiderius from marrying Charlemagne's sister, Gisela.[24] That the Pope can make such an invalidating prohibition follows from his power of establishing ecclesiastical impediments.[25]

A kind of prohibition is sometimes made by the S. Congregations, especially if a *matrimonium ratum tantum* is to be dissolved, in the following form: *"Vetito mulieri transitu ad alias nuptias inconsulta S. Congregatione, idque mulieri notificetur ante novam propositionem."* This clause is used in cases of impotence or inviolate virginity, when there is doubt as to the absolute proof of said physiological condition.[26] But this clause does not savor of an invalidating decree.

A prohibition, papal or episcopal, *ceases* by revocation, or lapse of time, or cessation of the cause for which it was made.[27]

THE POWER OF ESTABLISHING IMPEDIMENTS

CAN. 1040

Praeter Romanum Pontificem, nemo potest impedimenta iuris ecclesiastici sive impedientia sive dirimentia abrogare, aut illis derogare; item nec in eisdem dispensare, nisi iure communi vel speciali indulto a Sede Apostolica haec potestas concessa fuerit.

What we have said above concerning ecclesiastical legislation will suffice to explain this canon. It is now,

24 Migne 89, 1253 ff.; despite all imprecations the Pope does not employ the *clausula irritans*, but considers the planned marriage invalid because of previous betrothal; hence Wernz (*l. c.*, IV, Vol. II, p. 462) is wrong if he says, *sub poena nullitatis.*

25 Bened. XIV, *De Syn. Dioec.*, XII, 5, 3.

26 S. C. C., Dec. 18, 1869; Dec. 15, 1877 (*A. S. S.*, V, 553; XI, 141).

27 Wernz, *l. c.*, IV, Vol. II, n. 604, p. 467.

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and has been since the Council of Trent,[28] the teaching of the Church that the Roman Pontiff alone can either *totally* or *partially abolish impediments* established by ecclesiastical law, whether prohibitive or diriment. Note the term *ecclesiastici iuris,* for impediments of natural or divine law, such as those of *ligamen* or impotency, or blood-relationship of the first degree, can never be abolished or modified by the Pope. But ecclesiastical impediments were established by the Church and can be either totally or partially abrogated by her. No examples of complete abolition of diriment impediments are discoverable in the Code, if we except betrothal with regard to public honesty. But several impedient impediments have been abolished. Thus the *ecclesiae vetitum,* the *tempus feriatum,* the *sponsalia,* the *banns,* have all been done away with.[29] A *partial abrogation of diriment impediments* has been made concerning the degrees of kinship, spiritual relationship, affinity and public honesty.[30]

§ 2 says that the *Sovereign Pontiff alone can dispense* from *matrimonial impediments,* and no one else, unless the power has been granted to him by the common law or by special papal indult. This, too, is now the established teaching and practice of the Church, as may be seen from the condemnation of contrary tenets.[31] Benedict XIV was not a little surprised to hear that some

28 Sess. 24, can. 3, *de sacr. mat.*; c. 2, *de ref. mat.*

29 They were contained in the following verse:

Ecclesiae vetitum, tempus, sponsalia votum,
Mixtaque religio, si proclamatio desit.

30 The *diriment* impediments are contained in this verse:

Error, conditio, votum cognatio, crimen,
Cultus disparitas, vis, ordo, ligamen, honestas,
Aetas, affinis, si clandestinus et impos,
Si mulier sit rapta, loco nec reddita tuto,
Haec socianda vetant connubia, facta retractant.

31 Pius VI, "*Auctorem fidei,*" Aug. 28, 1794, prop. 59 f.; Syllabus of Pius IX, prop. 68.

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Polish prelates held a different opinion, especially with regard to the impediments of disparity of cult and mixed religion.[32]

What the general or *common law* grants to Ordinaries is contained in our Code, and they are allowed to go beyond the powers therein conferred only if a *special papal indult* gives them additional faculties. Such an additional faculty is that of April 25, 1918, and August 2, 1918, of which more will be said under can. 1048.

CUSTOM POWERLESS TO ESTABLISH IMPEDIMENTS

CAN. 1041

Consuetudo novum impedimentum inducens aut impedimentis exsistentibus contraria reprobatur.

Customs tending to introduce a new impediment or to abrogate those in force, are hereby reprobated.

There was a custom acknowledged concerning the "*Tametsi*," in so far as it was taken or presumed as a proof that the promulgation of said decree was duly made in a parish. This custom is quite different from one tending to introduce a new impediment, as that which crept into Servia, of regarding the act of being a witness to a marriage as an impediment to marriage. Benedict XIV strictly forbade any such custom.[33]

What the term *reprobated* means has been explained in the first Volume (pp. 112 ff.) of this Commentary. It is the intention of canon 1041 to preclude the rise of such customs, as well as to state that they cannot be called reasonable.

32 "*Magnae Nobis*," June 29, 1748.

33 "*Inter omnigenas*," Feb. 2, 1744, § 17. An even sillier custom, mentioned in the same Constitution, was that of considering the act of shearing the locks of a boy for the first time as an impediment to marriage.

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CLASSIFICATION OF IMPEDIMENTS

CAN. 1042

§ 1. Impedimenta alia sunt *gradus minoris*, alia *maioris*.

§ 2. Impedimenta gradus minoris sunt:

1.° Consanguinitas in tertio gradu lineae collateralis;

2.° Affinitas in secundo gradu lineae collateralis;

3.° Publica honestas in secundo gradu;

4.° Cognatio spiritualis;

5.° Crimen ex adulterio cum promissione vel attentatione matrimonii etiam per civilem tantum actum.

§ 3. Impedimenta maioris gradus alia sunt omnia.

§ 1. Impediments are divided into higher and lower.

§ 2. Impediments of a *lower degree* are the following:

1.° Consanguinity in the third degree of the collateral line;

2.° Affinity in the second degree of the collateral line;

3.° Public decency in the second degree;

4.° Spiritual relationship;

5.° The impediment of crime arising from adultery with a promise of, or attempt at, marriage, even by a merely civil contract.

§ 3. *All other impediments are of the higher degree.*

This division was introduced for convenience sake by the officials of the Roman Curia, because dispensations from minor impediments were issued by the subsecretary of dispensations attached to the S. C. of Sacraments, or his substitute, whereas dispensations from major impediments were granted by the Cardinal Prefect or the Secretary of the Congregation.[34]

[34] Cfr. *A. Ap. S.*, I, 90 f.

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It may here be noted that the Code does not treat as impediments in the proper sense error, servile condition, condition proper, compulsion and fear, but deals with them under ch. V, on Matrimonial Consent, as affecting the substantial form of marriage.

We will now exhibit in parallel columns the impediments of the major and minor degrees as enumerated in the present chapter.

LIST OF IMPEDIMENTS

Major	*Minor*
1. *Age.*	
2. *Impotence* (*iuris nat.*).	
3. *Ligamen* (*iuris nat.*).	
4. *Disparity of Cult* and *Mixed Religion.*	
5. *Sacred Orders.*	
6. *Solemn Profession.*	
7. *Rape.*	
8. *Crime,* with adultery and *uno machinante,* or without adultery, but *utroque machinante.*	1. *Crime* with adultery and promise of marriage.
9. *Consanguinity,* whole direct line and first and second degree of the collateral line (*iuris nat. 1° deg. lin. rectae*).	2. *Consanguinity* in the third degree of the collateral line.
10. *Affinity* in the whole direct line and first degree of collateral line.	3. *Affinity* in the second degree of the collateral line.
11. *Public honesty* in the first degree.	4. *Public honesty* in the second degree.
12. *Legal Adoption.*	5. *Spiritual relationship.*

We put the impediment of mixed religion, though only prohibitive, among the major impediments, as the Code seems to justify this classification (see can. 1071). As to the impedient impediments, a classification of them is superfluous.

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DISPENSATIONS

In Vol. I of this Commentary (pp. 173 ff.) the general principles governing dispensations have been outlined. A dispensation is a relaxation of the law in particular or individual cases. The sovereign lawgiver, and he alone, can by his inherent power dispense from laws subject to his domain. Hence the general principle asserted in can. 1040 concerning matrimonial dispensations is but a logical application of the general rule to a special class of dispensations. The same sovereign power may communicate the right of granting dispensations to inferiors, and the communication may be made by law or by *personal commission*. The latter may be given either to single individuals, for instance, the bishop, or a confessor or pastor chosen for this single instance, or by a general commission to Ordinaries as such, at least for a certain time and for certain countries. The powers thus conferred were formerly contained in fixed formularies, which now, however, are obsolete, though the S. C. Consistorialis, in virtue of the decree "*Proxima sacra,*" April 25, 1918, has again granted to the Ordinaries of the U. S. and other far-distant countries faculties concerning matrimonial dispensations which we shall discuss under can. 1048. These faculties we may call *delegated,* as they are delegated by the Supreme Pontiff. Besides, the lawgiver as such, or the *law itself,* has granted to Ordinaries, pastors, and other priests powers with regard to matrimonial dispensations, which consequently belong, as the decree quoted above intimates, to their *ordinary jurisdiction,* and may therefore be delegated to others. Of these the Code says:

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POWERS OF DISPENSING GRANTED TO ORDINARIES IN CASES OF DANGER OF DEATH

CAN. 1043

Urgente mortis periculo, locorum Ordinarii, ad consulendum conscientiae et, si casus ferat, legitimationi prolis, possunt tum super forma in matrimonii celebratione servanda, tum super omnibus et singulis impedimentis iuris ecclesiastici, sive publicis sive occultis, etiam multiplicibus, exceptis impedimentis provenientibus ex sacro presbyteratus ordine et ex affinitate in linea recta, consummato matrimonio, dispensare proprios subditos ubique commorantes et omnes in proprio territorio actu degentes, remoto scandalo, et, si dispensatio concedatur super cultus disparitate aut mixta religione, praestitis consuetis cautionibus.

In danger of death, Ordinaries may for the relief of conscience and, if the case demands, for the legitimation of children, dispense their own subjects, wherever they may be, and all other persons actually residing in their territory, from the form of marriage, and from all impediments of the ecclesiastical law, diriment and impedient, public and occult, simple and multiplex, including clandestinity, but not the impediment of priestly orders and affinity in the direct line, arising from consummated marriage.

In granting these dispensations all danger of scandal should be removed, and in the case of disparity of worship and mixed religion, the usual conditions should be imposed.[35]

This is, as noted above, no longer [36] a merely personal

[35] Translation adapted from *Irish Eccl. Record*, 1918, Vol. XI, p. 121 f.

[36] S. O., Feb. 20, 1888; April 23, 1890 (*Coll. P. F.*, nn. 1685, 1728). In the latter of these decisions the

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commission or faculty in the strict sense, but a communication by law. For the rest a delegation is hardly necessary, on account of can. 1044.

Our canon then states under what circumstances, when, by whom, in whose behalf, from which impediment, and under which clauses a dispensation may be granted.

(1) *Circumstances:*

(a) *Danger of death* is present when a physician declares that it is, and the Ordinary may rely on the physician's verdict. Besides, a priest with some practice learns to perceive the danger. Lastly, if the patient himself believes there is danger, he must be believed.

(b) *For the relief of conscience* (*ad consulendum conscientiae*) is a reminiscence of the "*Ne temere,*" art. VII, which has a similar phrase concerning the danger of death, only that it employs the term *imminente,* which is about the same as *urgente.* A conscience needs relief when it is troubled or oppressed by sadness, as is apt to be the case in an illicit marital relation. The term is quite general and does not exclude other causes.[87] The question may arise: Does *ad consulendum conscientiae* refer only to persons in danger of death or may it be applied to others who are in no such danger. Our answer is: As marriage is an individual contract, and the troubled conscience of the party that is not sick may at least indirectly affect the party who is, it would seem that the legislator means also to grant a dispensation in that case. This interpretation is corroborated by a declaration of the Holy Office. A dispute had arisen about the words, "*aegrotos in gravissimo mortis periculo constitutos.*" Some maintained that the faculty (as formerly understood) could be applied only in case the

faculty was explained "*veluti ordinaria.*"

87 Vermeersch, *De Sponsalibus et Mat. (Ne temere),* p. 39.

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impediment affected the sick person, but not if the sick person was free (*solutus*) and the impediment affected only the person who was well. Others asserted that the faculty could be applied also in case the sick person was free from impediments and only the other party was involved. The Holy Office decided that the dispensation may be applied in both cases.[38] This answer was the only logical and consistent one that could be given in view of the reasons stated above.

(c) Another and doubtless a grave circumstance is that of *legitimation of children*. Note, however, that this is not a requisite for applying the dispensation; the latter can be granted even if there is no offspring to be legitimated. Hence the insertion, "*et si casus ferat.*" Legitimation must be interpreted according to can. 1116 f.

(2) Who are meant by *Ordinaries* is explained under can. 198, to which we refer. The Vicar-general is included here as well as in the following canons. The *diocesan chancellor,* however, is not *ipso facto* included, unless he has obtained the power, which is now an ordinary one, from his bishop, either for a special case or generally.[39]

(3) *On whose behalf* the dispensation may be granted is determined by the words: subjects and actual residents. *Subjects* are those who have their domicile or quasi-domicile in the diocese. There is no need of making use of the privilege of the monthly sojourn, for all *actual residents* may avail themselves of this favor. There is this

[38] S. O., July 1, 1891 (*Coll. P. F.*, n. 1758), the example is as follows: "*Unde quum civiliter sint coniuncti, aut alias in concubinatu vivant, ex gr., puella soluta et diaconus, illaque aegrotante, hic valens sit, possetne Ordinarius cum his dispensare? Vel si monialis aegrotans in concubinatu viveret cum diacono bene valente, essetne locus dispensationi, quum diaconus non sit in gravissimo mortis periculo constitutus?*"

[39] Can. 199, § 1.

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difference, however, between these two classes of persons, that the Ordinary's power, because voluntary, may be exercised over his subjects even outside his own territory. The distinction is of little practical value, because if subjects of the diocese of St. Joseph actually dwell in Kansas City, the bishop of the latter diocese may dispense them. The case is somewhat different if one travels on land or sea, because an Ordinary can dispense his own subjects everywhere, hence also in a monastery of exempt religious.[40]

It has been customary with canonists[41] to assert that a dispensation can be applied only when a person had *either contracted a civil marriage or lived in concubinage.* This condition is *no longer required,* for the Code makes no such restriction, and Cardinal Gasparri has, certainly not without reason, omitted to cite the decision of Sept. 17, 1890, to which canonists were wont to appeal. For the rest it may be stated that this condition was not attached to the dispositive part of the well-known decree of Feb. 20, 1888.[42] Let us illustrate. James is about to marry Gemma, who is his second cousin, and with whom he has had illicit relations which were apt to result in pregnancy. But he is overtaken by the influenza and in danger of death. Here the Ordinary may grant a

40 The text says: "*locorum Ordinarii,*" and hence religious superiors are excluded. That exempt religious are residents of a diocese needs no proof, for exemption — unless there is question of an *Abbatia Nullius* — is not directly local, but personal. That such religious belong to a diocese also follows from the fact that they receive not only orders, but also faculties from *their* Ordinaries.

41 Thus Wernz, *l. c.,* IV, Vol. II, n. 617, p. 493; De Smet, *l. c.,* p. 491.

42 Neither was this clause inserted in the decision of March 1, 1887 (*Coll.,* n. 1698), to which Wernz (*l. c.*) refers. But it is true that the decree of Feb. 20, 1888, refers to that condition in the narrative part, and that the decision of Sept. 17, 1890, directly contains this clause; wherefore the authors mentioned were perfectly entitled to their interpretation.

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dispensation. We again refer to what was stated under n. I, *viz.*, that even if the sick party is not affected by the dispensation, *e. g.*, in case of disparity of cult, the dispensation may be made use of. Note, however, what is said *infra*, under (5).

(4) What *impediments may be dispensed from?* The Code says: *all impediments of the ecclesiastical law*, whether public or occult, diriment or impedient, with the sole exception of the priesthood and affinity in the direct line. Hence, negatively speaking, no *dispensation can be granted* for the impediment of *ligamen* or marriage bond; impotence; consanguinity in the direct line, and — at least most probably — in the first degree of the collateral line; affinity in the direct line; and sacred orders, *i. e.*, the priesthood. But dispensations may be granted from all impediments, public or occult, diriment or impedient, which latter include the five vows mentioned in can. 1058 and the impediment of mixed religion. That of clandestinity is also included in the ordinary power of dispensation, and solemn profession and the sacred orders up to subdeaconship and the diaconate may be dispensed from in such circumstances. Neither does the Code require that the Holy Office should be notified of dispensations granted to solemnly professed persons or persons in sacred orders if they recover.[43] The multiplex impediments of consanguinity and affinity[44] may also be dispensed from by the Ordinary in the case mentioned.

(5) *Clauses* or *clausulae* attached are: (a) *Consummato matrimonio*, which is the most important condition, undoubtedly affecting the validity of the dispensation. The legislator supposes a marriage which has been consummated by the *copula carnalis*. Juridically

43 Such notification was required by decree of Feb. 20, 1888.

44 Cfr. can. 1076 f.

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speaking, of course, there was no marriage at all. Hence the union must bear the aspect and semblance of a marital union. This may be effected either by a civil marriage, or a putative union, or one which was considered such by the parties and their surroundings. It may even be a concubinage, either legal or illegal. But the semblance at least of a marriage is required, and the supposed marriage must be consummated whether with or without resulting offspring. Upon this point the parties should be asked unless the existence of children makes the question unnecessary. That any marriage carrying with it the figure and semblance of a marital union is here included is evident from the text. For this comprises also dispensation from the observance of the form required.

(b) *Remoto scandalo,* as enjoined by the decree of Feb. 20, 1888, especially concerning religious and clergymen dispensed in danger of death. If they recover, the decree says, they should be induced to leave and go to some place where their ecclesiastical status is unknown, or if this is impossible, they should be given a wholesome penance and have a conduct prescribed that would repair the scandal given to the faithful. Concerning other persons the decree is silent. The scandal of concubinage is removed by marriage, which should be made known to those who were scandalized, either by the pastor or by the parties themselves. This clause does not affect the validity of the dispensation.

(c) Concerning the impediments of *disparity of cult* and mixed religion the legislator requires that the usual condition imposed for such marriages should also be demanded in cases where there is danger of death. Now in case of disparity of cult these conditions (called *reversales*) must be demanded and obtained under *pen-*

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alty of the dispensation being null and void;[45] in case of mixed marriages the validity, of course, is not affected, as this is only a prohibitive impediment.

POWERS GRANTED TO PRIESTS

CAN. 1044

In eisdem rerum adiunctis de quibus in can. 1043 et solum pro casibus in quibus ne loci quidem Ordinarius adiri possit, eadem dispensandi facultate pollet tum parochus, tum sacerdos qui matrimonio, ad normam can. 1098, n. 2, assistit, tum confessarius, sed hic pro foro interno in actu sacramentalis confessionis tantum.

This canon extends the favor to *parish priests* and to every *priest* who is called upon to assist at a marriage in accordance with can. 1098, n. 2, as well as to *confessors*. But there is a restriction: pastors, assistant priests, and confessors can use this faculty only when access to the Ordinary is impossible, and confessors only in the court of conscience and in the act of sacramental confession. Otherwise the power granted to the Ordinary by can. 1043 may be used by these to the same extent and in the same urgent cases.

(1) *Pastors* enjoy the faculty, not assistants as such, unless they are actually in charge of souls. Vice-pastors and chaplains are excluded.[46] However, since

(2) Every *priest* who is entitled to assist at marriages according to can. 1098, n. 2, may use the faculty of dispensing, assistants may also exercise it. Whether the pastor may, within his own district, delegate his assistant to assist at a marriage which would not fall under can.

[45] S. O., March 18, 1891 (*Coll.*, n. 1750); June 21, 1912 (*A. Ap. S.*, IV, 442 f.).

[46] S. O., April 23, 1890 (*Coll.*, n. 1728).

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1098, is not quite evident. The text as well as a decision of the Holy Office seem rather against such delegation.[47] On the other hand, since the power is given by law, and not merely by the Ordinary as a subdelegated faculty,[48] and since the pastor is empowered to delegate his authority of assisting at marriages to any priest within his district, it would seem that he may also delegate his assistant for such a case. This is our personal view.

(3) The *confessor* may make use of the power granted by law only in the *court of conscience* and in the *act of sacramental confession.* Here a doubt may arise as to public impediments, *e. g.,* consanguinity in the third degree. For example: James, being in danger of death, is engaged to Gemma, who is his second cousin. Father John is his confessor, but not his pastor. The couple would like to get married. What shall Father John do? The first thing he should do is to ask the pastor of James to hurry to the sickbed, or if no time is left for that, Father John should act himself, not as confessor, but as a priest who is allowed to assist by virtue of can. 1098, n. 2, and call two witnesses, after having heard James's confession. In the presence of two witnesses Father John should then ask and receive the consent of James and Gemma and say: "By the authority granted to me by the Holy Church, I dispense you from this impediment and unite you in the holy bond of matrimony." If the impediment is occult and concerns James only, Father John may grant a dispensation in the act of sacramental confession, and then assist at the marriage as above.[49] If the impediment is public, he may also

47 *Ibid.*: "*posse illum subdelegare habitualiter parochis tantum.*"

48 This is supposed in the decree just alleged.

49 No recourse to the Holy See is required for a dispensation; cfr. Feije, *l. c.*, n. 638, p. 576.

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dispense in the act of sacramental confession, but as this is valid only for the court of conscience, a regular dispensation will have to be asked for afterwards.[50]

(4) Pastors, priests, and confessors can make use of the faculty here under consideration only when *access to the Ordinary is impossible.* This impossibility must be understood of the ordinary means of communication, by messenger, letter, or "express." Concerning *telegraphic* communication, the Holy Office has decided that a dispensation given by the Ordinary in response to a telegraphic message, is not valid before the authentic document of the grant of favor has arrived, unless the message was sent officially by authority of the Holy See.[51] As to the use of the *telephone,* its validity depends upon prompt, reliable, and secret service. The ordinary "party line" is no trustworthy and confidential means of communication. But in no case is the use of the telegraph or telephone mandatory,[52] and even if these means of communication are available, pastors or priests or confessors could safely make use of the faculty granted by can. 1044.

In order to complete our notes on these two canons it may be well to ask a question concerning the distinction between a *marriage to be contracted* and *a marriage already contracted.* Does the power of the Ordinary and the faculty of the pastor, priest, or confessor hold *in both instances?* The answer is yes, because the Code makes no distinction, though this was not the common

50 Either from the Ordinary, if he enjoys the faculty, or from the Holy See, *i. e.*, the S. Cong. of the Sacraments. This dispensation is not superfluous, even if the other party should die in the meanwhile, because the marriage has to be verified and registered, and the offspring perhaps legitimated.

51 S. O., Aug. 24, 1892 (*Coll.*, n. 1810).

52 Thus also De Smet, p. 507 (ed. 2).

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doctrine of writers before the Code.[53] Their attitude was doubtless based upon the theory that the faculties could be applied only in cases of civil marriage or concubinage. But the decision of the S. C. Sacr. had already done away with that theory.[54]

CASUS PERPLEXUS

CAN. 1045

§ 1. Possunt Ordinarii locorum, sub clausulis in fine can. 1043 statutis, dispensationem concedere super omnibus impedimentis de quibus in cit. can. 1043, quoties impedimentum detegatur, cum iam omnia sunt parata ad nuptias, nec matrimonium, sine probabili gravis mali periculo, differri possit usque dum a Sancta Sede dispensatio obtineatur.

§ 2. Haec facultas valeat quoque pro convalidatione matrimonii iam contracti, si idem periculum sit in mora nec tempus suppetat recurrendi ad Sanctam Sedem.

§ 3. In iisdem rerum adiunctis, eadem facultate gaudeant omnes de quibus in can. 1044, sed solum pro casibus occultis in quibus ne loci quidem Ordinarius adiri possit, vel nonnisi cum periculo violationis secreti.

§ 1. Under the conditions laid down in can. 1043, if the impediment is discovered when everything is ready for the marriage, and the ceremony cannot be delayed without the probable danger of a grave inconvenience until a dispensation is obtained from the Holy See, Ordinaries can dispense from all the impediments mentioned in the same canon.

§ 2. This faculty holds good for the revalidation of a

53 Cfr. Putzer, *Comment. in Fac. Ap.*, p. 83 (ed. 4); Wernz, *l. c.*, IV, Vol. II, n. 617, p. 493.

54 S. C. Sacr., Venet., Aug. 16, 1909 (*A. Ap. S.*, I, 656).

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marriage already contracted, if delay is dangerous and there is no time to have recourse to the Holy See.

§ 3. In the same circumstances the pastor, priest and confessor mentioned in can. 1044 enjoy the same faculty, but they are allowed to apply it only in occult cases which admit of no recourse to the local Ordinary or if access to the Ordinary would entail danger of violating the secret.

This is the well-known *casus perplexus* of canonists,[55] which, however, by reason of can. 1043 and 1044, is now reduced to a minimum.

(1) The *local Ordinaries* empowered to grant a dispensation are all those mentioned in can. 198, therefore also the vicar-capitular and the vicar-general.

(2) They must observe the conditions or *clausulae* mentioned in can. 1043, *i.e. scandal must be removed,* if there be any, because the case of one in sacred orders or with solemn profession is hardly imaginable. But the other clause may easily occur; hence the *conditions* required for *disparity of cult* and *mixed religion* must by all means (and under penalty of the nullity of the dispensation) be complied with.

(3) The *impediments* from which the dispensation may be granted are those set up by *ecclesiastical law* only, with the sole exception of the priesthood and affinity in the direct line. Whether these impediments be diriment or impedient, occult or public, matters nothing; the Ordinary may dispense from all except the two expressly mentioned.

(4) The *circumstances* in which the dispensation may be granted are (a) if everything is ready for the marriage (*omnia sunt parata ad nuptias*) and (b) if *the marriage cannot be postponed without the probable danger of*

[55] See, for instance, Feije, *l. c.*, n. 640 ff., p. 581 ff.

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a serious inconvenience until the dispensation could be obtained from the Holy See. No doubt the latter clause determines the first one. It is not necessary for the couple to be already in church for the wedding.[56] We understand the phrase "all things ready for marriage" to mean that the final arrangements have been made and the day set for the wedding. The reason why the marriage cannot be postponed is the *probable,* not certain, *danger of a grave inconvenience,* such as the fear that one of the parties might change his mind, or the probability that scandal or disgrace might arise from a delay.[57] Pregnancy of the bride would also justify the granting of the dispensation, for this is a grave inconvenience.

What if the parties have *purposely* waited until the last moment, and hence are evidently not in good faith, especially if neither of them shows signs of repentance? Some authors who wrote before the Code would not permit a wedding under these conditions. However, the old rule must be applied: The law does not distinguish, and hence neither are we at liberty to distinguish, and therefore, even if the impediment were purposely concealed up to the last moment, when recourse to the Holy See is no longer possible, a dispensation may be granted by the Ordinary. Abuse or frivolous extension of the power need not be feared,[58] for the publication of banns and the careful investigation and examination imposed on the pastor will naturally reduce such cases to a minimum. Besides, if the Ordinary is afraid of abuses creeping in, he may and should at times refuse to grant a dispensation, in order to procure the necessary respect for ecclesiastical laws.

56 Thus Feije, *l. c.*, n. 642, p. 586.

57 Feije, *l. c.*, p. 586.

58 This was the argument of Card. Gousset; *apud* Feije, *l. c.*, n. 644, p. 594.

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§ 2 rules that the faculty can also be applied in case of a *marriage already contracted that needs to be revalidated,* the two conditions required being the same: danger in delay and no time for recourse. Cardinal Gasparri refers to a decision of the Holy Office,[59] which reads thus: What should a pastor or priest do in case he is called to the sickbed of a Catholic who was married civilly to an infidel or heretic and is now almost unconscious? Answer: Let the bishop or pastor make use of the faculty granted to the Ordinaries on Feb. 20, 1888, and let the parties renew their consent and promise to comply with the conditions required [for mixed marriages]. Hence the Ordinary should simply grant a dispensation (by telephone, if necessary) and the priest should require renewal of the consent, after he has obtained an oral[60] promise of complying with the required conditions.

§ 3 applies what is laid down in §§ 1 and 2 to the pastor, priest, and confessor referred to in can. 1044, with the additional proviso *that the case be occult and admit of no recourse to the Ordinary,* or that such recourse would endanger the secrecy of confession. Here it is evident that telephone and telegraph are excluded, and hence only the mails or a messenger can be employed. The case must be *occult.* An occult case would be one involving a secret crime or the vow of chastity.[61] It may also happen that a party was regarded as Catholic and was not even baptized,[62] or that one was godfather or

59 July 6, 1898, ad 3 (*Coll.,* n. 2007).

60 Can. 1061 prescribes written promises as "a rule," but this rule may, in such circumstances, be licitly dispensed with.

61 Affinity *ex copula illicita,* which formerly was counted among the occult impediments, no longer exists, either as an impediment or as a penalty in regard to the *debitum petendi.*

62 S. O., Aug. 22, 1906, ad 4 (*Anal. Eccl.,* t. XV, p. 8).

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godmother to the party whom he or she wishes to marry. All these cases may be occult, *i. e.*, they could not be proved in an ecclesiastical court, because there were no witnesses [63] or no record in the baptismal register. Hence if the pastor or priest or confessor alone knows of the impediment, he may dispense from it. But only in that case. If the impediment were occult at the moment of marriage but could be proved in court, because, as said under can. 1037, two witnesses knew of it or an authentic document existed, no dispensation could be granted by these clergymen. The ancient theories of simulation and cessation may henceforth be discarded, for it is not likely that the Code permits a pastor to apply these thories *in casu perplexo,* although we would not assert that the old view on cessation of human laws under urgent conditions is absolutely inapplicable in all circumstances.[64] But simulation [65] of marriage with a fictitious or conditional consent we hold to be unworthy of the marriage contract.

DISPENSATIONS TO BE REPORTED AND RECORDED

CAN. 1046

Parochus aut sacerdos de quo in can. 1044, de concessa dispensatione pro foro externo Ordinarium loci statim certiorem faciat; eaque adnotetur in libro matrimoniorum.

The S. C. of the Propaganda advised the priests of Ireland not only to keep copies of, but also to record, matrimonial dispensations.[66] Now the Code demands

63 Cfr. *A. S. S.*, t. 12, p. 422; can. 1037.

64 Feije, *l. c.*, n. 648, p. 601 f.

65 Cfr. *prop. 29 damnata ab Innocentio XI* (Denzinger, n. 1046).

66 S. C. P. F., July 21, 1791 (*Coll.*, n. 605). The cause of not registering dispensations was probably not carelessness, but some diplomatic or political reason.

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that the pastor or priest — the confessor [67] is exempted — immediately inform the Ordinary of every dispensation granted *in foro externo* and also record the same in the matrimonial register. Of course, the validity of a dispensation does not depend on the fact of its being duly reported and recorded.

DISPENSATIONS FOR THE INTERNAL FORUM

CAN. 1047

Nisi aliud ferat S. Poenitentiariae rescriptum, dispensatio in foro interno non sacramentali concessa super impedimento occulto, adnotetur in libro diligenter in secreto Curiae archivo de quo in can. 379 asservando, nec alia dispensatio pro foro externo est necessaria, etsi postea occultum impedimentum publicum evaserit; sed est necessaria, si dispensatio concessa fuerat tantum in foro interno sacramentali.

The text distinguishes between a dispensation from an occult impediment granted for the court of conscience, but *extra-sacramentally,* and a dispensation granted in the act of sacramental confession. The former should be carefully recorded in a special book to be kept separately in the diocesan archives, as mentioned in can. 379. No new dispensation is necessary for the external forum if the occult impediment should afterwards become public. On the other hand, a dispensation granted in the *act of sacramental confession* does not hold in the external forum, and therefore a new dispensation is required if the impediment becomes public. The beginning of the canon should not be overlooked: *"unless a rescript of the S. Poenitentiaria ordains otherwise."*

[67] Why the confessor is exempt is evident from the fact of the impediment being occult, not to speak of the seal of confession.

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Under can. 258 the S. P. is competent in matters concerning the *internal forum.* However, this must duly be distinguished, for the favors granted by that sacred tribunal may be applied outside of *sacramental confession, e. g.,* dispensation from vows or from occult impediments, or they may be restricted to the *act of sacramental confession, e. g.,* absolution. Besides, this same tribunal grants faculties to Ordinaries for a certain term of years, five or three. The procedure is governed by the Constitution of Benedict XIV, "*In Apostolicae,*" of April 13, 1744, and by the special rules laid down in the "*Sapienti consilio*" of Pius X, which demands that the Cardinal Poenitentiarius should have written rules signed by himself.[68] A special feature of this tribunal is that it must keep everything *secret* and grant its favors entirely *gratis.* All its officials are bound by a solemn oath. Its *present competency* must, as stated above, be measured by the powers granted by the "*Sapienti consilio,*" not by the "*Pastor bonus,*" of Benedict XIV (April 13, 1744). In matrimonial matters the term *occult impediment* must be taken as defined in can. 1037: it is one which cannot be proved in the external forum. Therefore the faculty formerly enjoyed by the S. P. "for the second degree of consanguinity and affinity, if the impediment lasted at least ten years and the petitioners had contracted publicly and lived as married people," [69] no longer exists. All depends on the occult nature of the impediment *and* on the manner of expediting the favor. If the impediment was occult and the dispensation was applied outside the confessional, for instance, by the pastor, the dispensation holds good *in foro externo* in case the impediment becomes public.

The reason for demanding a *new dispensation* in place

[68] *A. Ap. S.,* I, 101 f. [69] "*Pastor bonus,*" § 40.

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of one applied only in the sacramental act, if the impediment becomes public, lies in the seal of confession;[70] whence extra-sacramental and sacramental application are, as it were, two different departments, though both directly concern the court of conscience. The clause therefore: "*nisi aliud ferat S. P. rescriptum,*" can refer only to registration, as the grammatical construction seems to confirm. The meaning is: should the rescript forbid recording, for instance, in the case of a crime or vow, notation must be omitted; otherwise it must be made in the special secret record which is to be kept.

We may add that the S. P. is no longer empowered to dispense from any public impediment, no matter whether the petitioners are poor (*in forma pauperum*)[71] or wealthy. This was the custom before the Constitution "*Sapienti consilio*" of Pius X and was based on the fact that this sacred tribunal granted all its favors gratis.

FACULTIES OF ORDINARIES

CAN. 1048

Si petitio dispensationis ad Sanctam Sedem missa sit, Ordinarii locorum suis facultatibus, si quas habeant, ne utantur, nisi ad normam can. 204, § 2.

If application for a dispensation has been made to the Holy See, local Ordinaries should not use the faculties they have, except in accordance with can. 204, § 2. This canon rules that an inferior shall not interfere in matters

70 Because from this no public document could issue, which would prove the marriage, always remembering that marriage in itself is not of a private, but of a public character.

71 Before the Constitution "*Sapienti consilio*" petitions of poor people, although concerning a public impediment, were directed, not to the Apostolic Datary, to which they belonged, but to the S. Poenit.

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brought before a superior except for grave and urgent reasons, in which case he must immediately notify the superior.

This canon supposes that: (1) a petition was sent to Rome for a dispensation from a matrimonial impediment, and that (2) the Ordinary has power to grant same. If he had no faculties, interference would not only be ridiculous but presumptuous. Here we may briefly state the contents of a decree of the S. C. Consist., "*Proxima sacra*," of April 25, 1918, as compared with that of Aug. 2, 1918.

FACULTIES OF THE ORDINARIES OF THE U. S. AND GREAT BRITAIN

1. By *Ordinaries*[72] here are understood those who are under the jurisdiction of the S. C. Consistorialis; those under the S. C. Propaganda Fide continue to enjoy the same faculties as before.

In regard to matrimonial dispensations these Ordinaries are *no longer entitled* to use the faculties formerly granted in various formularies, but their faculties are now (since May 19, 1918) determined solely by the Code.[73]

2. The faculties granted by the S. Poenitentiaria remain *intact*. Therefore, as far as this sacred tribunal is able to grant faculties to our Ordinaries, these are only given for *occult impediments*, as described under can. 1037 and 1047.

72 By "Ordinaries" here are understood those mentioned in can. 198, but the "*Abbas Nullius*" of Belmont, North Carolina, as Vicar Apostolic belongs to the S. C. de Prop. Fide; thus also the Vicars-Apostolic of Alaska, of Athabaska and Mackenzie (Canada), of British Honduras, the Hawaii or Sandwich Islands, and Queensland, Australia.

73 The *quinquennium* dates from May 18, 1918.

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3. The decree ratifies the ruling of *canons 1043–1045* concerning danger of death and the *casus perplexus* explained above.

4. Both decrees grant the faculty of dispensing from *minor impediments*. The "Proxima," April 25, 1918, also permitted the Ordinaries to *revalidate* in the root marriages invalid on account of one of these impediments, provided can. 1133–1140 be observed, and allowed Ordinaries to dispense from those *major impediments* which are of merely ecclesiastical law, with the exception of affinity in the direct line and priesthood. But said decree did *not clearly grant* the faculty of *sanatio* in the case of these five impediments. Besides it contained the *clause:* "if the petition has been sent to the Holy See and urgent necessity has supervened, pending a recourse."

5. The *decree of Aug. 2, 1918,* has taken away this clause, but at the same time it has limited the faculty of dispensing from major impediments and mixed religion and revalidating such marriages, invalidly contracted on account of one of the major impediments, to the "*duration of the present dire condition of war.*" This latter clause is set forth most conspicuously.[74]

6. Therefore the *quinquennial faculties* comprise the power of dispensing from the minor impediments, to wit: consanguinity in the second degree of the collateral line, affinity in the second degree of the collateral line, public honesty in the third degree, spiritual relationship, crime with adultery and promise of marriage. These same marriages may also be healed in the root, with due observance of can. 1133–1140. This faculty was granted

74 The clause "*adiunctis, quae modo sunt, perdurantibus,*" as long as these conditions last, appears to be a hint that the Holy See is resolved to put the Code into practice after the war. But it may be permitted to say that disparity of worship and mixed religion would certainly demand some swifter expedient.

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for five years, not only for the duration of the war.

7. The *war-faculties* comprise the power of dispensing from major impediments (two excepted) of ecclesiastical law, either public or occult, simple and multiple, and of revalidating marriages invalid from such impediments without recourse to the Holy See; also of dispensing from mixed religion without recourse.

8. The Holy See, according to decree of Aug. 2, 1918, expects the Ordinaries to render *an annual account of all the dispensations* granted *during war-time* and to refund the fees for such dispensations granted by the Ordinaries.

9. We learn, through Rt. Rev. Bishop V. Wehrle, O.S.B., that the Roman Court is willing to acknowledge the right of Ordinaries to make use of can. 81, also with regard to matrimonial dispensations.

10. Note, finally, that can. 204, § 2, referred to in can. 1048, demands a grave and urgent cause, without which an Ordinary, being inferior to the Sovereign Pontiff, can neither validly nor licitly dispense. A *grave* cause is one which touches the intrinsic nature of the case, or, in other words, one which the law has acknowledged as canonical. An *urgent* reason is one which, because of time or circumstances, brooks no delay. For the validity of a dispensation a grave cause is sufficient. What are considered canonical reasons will be explained under can. 1054.

CUMULATIVE FACULTIES

CAN. 1049

§ 1. In matrimoniis sive contractis sive contrahendis, qui gaudet indulto generali dispensandi super certo quodam impedimento, potest, nisi in ipso indulto aliud expresse praescribatur, super eo dispensare etiamsi idem impedimentum multiplex sit.

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§ 2. Qui habet indultum generale dispensandi super pluribus diversae speciei impedimentis, sive dirimentibus sive impedientibus, potest dispensare super iisdem impedimentis, etiam publicis, in uno eodemque casu occurrentibus.

This canon betrays a greater liberality on the part of the lawgiver than was usual with canonists, who based their views on former decisions. Two different cases are distinguished: dispensation from multiplex impediments of the same species but of *different degrees,* and dispensation from several impediments of the same degree but of a *different species.* The grant of these faculties must be made by a *general indult,* not merely by a rescript in a particular case. Such a general indult no doubt is that granted by the "*Proxima sacra,*" April 25, 1918, and by the decree of Aug. 2, 1918. The canon makes the restriction: "*nisi in ipso indulto aliud expresse praescribatur,*" *i. e.,* unless the indult explicitly declares otherwise. Therefore the wording of each indult must be carefully examined. The two decrees just mentioned contain no such clause, and therefore our bishops certainly enjoy the powers granted in virtue of this canon as long as the general indult shall last.

§ 1 grants to those who are endowed with a general indult the faculty of dispensing from an *impediment,* although it be *multiple,* no matter whether there is question of a marriage already contracted or to be contracted. For instance, one is related to his partner in the second degree by a double *stipes* arising from the same common progenitors, or is related in the third degree and also in the second degree on account of common progenitors (can. 1076). In that case the degree is multiple, but the species is the same. This practice is also followed by

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the S. Poenitentiaria,[75] and therefore is to be applied to occult impediments.

§ 2 extends the cumulative faculties to impediments of a *diverse species*. He who has a general indult to dispense from several impediments of a diverse species, be they diriment or impedient, can dispense from these same impediments if several of them occur in the same case. This would happen if, *e. g.*, disparity of cult concurred with consanguinity. There was no doubt that, if a public impediment, *e. g., public honesty,* coincided with an *occult* impediment, *e. g.*, crime, the faculties could be used cumulatively.[76] But there was doubt as to cumulation when two impediments of a different subspecies, as is the case in crime with its three diverse distinctions, concurred. Besides it was denied that the faculties could be "bulked" if two different kinds, as exemplified in consanguinity and disparity of cult, would concur. Our text, however, admits cumulation in both these cases, even though two or more impediments concur in the same case. Furthermore the text permits cumulation in cases of two different impediments, one being prohibitive only whilst the other is diriment.[77] For instance, if Gemma, who has made the vow of celibacy, wishes to marry James, who is her second cousin, the Ordinary, or any one who has the faculty, may grant a dispensation. From the vow of *non-nubendi* or celibacy the Ordinary may dispense because that vow is not reserved,[78] and from the impediment of consanguinity by virtue of the decree or

75 S. O., June 19, 1861; June 15, 1875; April 2, 1892 (*Coll.*, nn. 1218, 1445, 1789); S. Poenit., April 20, 1883 (*Coll. cit.*, n. 1595).

76 S. C. P. F., March 31, 1872 (*Coll.*, n. 1382).

77 S. O., April 2, 1892; Aug. 18, 1897 (*Coll.*, nn. 1445, 1979); but n. II of the last-named decision would exclude cumulation in case one impediment was a diriment and the other a prohibitive one, if the latter was either that of mixed religion or arose out of the vow of perpetual chastity.

78 Can. 1309.

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general indult granted April 25, 1918. From both together in one and the same case he may dispense in virtue of our canon 1049.

CONCURRENCE OF DISPENSABLE AND INDISPENSABLE IMPEDIMENTS

CAN. 1050

Si quando cum impedimento seu impedimentis publicis super quibus ex indulto dispensare quis potest, concurrat aliud impedimentum super quo dispensare nequeat, pro omnibus Sedes Apostolica adiri debet; si tamen impedimentum seu impedimenta super quibus dispensare potest, comperiantur post impetratam a Sancta Sede dispensationem, suis facultatibus uti poterit.

This text also supposes a general indult or general faculties, not merely a particular indult for an individual case. However, it is safe to say that at present this canon does not affect our American Ordinaries, for it supposes Ordinaries who have limited faculties with regard to certain impediments *iuris ecclesiastici,* but can not dispense from other impediments of the same class. The meaning is that if an impediment from which they cannot dispense, concurs with another public impediment, or with several public impediments, from which they can dispense, they must *petition the Apostolic See for all impediments.* If, however, the impediment or impediments from which they can dispense are discovered only after petitioning the Holy See for a dispensation, they may make use of their faculties.

A letter of the S. C. P. F. to the delegate of Syria at Beirut [79] will illustrate our canon. According to the

[79] S. C. P. F., May 10, 1887 (*Coll.*, n. 1674).

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common doctrine of theologians it is necessary to explain all the impediments and circumstances that prohibit a marriage, otherwise the dispensation is invalid. This exposé must be made in one and the same petition, because the whole matter in all its bearings must be made known to the one who dispenses, and a greater number of impediments renders the dispensation more difficult. Therefore if a diriment impediment which requires recourse to the Holy See (or a Patriarch, if he has the faculty) concurs with another diriment or impedient impediment from which the bishop can dispense, both must be explained to the Holy See. If this is not done, the bishop can not validly dispense from the impediments from which he could otherwise dispense. The Code annuls a decision of the S. Poenitentiaria [80] which denied the validity of the dispensation granted by the bishop in a matter subject to him. Therefore the second clause of our canon says that in case of the discovery, *after a dispensation* has been granted by the Holy See, of an impediment from which the Ordinary can dispense, he may apply his faculty.

LEGITIMATION OF CHILDREN

CAN. 1051

Per dispensationem super impedimento dirimente concessam sive ex potestate ordinaria, sive ex potestate delegata per indultum generale, non vero per rescriptum in casibus particularibus, conceditur quoque eo ipso legitimatio prolis, si qua ex iis cum quibus dispensatur iam nata vel concepta fuerit, excepta tamen adulterina et sacrilega.

80 *Ibid.* (*Coll., n. cit.*).

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The Code distinguishes between a dispensation from a diriment impediment granted either in virtue of ordinary power (such a one is contained in canons 1043–1045) or of power delegated by general indult (such as our Ordinaries enjoy by the decree of April 25 and Aug. 2, 1918) and a dispensation granted by a rescript in a particular case. The former implicitly *legitimates* the offspring, whether born or only conceived, of the dispensed parents, provided it be not adulterine or sacrilegious.[81]

By a special favor of the Sovereign Pontiff, of course, sacrilegious and adulterous offspring can be legitimized. But a rescript as such issued for a particular case has not the effect of legitimating children of any kind of illegitimacy, unless this effect is explicitly mentioned in the rescript. As to the different kinds of illegitimacy, see can. 1114 f. An individual case is hardly imaginable as long as the general indult of April 25 and Aug. 2, 1918, lasts. But when it shall cease, the Ordinaries will have to apply for single cases and then our canon takes full effect. The S. Cong. Sacrament. has special formularies for legitimation, which are not identical with those required for dispensations, and therefore the executor of such a rescript should carefully study its wording.

ERROR IN DISPENSATION

CAN. 1052

Dispensatio ab impedimento consanguinitatis vel affinitatis, concessa in aliquo impedimenti gradu, valet,

[81] S. O., Dec. 12, 1748, ad 1; July 8, 1903 (*Coll.*, nn. 368, 2171). The clergyman who applies the dispensation may, according to previous decisions, *declare* the act of legitimation in the following words: "*Eadem auctoritate prolem sive susceptam sive suscipiendam legitimam decerno.*" Cfr. Leitner, *l. c.*, p. 455.

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licet in petitione vel in concessione error circa gradum irrepserit, dummodo gradus revera exsistens sit inferior, aut licet reticitum fuerit aliud impedimentum eiusdem speciei in aequali vel inferiore gradu.

A dispensation from the impediment of consanguinity or affinity, granted for a certain degree, is valid even though a mistake was made concerning the *degree* in the petition or concession, provided that the real degree be inferior to the one which was mentioned. It is valid also though an *impediment has been concealed in the petition, provided it be of the same species* and of an equal or inferior degree.

Two cases may illustrate this canon. James and Gemma are actually related in the third degree (*i. e.*, second cousins), but the petition for a dispensation was worded in such a way that the second degree could be read into it (*i. e.*, that they were first cousins). A dispensation was granted from the impediment of consanguinity in the second degree of the collateral line, whilst actually it was needed only for the third degree. The dispensation is valid.[82]

The second clause of our text concerns an *impediment that is concealed,* but of the same species as the one for which a dispensation is asked. For instance, James is related to Gemma not only in the third degree, but also, on account of common progenitors, in the second degree; therefore there are two impediments. Now if the latter was duly stated, but the former concealed or forgotten, the dispensation is valid. But if a dispensation would be asked and granted from affinity instead

82 The Const. of St. Pius V, "*Sanctissimus,*" of Aug. 20, 1566 (*Coll. P. F.*, Vol. I, p. 212) admitted the validity of a rescript even if the more distant degree was expressed in the petition, provided the real degree was the first.

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of consanguinity, it would be invalid, and the so-called *Perinde valere* rescript would have to be requested, to make the previous rescript valid.[83] Such a procedure would also become necessary if instead of the direct line of affinity, the collateral line had been stated in the petition.

Attention may here be drawn to can. 47, which renders good service when a mistake has been made in spelling or writing the name of the petitioner. If the names are misspelled, the rescript is nevertheless valid so long as the parties can be properly identified.

When a rescript is asked from the S. C. of Sacraments, or from the Holy Office (in matters of disparity of cult and mixed religion), the petitioners must state their baptismal and family names as well as the name of the diocese to which they belong, their age and religion.

In cases of mixed religion the petition is made in the name of the Catholic party only.

It is advisable to use the typewriter for names. If the petition is directed to the S. Poenitentiaria, fictitious names are used, but the impediments must be clearly described as to species, number, and degree.

IMPLIED DISPENSATION FROM THE IMPEDIMENT OF CRIME

CAN. 1053

Data a Sancta Sede dispensatio super matrimonio rato et non consummato vel facta permissio transitus

83 The decree *perinde valere*, properly so-called, is a declaration issued in case the first rescript has already been expedited, and decrees it to be valid, just as if everything had been properly expressed (*valere, perinde ac si ab initio omnia fuissent recte expressa*). This rescript revalidates the favor granted and exerts its force from the date when the favor was first granted, provided no new defect or impediment has occurred in the meanwhile. Cfr. Putzer, *Comment.*, ed. 4, pp. 25, 95.

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ad alias nuptias ob praesumptam coniugis mortem, secumfert semper dispensationem ab impedimento proveniente ex adulterio cum promissione vel attentatione matrimonii, si qua opus sit, minime vero dispensationem ab impedimento de quo in can. 1075, nn. 2, 3.

A dispensation granted by the Holy See from marriage ratified and not consummated, or permission given to marry again on account of the presumed death of the other spouse, always includes a dispensation from the impediment arising from adultery with promise of, or attempt at, marriage (by civil act), if there be need of such, but not from the other two impediments of crime (can. 1075, n. 2, 3).

The occasion for this enactment, as may be inferred from a decree of the S. C. of Sacraments,[84] was this: Two parties had received a dispensation from a ratified marriage, the papers attesting their free status on account of the presumed death of one party, and were married in church after having contracted a civil marriage with another party with whom they had intercourse during the first marriage. Take a case that may occur at any time. James is supposed to have been killed in war, and his wife Gemma, tired of waiting until the way is fully cleared, obtains a document certifying to her free status, but omits to state in the petition that she committed adultery with Brutus whilst her husband was still alive and that she contracted a civil marriage with Brutus before permission to remarry had been issued. Now after the permission has been granted, they wish to get married in church. In such a case, the canon says, the permission granted includes a dispensation from the impediment of crime of the first kind. But if Gemma had

84 June 3, 1912 (*A. Ap. S.*, IV, 403).

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killed her husband or caused him to be killed, and committed adultery with Brutus besides; or if Brutus and Gemma had plotted together against the life of James and the plot resulted in his death, the permission granted would not include a dispensation from that twofold crime.

Here is another similar case. James and Gemma had their marriage declared null by the Holy See because of alleged impotency or fear. The marriage had been valid, though it was never consummated. Gemma, still being the wife of James, had intercourse with Brutus and promised him to marry him after the dissolution of her union with James. Now in the petition for solution this impediment of crime was not mentioned. Therefore, because of the impediment of crime, the marriage of Gemma and Brutus was invalid, even though it had been solemnized in church. But the Code says that dispensation from a ratified marriage also includes dispensation from the impediment of crime of the first species, and therefore the union of Gemma and Brutus is legal and valid.

REASONS FOR DISPENSATIONS

CAN. 1054

Dispensatio a minore impedimento concessa, nullo sive obreptionis sive subreptionis vitio irritatur, etsi unica causa finalis in precibus exposita falsa fuerit.

A dispensation granted from a minor impediment is not vitiated by the fact that a falsehood has been expressed or the truth suppressed in the petition, even though the sole final cause alleged be false.

Note the term "*minor impediment.*" Major impediments are excluded from the benefit of this canon. The

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subreptitious or obreptitious petition and consequent grant may not be extended to other rescripts,[85] as this favor is attached only to marriage, on account of its public character and the welfare of souls involved.

In order to understand the text more thoroughly it must be remembered that the Sovereign Pontiff alone (to the exclusion of Ordinaries who have faculties) can dispense without cause in matters entirely subject to his legislative and judiciary power. But as dispensations are considered "a sore on the law," it is to be presumed that the Apostolic See does not grant favors without a cause. Therefore, as an instruction of the S. C. P. F. says,[86] dispensations should not be granted without legitimate and weighty reasons, and the graver the impediment, the weightier the reason required for a dispensation. The *Normae Peculiares for the S. C. of Sacraments*[87] declare that all dispensations from minor impediments are granted *for reasonable motives approved by the Holy See.*

A motive may be either the *final* one, which alone determines and moves the grantor to grant the favor; or it may be an *impelling* cause, *i. e.*, one that helps to move the grantor. One final cause (*causa motiva*) is sufficient for obtaining a dispensation. But sometimes one impelling cause (*causa impulsiva*) is insufficient, whereas several of the same kind amount to a final cause. Hence it is that different reasons for granting dispensations have been "canonized" or formally approved by the Roman Court, and the above mentioned instruction of the S. C. P. F. exhorts petitioners to mention several reasons, if possible. With regard to minor impediments any reason, if accepted, is sufficient and the dispensation is valid, even though the final cause alleged in the pe-

85 Cfr. can. 42.
86 May 9, 1877 (*Coll.*, n. 1470).
87 *A. Ap. S.*, I, 92 (P. II, c. VII, art. 3, n. 21).

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tition be false. For the S. C. of Sacraments grants these dispensations "*ex motu proprio et ex certa scientia,*" which clause revalidates all subreptitiously or obreptitiously obtained rescripts.

The *reasons* given in the instruction of S. C. P. F. are the following:

(1) *Angustia loci* or smallness of the place or town (not parish).[88] This reason can be alleged by a girl living in a place with less than 1500 inhabitants, because in such a small place it is difficult for a girl — not a widow — to find a husband of equal social standing.

(2) *Aetas feminae superadulta,* or relatively advanced age of the girl, if she is more than twenty-four years old.

(3) *Deficientia aut incompetentia dotis,* if a woman has no dowry or property, and a relative would marry or endow her under certain conditions.

(4) *Lites super successione bonorum iam exortae vel earundem grave aut imminens periculum,* which would be the case if the quarrel could be settled by a marriage between relatives or if the husband *in spe* were the only man who could settle a lawsuit concerning property or inheritance.

(5) *Paupertas viduae,* poverty in the case of a widow, especially if she has many children.

(6) *Bonum pacis,* if it is possible by a marriage to settle family or feudal quarrels and remove long-standing enmities.

(7) *Nimia suspecta periculosa familiaritas,* too long

88 S. C. C., Dec. 16, 1876 (*Coll. P. F.*, n. 1463): "*angustiam loci non esse desumendam a numero focorum* [the reading in the text: *locorum* is a manifest mistake] *cuiusque parochiae, sed a numero focorum cuiusque loci vel etiam plurium locorum, si non distent ad invicem ultra milliare.*" A *focus* or *foculare* signifies a home or hearth or family; a small place is one not having more than three hundred families, and taking a family to consist of five members, we have the number 1500 given above.

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courtship and great intimacy, which might cause suspicion or scandal.

(8) *Copula cum consanguinea, praegnantia ideoque legitimatio prolis,* which requires marriage in order that the damage be repaired and disgrace averted.

(9) *Infamia mulieris,* ill fame of the woman, caused by the fact mentioned under n. 7, even though she be innocent.

(10) *Revalidatio matrimonii,* if a marriage has been contracted in the prescribed form and in good faith.

(11) *Periculum matrimonii mixti vel coram acatholico ministro,* danger of a mixed marriage, which is present especially in small congregations and in communities with a preponderantly non-Catholic population.

(12) *Periculum incestuosi concubinatus,* when near relatives live under the same roof and in imminent danger of concubinage.

(13) *Periculum matrimonii civilis,* danger of a civil marriage if a dispensation be denied.

(14) *Remotio gravium scandalorum et cessatio publici concubinatus;* serious scandal and cessation of public concubinage are generally connected, and here supposed to be existing.

(15) *Excellentia meritorum,* if one has deserved well of the Catholic faith by combating its enemies in word or writing, or by generosity, or conspicuous learning and virtue.

These are the usual grounds (though not all) upon which a dispensation is granted. And the aforesaid instruction admonishes those who grant dispensations by delegated power to proceed properly and in a becoming manner.

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EXECUTION OF DISPENSATIONS

CAN. 1055

Dispensationes super publicis impedimentis Ordinario oratorum commissas, exsequatur Ordinarius qui litteras testimoniales dedit vel preces transmisit ad Sedem Apostolicam, etiamsi sponsi, quo tempore executioni danda est dispensatio, relicto illius dioecesis domicilio aut quasi-domicilio, in aliam dioecesim discesserint non amplius reversuri, monito tamen Ordinario loci in quo matrimonium contrahere cupiunt.

The text refers only to *public impediments,* from which a dispensation was indeed granted by the Holy See, but by rescript forwarded to the Ordinary. For it is the latter who is generally — exceptions are not frequent, though possible — set up as *executor.* As such the Ordinary must, as stated elsewhere,[89] examine the rescript closely, to see whether it is genuine and whether he is an *executor necessarius* or *voluntarius.* But it is safe to say, in view of can. 1054, that he need not examine the existence of the reasons alleged, if dispensations from minor impediments are the object of the rescript. There is only one reason that might justify the executor in withholding execution, *viz.,* unworthiness of the petitioner, and in that case the Holy See must be immediately informed.[90] If a dispensation from a major impediment was granted by the Holy See with *clausulae* like this: "*Si preces veritate nitantur,*" or, "*si constiterit,*" or "*constito,*" then the Ordinary is an *executor voluntarius* or *mixtus,* who must verify the reasons before he "*fulminates*" the dispensation. If absolution from censures is

89 Cfr. Vol. I of this Commentary, p. 141.

90 *Ibid.,* p. 143.

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required, he has to impart it, either personally, or through the pastor or confessor.[91]

Our text supposes that a valid and properly drawn up rescript has been forwarded to the Ordinary, who sent either a recommendation (*litteras testimoniales*) or a petition for it to the S. C. of Sacraments. A recommendation may be sent if the Ordinary doubts his own competency,[92] and therefore does not care to send a petition himself, but lets the petitioners do so. As a general rule, if the petitioners are his subjects by reason of domicile or quasi-domicile, the Ordinary forwards the petition and in that case is called *Ordinarius oratorum* and receives the dispensation. He may execute the dispensation even though the petitioners (*sponsi*) have given up their domicile or quasi-domicile in his diocese at the time the dispensation is to be used, and have gone to another diocese with the intention of not returning.

The Ordinary who executes the rescript should inform the Ordinary in whose diocese the wedding takes place.[93] Thus if James and Gemma, dwelling in the diocese of St. Joseph, were granted a dispensation by the Holy See, and the rescript was sent to the Ordinary of that diocese, supposing the parties have meanwhile removed to Springfield, Mo., in the diocese of Kansas City, the bishop of St. Joseph or his vicar-general may send the rescript to the Ordinary of Kansas City with the words: "As executor of the rescript enclosed we hereby execute the dispensation granted by the Holy See," followed by the

91 Cfr. Putzer, *l. c.*, p. 106 f.

92 A doubt might arise from uncertainty whether or not the petitioners belong to the diocese; this doubt was removed by the S. O., July 6, 1896 (*Coll.*, n. 1945) by abolishing the former condition: *intra fines dioecesis.*

93 The rescript is generally addressed to the *Ordinarius*, for instance, *St. Josephi;* if it is addressed to the *Episcopus*, the bishop and not the Vicar-general must attend to the matter.

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name of the executor. The fee which is usually fixed and written on the back [94] of the rescript, belongs to the executor, in our case the Ordinary of St. Joseph.

CHARGES FOR DISPENSATIONS BY RESCRIPT

CAN. 1056

Excepta modica aliqua praestatione ex titulo expensarum cancellariae in dispensationibus pro non pauperibus, locorum Ordinarii eorumve officiales, reprobata quavis contraria consuetudine, nequeunt, occasione concessae dispensationis, emolumentum ullum exigere, nisi haec facultas a Sancta Sede expresse eis data fuerit; et si exegerint, tenentur ad restitutionem.

It is not necessary to defend the right of the Apostolic See to a fair remuneration for the work involved in issuing papal documents. Any one who has a little business capacity will see that a court like the Roman needs a large and expensive machinery. Many buildings and persons compose the Apostolic Chancery, and the expenses of conducting it run high, especially at the present time when the cost of living for the officials is steadily increasing. It is not true, as we sometimes hear, that there are "too many lazy employees." The S. C. of the Sacraments, the one we are dealing with here, is not only overburdened with work, but short of help. We will add that the taxes demanded do not involve simony, but their payment is merely an act of deference and gratitude to the Apostolic See in recognition of the favor granted, and an act of justice towards those who are occupied with

94 On the back there are generally three kinds of fees to be noticed in the following order:
Taxa, Libelli (in Italian lire; 1 lira = about 18 cents).
Executoria, Libelli (for the executor of the rescript).
Agenzia, Libelli (for the Agent in Rome).

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the tedious labor necessary for the conduct of the chancery. Besides it must be remembered that dispensations are "a sore on the law," which must be repaired, and marriages with impediments must be prevented whenever possible.

Here it will not be amiss to state *some rules* which are in force at the Roman Court with regard to *fees* or *taxes*. The *Normae Communes*[95] published in connection with the Constitution "*Sapienti consilio*" of Pius X (1908), lay down the following rules:

(1) For matrimonial dispensations the rules prevailing in the Apostolic Dataria, the S. Poenitentiaria, and the S. C. Concilii are still in force. Their scale of taxation is approximately the following. Taking the annual surplus of income over necessary expense as a standard, those are *really poor* whose net annual profit after all expenses are counted off amounts to about $25. Those whose annual net surplus amounts to about $80, are *quasi-poor*. All others are not to be regarded as poor. The really poor pay no *componenda*[96] or tax, but only a moderate fee besides the postage. The quasi-poor pay $2 in addition to the fee imposed on the really poor. All others must pay a certain percentage, reckoned in proportion to the capital and their net yearly revenue. For instance, one who has an income of $10,000, of which $400 are reckoned as net annual profit, pays a certain per cent of that profit, according to the importance of

95 Cfr. *A. Ap. S.*, I, 55 f.

96 Cfr. Gasparri, *De Mat.*, n. 315; Leitner, *l. c.*, p. 422 f. A *componenda*, also called *compositio*, is a fine to be paid for dispensations from consanguinity and affinity and is expended for works of charity (*in pias causas*). A *taxa* or tax, properly so called, is a fee for defraying the expenses of the Roman congregations and tribunals (cf. Feije, *l. c.*, n. 691 f.). When I received my American passport, I had to pay $1 to the American Consul General at Zurich in Switzerland, and an additional $1 for the signature of each consul of the different countries through which I had to travel.

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the impediment and the character of the reasons advanced. We mention this rule here to give a clue to Ordinaries who try to be conscientious in such matters.

(2) The Ordinary should secretly ask the pastor concerning the financial status of the petitioners in order to decide whether they deserve a reduction of the tax, *i. e.*, whether they are really or quasi-poor. If any of the parties concerned, or the pastor, or the Ordinary grievously offend against this rule, they are obliged to make restitution.

(3) If the petitioners maliciously refuse to pay the tax or commit fraud, and the dispensation is necessary for removing scandal or sin, the Ordinaries must mention this circumstance in the petition, and when they communicate the dispensation, admonish the parties of their duty towards the Apostolic Chancery. However, neither fraud nor error concerning the financial condition of the parties concerned in any way affects the validity of the rescript.

We deemed it necessary to set forth these facts here, though they do not bear directly on can. 1056, which refers to the charges made by the *diocesan chancery*. With the exception of a moderate fee for the expenses of the chancery, it says, the local Ordinaries or their officials are not allowed to charge anything for dispensations, unless the Holy See has expressly granted them permission to make a charge. Every contrary custom is reprobated. If a charge is made without permission, the officials are bound to restitution.

The Council of Trent[97] and the Roman Congregations[98] had strictly forbidden Ordinaries to make any

97 Sess. 24, c. 5, *De ref. mat.*

98 Thus the S. O., Jan. 12, 1769 (n. 472, II, 3): "*ut eaedem dispensationes gratis omnino et absque ulla prorsus mercede impertiantur*"); S. C. C., July 3, 1634; S. C. P. F., Jan. 14, 1716 (*Coll.*, n. 2188).

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charge, especially in the shape of a fine, for dispensations granted in virtue of faculties received from the Holy See. Even the bishops of Ireland, who received but a bare pittance from their clergy, were not permitted to exact any fees for dispensations.[99] Only the bishop of Quebec for special reasons obtained the privilege of demanding a moderate tax from rich as well as poor, according to their means, but the money had to be used for pious purposes.[1] Otherwise demanding a fee for dispensations granted in virtue of Apostolic faculties was strictly forbidden, even under pain of nullity of the dispensation.[2] However, this must not be understood literally. When a rescript bears on its back the remark: *taxa* — so much; *executoria* — so much; *agenzia* — so much, the resp. Ordinary is allowed to demand the sum-total of these fees from the parties concerned. Besides, the chancellor is entitled to demand a moderate fee for chancery expenses and postage.

A difficulty arises concerning the faculties granted to our Ordinaries by the decrees of April 25 and Aug. 2, 1918. The latter prescribes, as stated under can. 1048, that Ordinaries have to render an account of the dispensations granted and, on the same occasion, pay the amount due to the Holy See. Here Ordinaries are plainly allowed to collect the usual fee demanded by the Holy See, because they are commanded to forward the money to Rome; for if they were not permitted to collect the tax usually imposed by the Roman Court, they would have to pay the *iura* demanded by the Holy See out of their own pockets, which cannot be the intention of Rome.

99 S. C. C., *l. c.*; S. C. P. F., Feb. 12, 1821 (*Coll.*, n. 755).

1 S. C. P. F., July 4, 1793 (*Coll.*, n. 616).

2 *Ibid.*

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As to *restitution,* note that the text says that it becomes obligatory only if the Ordinaries have *exacted* (*exegerint* [3]) money. A voluntary contribution does not oblige to restitution.

MENTION OF DELEGATION WHEN DISPENSING

CAN. 1057

Qui ex potestate a Sede Apostolica delegata dispensationem concedunt, in eadem expressam pontificii indulti mentionem faciant.

Those who grant dispensations in virtue of delegated power from the Apostolic See, shall mention the papal indult when using it.

This text cannot be construed as if the mention of delegation affected the validity of a dispensation. In matter of fact it affects only the licitness of the same;[4] otherwise the lawgiver would have appended an invalidating clause. But it must be expressed in the use of both a general and a particular indult, and all the *clausulae* must be observed as far as circumstances permit.[5]

3 Bened. XIV, "*Ad tuas,*" Aug. 8, 1748, demanded the insertion of this clause in every rescript under penalty of nullity of the dispensation. This shows how carefully even the appearance of simony must be avoided.

4 The Holy Office (June 15, 1875; *Coll.,* n. 1444) has limited the import of this clause to licitness.

5 *Ibid.*

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CHAPTER III

PROHIBITIVE IMPEDIMENTS

The Code mentions only three prohibitive impediments: vow, legal adoption, and mixed religion. However, it enumerates five different vows, and if these are taken as specifically distinct, there are *seven* prohibitive impediments, which we shall now proceed to explain.

THE IMPEDIMENT OF VOW

CAN. 1058

§ 1. Matrimonium impedit votum simplex virginitatis, castitatis perfectae, non nubendi, suscipiendi ordines sacros et amplectendi statum religiosum.

§ 2. Nullum votum simplex irritat matrimonium, nisi irritatio speciali Sedis Apostolicae praescripto pro aliquibus statuta fuerit.

§ 1. Marriage is rendered illicit by the simple vow not to marry, the vow of virginity and perfect chastity, the vow to receive sacred orders or to embrace the religious state.

§ 2. No simple vow invalidates a marriage unless the Apostolic See has made a special enactment to that effect.

The final clause is plainly intended to safeguard the constitutions of the Society of Jesus, for whom Gregory XIII, in his constitution "*Ascendente Domino*," May 25, 1584, declared that the simple vows taken by the scho-

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lastics after two years' novitiate have the same invalidating effect as if they were solemn.[1]

The Code distinguishes five different vows. But it would be difficult to establish a real distinction between the vow of virginity and the vow of perfect chastity. The object of the vow of virginity is the integrity of the body, and though it may be taken for the specific purpose of obtaining the aureole promised to virgins,[2] bodily integrity without perfect chastity is not easily conceivable. We are aware that internal acts are distinct from external acts and that while merely internal acts against chastity may not destroy the integrity of the body, perfect chastity includes both internal and external acts and therefore also the vow of virginity. It is not surprising, therefore, that the Decretals never expressly mention the vow of virginity, but only the simple vow of chastity or not marrying. We would not, however, deny that the vow of chastity may be taken after virginity has been lost. For instance, a person once married may make the vow of chastity; but whether it may really be called perfect chastity, if the marriage rights had been made use of, is another question. Canonists generally allege only four species to the exclusion of the vow of virginity. In our commentary we shall include the vow of virginity in that of perfect chastity or celibacy.[3]

1. *The Simple Vow of Perfect Chastity*, whether absolute or conditional, prohibits marriage, because marriage is opposed to the object of perfect chastity. On the other hand, a promise made to God to observe chastity requires

1 Simple religious vows had been unheard of up to that time, and in order to protect the Society of Jesus against attacks the Pope issued this Constitution.

2 Cfr. Apoc. 14, 4; Putzer, *Comment.*, p. 161.

3 Wernz, *l. c.*, IV, Vol. II, n. 564, p. 427, justly observes that the distinction between the vow of celibacy and that of virginity has little practical value and the latter differs from the former only in regard to the first *opus carnale*.

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that all danger and proximate occasion of breaking the vow be removed. Now marriage would enhance the danger and render either the vow or the marriage rights illusory. Therefore the vow of perfect chastity and marriage exclude each other. However, as the Church accepts this vow only as *simple,* not irrevocable, which would imply full surrender of one's self, it does not render marriage invalid.[4]

2. The *Vow of Celibacy* is diametrically, though only contradictorily, opposed to marriage and renders the latter illicit; for although this vow is opposed to marriage, it does not imply that the right to one's body has been completely given up; it has merely been suspended.

3. The *Vow of Receiving Major Orders,* by a positive law of the Church,[5] renders marriage illicit because by it one would take upon himself a state of life which, according to the same law, is incompatible with the state of higher orders, requiring celibacy.

4. The same must be said concerning the *Vow of embracing the Religious State,* although this state not only by positive but also by natural law is incompatible with marriage. By religious state must be understood, according to our Code, every religious institute with solemn or simple, temporary or perpetual vows, or, in other words, every organization whose members pronounce the three religious vows and live a common life.

The *effect* of these vows is, therefore, generally speaking, to render marriage grievously illicit. In particular these differences between the single vows may be noticed:

(1) The *vow of perfect chastity,* if not dispensed from, retains its force even in the married state, as far as compatible with the rights of the other party.[6] Hence

4 Sanchez, *l. c.,* l. VIII, disp. 11, n. 4; Feije, *l. c.,* n. 559, p. 436; Wernz, *l. c.* IV, Vol. II, n. 566.

5 Cc. 1, 3, X, IV, 6.

6 One who, knowing of the vow, would marry such a person, would

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a person bound by the vow of chastity is not allowed to demand the *debitum coniugale,* though he may render it at the demand of his partner. Yet no obligation attaches to the vow which would compel the person bound by it to enter a religious order, if possible, for an obligation cannot be stretched further than the intention of him who incurs it. And the intention of embracing the religious life is not included in the vow of chastity.[7] Besides, unless the vow of chastity is dispensed from, or was conditional, or made for a limited time only, it is not extinguished by an illicit marriage and consequently revives after the dissolution of the marriage tie.

(2) The *vow of celibacy* is broken by the act of contracting marriage, and therefore we cannot understand the opinion of some authors[8] who would prohibit one bound by this vow from contracting a second marriage, except as far as the moral obligation is concerned. As to the *debitum coniugale,* this may be not only rendered, but also demanded, because the object of the vow was marriage, and nothing else.

(3) The *vow of receiving sacred orders* as well as that of embracing the *religious life* prohibits the consummation of marriage, but after consummation the party bound by the vow is allowed both to render and to demand the *debitum.* As long as the marriage is not consummated the obligation remains, and it revives when the party is freed from the marriage obligation.[9] These effects show how anomalous is the state of marriage when no dispensation has been obtained from this vow.

commit a grievous sin. Sanchez, *l. c.,* l. VII, disp. 11, n. 11.

7 Sanchez, *l. c.,* l. IX, disp. 34, n. 3; Feije, *l. c.,* n. 559.

8 Cfr. Feije, *l. c.,* n. 562; Wernz, *l. c.,* IV, Vol. II, n. 566.

9 Feije, *l. c.,* n. 560 f.

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DISPENSATION FROM VOWS

First of all it should be noted that of these five vows only two are *reserved to the Apostolic See, viz.,* the vow of perfect and perpetual chastity and the vow of embracing the religious life with solemn vows, provided these vows were made absolutely and after the 18th year of age had been completed.[10] A vow is *absolute* if it has attached to it no condition as to time or circumstances or the matter itself. When a condition is attached, the vow is *conditional.* Thus it would be a conditional vow were one to promise: "I will enter such and such an order, provided it has a monastery in my country, or if I am found fit for it, and none other." If he is subsequently received into that order, and dismissed from it, the conditional vow is fulfilled, and no dispensation is needed to enable him to marry. If a secular Tertiary of the Franciscan Order would imagine that his profession involved perfect and perpetual chastity, the vow would be incomplete and no dispensation would be required.[11] For the two vows reserved to the Holy See special faculties are needed. If they are private and secret, they fall under the jurisdiction of the S. Poenitentiaria; as the faculties granted for such cases are not revoked by the decree of April 25, 1918, Ordinaries may continue to use and subdelegate them to their clergy. The confessor in the act of sacramental confession, or the pastor outside the confessional but for the internal forum only, (we suppose the impediment to be occult, as it generally is) must impose other good works and monthly confession, for there is question here rather of a commutation than of a pure dispensation.[12] The works of penance enjoined should be adapted to the condition of the party as well as pro-

10 Can. 1309.
11 Cfr. Leitner, *l. c.*, p. 344.
12 Putzer, *l. c.*, p. 162 f.

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portionate to the reasons for which the dispensation is granted. These *reasons* may arise from the imperfect act, the vow itself (rashness, ignorance, mental depression), moral and physical weakness, and family circumstances.[13] Let it be added, however, that a dispensation for one marriage does not imply a dispensation for several marriages; a new dispensation is required for each. A dispensation from the vow of entering a religious order or congregation, if given for the sole purpose of enabling the subject to remain in the world, does not include permission to contract marriage.[14] The *vows of celibacy* and *virginity* and that of *receiving holy orders* are *not reserved,* and may therefore be dispensed from by the Ordinary in virtue of his ordinary power, which he may communicate to others. If a dispensation is granted, the obligation ceases entirely and forever, and hence it may be supposed to be given for more than one marriage.

LEGAL ADOPTION

CAN. 1059

In iis regionibus ubi lege civili legalis cognatio, ex adoptione orta, nuptias reddit illicitas, iure quoque canonico matrimonium illicitum est.

The Code twice mentions adoption as an impediment to marriage; once in this canon, and again in can. 1080, thus introducing a distinction between legal adoption simply as an impedient and as an invalidating impediment. Our can. 1059 states that in countries where relationship aris-

13 We hold with Sanchez (*l. c.*, l. VII, disp. 11, n. 12) that if a penitent would ask his pastor or confessor whether a marriage contracted under such a vow is valid, the latter would be entitled and obliged to answer in the affirmative, for this is the teaching of the Church and requires no mental restriction.

14 Wernz, *l. c.*, IV, Vol. II, n. 570 f.; p. 432.

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ing from legal adoption is a prohibitive impediment by civil law, it is so also by Canon Law. This is an instance of what is called "canonization" of a civil law by the Church. For further explanation we refer the reader to can. 1080, which treats legal adoption as a diriment impediment.

MIXED MARRIAGES

The distinction between the impediments of disparity of worship and mixed religion was hardly known until Huguccio, in his gloss to the Decree of Gratian,[15] and especially St. Thomas,[16] commenced to distinguish between the two and assigned a prohibitive character to the latter. The so-called Reformation of the XVIth century led to a vast increase in the number of "mixed" marriages, though the Church always resisted such unions, as many papal constitutions and decisions of the Roman Court prove.[17]

MIXED RELIGION

CAN. 1060

Severissime Ecclesia ubique prohibet ne matrimonium ineatur inter duas personas baptizatas, quarum altera sit catholica, altera vero sectae haereticae seu schismaticae adscripta; quod si adsit perversionis periculum coniugis catholici et prolis, coniugium etiam lege divina vetatur.

The Church most severely forbids everywhere marriages between two baptized persons, one of whom is a Catholic and the other a member of a heretical or schis-

15 Ad c. 16, C. 28, q. 1, *s. v. haereticis.*

16 Lib. IV, Dist. 39, q. 1, art. 1, ad 5.

17 See the quotations in Card. Gasparri's edition of the Code.

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matic sect; if there is danger of perversion for the Catholic party or the offspring, such a union is forbidden also by divine law.

Here we have a concise statement of the reasons why the Church forbids mixed marriages.

(1) These *reasons* are found in a well-known instruction of Cardinal Antonelli, published in 1858, and in an instruction issued to the Oriental bishops by the Holy Office in 1888.[18] They are the following:

(a) The detestable communion in sacred matters (*flagitiosa in divinis communio*), which results in such cases from the sacramental character of marriage and which is strictly forbidden;

(b) The *danger of perversion* to the Catholic party arising from indifference in religious matters;

(c) The irreligious or at least *careless education of children* brought up in the atmosphere of religious indifference.

Since the Church claims to be the true Church of Christ, and since the Catholic faith is divine, any wilful and unwarranted exposure of it to the danger of loss is forbidden by divine and, we may add, also by the natural law. For the natural law commands us to strive for our last end by employing means proportionate to it. In the supernatural order this end can be attained only by divine faith. Hence a natural and a supernatural premise compel the conclusion that to endanger the bulwark of salvation needlessly is contrary to divine and to the natural law.[19] It is not necessary to prove the evil effects of indiscriminately contracted mixed marriages by statistics. The Code admits that they are real.

18 Sec. Status, Nov., 1858; S. O., Dec. 12, 1888 (*Coll. P. F.*, nn. 1169, 1696); Leo XIII "*Arcanum*," Feb. 10, 1880.

19 Sec. Status, March 27, 1830 (*Coll. P. F.*, Vol. I, p. 474).

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(2) The *impediment* of mixed religion is merely prohibitive and was established by *ecclesiastical law.* But there is no contradiction between the general prohibition which arises from the natural and from divine law on the one hand, and the positive prohibition of the Church on the other. For the general obligation of avoiding all danger to the faith and to salvation is not neutralized by the positive sanction of the Church, but this sanction is merely a juridical formulation of the divine law. The Church in thus formulating that law did not mean to dispense from the precautions required by the natural and by divine law. Hence the positive law only is dispensed from, whilst the obligations attendant upon the natural and divine law remain.[20] We might therefore call the dispensation from this impediment a conditional one, *i. e.,* dependent upon the fulfillment of the required conditions. But we must not be understood as saying that a dispensation becomes valid only *when* the conditions are fulfilled. No, the dispensation is valid from the date when it is granted, but the obligation of complying with the conditions always remains, and no human power can remove it. From this again it appears how seriously the Church regards mixed marriages.

(3) The *extent* of this impediment is determined by the *difference of religion,* which regards Christian denominations only. The foundation is *Baptism,* presumed to be valid. And herein lies the specific distinction between

20 Wernz (*l. c.*, IV, Vol. II, n. 583, p. 441) appropriately says: "*Quodsi prohibitio legis divinae in casu particulari non est sublata, a nullo potestate humana licita et valida dispensatio super impedimento mixtae religionis, quatenus nititur iure divino, concedi potest. At si prohibitio legis divinae in casibus particularibus cessavit, ii scriptores modum excesserunt, qui vel ipsi Romano pontifici a manente lege ecclesiastica contra mixta matrimonia absolute et universaliter lata potestatem dispensandi negarunt. Eo enim in casu manet sola lex ecclesiastica, super qua ex iusta causa certe licite et valide ab Ecclesia dispensari potest.*"

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this impediment and that of disparity of worship. Baptism also furnishes the reason why these two impediments are classified differently, that of mixed religion belonging to the forbidding, whereas disparity of cult is numbered among the diriment impediments. Since by baptism one radically becomes a subject of the Church,[21] baptized non-Catholics are not outside her pale. Furthermore, as Christian denominations are now scattered broadcast everywhere, it would be a difficult matter to set up a diriment impediment, or as it were, an insurmountable barrier between Catholics and Protestants.[22] But a Catholic may not on that account licitly marry a member of a heretical or schismatic sect.

Who are *heretics?* A declaration of the Holy Office[23] with regard to mixed marriages in Holland may help us to understand the term better. It says that all those are called heretics who, though baptized by Catholics, were educated in heresy before they were seven years of age; also all those educated by heretics, although not thoroughly imbued with heretical doctrines; likewise those who have fallen into the hands of heretics and adhere to their tenets; those who have apostatized from the Catholic faith and joined a heretical sect; and those born of and baptized by heretics who have grown up without making formal profession of heresy or without any religion at all. However it must not be overlooked that our text says: *"sectae haereticae adscripta," i. e.,* the non-Catholic party must be a member of a heretical sect, or at least must have adhered to a sect some time previously to the marriage. The Holy Office has expressly declared that those can not be regarded as heretics who have rejected the Catholic

21 *Trid.*, sess. 7, can. 7, *de bapt.*

22 Bened. XIV, *"Matrimonia."* Nov. 4, 1741; S. O., Dec. 12, 1888 (*Coll. P. F.*, n. 1696 ad 1).

23 S. O., April 6, 1859 (*Coll.*, n. 1174).

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faith but have not joined a false religion or heretical sect,[24] and that *Freemasons* who belong to a condemned sect are not to be classified as heretics.

Schismatics are all those who have separated themselves from the unity of the Church and are certainly to be considered heretics.[25] Pure schism now-a-days is almost impossible. The extant decisions on that point have reference to Oriental schismatics, but they apply to all who have heretical tendencies, whoever they may be.[26]

What about *doubtful Baptism?* The Holy Office has declared more than once that a doubtful Baptism must be considered valid with regard to marriage. The *rules* to be followed in such cases are the following:

(a) If the ritual of the heretical sect prescribes Baptism, but without the required matter and form, each single case must be treated on its own merits.

(b) If the resp. sect baptizes validly, according to its ritual, the Baptism is to be considered valid. If there is room for doubt, even in the first mentioned case, the Baptism must be regarded as valid in reference to marriage.

(c) If it is evident from actual custom that Baptism in a sect is invalid, then marriage, too, is invalid if contracted between one thus invalidly baptized and a Catholic, because of the impediment of disparity of cult.[27]

24 S. O., Jan. 30, 1867 (*Coll.*, n. 1300).

25 Cfr. can. 1325, § 2: One who refuses to be subject to the Roman Pontiff or to communicate with the members of the Church subject to him, is a schismatic. A stubborn refusal of obedience to the Roman Pontiff may practically coexist with the Catholic faith, but it is next to impossible to imagine a theoretical schismatic without a taint of heresy.

26 S. O., Jan. 3, 1871; Dec. 22, 1888; S. C. P. F., Feb. 18, 1783 (*Coll.*, nn. 1362, 1696, 562).

27 S. O., Nov. 17, 1830; Sept. 9, 1868 (*Coll.*, nn. 821, 1334): "*generatim loquendo, ut christiani habendi sunt ii de quibus dubitatur an valide baptizati fuerint.*" S. O., Dec., 1872 (*Coll.*, n. 1392): "*Utrum baptismus dubius censendus sit validus in ordine ad matrimonium etiam in eo sensu, quod invalidum sit matrimonium inter haereticum dubie baptizatum et infidelem propter impedimentum dis-*

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Of special interest for our country is the answer of the Holy Office to the Bishop of Savannah.* The first point is nothing else but a reaffirmation of the principle stated above, namely, that the presumption is in favor of the validity of Baptism with regard to marriage. But the bishop wished to know further when the *presumption* of validity might be duly applied. The answer was: (α) If the parents belong to a sect which rejects Baptism, the latter is not to be presumed; (β) The same holds good if the sect rejects infant Baptism (as, *e. g.*, the Baptists do). (γ) Also if the parents belong to no sect whatever, but are absolutely indifferent in religious matters. (δ) If, on the other hand, the parents belong to a sect that requires Baptism and generally administers it, and if these parents were zealous in their religion, Baptism may be presumed. (ε) If only one of the parents belongs to a sect that prescribes and administers Baptism, and this one, whether father or mother, was the chief educator of the party in question, Baptism is to be presumed, provided the other parent, who was less zealous in religious observance, did not positively object. (ζ) If no presumption is admissible, the case must be examined for itself and, if the doubt remains, reported to the Holy See.

After having stated the reasons for the Church's severe prohibition of mixed marriages and explained the nature and extent of the impediment, the Code lays down the conditions under which such marriages may be permitted.

paritatis cultus." S. C. respondit: "Affirmative." S. O., July 14, 1880 (*Coll.*, n. 1536):

1. Matrimonium dubie baptizati cum non baptizata estne validum?

2. Matrimonium duorum dubie baptizatorum estne validum etiamsi sint consanguinei, affines, etc.

R. ad 1. Matrimonium esse habendum uti invalidum ob impedimentum cultus disparitatis.

Ad 2. Matrimonium habendum esse ut invalidum ob impedimentum consanguinitatis vel affinitatis.

* S. O., Aug. 1, 1883 (*Coll.*, n. 1605).

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CONDITIONS UNDER WHICH MIXED MARRIAGES MAY BE PERMITTED

CAN. 1061

§ 1. Ecclesia super impedimento mixtae religionis non dispensat, nisi:

1.° Urgeant iustae ac graves causae;

2.° Cautionem praestiterit coniux acatholicus de amovendo a coniuge catholico perversionis periculo, et uterque coniux de universa prole catholice tantum baptizanda et educanda;

3.° Moralis habeatur certitudo de cautionum implemento.

§ 2. Cautiones regulariter in scriptis exigantur.

§ 1. The Church *does not dispense* from the impediment of mixed religion, unless:

1.° There be just and weighty reasons;

2.° The non-Catholic party guarantees to remove the danger of perversion from the Catholic party, and both promise to baptize and educate all their children in the Catholic faith;

3.° There be a moral certainty that the promises will be kept.

§ 2. The promises must, as a rule, be demanded in writing.

Concerning the reasons we refer to can. 1054. Any of the reasons there stated will suffice for obtaining a dispensation. Besides, the following may be mentioned as admissible: if the projected marriage be the only means by which the Catholic education of children born of a former marriage can be safeguarded; danger of civil marriage or complete apostasy from the faith; if grievous scandal can only be repaired by a mixed marriage.[28]

[28] Leitner, *l. c.*, p. 350.

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As to the *guarantees,* they have always been insisted upon and, as was said above, a dispensation from them is impossible, because it would violate the natural and divine law.[29]

It may surprise the reader that *two promises* are now considered as sufficient — *removal of the danger of perversion,* and the *Catholic education* of the children. This provision marks a stage in the advance of juridical precision. For these two guarantees almost entirely depend on human factors and may be effected by legal means, unless the civil law offers an obstacle, as is the case in some European countries where boys must follow the religion of the father, and girls that of the mother. This is a foolish and unjust law, which, we are glad to say, has no counterpart in America.[30] The two conditions mentioned are strictly juridico-canonical, whereas the others still mentioned in the *litterae reversales*[31] have been relegated to a special canon.

Concerning the *manner of demanding* these guarantees, the Code says that *moral certainty* must be obtained that they will be complied with, and hence they should, as a rule, be given in writing. Formerly the parties had to go before the officials of the diocesan court or before the pastor and swear and subscribe to the formula; the pastor then had to forward the papers to the chancery office.[32] Now *moral certainty* as to the fulfillment of the promises is considered sufficient, and this may be based upon the known character of the parties. But if advisable, the bishop or pastor may demand an oath of

29 S. O., June 3, 1871 ad 6; Dec. 10, 1902 (*Coll.*, nn. 1362, 2155).

30 Switzerland had a law to this effect in 1863, of which the Holy Office (Jan. 21, 1863, *Coll.*, n. 1263) complained; Prussia maintained the same attitude, and Baden also.

31 Hence these might be remodelled.

32 S. O., June 6, 1879 (*Coll.*, n. 1521).

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them.[33] Broadly speaking, the promises must be made in the form of a contract or agreement which offers a moral guarantee that its stipulations will be fulfilled.[34] We may add that these promises must be demanded also when there is danger of death.[35]

CONVERSION OF THE NON-CATHOLIC PARTY

CAN. 1062

Coniux catholicus obligatione tenetur conversionem coniugis acatholici prudenter curandi.

The Catholic consort is bound prudently to procure the conversion of the non-Catholic party.

This obligation is based upon charity. It should be fulfilled *prudently,* says the Code; and hence not by force or threats. Faith is a free gift of God.

NON-CATHOLIC MINISTERS EXCLUDED

CAN. 1063

§ 1. Etsi ab Ecclesia obtenta sit dispensatio super impedimento mixtae religionis, coniuges nequeunt, vel ante vel post matrimonium coram Ecclesia initum, adire quoque, sive per se sive per procuratorem, ministrum acatholicum uti sacris addictum, ad matrimonialem consensum praestandum vel renovandum.

§ 2. Si parochus certe noverit sponsos hanc legem violaturos esse vel iam violasse, eorum matrimonio ne assistat, nisi ex gravissimis causis, remoto scandalo et consulto prius Ordinario.

§ 3. Non improbatur tamen quod, lege civili iubente,

[33] S. O., Feb. 17, 1875 (*Coll.*, n. 1433).

[34] S. O., June 30, 1842 (*Coll.*, n. 950).

[35] S. O., March 18, 1891 (*Coll.*, n. 1750).

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coniuges se sistant etiam coram ministro acatholico, officialis civilis tantum munere fungente, idque ad actum civilem dumtaxat explendum, effectuum civilium gratia.

§ 1. Even when a dispensation from the impediment of mixed religion has been given by the Church, the parties can not, either before or after their marriage before the Church, go, whether in person or by proxy, to a non-Catholic minister in the exercise of his office, for the purpose of giving or renewing the matrimonial consent.

§ 2. If the pastor knows for certain that the parties are about to violate this law, or have violated it, he shall not assist at their marriage, except for very weighty reasons, all danger of scandal being removed and the Ordinary having been consulted.

§ 3. It is not, however, forbidden for the parties to present themselves before a non-Catholic minister acting as a civil magistrate, when the civil law requires it, solely to comply with a civil formality and for the sake of civil effects.

The distinction [36] between § 1 and § 3 consists in the following: If the parties were to approach a non-Catholic minister, as such, and to ask and obtain from him the nuptial blessing, the Catholic party would acknowledge him as a lawful minister of Christ, and approve of and profess a heretical rite. This cannot be allowed because it would be an active participation in heretical functions, which is *per se* a grievous sin. But if the parties present themselves before a non-Catholic minister acting as a civil magistrate, and who does not mean to confer a blessing, the Catholic party is free from guilt, if the cere-

[36] Cfr. Benedict XIV, "*Redditae sunt*," Sept. 17, 1746; *De Syn. Dioec.*, VI, 7; S. O., Jan. 29, 1817 (*Coll.* 717).

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mony is gone through merely to observe the civil law and to avoid greater evils.[37]

Attention must be drawn to the expression, "*ad matrimonialem consensum praestandum vel renovandum.*" This implies that the parties really have the intention of giving or renewing the matrimonial consent, or, in other words, desire to celebrate their marriage before a non-Catholic minister, as such, at least by the external act, although the internal consent may be absent in the Catholic party, or may be given inadvertently, or reluctantly, or out of mere courtesy. The reason of this strict prohibition is the inevitable participation in sacred things and the external approval of heretical rites to the scandal of Catholics.[38]

Note furthermore: "*sive per se sive per procuratorem.*" The matrimonial consent may be given either personally or by proxy.[39] If given by proxy, rules 68 and 72 in 6° must be observed and hence the guilty party is the one that acts through the proctor, although the latter, too, commits a grievous sin if he is a Catholic and realizes his guilt.[40]

On the other hand, both guilt and prohibition are absent if § 3 is verified. For in that case a merely civil act is performed in order to obtain civil effects. Thus, for instance, if a preacher would act merely as justice of the peace, being acknowledged as such, no matter how unctuous an exhortation he might deliver on the occasion, the

37 Cfr. *Instructio S. O. ad Ep. Osnabruck.*, Feb. 17, 1864 (*Coll.*, n. 1247), from which sect. 3 of our canon is borrowed almost verbally.

38 S. O., *ibid.*, Dec. 12, 1888 ad 7 (*Coll.*, n. 1696).

39 Cfr. can. 1088.

40 The censure mentioned in can. 2319 would not be incurred by the proxy. The term *non-Catholic minister* includes any minister of any heretical or schismatic denomination, which as such is opposed to, or rejected by, the Catholic Church. This seems to be based upon Pius IX's Const., "*Apostolicae Sedis*," 1869, I, 3.

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ceremony would be a purely civil one. If the minister is not the only man in town who may act as official, the parties, after having obtained a duly issued license, may certainly be suspected of approaching him as a *minister in sacris*. The same holds good in a higher degree if in a town or city there are several different denominations, and the non-Catholic party chooses the minister of his own creed. Neither does it matter whether he is dressed as a clergyman or where he receives them, in church or in his parlor.

§ 2 is taken from the instruction of the Holy Office to the Bishop of Osnabrück, which says: If the pastor is asked by the parties concerning their intention of going to a preacher, or if he knows for certain that they will go to him, he is not allowed to remain silent, but must warn them of the grievous sin they are about to commit. However, to avoid greater evils, if the pastor is not asked whether they may go to a non-Catholic minister and no explicit declaration is made of their purpose, although he foresees their going thither and is aware that an admonition would do more harm than good, he may be silent, provided the scandal is repaired and the required promises are duly made.[41] Our text says that in both cases, *viz.*: when the parties intend to go or have already gone to the non-Catholic minister, the pastor must seek to remove the scandal and then consult the Ordinary as to what is to be done.

How the *scandal is to be removed* is not indicated in the said instruction. Evidently it must be done in such a way that the Catholic people are satisfied. Thus a public apology made before the congregation, or printed in a Catholic newspaper, or a public denunciation, if the parties went to the preacher after the Catholic wedding,

41 S. O., Feb. 17, 1864 (*Coll.*, n. 1247).

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would repair the scandal. If they went to the minister before the Catholic wedding, the most efficacious way of removing the scandal would be a flat refusal of assistance until public penance is accepted.

DUTIES OF PASTORS

CAN. 1064

Ordinarii aliique animarum pastores:

1.° Fideles a mixtis nuptiis, quantum possunt, absterreant;

2.° Si eas impedire non valeant, omni studio curent ne contra Dei et Ecclesiae leges contrahantur;

3.° Mixtis nuptiis celebratis sive in proprio sive in alieno territorio, sedulo invigilent ut coniuges promissiones factas fideliter impleant;

4.° Assistentes matrimonio servent praescriptum can. 1102.

Ordinaries and other pastors of souls shall:

1.° Deter the faithful from contracting mixed marriages as much as they can;

2.° If they cannot prevent them, they shall take the greatest possible care that such marriages are celebrated according to the laws of God and the Church;

3.° After such a marriage has been contracted, either in their own territory or outside of it, they shall watch over the faithful fulfillment of the promises made;

4.° In assisting at such marriages they shall follow the regulations of can. 1102.

Reference may here be made to the IInd and IIIrd Plenary Councils of Baltimore. The former (n. 336) admonishes pastors to instruct the faithful at least once a year on the evils arising from mixed marriages. The latter (n. 133) advises frequent instruction, uniform prac-

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tice in proceeding in such cases, an accurate examination of the reasons alleged to obtain a dispensation, and finally careful watching over the fulfilment of the promises. The Councils might profitably have added a little reminder to Ordinaries that they should examine the reasons alleged as to their canonical weight and accompanying circumstances. We know from experience that where local circumstances are such as to permit a dispensation on account of the small number of Catholics, God gives special graces, whereas those who contract a mixed marriage frivolously have to go without such help.

MARRIAGES WITH INDIFFERENTISTS DISCOURAGED

CAN. 1065

§ 1. Absterreantur quoque fideles a matrimonio contrahendo cum iis qui notorie aut catholicam fidem abiecerunt, etsi ad sectam acatholicam non transierint, aut societatibus ab Ecclesia damnatis adscripti sunt.

§ 2. Parochus praedictis nuptiis ne assistat, nisi consulto Ordinario, qui inspectis omnibus rei adiunctis, ei permittere poterit ut matrimonio intersit, dummodo urgeat gravis causa et pro suo prudenti arbitrio Ordinarius iudicet satis cautum esse catholicae educationi universae prolis et remotioni periculi perversionis alterius coniugis.

Having laid down the rules for mixed marriages, the Code now turns to *marriages with unbelievers and Freemasons* and, in can. 1066, with public sinners and persons under ecclesiastical censure. The faithful, it says, should be deterred from marrying those who have notoriously renounced the Catholic faith, without, however, joining a non-Catholic sect, or with those who are notoriously affiliated with societies condemned by the Church. The

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pastor shall not assist at such marriages, except after consulting the Ordinary, who, after due consideration of all the circumstances of the case, may permit the pastor to assist, provided there be a weighty reason and sufficient provision be made for the Catholic education of all the children.

The reason for this precaution lies in the danger of perversion of the Catholic party and of the offspring of the marriage. Hence it may be truly said that such unions are forbidden by the natural and by divine law, even though the Church does not prohibit them under penalty of an impediment. But since this class of persons are a real menace to the Church and to society, and at the same time only too ready to attack the faithful, it is impossible to treat them more leniently than is compatible with her fundamental principles. Every pastor should endeavor, by public and private exhortations, by prudent severity in the confessional, and by appealing to the parents of the Catholic party, to prevent such unions, from which no happy results can be expected. If his endeavors prove vain, he must report to the Ordinary.[42]

The latter must first and above all ascertain whether the apostasy of the party is *notorious, i. e.,* so well known that it cannot be concealed by any artifice.[43] If a man who no longer attends church is known to the whole community as an unbeliever who ridicules the Church, or if he has written publicly against the Catholic faith, he is a notorious apostate. The same rule must be applied to *Freemasons,* although in their case secrecy may cause some difficulty. But they have their meetings, balls, entertainments, badges and papers. Besides the identity of

42 S. O., Aug. 1, 1855; Aug. 21, 1861; Jan. 30, 1867; July 21, 1878 (*Coll.*, nn. 1116, 1219, 1300, 1495).

43 Can. 2197, 3; the addition "*nulloque iuris suffragio excusari possit,*" is implicitly verified in our case, for neither divine nor ecclesiastical law excuses an apostate.

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their leaders and that of active, influential members can scarcely remain hidden, even if there were no lists of members. But it is not sufficient that they be merely notorious, they must also belong to a *condemned sect, i. e.,* a society which aims at the subversion of ecclesiastical or civil authority, no matter whether its members are bound by secrecy or not.[44] All such societies are strictly condemned. To this class belong, in our country, the lodges of the Oriental Rite. The "Independent Order of Good Templars,"[45] the "Odd Fellows," the "Sons of Temperance" and the "Knights of Pythias" are forbidden to Catholics but not explicitly declared to be under ecclesiastical censure,[46] and hence cannot be called condemned societies in the strict sense of the term.

When the Ordinary has informed himself as to the character of the non-Catholic party, he shall weigh the circumstances of the case, the influence of the apostate or Freemason, and of both parties and their families, and take into consideration the condition of the parish, the danger of probable scandal, and the consequences likely to follow. Before granting permission he must be morally certain that all the children will be baptized and brought up in the Catholic faith and that there is no danger that the Catholic party will be hindered in the practice of his or her religion. These *guarantees must* by all means *be obtained,* because they are demanded by divine law; but no writing or oath is required, a serious promise will suffice. Finally there must be *grave reasons* in order to permit assistance, and these may be either the canonical ones (can. 1054) or others that may claim the Ordinary's consent, for instance, danger of a purely civil

44 S. O., Aug. 5, 1846; S. C. P. F., Sept. 24, 1867 (*Coll.*, n. 1320); S. O., May 10, 1884 ad 3 (*Coll.*, n. 1615): "*contra Ecclesiam vel legitimam potestatem machinantur.*"

45 S. O., Aug. 9, 1893 (*Coll.*, n. 1845).

46 Putzer, *Comment.*, p. 235.

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marriage and subsequent concubinage, danger to the Church at large or in the particular territory in question, probable hope of conversion, etc.

After all these precautions have been taken, the Ordinary may permit the pastor to be present at the marriage (*ut parochus matrimonio intersit*).[47] How far the assistance may go depends on the circumstances of the case. A directive norm is found in can. 1102, unless the Ordinary should deem it necessary to restrict the "assistance" to what is absolutely necessary.[48]

PUBLIC SIN AND CENSURE

CAN. 1066

Si publicus peccator aut censura notorie innodatus prius ad sacramentalem confessionem accedere aut cum Ecclesia reconciliari recusaverit, parochus eius matrimonio ne assistat, nisi gravis urgeat causa, de qua, si fieri possit, consulat Ordinarium.

This canon may be regarded as supplementing the previous one and concerns a case less detrimental to the public interest of the Church. It treats of *public sinners* and persons *notoriously under censure*. If such persons wish to get married, and refuse to go to confession or to be reconciled to the Church before the marriage, the pastor is not allowed to assist thereat, except for grave and urgent reasons, about which he shall, if possible, consult the Ordinary.

Public sinners, as distinguished from the others men-

47 S. O., July 5, 1878 (*Coll.*, n. 1495): "*permittere poterit, ut parochus matrimonio passive intersit, idest absque benedictione, alioque ritu ecclesiastico, tanquam testis authorizabilis.*" Of course, receiving and demanding the consent is strictly required, and it appears that assistance at such marriages is the same as at mixed marriages.

48 S. O., Feb. 1, 1883 (*Coll.*, n. 1591): "*omnino excludatur celebratio sacrificii Missae.*"

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tioned, are persons who, through their own fault, are ignorant of the most necessary Christian doctrines, or refuse to comply with their duties as Catholics, especially that of receiving the sacraments and assisting at divine service, even though they may retain the faith.[49]

Notoriously under censure are those who have been excommunicated by name or denounced by the ecclesiastical judge, or whose censures are known to the people.[50] Stress is laid upon publicity, because if the pastor would know of a person's guilt or censure only from confession, he could not refuse his assistance, since this is a public act. But if the sinful conduct or censure is notorious, then what? The pastor should endeavor to bring such public sinners to their senses in the confessional, or by reconciliation, if censures have been incurred. In the latter case, therefore, absolution is required, and if the necessary faculties are wanting, recourse to the Ordinary is inevitable. If the parties both refuse, the pastor may, time permitting, report to the bishop. But if the case is urgent, and reasons are given, he may assist. St. Alphonsus is more rigoristic, yet he permits assistance if there be danger of death, or great evils affecting the community, or if the pastor foresees that the parties would continue to lead a sinful life.[51]

The text does not state what *kind of assistance* is to be granted, but as the quotations given by Card. Gasparri refer to the Freemasons, what has been said under the preceding canon, may also be applied here.

Since a marriage contracted against the prohibition of the Church is only illicit, not invalid, cases may arise

49 De Smet, *l. c.*, p. 139.

50 Can. 2197.

51 S. Poenit., Dec. 10, 1865 (*Coll.*, n. 1205, which refers to St. Alphonsus, l. VI, tr. 1, cap. 2, n. 54); Bened. XIV, *De Syn. Dioec.*, VIII, c. 14.

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which require *straightening*. How is that to be done?

First be it noted that the case of a merely illicit marriage is comparatively rare. A marriage not contracted in the presence of the pastor (priest) and two witnesses is not merely illicit, but also invalid. If it is contracted properly, no unlawfulness attaches to it. However, it may happen, through ignorance on the part of the pastor, or by surprise, or in consequence of stubborn refusal of the two conditions or promises,[52] that a marriage is contracted in the prescribed form, yet without a dispensation, and therefore unlawfully. In that case the mode of procedure would be the following:

(1) If the parties were married in church, and *not before a non-Catholic minister as such* (*qua sacris addictus*), the pastor shall instruct them concerning the sin they have committed and the strict obligation of complying with the required conditions, especially that concerning the Catholic education of their offspring, and assure them that any contrary promises are not binding, because unjust. If they acknowledge the wrong they have done, and show signs of repentance, they may be admitted to the sacraments, with the imposition of a wholesome penance.[53] And this is all that may or should be done in such a case; for the marriage is valid, and the dispensation cannot affect its lawfulness after it has been contracted.

(2) If the parties have been married in church, but have *presented themselves before a non-Catholic minister, as such* (can. 1063), the Catholic party has incurred the *excommunicatio latae sententiae, reserved by law* (can. 2319, § 1, n. 1) *to the Ordinary*. This is the only cen-

52 The case is mentioned in a decree of the S. O., June 21, 1912 (*A. Ap. S.*, IV, 444), but not quoted by Card. Gasparri.

53 S. O., Jan. 3, 1871 (*Coll.*, n. 1362). But the two promises must be imposed.

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sure, none other being mentioned in the Code. Hence what was formerly said about a reserved case [54] is now obsolete. But the way a pastor must proceed is not entirely changed. It is as follows:

(a) The pastor must seek to persuade the Catholic party to repent of his or her fault and deny him or her the sacraments until they do so.

(b) If there are signs of repentance, he must demand the two promises, as a rule in writing.

(c) If these promises are sincerely made, he shall apply the faculty of absolving from the episcopal censure, or procure the same if he does not yet enjoy it, and impose a wholesome penance. No renewal of consent is required.

If the *penance* is to be *public,* according to the diocesan statutes or a special injunction of the Ordinary,[55] in order to repair the scandal given, the pastor is not at liberty to remit it. Nothing else is to be done, because the marriage is supposed to be valid.

(3) If the marriage is *invalid* because of lack of the prescribed form — *vitio clandestinitatis* — the pastor must refuse the sacraments until the Catholic party repents and makes the two promises, and then obtain a dispensation. Should the parties have given their consent before a non-Catholic minister, the censure must also be removed. In that case the procedure would be as follows:

54 Putzer, *l. c.*, p. 65; Leitner, *l. c.*, p. 355 f., who would, of course, refer to "*Apostolicae Sedis,*" 1869, I, 3.

55 There is no doubt that the diocesan statutes or a special order of the bishop may lawfully impose public satisfaction. Besides, it must be noted that, if the censure is known publicly, the absolution should be imposed publicly. S. O., Feb. 17, 1864 (*Coll.*, n. 1247); S. O., Aug. 23, 1877 (*Coll.*, n. 1478). If the censure was occult, absolution *in foro interno* suffices. Furthermore, if the parties did not know of the censure, the latter is not incurred, provided theirs was not *ignorantia crassa* or *affectata.* Leitner, *l. c.*, p. 358.

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(a) The *litterae reversales* or the two promises must be agreed to, either in writing or orally.

(b) Absolution from censure must be given.

(c) A dispensation from the impediment of mixed religion must be obtained and applied.

(d) The matrimonial consent must be renewed in the presence of the pastor and two witnesses.[56]

A new difficulty arises if the non-Catholic party refuses to renew the consent. In that case it would be necessary to revalidate the marriage *in radice*,[57] as explained in canons 1138–1141. But since our bishops enjoy the faculties mentioned under can. 1048, according to the decree of April 25 and Aug. 2, 1918, recourse to the Holy See is not required. In case of danger of death can. 1143 f. must be followed.

[56] S. O., Aug. 23, 1877 (*Coll.*, n. 1478).

[57] S. O., Nov. 22, 1889 (*Coll.*, n. 1721).

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CHAPTER IV

DIRIMENT IMPEDIMENTS

This chapter enumerates twelve[1] *impediments which render* a marriage not only illicit, but also *invalid*. The Code does not determine which of these belong to the order of the natural and divine law, and which to the order of ecclesiastical law. If the reader, therefore, desires a classification, he will have to accept the statement of authors, who agree more or less on the subject. The only controversy of any importance concerns the impediment of consanguinity.

AGE

CAN. 1067

§ 1. Vir ante decimum sextum aetatis annum completum, mulier ante decimum quartum item completum, matrimonium validum inire non possunt.

§ 2. Licet matrimonium post praedictam aetatem contractum validum sit, curent tamen animarum pastores ab eo avertere iuvenes ante aetatem, qua, secundum regionis receptos mores, matrimonium iniri solet.

A boy can not validly contract marriage before he has completed his *sixteenth,* and a girl before she has completed her *fourteenth year*. Although marriage contracted after the aforesaid age is valid, pastors of souls

1 We say *twelve,* because legal adoption is an impediment only in countries where it has been set up as such by civil law, but does not affect the Church at large.

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should deter from it young people who have not reached the age at which, according to the custom of the country, marriage is usually contracted.

In this formulation the impediment is of *merely ecclesiastical law,* which now demands a higher age than was formerly required. The Decretals [2] followed the Roman law in reckoning the age. There was a controversy between the Cassians and the Proculejans, until Justinian adopted the view of Proculejus, who maintained that the number of years, fourteen for boys and twelve for girls, should be decisive in admitting one to marriage. The Cassians, on the other hand, held that not only age but natural capacity for the marital act should be taken into consideration.[3] This double method of determining the impediment of age is noticeable not only in the early ecclesiastical legislation,[4] and in the *Summae* of Tancred [5] and Bernardus Papiensis,[6] but also in the Decretals quoted. In fact it remained in vogue until the present. For the commentators all distinguished between age properly so called, and mental and physical capacity. It was an axiom that "*malitia supplet aetatem.*" Most canonists assumed that, as far as mental ability was concerned, the impediment rested on the natural law, whilst impotence was not absolute, because it might disappear. In southern or warmer climates maturity is attained at an earlier age than in the North. Yet, if we may believe missionaries, no human being is ripe for marriage before the eleventh year of age. There are pontifical constitutions which forbid marriage to be contracted at the age

2 Cfr. cc. 12, 13, X, IV, 2; c. 2, X, IV, 15; c. un. 6°, IV, 2.

3 Cfr. ll. 13, 29, dig. 19, 1; pr. Inst. I, 22; l. 3, Cod. V, 60.

4 Cfr. Wasserschleben, *Die Bussordnungen,* pp. 178, 217, 583.

5 *Summa de Spons. et Mat.,* ed. Wunderlich, p. 22.

6 *Summa de Mat.,* ed. Laspeyres: "*Impossibilitas coeundi animo et corpore tam impedit matrimonium quam dirimit contractum.*"

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of six or seven, but they do not state a precise limit.[7]

Our Code lays down the age-limit without reference to either mental or bodily capacity. However, it stands to reason that if a real and substantial defect of mind could be proved, a marriage would be invalid even after the age designated in the Code. But in that case the subject belongs to the next chapter, which treats of consent. As to impotency, this must be judged according to the following canon.

In the United States there is no uniformity in the civil law of the different States with regard to the age limit for marriage. While in some the common-law age of consent, namely fourteen and twelve, prevails, in others it has been raised by statutes. The terms differ.[8] The Statute of Missouri (sect. 4321) reads in part: "No recorder shall issue a license authorizing the marriage of any male person under the age of twenty-one years, or female under eighteen, except with the consent of his or her father or mother." But the invalidity of a marriage under that age is nowhere explicitly asserted. The Church, however, wisely admonishes pastors to deter young people from marrying against the statutes of their respective country. For the custom of a country is the best interpreter of the natural law in matters of this kind.

IMPOTENCY

CAN. 1068

§ 1. Impotentia antecedens et perpetua, sive ex parte viri sive ex parte mulieris, sive alteri cognita sive non,

7 Bened. XIV, "*Omnium sollicitudinum*," Sept. 12, 1744, and the Const. of Clement XII, quoted in the same Bull. (ed. Prati, Vol. I, 428 ff.).

8 Bishop, *Marriage Laws*, I, p. 249, § 582.

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sive absoluta sive relativa, matrimonium ipso naturae iure dirimit.

§ 2. Si impedimentum impotentiae dubium sit, sive dubio iuris sive dubio facti, matrimonium non est impediendum.

§ 3. Sterilitas matrimonium nec dirimit nec impedit.

§ 1. Anterior and perpetual *impotency,* whether in man or woman, whether known to the other party or not, whether absolute or relative, renders marriage invalid by the very law of nature.

§ 2. If the impediment of impotency is *doubtful,* whether the doubt be one of fact or by reason of the law being doubtful, marriage should not be hindered.

§ 3. *Sterility* renders marriage neither invalid nor illicit.

This is the impediment of impotency, set up by *natural law.* As its nature is not determined in the text, there is room for controversy, which has not been wanting. The reader may rest assured that we shall not carry coal to Newcastle, but keep within the boundaries of Canon Law.

(1) What is *impotency?* In order to understand the attitude of the Church on this subject, a brief historical note seems necessary. The *Roman law* distinguished two classes of eunuchs or *spadones;*[9] those who could not beget children and yet were entitled to contract marriage with all its juridical effects; and those who could neither beget children nor contract marriage according to law. In case of natural incapacity for marital intercourse (*impotentia coeundi*) the law permitted dissolution of the union after an experiment of two or three years.[10]

The *ecclesiastical* conformed to the Roman law up

9 *Spado* from the Greek σπάω, *to draw, pull, pluck,* hence, *to castrate.*

10 Cfr. § 9, *Inst.,* I, 11; fr. 39, dig. 23, 3; l. 10, Cod. V, 17; Nov. 22, c. 6; Nov. 117, c. 12.

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to the eighth century.[11] A fluctuation is noticeable in the writings of Bernardus Papiensis and Tancred, who, however, following the French school, maintained the invalidity of a marriage contracted with natural impotency.[12] According to the belief of those ages there was an artificial impotency, due to satanic influence or witchcraft.[13] This artificial, as distinguished from natural impotency, or *frigiditas,* was not commonly regarded as sufficient to constitute a diriment impediment. Some uncertainty is perceptible in the Decretals, where the expedient of allowing the parties to cohabit as brother and sister is resorted to. Nor is the distinction between absolute and relative impotency uniformly maintained. All this goes to prove the wavering attitude of the School in this matter. But the triennial experiment is fully admitted,[14] and it is further evident from the Decretals that *impotentia coeundi* is the distinctive characteristic of the impediment; hence the terms: *foeminae clausae, impotentes commisceri maribus, arctae,* whilst the men are called *frigidi,* or simply *impotentes coeundi, debitum reddere non potentes.* At the same time, however, note the terms: *volo esse mater, nunquam potuit fieri mater aut conjux, tanquam cui naturale deerat instrumentum.* We note this purposely, in order to enable the reader to pass a fair judgment on the opinions of those times. What the theologians taught will be stated later.

The answer to the question, what is impotency? may be given thus: It is a natural incapacity both for marital intercourse and the procreation of offspring.[15] This

11 Cfr. Wasserschleben, *l. c.*, p. 216; c. 18, C. 32, q. 7, which latter text is a decision of Greg. II, but seems rather a dissolution of a ratified marriage.

12 *Summa cit.*, p. 177 f.; Tancred, *Summa cit.*, p. 63.

13 Cfr. X, IV, 15, *de frigidis et maleficiatis et impotentia coeundi.*

14 C. 5, X, IV, 15.

15 Cfr. *New International Encyc.* 1904, *s. v.* "Impotency."

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definition would be given by any physiologist. But theologians and canonists adopt a more restricted definition of impotency. They say: *It is incapacity for performing the marital act, which in itself would be apt for procreation.*[16]

Incapacity in this sense exists where the necessary organs are entirely lacking. Men who have been completely castrated are incapable of exercising the *copula.*[17] In women complete or perfect *vaginismus* (*arctitudo*) causes incapacity for copulation. If this condition is incurable, the defect is called *perpetual,* and if it existed before marriage, it is called *antecedent,* in order to distinguish it from impotency contracted after marriage. Note well: we say *contracted,* not *discovered.* For it may happen that a person had the defect before marriage but was unaware of its existence, although it is difficult to understand that no physical disturbance should follow such a defect. But whether it becomes known after marriage only or is realized before marriage, whether or not the party suffering from it revealed the defect to the other party, is immaterial. If it existed in an incurable and therefore perpetual form, it affects the validity of the marriage.

A distinction may be drawn between absolute and relative impotency. This is illustrated by the following case: Gemma upon ocular inspection was declared to lack the natural instrument of copulation, and was therefore granted a separation from James. But she found another man with whom she could have marital intercourse.[18]

16 "*Inhabilitas ad copulam, quae ex se* (or *per se*) *apta est ad generationem.*"

17 Sixtus V, "*Cum frequenter,*" June 27, 1587: "*Spadones utroque teste carentes*" are declared incapable of contracting marriage.

18 C. 5, X, IV, 15: "*Mulier invenit qui seras huiusmodi reseravit,*" which seems to allude to an anatomical rather than physiological defect.

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This is *relative* impotency, which affects a marriage between two definite persons only. But suppose Gemma had been entirely devoid of natural organs, or so affected with complete *vaginismus,* that intercourse would have been impossible to her with any man; then there would have been *absolute* impotency. Similarly a complete eunuch could not contract marriage with any woman.

(2) The second part of our definition also calls for some explanation. *"Per se apta ad generationem"* means intercourse which is *per se* conducive to procreation. Here is the salient point of the controversy which was called forth by two decisions of the Holy Office, Feb. 3, 1887, and July 30, 1890.[19] These decisions read as follows:

That of 1887: *"Num mulier, per utriusque ovarii excisi defectum sterilis effecta, ad matrimonium ineundum permitti valeat et liceat, necne? Resp. Re mature diuque perpensa, matrimonium mulieris, de qua in casu, non esse impediendum."*

That of 1890 (Quebec.): *"Se unna donna, cui per mano chirurgica siano asportate ambedue le ovarie e l'utero, possa validamente contrarre matrimonio." Resp. Matrimonium non esse impediendum."* (Cfr. *Coll. P. F.,* n. 1733.)

It follows that the lack of ovaries and uterus in a woman does not constitute the invalidating impediment of impotency. A distinction is here clearly supposed between the *terminus a quo* and the *terminus ad quem* of the copula. The former is the conjugal act, taken as fecund, at least *in posse,* provided no obstacle interferes.

19 Cfr. *Am. Eccl. Rev.,* Vol. XXVIII, pp. 51 ff., where the pros and cons are discussed at some length; cfr. O'Malley and Walsh, *Essays in Pastoral Medicine,* 1911, p. 326 ff., whose medical judgment gives way to moralist assumptions.

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The *terminus ad quem* is the same act as related to the organs and elements required for fecundation, and therefore presupposes these organs, especially the ovaries and the uterus, to be in a condition fit to produce the natural result of the act, namely, procreation. The decisions quoted simply require the *terminus a quo*.

(3) What of impotency if it negatively at least frustrates the primary end of marriage? In other words, *can the Church declare that a marriage is valid, although the primary end of marriage cannot be obtained?* After having read all the authors on the subject, the conclusion was forced upon us in the shape of the question just formulated. It is a theological rather than a physiological problem. In order not to fatigue the reader, as we were fatigued by reading all those hundreds of pages,[20] we briefly resume the matter as follows:

(a) *Ab esse ad posse valet illatio.* The decisions of the Holy Office quoted reflect the power of the Church, but only over single or individual cases, as those mentioned really were. We may not generalize them, especially since the Holy Office never states the reasons for its decisions. But the decisions of that august Congregation are neither infallible, nor do they extend beyond the cases for which they are rendered, unless the wording has a general tenor.

(b) What justifies these decisions *in casu* is the fact that marriage has several ends or purposes for which it was instituted by the Author of nature. The *primary end* is the *procreation of offspring,* and this is not only intrinsic but also essential to marriage.[21] It is the *officium naturae.* When we assert that it is essential, we do not,

20 Cf. Eschbach, *Disputationes Physiologico-Theologicae,* 1901; Id. in *Anal. Eccl.,* t. X, pp. 85 ff.; Antonelli, *Medicina Pastoralis,* 1905; Id., *De Conceptu Impotentiae et Sterilitatis,* 1901.

21 It is difficult to admit statements made by the Salmant. and St.

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however, mean to say that it is the sole end of marriage, because there are secondary ends, as stated in can. 1013: mutual help and relief of concupiscence. The right of declaring that, in a particular case, the secondary ends suffice, provided everything is done in a lawful manner, in order to contract a valid marriage, must be vindicated to the supreme authority in a matter subject to its power. For the welfare, not only of single individuals, but of Christian society at large, demands that there be such a power, and none other can be imagined than the one set up by God for ruling the society instituted by Christ. This is nothing else but an interpretation of the natural law.

(c) We do not believe that any further reason can be assigned to justify the aforesaid decisions. We are aware indeed of the argument that want of ovaries and uterus is similar to lack of the power of begetting children in an old woman, or, in other words, to sterility. However, the comparison is not perfect. For, in the first place, sterility is only partial and sometimes only temporary impotency, which may be removed either by natural or preternatural means.[22] No doubt the possibility of a miraculous interference had much to do with the attitude of the Church towards sterility.[23] Besides, as the late Fr.

Alphonsus (cfr. *Anal. Eccl.* 1902, t. X, p. 468; *Amer. Eccl. Rev.*, Vol. XXVIII, p. 658) that the *susceptio prolis est (nec unicus) nec immediatus finis matrimonii.* What then is the *finis primarius?* The *coitus?* The sophism (*Am. Eccl. Rev.*, 28, 651) does not consist in distinguishing the ecclesiastical from the medical sense of impotency, but in admitting a difference between natural and ecclesiastical impotency. The impotency caused by nature and intended by the Church must be one and the same. See *Am. Eccl. Rev.*, April 1919, Vol. 60, 426 ff., where the doctrine of St. Thomas concerning consummation of marriage is clearly set forth.

22 We would like to hear an able physician's view as to whether a woman destitute of ovaries and uterus could by miraculous interference be made pregnant and bring forth a child.

23 Examples: Sarah, Anna, Elizabeth, the parents of SS. Nicholas

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Lehmkuhl, S. J., justly pointed out, there is a great dissimilarity between the two cases.[24] If the ovaries and the uterus are excised, we have a positive interference, either lawful or unlawful, with nature. If this interference takes place by mutual consent and agreement, it invalidates marriage because it is incompatible with a substantial end of marriage. Sterility, on the other hand, is merely a passive condition of either one or both parties, which does not in any shape or form suppose a mutual pact of avoiding the primary end of marriage. If marriages such as those referred to in the two decisions would be allowed generally, and not merely by way of exception, one stronghold against race suicide would be seriously shaken, and the primary end of marriage would be made coordinate with the other two, which are merely secondary.

§ 2 permits marriage as *licit and valid* if there is any doubt as to the existence of the impediment of impotency. The existing doubt may be one of *fact* or of *law*. There is a *dubium facti* if the natural impotency is not absolutely proven, for instance, in surgical operations, after which there sometimes remain traces of the generative power. A doubt of *law* existed in the case mentioned above, because it seems as yet uncertain how far the limits of impotency extend. Until a general interpretation is given [25] the Church wishes us to apply the principle: "*In dubio libertati favendum est.*"

For the rest, the Holy Office has declared that in case of doubt recourse should be had to Rome.[26]

of Tolentino and Juliana de' Falconieri.

24 *Am. Eccl. Rev.*, Vol. 28, 317.

25 That the decision of S. O., July 23, 1890 (*Coll. P. F.* n. 1733) was only a *particular* one, is duly noted by the editors of the *Collectanea P. F.* (see the number quoted). This corroborates our view. The other *causa* referred to by Card. Gasparri is rather a dispensation from a ratified marriage; cfr. *A. S. S.*, t. 14, p. 68.

26 S. O., July 31, 1895; Jan. 16,

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§ 3 mentions *sterility*. Now sterility exists when the *copula per se apta ad generationem* can be properly performed, but by a merely accidental and natural fact fecundation does not follow. This happens when marriage is contracted at an advanced age when the generative powers have ceased to function. Those authors who maintain that a woman without ovaries and uterus can contract a valid marriage, would consistently have to reduce that kind of impotency to mere sterility. What we said on the subject under § 1, (3, c.) may suffice. We will only add that if no sophistry is to be practiced, the ecclesiastical concept of the impediment of impotency cannot differ from that given by competent physiologists, since the impediment of impotency is not established by the Church, but by the law of nature.

We add a few practical hints to the *confessor* or *pastor*. The first question, of course, in such a case would be, whether a conscientious physician has been consulted and what was his opinion? If the physician diagnosed the case as one of perpetual and antecedent impotency, his judgment must be referred to the diocesan court, unless there is room for the solid presumption that the parties may be allowed to live together like brother and sister, and a separation would cause grave scandal. But the danger of incontinency must be remote.[27] If the parties prefer to get an ecclesiastical divorce, that would dissolve the matrimonial tie.

A triennial experiment is no longer admitted, but its place is taken by ocular inspection by physicians or nurses.

As to *hermaphrodites*, or such persons as have the sexual characteristics of both sexes, whether it be *andro-*

1895 (*Coll.*, n. 1907, Vol. II, 324).

27 S. O., March 8, 1900 (*Coll.*, n. 2078); Leitner, *l. c.*, p. 151 f.

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gynia or *gynandria* or *hermaphroditismus neuter,* the testimony of physicians is required. No *hermaphroditus neuter* can possibly be called capable of marrying because the sex is not sufficiently determined.[28] Finally it must be observed that *artificial fecundation, i. e., extra copulam naturalem,* is never allowed.[29]

The *parties* involved *are alone competent* to *attack the marriage* on the score of impotency, for they are the only ones interested. And if they do so, they must prove that the existing impotency is antecedent and perpetual and cannot be removed by natural and lawful means. If it is absolute, *i. e.,* renders the conjugal act impossible, it also renders marriage with every other person invalid; if it is merely relative, it affects only the persons concerned.[30]

LIGAMEN OR BOND OF A PREVIOUS MARRIAGE

CAN. 1069

§ 1. Invalide matrimonium attentat qui vinculo tenetur prioris matrimonii, quanquam non consummati, salvo privilegio fidei.

§ 2. Quamvis prius matrimonium sit irritum aut solutum qualibet ex causa, non ideo licet aliud contrahere, antequam de prioris nullitate aut solutione legitime et certo constiterit.

§ 1. Those bound by the bonds of a former marriage, even though it was not consummated, attempt marriage invalidly, excepting the privilege of the faith.

§ 2. Although the previous marriage be invalid or dissolved for whatever reason, it is not lawful to contract

28 Antonelli, *l. c.,* p. 105 f.; Eschbach, *l. c.,* p. 53 f.

29 S. O., March 24, 1897 (*Coll.,* n. 1904): "*Ssmus adprobavit,*" the clause added to that decision, is not found in the other two.

30 *Instructio S. C. P. F.,* 1883, n. 46 (*Coll.,* n. 1587)

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another one before the nullity or dissolution of the first has been legally and certainly established.

The essential properties of marriage, unity and indissolubility, exclude a valid marriage with another party while the marital bond continues. Divorce, as understood by the civil law, was and is repudiated by the Church. A person who married a divorced man or woman in former times had to do penance publicly and break off the unlawful relation, otherwise he was denied the Sacraments, except at the point of death.[31] However, it cannot be denied that a *matrimonium ratum tantum* was judged more liable to solution than one both ratified and consummated, and diverse opinions, even of Roman Pontiffs, floated about in the canonical air [32] until a decision given by Pope Alexander III made the position of the Church more uniform. From the Penitential Books we know that the time of waiting for the certainty of death of the other party was not extended, five years being deemed sufficient if the party was taken captive,[33] nor rigorously insisted upon. This leniency is easily explained by the slow and difficult means of communication in times past.

§ 1 sets up the *diriment impediment* of the *marriage bond,* or *ligamen,* opposed alike to polygamy and divorce. That this impediment exist, it is required, (a) that the first marriage was valid and never dissolved, even though (b) the union is not yet consummated, but only ratified. This latter condition is quite intelligible, because the marriage bond is validly contracted by a valid consent, and needs no consummation to be perfect.

31 Syn. of Elvira (305), can. 9; c. 8, C. 32, q. 7.

32 Cfr. Bernard. Pap., *l. c.*, p. 298; Rolandus Mag., *Summa,* ed. Thaner, pp. 114, 187, 200; Tancred, *l. c.*, p. 49; c. 3, X, IV, 14, where Alex. III reviews different verdicts of his predecessors.

33 Cfr. Wasserschleben, *l. c.*, p. 148.

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The first condition supposes a valid *union* that has not been legitimately dissolved. Validity depends on the valid consent, on the observance of the prescribed form, and on the absence of diriment impediments. The *consent* would be affected by a condition opposed to the essential qualities of unity and indissolubility. For instance, a couple taught to contract marriage subject to divorce would contract invalidly, if this condition was stipulated by mutual consent.[34] The *form* would affect the validity if marriage were contracted against can. 1094 ff. A *diriment impediment* would invalidate the marriage if it objectively affected either one or both of the parties. Thus, for instance, James, a baptized person, pretending to be a Catholic, married Gemma, but afterwards declared that he was no Catholic at all. The marriage was declared valid on the ground that, as James was baptized, neither dissimulation nor apostasy could annul a marriage validly and lawfully contracted by him.[35] The privilege of the faith could not be invoked in this case.[36] As long as a former marriage exists, the second is invalid, and the parties must separate.[37] The clergy or hierarchy cannot connive at polygamy, even though there were danger that a whole country would be involved in heresy, as happened once upon a time in Transylvania (Hungary). All they can do is to abstain from inflicting penalties, if the danger of apostasy is general.[38]

A marriage which is only *ratified,* not *consummated,* may be solved by papal intervention, as shall be seen un-

34 S. O., Jan. 24, 1877 (*Coll. P. F.*, n. 1465); cfr. can. 1092.

35 S. O., March 20, 1817 (*Coll.*, n. 721).

36 S. O., March 20, 1675 (*Coll.*, n. 208). A Christian became a Mohammedan after baptism and marriage; the bond remains; cfr. S. O., Dec. 11, 1850, ad 25–27 (*Coll.*, n. 1054).

37 S. O., Aug. 19, 1857 (*Coll.*, n. 1147).

38 S. O., June 23, 1671, ad 3 (*Coll.*, n. 196).

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der can. 1119, and by religious profession, which is treated under can. 1073.

A legitimate though consummated marriage can be dissolved only by the application of the Pauline Privilege (see can. 1120 ff.).

§ 2 treats of what is technically called *certus mortis nuntius*, certainty regarding the death of the other party. The *proof* for the dissolution of the former marriage bond, says the text, must be *legal* and *certain*. If legal proof has been duly furnished, the ecclesiastical judge need require no more. Before explaining the method of procedure in such matters, some preliminary remarks seem pertinent.

(a) There is no definite time limit or determined number of years required for quasi-prescription; hence the ecclesiastical judge should never conform himself to the prescription of the civil law concerning the number of years.[39]

(b) The clergy can never declare that, if no notice of death is received, a marriage is dissolved after a certain lapse of time. To do so would be coöperating in polygamy and adultery.[40] Note here what has been said under can. 1031.

The *method of legally proving the death* of a person is as follows:[41]

1. If possible, an *authentic document*[42] must be obtained from the records of the parish or hospital or asylum or military department, or from civil authority.

2. If no such document can be obtained, *two witnesses*

39 S. O., Instr. 1868 (*Coll.*, n. 1321). Our modern codes admit full divorce in case of prolonged absence; cfr., for instance, the Statutes of Missouri, sect. 2921, where one year's absence is declared sufficient.

40 S. O., June 23, 1671 ad 1 (*Coll.*, n. 196).

41 *Instructio S. O.*, 1868 (*Coll.*, n. 1321); *Instr. S. C. P. F.*, 1883 (*Coll.*, n. 1587).

42 What an authentic document is may be seen under can. 1990.

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may be admitted. These must be trustworthy persons and testify under oath. They must have known the person whose death they attest, and their testimony must agree as to the place, the cause and the essential circumstances of the death.

3. If two witnesses cannot be produced, *one will suffice,* provided he was acquainted with the party and the circumstances of death, and nothing unsuitable or unlikely is found in his deposition.

These witnesses may also testify from *hearsay,* provided their testimony agrees with circumstances known from other sources, and provided their information has come from direct witnesses.

4. If no witnesses are available, the judge may resort to *circumstantial evidence,* which is furnished by conjectures, presumptions, and circumstances that preceded, accompanied, and followed the supposed death. Examples are furnished by military companions, especially officers, or by the companions and circumstances of a voyage either on land or sea; whether the person in question travelled alone or in company, for what purpose, which was his route and destiny, whether a wreck took place, etc.

5. *Rumor* may be admitted if other proofs are wanting. A rumor must be established by two trustworthy witnesses who testify under oath to its reasonableness as also to the general opinion of the people and their own conviction.

6. Finally, a *newspaper advertisement* may effect the desired result, especially if the manager is furnished with the necessary information.

These are the rules which the ecclesiastical judge should follow. If he is morally certain of the death of the other party, he may pronounce sentence to the effect

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that the surviving party may contract another marriage. Nor are two uniform sentences required to permit a second marriage.[43] If the doubt can not be entirely removed, recourse must be had to Rome and all the documents forwarded thither.[44] Meanwhile the parties must be told to separate until a decision is rendered.

Here it may be stated that neither the *confessor* nor the *pastor* are entitled to give judgment in such cases. When approached, they must direct the parties to the diocesan court, or, with the permission of the latter, themselves bring the case before that tribunal. If a second marriage was already concluded and a reasonable doubt as to the death of the former party exists, the parties must be told to suspend their marital relations (*copula*) until a decision is given.[45]

The Code says that until such a verdict is rendered, the parties concerned may not *lawfully* contract a new marriage. This means that the second marriage will be valid, provided the former marriage was dissolved by whatever cause. This case was brought before the S. C. C., which decided that the second marriage was valid, though illicit.[46] Consequently the party thus contracting a marriage without full certainty as to the former partner's death, though it had really occurred, would not be allowed to demand the *debitum,* but only to render it if asked.

A curious case was solved in 1865 by the Holy Office.[47] Titius was taken by rebels and no notice of his fate reached his wife Martha for two or three years. She married a man named Mark, a Christian like herself. Mark, being seriously rebuked by the local missionary, declared his

43 S. O., May 6, 1891 (*A. S. S.*, t. 24, 747).

44 S. O., Aug. 19, 1857 ad 2 (*Coll.*, n. 1147).

45 Cfr. Leitner, *l. c.*, p. 170 f.

46 S. C. C., Sept. 9, 1752, Smyr. (Richter, *Trid.*, p. 225, n. 92).

47 S. O., March 22, 1865 (*Coll.*, n. 1272).

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readiness to leave Martha, but wished to marry another woman. The Holy Office decided that the parties were to be separated, but Mark could not marry another until he was morally certain that at the time of his marriage to Martha, the latter's husband was still alive. Although this solution at first blush seems strange, it is quite logical, for if Martha's first husband had been dead when she married Mark, the marriage would have been valid and Mark could not validly leave her and marry another. Therefore he had to wait until he could obtain certainty regarding Titius's death.

DISPARITY OF WORSHIP

CAN. 1070

§ 1. Nullum est matrimonium contractum a persona non baptizata cum persona baptizata in Ecclesia catholica vel ad eandem ex haeresi aut schismate conversa.

§ 2. Si pars tempore contracti matrimonii tanquam baptizata communiter habebatur aut eius baptismus erat dubius, standum est, ad normam can. 1014, pro valore matrimonii, donec certo probetur alteram partem baptizatam esse, alteram vero non baptizatam.

§ 1. A marriage is null when contracted by a non-baptized person with a person baptized in, or converted to, the Catholic Church from heresy or schism.

§ 2. If the party, at the time of the marriage contract, was commonly held to have been baptized, or if his or her baptism was doubtful, the marriage must be regarded as valid in accordance with can. 1014, until it is proved with certainty that one party was baptized and the other was not.

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CAN. 1071

Quae de mixtis nuptiis in canonibus 1060–1064 praescripta sunt, applicari quoque debent matrimoniis quibus obstat impedimentum disparitatis cultus.

The rules laid down in can. 1060–1064 for mixed marriages must be applied also to marriages to which there is an impediment of disparity of worship.

This impediment, like that of mixed religion, is based on the natural and on divine law. The natural law, as stated above, forbids endangering one's faith without necessity. The divine law has a positive foundation in Holy Writ, which reprobates unions between Jews and Gentiles.[48] Christianity in the beginning was more lenient in this respect, for reasons which were certainly justified.[49] The Christian Emperors declared marriages between Jews and Christians illegitimate.[50] This civil legislation was adopted by a number of councils (Elvira, 305, Toledo VI and X, Orleans and Clermont).[51] In the eleventh and twelfth centuries canonists regarded heresy as a diriment impediment. Gradually, however, since the beginning of the thirteenth century, by custom rather than by positive law, a distinction was made between infidelity and heresy with regard to marriage.[52]

1. The *foundation* of this impediment is the essential difference of religion brought about by *Baptism*. Hence a pagan, whether Buddhist, Brahman, Mussulman, or a Jew, even though enrolled among the catechumens,

48 Exod. 34, 16; Deut. 7, 3 f.

49 Cfr. Tertull., *De Corona*, c. 13; *De Monogamia*, c. 11; *Ad Uxorem*, II, 3. He rebukes marriages with pagans, but never says they are invalid.

50 L. 2, Cod. Theod., III, 7; l. 2, *ib.* XVI, 8; l. 6, Cod. I, 9.

51 Cfr. Freisen, *l. c.*, p. 635 f.

52 Bened. XIV, "*Singulari Nobis*," Feb. 9, 1747, § 9.

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cannot validly contract a marriage with a baptized Catholic.

2. Note the difference between marriages contracted before May 19, 1918, and after that date. The Code, while it legislates only for Catholics, appears to imply that after the date mentioned Catholics only are bound by this impediment. Such, at least, seems to be the prevalent opinion.[53] But the question arises, What about the impediment if contracted before May 19, 1918? Take an example. James, a Jew, married Gemma, a baptized Anglican, in 1913. Was the marriage valid? No, because before the promulgation of the Code the impediment of disparity of worship bound baptized Protestants. Has the marriage become valid since the promulgation of the Code? No, because marriages contracted invalidly by reason of ecclesiastical impediments abrogated by the New Code do not become valid by its promulgation. Hence if either James or Gemma should become a Catholic, they would need a dispensation or, possibly, a *sanatio in radice*. This is the answer given by the Commission for the Authentic Interpretation of the Code.[54] There is only one difficulty connected with this answer: The number (1) which contains the answer speaks exclusively of promulgation, whilst the following number, which treats of spiritual relationship, takes May 19, 1918, as the date on which the impediment, as formerly understood, ceased. However, since the same Commission speaks in n. 6 of the *ius vigens* (the law as now in force), we believe that promulgation in our case, which has no date, must be taken as May 19, 1918, or the date on which the Code commenced to be law.

53 Cfr. *Am. Eccl. Rev.*, 1918, Vol. LVIII, p. 484. The quotations in Card. Gasparri's edition seem to prove the contrary.

54 June 2–3, 1918 (*A. Ap. S.*, X, 346).

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3. The *Catholic* who cannot validly marry a non-baptized person is one who was either baptized in the Catholic Church, or converted thereto from heresy or schism.

(a) He is *baptized in the Catholic Church* who has become a member of that body through valid Baptism. If a Catholic minister performed the ceremony, there can be no reasonable doubt as to its validity. But since private baptism may also be employed, and parents have the right of baptizing their children at least when there is danger of death,[55] Baptism must also in this case be presumed as given in the Catholic Church. The same must be said if Catholic grandparents, or guardians, have baptized a child in a case permitted by law.[56]

(b) *Converts* are persons who have been heretics or schismatics, but embraced the Catholic faith either by receiving (conditional) Baptism or by abjuring their former creed. *Heretics* are those who, after having received Baptism, retain the name of Christian, but pertinaciously deny or doubt some truth which must be believed by divine or Catholic faith. A *schismatic* is one who refuses to subject himself to the Sovereign Pontiff or to be in union with the members of the Church subject to him.[57] A heretical tendency is usually connected with schism. Heretics, then, and schismatics, if converted to the Catholic faith, cannot validly contract marriage with a non-baptized person. The question here arises: does can. 1099, § 1, n. 2, apply to the following case? James had been a convert to the Catholic faith for a number of years. Now he is engaged to a rich young lady, Gemma, who, though taken to be a Protestant, was never baptized. She is opposed to a Catholic marriage

55 Cfr. can. 742, § 3.
56 Cfr. can. 750, § 2, and what is said under can. 1099, § 1.
57 Cfr. can. 1325, § 2.

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and mode of life, and spurns any insinuation as to promises. James finally gives way and leaves the Catholic faith, declaring himself a Protestant. After a few months the two are married before a squire. No doubt can. 1099, § 1, n. 2, renders that marriage invalid; for the form prescribed was not observed. But does can. 1070, § 1, also render it invalid? It might justly be urged that this canon supposes the party, actually there and then, at the moment of the marriage, to belong to the Catholic religion. Yet the rule of interpretation from parallel texts would seem to demand that the law of clandestinity be here applied to the case of disparity of cult. For the wording is almost the same. Therefore we believe that the marriage *in casu* is invalid on account of the existing impediment of disparity of cult as well as by reason of lack of the required form.[58]

§ 2 speaks of a *common opinion* to the effect that a person was baptized. Here is a case in point. Gemma was held by all to be a Catholic and married James, a Catholic, in church. But afterwards she told the priest that she had never been baptized. The priest baptized her secretly and probably thought this revalidated the marriage; but it did not, because the impediment was objectively and subjectively in the way of validity. Therefore, simple revalidation being impossible, there was no other remedy left but *sanatio in radice*.[59] Ignorance of the law enacting the impediment does not excuse. For impediments are not established for private but for the public good.[60] In the case just mentioned the proof that

[58] Can. 1099, § 1, n. 1, causes some difficulty, because even a fallen-away convert is bound to observe the form prescribed by the Church.

[59] S. O., Aug. 22, 1906 (*Anal. Eccl.*, 1907, t. XV, p. 8 f.); April 29, 1842 (*Coll.*, n. 948).

[60] S. O., Sept. 19, 1671 (*Coll.*, n. 202) says: "*Et lex huiusmodi impedimentum inducens non fuit invincibiliter ignorata*"; but this

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Gemma never was baptized was given in the confessional, and this was deemed sufficient.

More difficult would be the case where *Baptism was doubtful.* Most sects now-a-days care little for this sacrament; not a few openly spurn it. The rules given above for mixed marriages suffice to enable us to understand the Roman practice. For the rest, conditional Baptism may remove the difficulties. But the general rule stated above (under mixed marriages) that each Baptism must be examined separately, especially as to matter, form, and the intention of the minister, also holds good in the case of this diriment impediment.[61] See the answer given by the Holy Office to the bishop of Seattle (then Nesqually), that a general presumption against the validity of Baptism is not admissible. The bishop had asked concerning the baptism conferred by Methodist preachers, who were (and are) inclined to deny the necessity and efficacy of this sacrament and employ a doubtful form, especially in regard to the Holy Ghost. The Holy Office[62] answered that an erroneous intention on the part of the minister concerning the efficacy of Baptism does not affect its validity, and as to the mode of administering the sacrament, the ritual used by these ministers should be examined to ascertain whether the rite contains anything affecting the validity of Baptism. Inquiry should also be made into the conduct of the minister,— whether he observed the ritual of his denomination, etc. From all this it will be seen that no general rule can be established with regard to the validity of

clause refers to admission to the sacraments; elsewhere the Holy Office declared that ignorance, even if invincible, does not remove the impediment; S. O., July 4, 1855; March 11, 1868 (*Coll.*, nn. 1114, 1326).

61 S. O., Nov. 17, 1830; July 5, 1853; Jan. 24, 1877 (*Coll.*, nn. 821, 1096, 1465).

62 S. O., Jan. 24, 1877 (*Coll.*, n. 1465).

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Baptism administered by American Methodists. That Anglicans baptize validly is taken for granted in the same document, whereas the Baptism of Quakers is rejected as invalid.

But in all cases certain proof, and not a mere presumption, is required to establish the validity or invalidity of a Baptism. Where no proof is adduced, the *presumption is in favor of validity*. The question how proof is to be furnished may cause trouble and a good deal of writing. If no baptismal record can be obtained, and no witnesses (sponsors) or parents are available to testify to the fact of Baptism, the party himself must be asked under oath whether he knows anything of Baptism being administered to him, what sect he or his parents belonged to, etc. Then the rules given above for mixed marriages may be applied. Until this is done, however, the party must be presumed to have been validly baptized, unless he and his parents were unbelievers, in which case there would be a strong presumption that Baptism had never been administered.[63] (See Appendix III, *infra*.)

Can. 1071 mentions the *promises and reasons* stated under the same heading in can. 1060–1064 concerning mixed marriages. The two promises must be made in the same way as in mixed marriages, and the reasons must be just as strong as, if not stronger than, those required for a mixed marriage. The Roman Court has always insisted upon very grave reasons.[64] However, the canonical reasons mentioned under can. 1054 will suffice. Yet if there were great danger of scandal, especially in an entirely Christian country, the Holy See might not dispense.[65]

63 Yet even in that case the possibility of Baptism is not entirely excluded, for it may be that the child was baptized in a hospital or by a nurse, etc.

64 S. O., Sept. 5, 1736 (*Coll.*, n. 319). A long-standing marriage and offspring would be a solid reason.

65 The case of Popper-Castrone

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As to the *faculties of our Ordinaries,* see under can. 1048. A few remarks may complete what is said there. There is a decision of the Holy Office which says that a dispensation granted without demanding the guarantees, or after the contracting parties have refused to give them, is null. The Ordinary may, without recurring to the Holy See for a final sentence, declare such a marriage when contracted without the promises to be void.[66]

The faculty of dispensing from the impediment of mixed religion is specifically different from that of dispensing from disparity of worship, and therefore the one does not supply the other.[67] But the cumulative faculty is thereby not curtailed.[68] If a dispensation from disparity of cult is granted to a couple already married, renewal of the consent is required, unless a *sanatio in radice* has to be applied.[69]

If the pastor, when asking for a dispensation, is in doubt whether a dispensation from disparity of worship or from mixed religion is required, let him *ask for both* and explain the reason for his request.[70] It may happen that in the meantime new proofs either for or against the validity of Baptism are brought to his attention. If the doubt against the fact or the validity of Baptism is so strong that it almost amounts to a certainty, the dispensation from disparity of cult should be applied. But if the doubt disappears in favor of the validity of Baptism, the dispensation from mixed religion must be used.

(Popper was a Jewish baron of Hungary) is proof of this, for a dispensation was denied (*Arch. f. K.-R.*, Vol. LV, 161, 361; Leitner, *l. c.*, p. 275), although an enormous sum had been offered.

66 *S. O.*, June 21, 1912 (*A. Ap. S.*, IV, 443).

67 S. O., April 29, 1842; March 18, 1891 (*Coll.*, nn. 948, 1750).

68 Cfr. can. 1049.

69 S. O., June 12, 1850 (*Coll.*, n. 1044).

70 Cfr. S. O., April 29, 1842 (*Coll.*, n. 948; Putzer, *l. c.*, p. 394). Lehmkuhl's assertion (*Theol. Moral.*, II, 752, 3) that the dispensation from mixed religion hypothetically and tacitly contains that from disparity of cult, cannot easily

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SACRED ORDERS

CAN. 1072

Invalide matrimonium attentant clerici in sacris ordinibus constituti.

A marriage is invalid when attempted by clerics in major orders.

This brief canon has a lively history and must be compared with can. 132, in connection with which we have given a sketch of clerical celibacy in the Latin and Oriental Churches. The *Oriental practice,*[71] which permits clerics to marry before they are ordained subdeacons, is not admitted in the United States, and no priests of the Oriental Rites are allowed to exercise the sacred ministry here unless they obey the law of celibacy.[72]

Celibacy was established as a *diriment impediment* for the *Latin Church* by the IInd Lateran Council, A. D. 1139, which made it obligatory also on subdeacons and thus raised this latter order to the rank of a higher or sacred order. Although attempts were made to abolish celibacy at the councils of Constance and Bâsle, the Church has always upheld this prerogative of her clergy.

The impediment arises from a sacred or higher order validly and willingly received. We say *validly,* for the impediment cannot exist, unless it has a foundation, and there is no foundation if the ordination was invalid.[73] But ordination may be valid but received *unwillingly.*

be admitted. For the negative answer of the Holy Office to the question: "*Utrum intendat S. Sedes dispensare etiam super impedimento disparitatis cultus quando dispensat partem catholicam ad contrahendum cum parte acatholica*" would seem to preclude such an assumption.

71 Bened. XIV, "*Etsi pastoralis,*" May 26, 1742; "*Eo quamvis,*" May 4, 1745; "*Anno vertente,*" June 19, 1750; Milasch-Pessic, *K.-R. d. abendländ. Kirche,* 1905, p. 598.

72 S. C. P. F., Oct. 1, 1890; June 13, 1891; May 10, 1892.

73 Reiffenstuel in Reg. Juris 52 in 6°; Engel, III, 3, n. 12.

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Can. 214 declares a validly ordained clergyman free from the obligation of celibacy if ordination was administered under compulsion or grave fear.[74]

The *effect* of this impediment is that it invalidates a marriage to be contracted, but does not dissolve a marriage already validly contracted. Therefore the wife of a cleric who has received higher orders with Apostolic dispensation [75] cannot contract a new marriage.[76]

The *source* of the impediment is not the vow attached to celibacy,[77] but the *ecclesiastical law* which forbids sacred ministers, for reasons of the public good, to contract marriage. The vow is only an accessory, and, we may say, a safeguard of the law which imposes the obligation of continency. Therefore this impediment is specifically distinct from that of solemn profession.

Although this impediment is *iuris ecclesiastici,* and binds only the clergy of the Latin Church,[78] yet dispensations from it, especially when the diaconate is involved, are exceedingly rare.* This may be seen from can. 1043, which excepts from the power of dispensation the case of priests. If such a case comes before a pastor or confessor (danger of death), nothing can be done but to impart absolution, provided the penitent is properly disposed and agrees to separate from the woman and repair the scandal he has given.

74 Cfr. S. C. C., Yprens., Dec. 16, 1719 (Richter, *Trid.*, p. 201 f., n. 1).

75 Can. 132, § 3.

76 Sanchez, *l. c.*, l. VII, disp. 40, nn. 2, 6.

77 A vow was maintained by Sanchez, *l. c.*, VII, disp. 27, n. 9; but the majority of authors defend the view stated in the text; cfr. Wernz, IV, p. 534 (ed. 1); Scherer II, 367.

78 Whether a marriage attempted by a cleric of the Oriental Rite in the U. S. before subdeaconship would be invalid, has never been decided. Practically the question is useless, because such a priest could not exercise the ministry.

* See Richter, *Trid.*, p. 202, n. 2.

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RELIGIOUS PROFESSION

CAN. 1073

Item invalide matrimonium attentant religiosi qui vota sollemnia professi sint, aut vota simplicia, quibus ex speciali Sedis Apostolicae praescripto vis addita sit nuptias irritandi.

Marriage is null also if attempted by religious who have taken *solemn vows,* or simple vows that have the force of invalidating marriage by special disposition of the Holy See.

After the religious state had spread and experienced a certain relaxation, especially in Spain, there were not a few cases of attempted marriage, with which the Church was prompt to deal. The marriages of religious were declared "unlawful and sacrilegious unions," "incestuous and adulterous," and condemned by civil and ecclesiastical laws.[79] The severe denunciations by Popes Siricius (384–399) and Innocent I (401–417) seem to indicate that they regarded solemn vows as an annulling impediment. They were formally declared to be such by the IInd Lateran Council, 1139.[80] Boniface VIII, in his much-discussed Decretal,[81] added nothing new to the intrinsic force of the prohibition, but merely declared that the distinction between solemn and private vows was introduced with the sanction of the Church (*constitutione ecclesiae*). It was the view of the School,[82] as well as the Roman practice up to the time of the foundation of the *Society of Jesus,* that vows taken either explicitly or implicitly in an approved religious order were solemn and

79 Cfr. Coustant, *Epp. Rom. Pont.*, pp. 629, 688, 755.

80 C. 40, C. 27, q. 1.

81 C. un. 6°, III, 15; cfr. c. 9, X, III, 32.

82 Cfr. Bern. Pap., *Summa,* ed. Laspeyres, p. 149; Tancred, *Summa,* ed. Wunderlich, p. 20.

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constituted a diriment impediment to marriage. When the Jesuits drew a distinction between solemn and simple vows among their members, it became necessary to have a declaration by the Apostolic See that the members of the Society with simple vows were true religious. The consequence was that Gregory XIII attached to these simple vows the same effects, as concerns the vow of chastity, which flow from solemn vows.[83] Hence the clause in our Code: *"by special disposition of the Holy See."*

1. The foundation of this impediment is *solemn profession,* which, like the impediment itself, originates in the sanction of the Church and is therefore *iuris ecclesiastici.* If *simple vows* have the power of invalidating marriage, this is not by the common law of the Church, but by a special ruling of the Apostolic See. By common law only those religious orders in which solemn vows are taken, and in these orders only those members who have pronounced solemn vows, are affected by this impediment.

2. For solemn profession to induce this impediment, it must be made validly, according to the conditions established in our Code.[84] If the solemn vow was dispensed from, there is no effect invalidating marriage.

3. There is a *specific difference* between the impediment arising from sacred orders and that attached to solemn profession, owing to the fact that they have a different foundation, inasmuch as sacred orders constitute a marriage impediment not by reason of the concomitant vow of chastity, but merely by ecclesiastical law; whereas solemn profession is an impediment by reason of the vow

83 Greg. XIII, *"Quanto fructuosius,"* Feb. 1, 1583; *"Ascendente Domino,"* May 25, 1584.

84 Cfr. can. 572 and our Commentary, Vol. III, p. 254 ff.; S. C. C., March 26, April 9, 1718 (Richter, *Trid.*, p. 255, n. 93).

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itself, and indirectly in virtue of the ecclesiastical law that sets up the distinction between solemn and simple vows. The consequence is that one who is in sacred orders, and at the same time solemnly professed, is bound by two impediments, and the Ordinary who may enjoy the faculties of dispensing from impediments *iuris ecclesiastici* would have to "cumulate" the faculties.[85] Note that although the Holy See may dispense from this impediment, yet it does so only in very rare cases and always restricts the dispensation to the one marriage for which dispensation is granted.[86]

4. The decretals[87] as well as our Code[88] attach a further effect to solemn profession, *viz.*, the *dissolution of a marriage which is ratified* but not yet consummated. For that purpose a space of two months was generally granted, during which both parties were free to consummate the marriage or not. After the lapse of this period the party who refused to render the *debitum coniugale* could be compelled by the ecclesiastical judge either to render it, or to embrace the religious state and make solemn vows.[89] In order, however, that the other party who is unwilling to enter religion need not wait four years (one year's novitiate and three years of temporary profession), recourse to the S. C. Rel. may be had to permit acceleration of solemn profession. Now-a-days no one bound by the marriage bond can be validly received into any religious order without an Apostolic indult.[90] Therefore after the very first moment of a valid union, the case must be brought before the Apostolic See,

85 S. O., July 1, 1891 (*Coll. P. F.*, n. 1758): "*Monialis aegrotans in concubinatu vivens cum diacono,*" in which case can. 1043 may be applied.

86 De Smet, *l. c.*, p. 348.

87 C. 10, X, III, 32.

88 Can. 1119.

89 S. C. C., Feb. 3, 1725; Leitner, *l. c.*, p. 191.

90 Can. 542,; cfr. S. C. super Statu Reg., Jan. 24, 1861.

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which will demand proof of non-consummation. After this has been duly furnished, the party that enters a religious institute will be told to make solemn profession as soon as the Holy See commands. After the solemn profession the marriage is dissolved, because no dispensation is needed for that purpose.

In the case of a *consummated marriage* the bond cannot be severed by solemn profession and neither party can be received into a religious institute without the other's consent. Supposing the marriage was consummated and the wife enters a religious institute with papal permission and the consent of her husband, who remains in the world and takes the simple vow of chastity; may he marry again after the death of his wife? The vow of chastity seems to be against him; but this vow must be regarded as conditional,— conditioned, namely, by the state of marriage and the religious state of the wife. Both conditions being removed, the husband is free to marry again without a dispensation, unless, indeed, his vow was an absolute one of perfect chastity.[91]

ABDUCTION (RAPTUS)

CAN. 1074

§ 1. Inter virum raptorem et mulierem, intuitu matrimonii raptam, quandiu ipsa in potestate raptoris manserit, nullum potest consistere matrimonium.

§ 2. Quod si rapta, a raptore separata et in loco tuto ac libero constituta, illum in virum habere consenserit, impedimentum cessat.

91 Cfr. Bened. XIV, *De Syn. Dioec.*, XIV, 12, 16; Wernz, *l. c.*, IV, p. 564, (1 ed.); can. 1058; can. 1309. Concerning the penalties incurred by clergymen and religious attempting marriage, see can. 2388: "*Excommunicatio latae sententiae Sedi Apost. simpliciter reservata.*"

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§ 3. Quod ad matrimonii nullitatem attinet, raptui par habetur violenta retentio mulieris, cum nempe vir mulierem in loco ubi ea commoratur vel ad quem libere accessit, violenter intuitu matrimonii detinet.

§ 1. Between the abductor and the woman abducted with a view to marriage there can be no (valid) marriage as long as she remains in the power of the abductor.

§ 2. If the abducted woman, having been separated from the abductor and restored to a place of safety, consents to have him for a husband, the impediment ceases.

§ 3. As far as the nullity of marriage is concerned the violent detention of a woman is equivalent to abduction, when, namely, a man violently detains her with a view to marriage, in the place where she dwells or to which she has repaired of her own accord.

It is not necessary to cite the rather confused Roman law [92] on the subject, or ancient ecclesiastical discipline, which has not been uniform.[93] As an impediment of *ecclesiastical law* abduction was formulated by the Council of Trent.[94] Of course, it *is* founded upon natural law, inasmuch as it affects the freedom of consent. But the formal side of the impediment is strictly ecclesiastical or human.

The Code mentions two kinds of abduction: abduction proper and detention (§ 3). But both amount to the same and have the same effect. The *requisites* are the following:

1. The *object* of abduction is a woman, not a man, although boys, too, may be "kidnapped." It is immaterial whether the woman be good or bad, young or old,

92 Cfr. Cod. IX, 13; Nov. 143; Nov. 150.

93 Freisen, *l. c.*, p. 590; the plainest canon is that of a synod of Meaux, VIIIth century (Mansi, *Coll. Conc.*, XIV, 834 can. 60); cfr. c. 7, X, V, 17; Bernard. Pap., *Summa, ed. cit.*, p. 231.

94 Sess. 24, c. 6, *de ref.*

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rich or poor, marriageable or not, whether betrothed to the abductor or not. All these qualities are purely accidental.[95]

2. The *abduction* as well as the *detention* must be *violent*. Now abduction means removal from one place to another even though it be in the same town or house, assuming that the latter has several apartments.[96] *Detention* may take place in the same room, but it must be violent, *i. e.*, effected by physical compulsion, fraud or allurement. It does not matter whether it is perpetrated by the abductor himself or by his accomplices and friends, even if they be the parents of the woman.[97] But violence naturally supposes that the woman does not consent to or connive at the abduction,— hence *nolentem mulierem*, an unwilling woman. If the woman consented to the abduction, but afterwards repented, there would be no violence,[98] though there may be violent detention. But the unwillingness to consent must be in the woman herself, in other words, though the parents may be opposed to the abduction and to the marriage, if the woman is satisfied, there is no impediment.[99]

3. The *end or purpose* of the abduction or detention must be *marriage* with the abductor or detainer. If the motive were other, for instance, merely *vesanus amor*,[1] or satisfaction, or material gain, the impediment would not arise; therefore the Code says: *intuitu matrimonii*. This is so true that even if the original intention were afterwards changed into that of contracting marriage,

95 Boekhn, IV, 6, n. 54; Gasparri, *l. c.*, n. 621; Wernz, *l. c.*, IV, p. 419 (1 ed.); v. Scherer, II, 380.

96 Santi-Leitner, IV, 1, n. 159.

97 S. C. C., June 25, Aug. 27, 1864 (*A. S. S.*, I, 15 ff.); *Reg. Iuris*, 72 in 6°.

98 Sanchez, *l. c.*, l. VII, disp. 12, n. 7 f.

99 S. C. C., March 5, 1714 (Richter, *Trid.*, p. 252, n. 90); *A. S. S.*, I, 63; Sanchez, *l. c.*, n. 9.

1 S. C. S., *ibid.*

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there would be abduction in the canonical sense. This also holds true if one abducts his own *fiancée,* provided the abduction is perpetrated for the purpose of marriage.[2]

4. *Violent abduction* — not detention, because of the *contradictio in adiecto* that would follow — *ceases* as soon as the woman is in a safe place and freely consents to the marriage. Freedom of consent is all that is required, and the impediment is removed as soon as this freedom is restored.[3]

CRIME

CAN. 1075

Valide contrahere nequeunt matrimonium:

1.° Qui, perdurante eodem legitimo matrimonio, adulterium inter se consummarunt et fidem sibi mutuo dederunt de matrimonio ineundo vel ipsum matrimonium, etiam per civilem tantum actum, attentarunt;

2.° Qui, perdurante pariter eodem legitimo matrimonio, adulterium inter se consummarunt eorumque alter coniugicidium patravit;

3.° Qui mutua opera physica vel morali, etiam sine adulterio, mortem coniugi intulerunt.

There can be no valid marriage between:

1.° Those who, during the same legitimate marriage, have committed adultery with and promised marriage to each other or attempted it, even by a merely civil act (*promissio cum adulterio*).

2.° Those who during the same legitimate marriage have committed adultery together and one of them conjugicide (*uno machinante et adulterio*).

2 All the decisions quoted in *A. S. S.*, I, 57 f.; IX, 519 f.; XXI, 593; XXIII, 451 ff. are not to the point, because the girl in the case connived at or consented to the abduction.

3 Concerning the penalty, see can. 2353.

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3.° Those who, even without adultery, caused the death of a partner by mutual coöperation, either physical or moral (*utroque machinante absque adulterio*).

This so-called impediment of crime was acknowledged by the synod of Tribur, A. D. 896, whose 40th canon was received into the Decree of Gratian.[4] The Decretals[5] also mention it, and the canonists have explained it more elaborately. The reason for making crime an impediment, Sanchez says,[6] is to preclude the hope of a future marriage to adulterous conjugicides. It is founded on natural law,[7] though as a formal impediment it is *ecclesiastical*.[8] As it contains a *threefold distinct species*, this must be plainly indicated in the petition for dispensation, as explained under can. 1053.

The *first species* is *adultery with a promise of marriage*. This impediment is incurred only if:

1. The act of *adultery* is complete and formal, that is if perfect carnal intercourse (*copula per se apta ad generationem*) has taken place, with or without subsequent pregnancy, and one of the parties at least must be aware of the married state of the other. James, an unmarried man, has carnal intercourse with Gemma, who is lawfully married to Brutus. If James knows nothing of Gemma's being married, there is no formal, but merely material, adultery. It does not matter whether Gemma is separated or civilly divorced from her husband, or whether the latter had consummated his legal marriage with Gemma, as long as a valid marriage tie exists between the two. However, it might happen that a civilly divorced woman, in our case Gemma, would not regard

4 C. 4, C. 31, q. 1.
5 Cfr. X, IV, 17; V. 16.
6 *L. c.*, l. VII, disp. 79, n. 1.
7 The Mosaic Law in Lev. 20, 10; Deut. 22, 20. The Roman Law in l. 6, Dig. 48, 5; l. 4, Cod. IX, 9; Nov. 134, c. 12.
8 Benedict XIV, "*Aestas*," Apr. 11, 1757, n. XV.

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it as adultery, but merely as fornication, to have intercourse with an unmarried man. In that case there would be no formal adultery.

2. The second condition for the impediment is a *mutual promise of, or an attempt at, marriage.* This promise must be a serious, free and mutual promise, the object of which is marriage, not "free love," or something else. Neither would a conditional promise, as long as the condition is not verified, be sufficient to induce the promise or impediment. Of course, such a promise is neither licit nor valid. Thus in our case James (unmarried) may have committed adultery with Gemma (married) and promised to marry her after the death of her husband. The latter dies a natural death.[9] In that case there would be the impediment of crime if adultery was committed and a promise of marriage made. However, if the promise was conditional, for instance, "*provided* Brutus dies a natural death," or "*provided* he leaves an insurance policy of $5000," some authors [10] say that a conditional promise not verified before the death of the innocent party must be looked upon as annulling the promise, and that there would be no impediment. It is difficult to understand this reasoning; for certainly a conditional consent is possible and admissible, and on the other hand the conditions mentioned above are possible and admissible and may certainly be combined with a serious,[11] externally manifested and mutual promise of future marriage. Equal to a promise of marriage (which, of course, need not be made in the form of an engagement), is an *attempted marriage.* To attempt

9 S. C. C., March 26, 1746 (Richter, *Trid.*, p. 268, n. 109).

10 Gasparri, *l. c.*, n. 648; Wernz, *l. c.*, IV, Vol. 2, p. 404, n. 524.

11 Cfr. Sanchez, *l. c.*, VII, disp. 79, n. 11 f. Wernz admits a condition, but one to be verified before death; — why? c. 7, X, IV, 17, does not militate against our view.

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marriage here means not merely to plan or prepare for marriage, but to contract marriage invalidly by words expressing consent or by some other sign involving a promise of consent. Therefore, even if a civil divorce was granted, and polygamy could not be charged, and the marriage was performed before the civil magistrate, the Church would look upon this second (civil) marriage as a mere attempt. But this attempt would amount to a promise of marriage according to ecclesiastical usage, and would suffice to constitute the impediment of crime, provided adultery had been committed.

3. There is a third condition to be considered; the adultery and the promise of marriage must occur during the same lawful marriage, *perdurante eodem legitimo matrimonio*.[12] To illustrate: James is lawfully married to Gemma, but commits adultery with Anna, without promising to marry her. After Gemma's death he legally marries Olga, and during this marriage promises to marry Anna, but does not commit adultery with the latter. There is no impediment of crime between James and Anna because adultery and promise must be related to one and the same marriage. On the other hand, it is immaterial whether adultery precedes or follows the promise, provided only the promise has not been revoked before the adultery was committed.[13]

The second species of the impediment is *adultery with conjugicide* perpetrated by one of the accomplices.

1. The *adultery,* as described above, must precede the death of the innocent party, but it is not necessary that it precede the plotting — *machinatio mortis.*

2. The *death* of the innocent party must be the actual result of an act performed by one of the accomplices.

12 Cfr. cc. 6, 8, X, IV, 7.
13 Sanchez, *l. c.*, l. VII, disp. 79, nn. 7, 34.

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This act may be physical or moral, as, for instance, counselling, commanding, hiring an assassin, in a word any co-operation the result of which is death.[14] Neither is it required that, *e. g.*, Gemma (married), who has committed adultery with James (unmarried) should know about the act James intends to perpetrate.[15] But the object of the murder must be marriage with the adulterous party, or with the party that is made free by the death thus caused. Hence if Brutus would kill Gemma simply because she had committed adultery with James, and for the sole purpose of revenge, no impediment would exist.[16]

3. The adultery and the killing must occur during the *same legitimate marriage*. Therefore, in the case posited, James must kill Brutus after having committed adultery with Gemma, whilst the latter was lawfully married to Brutus.

The lawgiver constantly uses the term "*perdurante eodem legitimo matrimonio.*" A legitimate marriage may exist also between unbaptized persons, and hence this impediment would seem to affect non-baptized persons indirectly, if they wish to contract marriage with a Christian, or rather, a Catholic. But if the crime is committed before Baptism, and both parties are afterwards baptized, the impediment no longer exists, because the Sacrament wipes out all crimes.[17]

The third species is *conjugicide* alone when the death results from the effective co-operation of the two parties.

1. Adultery is not required in this case.

2. But there must be a *conspiracy* of two accomplices against the life of one living in valid marriage. This

14 Mere ratification or approval would not be sufficient.

15 C. 1, 3, 7, X, IV, 7.

16 S. C. C., Sept. 28, 1726 (Richter, *Trid.*, p. 268, n. 108).

17 S. C. P. F., Aug. 23, 1852, ad 5 et 6 (*Coll.*, n. 1079).

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conspiracy must be *mutual* and actual, not a mere ratification or approval.[18]

3. Death must actually *follow* this physical or moral conspiracy.

4. Finally, the intention of killing the husband or wife must be directed to *marriage* with the party freed by the other's death. Though this is an implied condition only, and is not expressed in the law, it is reasonably presumed, at least in *foro externo*.[19] For the rest, the intention can often be shown to have existed from suspicious familiarity, love letters, presents, etc.

Since this impediment contains a threefold species, it may be multiplied according to its combination with one or more of said species.

If both parties are married, this aggravates the circumstance, although it does not multiply the species.

Since this impediment was set up to preserve the sacredness of marriage and for the public welfare, it follows that *ignorance of the impediment is no excuse from incurring it*. This view is not only extrinsically but also intrinsically the more probable.[20]

The civil codes of the United States and of England do not treat crime as an impediment proper, but merely as a reason for divorce.[21]

CONSANGUINITY

It is not necessary to restate here the *Hebrew law*[22] concerning the various degrees of consanguinity. The *Roman Law* may be alleged only in so far as there

18 Panormit. ad c. 3, X, IV, 7, n. 4.

19 Schmalzgrueber, IV, 7, 2, 55; Wernz, *l. c.*, IV, Vol. 2, p. 408, n. 528.

20 Boekhn, IV, 7, n. 17; De Angelis, IV, 7, p. 188; De Smet, *l. c.*, p. 401, says that this is the only view to be followed *in foro externo*. Dispensation from the 2nd and 3rd species are granted but rarely. Benedict XIV, "*Aestas*," n. XV.

21 Bishop, *l. c.*, I, § 53, 65.

22 Lev. 20, 21 ff.

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is a distinction between the manner in which it reckons the degrees in the collateral line and the ecclesiastical *computus*. The latter says that brother and sister are related in the first degree of the collateral line, whereas the Roman lawyers [23] maintained that they are related in the second degree. It was the *Germanic law* that chiefly influenced the ecclesiastical style of computing the degrees in the collateral line. The Germanic tribes, taking the human body as representing the distance of the clans, counted from the head downward to the last knuckle of the fingers, thus finding seven degrees within which the *prosapia* (*Sippe*) was confined, and marriage within which was prohibited.[24] Pseudo-Isidor strenuously defended these six or seven degrees and gained his point, until the IVth Lateran Council established the fourth degree in the collateral line as the last for the diriment impediment.[25] Thus the matter stood until now. Our Code takes off one more degree.

EXTENT OF CONSANGUINITY

CAN. 1076

§ 1. In linea recta consanguinitatis matrimonium irritum est inter omnes ascendentes et descendentes tum legitimos tum naturales.

§ 2. In linea collaterali irritum est usque ad tertium gradum inclusive, ita tamen ut matrimonii impedimentum toties tantum multiplicetur quoties communis stipes multiplicatur.

§ 3. Nunquam matrimonium permittatur, si quod subsit dubium num partes sint consanguineae in aliquo

23 Fr. 1, 3, Dig. 38, 10.

24 There is still a dispute concerning the expression *usque ad 7 gradum*, whether it includes only six degrees; cfr. Freisen, *l. c.*, 411 ff.; v. Scherer II, 299.

25 C. 8, X, IV, 14.

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gradu lineae rectae aut in primo gradu lineae collateralis.

§ 1 determines the diriment impediment in the *direct* line: *"In the direct line consanguinity invalidates marriage between all ascendants and descendants, whether legitimate or natural."*

Johannes Andreae says in his *"Lectura Arboris,"* [26] that consanguinity is a bond between persons descending from the same stock, contracted by carnal propagation. In other words, it is relationship that exists between persons who have the same blood in their veins. This relationship is confined within certain limits. There is no *processus in infinitum,* else we might say that all men are related to one another, as all are descended from Adam and Eve.[27] Yet in the direct line there is a certain indefinite relationship, which the Roman law wisely restricted to the seventh degree, adding that beyond that limit human nature does not permit man to exist.[28] Our Code does not state any degree, no doubt because it was deemed superfluous to make an observation as to further degrees.

We now return to can. 96, which says that *consanguinity is reckoned by lines and degrees.* The *line* is nothing else but the series of persons descended from the same stock. The degree is determined by the number of generations or persons forming the line. The line has been likened to a ladder,— the original image of ancestry, — which contains two sides and a more or less well defined number of degrees. The line may be *direct* or indirect, *i. e.,* collateral. The former subsists between persons of whom one is descended in a direct line from the other,

26 Cf. Friedberg, *Decretum Magistri Gratiani,* p. 1125.

27 Cfr. Smith, *Marriage Process,* 1892, p. 115.

28 Fr. 4, Dig. 38, 10.

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either upwards in the direct ascending line, or downwards in the direct descending line. Add now the *degree* or measure of distance in the relationship of one person to the other, and recall can. 96, § 1: *"In the direct line there are as many degrees as there are generations, or as there are persons, not counting the common stock,"* and you will have the following scale:

James

Descending Line	*Ascending Line*
1	1
Son (*Filius*)	Father (*pater*)
2	2
Grandson (*Nepos*)	Grandfather (*Avus*)
3	3
Great grandson (*Pronepos*)	Great grandfather (*Proavus*)
4	4
Great great grandson (*Abnepos*)	Great great grandfather (*Abavus*)

James is therefore related to the son in the first degree of the descending line, and to the father in the same degree in the ascending line. To the great great grandfather James is related in the fourth degree, because there are four generations: great grandfather, grandfather, father, son, or if you prefer, there are five persons, not counting the common stock, or the great great grandfather.

The Code extends this relationship to any *indefinite degree,* and to *natural* as well as *legitimate* descendants and ascendants. The term "natural" here means persons born out of legitimate wedlock, no matter whether of

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a fornicarious (strictly natural) or adulterous or sacrilegious intercourse.

§ 2 establishes the extent of the impediment arising in the collateral line as follows: *"In the collateral line matrimony is invalid to the third degree inclusively,* in such a way, however, that the impediment is multiplied only as often as the common stock is multiplied."

Returning to lines and degrees, the reckoning is almost the same. The line is called *collateral* because, although the collateral relations descend from the same stock or ancestor, yet they differ in this that they do not descend one from the other, but branch out from the common stock. Again we must return to can. 96, § 3, which determines the degrees: *"In the oblique (or collateral) line, if both sides of the line are equal, there are as many degrees as there are generations on one side; if they are unequal, there are as many degrees as there are generations on the longer side."* Here then we have an equal and uneven collateral line, *i. e.* one consisting of uneven steps. For the unequal line, *linea collateralis inaequalis,* is one in which the relationship to the common ancestor is more distant on the one side than on the other, and in the latter case the more remote degree determines the degree of relationship. But it must be added that the line and degrees are reckoned in the ascending as well as the descending line. Unfortunately, in English, there are no names to designate the further degrees. Here are the *line and degrees:*

I. Collateral Ascending Line

1. *Paternal Line*

1st degree: Uncle, *patruus* (father's brother)
Aunt, *amita* (father's sister)

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2nd degree: Granduncle, *patruus magnus*
Grandaunt, *amita magna*
3rd degree: Great granduncle, *propatruus*
Great grandaunt, *proamita*

2. *Maternal Line*

The same names in English, with the addition of paternal or maternal uncle or aunt. In Latin:
1st degree: *avunculus, matertera;*
2nd degree: *avunculus magnus, matertera magna;*
3rd degree: *proavunculus, promatertera.*

II. Collateral Descending Line

1. *Paternal Line*

1st degree: brother, *frater*
sister, *soror*
2nd degree: first cousins, nephew, *patrueles,* whose fathers are brothers,
first cousins, niece, *amitini,* whose father and mother are brother and sister
3rd degree: second cousins, *patrueles magni*
amitini magni

2. *Maternal Line*

The same terms in English; in Latin, first cousins are called *consobrini* if their mothers are sisters, and the 3rd degree or second cousins are called *consobrini magni.*

III. Collateral Unequal Line

John (common stock)

1st degree: brother
2nd degree: nephew (first cousin)
3rd degree: grand nephew (James)

1st degree: sister
2nd degree: niece (Gemma)

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Therefore James would be second cousin to Gemma, or, in Latin, *in tertio gradu tangente secundum lineae collateralis inaequalis.* For there are three persons descending in the longer line from John, and two persons descending from the same John in the nearer line; but according to can. 96, § 3, the reckoning is made according to the longer series.

IV. Multiplication of Relationships

Suppose James and John Murphy, brothers, marry Gemma and Olga, who are first cousins. The children of these two couples will be related to each other in the second degree on the father's side, and in the third degree on the mother's. For as brothers James and John are related through the common father, Murphy, in the first degree, and consequently their children in the second degree. Gemma and Olga have the same grandparents and are therefore related among themselves in the second degree. Add now the one degree accruing to their children, as stated above. Hannah, the daughter of James and Gemma, and Francis, the son of John and Olga, are related in the second and third degree, or the impediment is multiplied because of the multiple common stock.

Now this multiple impediment, arising from a double common stock, must be expressed in the petition for a dispensation. For instance, two persons are related in the second degree (first cousins) and their grandparents were also related in the second degree. Hence they are related in the second and fourth degree of the collateral equal line. If two brothers marry two sisters, their offspring are related to one another in the double second degree of the collateral line.[29]

§ 3 states that "*Matrimony is never to be permitted*

29 S. O., March 11, 1896; Feb. 22, 1899 (*Coll. P. F.*, nn. 1920, 2040).

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when there is a doubt whether the parties are related in some degree of the direct line or in the first degree of the collateral line."

This is the practical answer to the query whether the impediment of consanguinity arising from the direct line, either ascending or descending, or from the first degree of the collateral line, is of natural, or of merely positive, *i. e.*, ecclesiastical, law. The question has been disputed. While the first degree of the direct line has been considered by all as forbidden by natural law, regarding the remote degree of the direct line, and the first degree of the collateral line (brother and sister), opinions were divided. However, it is a physiological fact that the intermarrying of near relatives often produces bad results. Besides, reverence and piety should prevent near kinsmen from commingling their blood. And, finally, the social order requires the spread of social bonds beyond the narrow limits of clans and tribes. New and fresh branches invigorate the blood and harmonize the diverse elements of society. Hence Innocent III, although exempting the Gentiles from the observance of the law of consanguinity in the more remote degrees of the collateral line, would include them in the first degree.[30]

The intention of the Church is plainly stated in § 3 of can. 1076. She is not wont to dispense in the whole direct line, nor in the first degree of the collateral line.[31] And this holds good also in case the bride or groom is the natural sister or brother of the other party.[32] A case was proposed to the S. C. Concilii concerning a girl

30 C. 8, X, IV, 19; *Trid.*, sess. 24, c. 5, *de ref.*; Wernz, *l. c.*, IV, n. 413 f.

31 S. O., Dec. 9, 1874 (*Coll.*, n. 1427, Vol. 2, p. 87).

32 S. C. C., Dec. 14, 1793 (Richter, *Trid.*, 6. 261, n. 98), in which decision we read that Rome never granted dispensations from the first degree; example: the Duke of Richmond and Mary, daughter of Henry VIII.

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supposed to be spurious or natural, who was sought in marriage by a young man. Rumor had it that she was his sister, born out of lawful wedlock by a domestic servant of his father. Several witnesses testified to the fact that the girl was the offspring of the father whose legitimate son asked her for his wife. Therefore the petition was answered negatively.[33] Infidels married in the direct line or in the first degree of the collateral line to converts, would have to separate, unless they were and are in good faith and greater evils would result from a separation.[34]

AFFINITY

CAN. 1077

§ 1. Affinitas in linea recta dirimit matrimonium in quolibet gradu; in linea collaterali usque ad secundum gradum inclusive.

§ 2. Affinitatis impedimentum multiplicatur:

1.° Quoties multiplicatur impedimentum consanguinitatis a quo procedit;

2.° Iterato successive matrimonio cum consanguineo coniugis defuncti.

This impediment, as described in the Code, is newly formulated. Its foundation *is valid marriage,* whether it be only ratified, or both ratified and consummated, as stated in canon 97. The impediment can no longer arise from carnal intercourse outside of marriage.

§ 1 says: *"Affinity in the direct line annuls marriage in any degree; in the collateral line it annuls it to the second degree inclusively."*

Can. 97 determines the extent of affinity as follows:

33 S. C. C., Nov. 23, 1805 (Richter, *l. c.*, n. 99).

34 Leitner, *l. c.*, p. 206.

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It exists only between the man and the blood relations of the woman, and likewise between the woman and the blood relations of the man. It is reckoned in this wise, that the blood relations of the man are related to the woman by affinity in the same line and the same degree, and *vice versa*. Suppose James is married to Gemma, and after the latter's death wishes to marry again. He cannot validly marry: in the *direct line* Gemma's mother, mother-in-law (*socrus*), or grandmother (*prosocrus*), nor Gemma's daughter-in-law (*privigna*), nor the latter's daughter, etc. In the collateral line James can marry neither Gemma's sister, nor aunt (*amita*), nor niece, nor first cousin. Conversely, Gemma cannot marry any blood relation of James in the direct line *usque in indefinitum*, and in the collateral line she cannot marry James's brother, uncle, nephew, or first cousin.

The common English and Latin names for the various degrees of affinity may be mentioned here:

father-in-law, *socer*	mother-in-law, *socrus*
son-in-law, *gener*	daughter-in-law, *nurus*
brother-in-law, *sororius*	sister-in-law, *glos, fratria*
stepfather, *vitricus*	stepmother, *noverca*
stepson, *privignus, filiaster*	stepdaughter, *privigna, filiastra*

The law texts which refer to our subject mention the following relations between whom no valid marriage can be contracted: a man cannot marry his brother's wife,[35] nor his mother-in-law, nor the first cousin of his wife, nor his uncle's daughter or stepdaughter, nor any relative whom he has defiled by carnal intercourse or married.[36]

35 C. 11, C. 27, q. 2. Innocent III permitted, for a time, the newly converted Livonians to marry the brother's wife, according to the Mosaic Law (Levir-marriage), but in future they should abstain from the practice (c. 9, X, IV, 19).

36 C. 8, C. 35, q. 2 et 3, c. 20, C. 35, q. 7, savors rather of illicit affinity.

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Here the old theory of the foundation of affinity is transparent, yet the addition "*aut uxorem duxerit*" may be construed as fitting the impediment of the Code. Besides, the text does not go beyond the second degree, but, like the Code, limits affinity in the collateral line to the second degree, though it admits of no restriction in the direct line, ascending as well as descending.

§ 2 says that the impediment of affinity is *multiplied:*

1.° *As often as the impediment of consanguinity, from which it originates, is multiplied;*

2.° *By successively repeated marriages with blood relations of the deceased consort.*

The *first reason* for multiplication is therefore to be gauged by can. 1076, § 2, which says that the impediment is multiplied only as often as the common stock is multiplied. This is evident, because affinity supposes consanguinity of either husband or wife, and therefore blood-relationship naturally reflects on affinity. However, affinity does not beget affinity, so that the relatives of the man do not become relatives of the woman's relatives, or *vice versa.*[37]

The *second reason* for a multiplied affinity arises from repeated marriage with a kinsman of the deceased consort. Therefore if James, after his wife's (Gemma's) death, would marry her sister (Anna) or her niece (Olga) or her first cousin, affinity would not be multiplied, because by the first marriage James became a relative only of Gemma's sister, niece, or cousin; and in this consists the simple impediment of affinity. But if James, after the demise of Anna, whom he married after Gemma's death,

[37] Cfr. O'Hara, *The Laws of Marriage simply explained according to the New Code*, Philadelphia, 1918, p. 59.

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would marry Olga, a niece of Gemma and Anna, the impediment would be multiplied. This appears to be certain. The Code says *successive,* which simply precludes polygamy.

Affinity in its whole latitude, whether in the direct or collateral line, is an impediment of merely ecclesiastical law, as Benedict XIV says.[38] However, observes the same Pontiff, so far it has never happened that the Pope dispensed from the first degree of the direct line. Since it is a merely ecclesiastical impediment, those not baptized are not subject to it. However, according to a declaration of the Holy Office, after Baptism this affinity, though contracted in infidelity, becomes a marriage impediment, in virtue of which infidels become subject to the Church and her laws.[39] And since in some missionary countries it frequently happens that a brother marries the wife of his deceased brother, the faculty of dispensing from the first degree in the collateral line was and is generally granted to missionaries.[40]

The *civil laws* of different countries vary as to consanguinity and affinity. The Revised Statutes of Missouri (Sec. 4312) ordain as follows: "All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as of the whole blood, and between uncles and nieces, aunts and nephews, first cousins, white persons and negroes, are prohibited and declared absolutely void; and this prohibition shall apply to illegitimate as well as legitimate children and relatives."

38 "*Aestas,*" Oct. 11, 1757; *De Syn. Dioec.*, IX, 13. 4.

39 Aug. 26, 1891 (*Coll. P. F.*, n. 1766).

40 S. O., Sept. 20, 1854 (*Coll. cit.*, n. 1104); an interesting case of the former impediment is reported in S. O., Sept. 16, 1824, n. 2 (*Coll.*, n. 784).

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PUBLIC PROPRIETY

CAN. 1078

Impedimentum publicae honestatis oritur ex matrimonio invalido, sive consummato sive non, et ex publico vel notorio concubinatu; et nuptias dirimit in primo et secundo gradu lineae rectae inter virum et consanguineas mulieris, ac vice versa.

As worded in the text, this impediment is entirely new,[41] since affinity has taken the place of the former impediment of honesty. The text reads: "*The impediment of public propriety (or decency) arises from invalid marriage, whether consummated or not, and from public or notorious concubinage;* and it annuls marriage in the first and second degree of the direct line between the man and the blood relations of the woman, and *vice versa.*"

Two foundations are assigned for this impediment: invalid marriage and concubinage.

1. A marriage is *invalid* if there is a *diriment impediment.* Such an impediment may also be established by the civil power, as long as it does not manifestly clash with ecclesiastical legislation. Therefore if the State establishes adoption (see can. 1080), or consanguinity, or affinity, as an impediment, this impediment annuls marriage, and to obey it becomes a matter of public decency or decorum. The text simply says: "from invalid marriage," which certainly affects public honesty. On the other hand a merely *civil marriage* would be invalid if an ecclesiastical impediment, especially clandestinity, would be in the way.

The text says that it makes no difference whether the

41 This is also evident from the lack of any quotations in Card. Gasparri's edition.

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invalid marriage has been *consummated or not.* Hence it is immaterial whether there was carnal intercourse between the parties. However, we believe that, from this viewpoint only, leaving aside concubinage, the marriage would have to present the species of a marriage, *figuram seu speciem matrimonii;* otherwise it would be difficult to see the difference between an invalid marriage and concubinage. But the text, by simply saying, *invalid marriage,* supposes that it may be invalid from any impediment, or defect of form, or defect of consent. Not making a distinction, the lawgiver clearly intends to include the whole range of invalid marriages.

2. The impediment, we are told, may arise also from "*public or notorious concubinage.*" The Code offers no definition of concubinage, but evidently adopts the view of canonists. According to these, concubinage is the retention, either in one's own or in a strange house,[42] of a woman [43] for the purpose of continued illicit cohabitation. Hence the essential point is that the unlawful relation is maintained habitually with the same person, whether married or unmarried. If married, the scandal and therefore the violation of public decorum would be greater than if she were single. But the concubinage must be *either* public *or* notorious. It is *public* when the fact is known to the people, or if the circumstances are such that one may and must prudently judge that it will be made known. It is *notorious* after the final sentence of a competent judge — ecclesiastical or civil — given according to the law,[44] or after a judicial confession of

42 The Roman Law (Dig. 26, 7; Cod. V, 27), insisted upon the fact that the concubine must be kept in one's own house, but canonists (cfr. Engel, V, 16, n. 21; Reiffenstuel, V, 16, n. 61) only demand repeated or continuous illicit relations with the same person; cfr. also *Cath. Encycl.*, s. v. "Concubinage."

43 Some add: *cum soluta,* but others speak of either *soluta* or *maritata;* thus Engel, *l. c.*

44 There might be a difficulty between civil and ecclesiastical law on

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guilt. This would be notoriety of *law*. By *fact* a concubinage would be notorious if it were publicly known and carried on under such circumstances that it could not be concealed by any artifice or excused by the aid of the law.[45] This is as far as we can explain the nature of the impediment, which must occasion many doubts.[46]

3. In *extent* the impediment of public propriety is limited to the *first and second degree of the direct line*. Hence James, having been married to Gemma, or living with her in public or notorious concubinage, cannot validly marry her mother or grand-mother, nor the latter's daughter or grand-daughter.

SPIRITUAL RELATIONSHIP

As the name indicates, this impediment is based on a sort of spiritual adoption, which, as Nicholas I says, is stronger than legal adoption.[47] The same view was held by the Emperor Justinian and is expressed in a law of A. D. 530.[48] Canonical writers seem to have taken special delight in enlarging this impediment. The Decretals [49] mention various customs, but adopt a milder practice if no contrary custom exists. It must be remembered that, in the Latin Church, Confirmation was not administered immediately after Baptism, but separately at a maturer age, and therefore the impediment of spiritual relationship was extended to Confirmation.[50] But the Italo-Greeks of Calabria and Sicily were bound by the impedi-

account of the matrimony of conscience, and in that case the sentence of the civil judge could not be followed.

45 Cfr. can. 2197.

46 *Am. Eccl. Rev.*, 1918, Vol. 58, p. 486.

47 C. 1, C. 39, q. 3.

48 L. 26, § 2, Cod. V, 4.

49 C. 1, X, IV, 11; the terms *compatres* and *commatres*, which often occur, signify father and mother of the baptized with regard to the godparents, wherefore no valid marriage can exist between the godfather and the mother of the child; c. 1, 6, IV°, 3.

50 *Trid.*, sess. 24, c. 2, *de ref.*

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ment arising from both Baptism and Confirmation.[51] The Code has considerably reduced the extent of this impediment, which now arises from baptism only.

CAN. 1079

Ea tantum spiritualis cognatio matrimonium irritat, de qua in can. 768.

The only spiritual relationship that annuls marriage is that mentioned in can. 768.

It arises only from Baptism and exists between the baptizing minister and the baptized person and the baptized person and the sponsor.

Therefore no valid marriage can be contracted:

1.° Between the baptizing minister and the baptized person;

2.° Between the sponsor and the baptized person.

But the parents do not enter into spiritual relationship. Neither the father nor the mother nor the consort of the baptized person contract any spiritual relationship with him, because they cannot be sponsors at all.[52]

The *conditions* required for the impediment are the following:

1. The *Baptism* must be *valid,* because otherwise there would be no foundation for a spiritual relationship.

2. If *Baptism* is conferred *conditionally,* the sponsor contracts spiritual relationship only in case he was sponsor also at the former Baptism; but if he is sponsor *only* at the conditional Baptism, he does not incur the impediment.[53]

It matters not whether Baptism is administered solemnly or privately, if the sponsor or minister perform

51 Benedict XIV, "*Etsi pastoralis,* May 26, 1742, § VIII, n. VI.

52 Can. 765, 3°.

53 Can. 763, § 2.

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their parts properly. However, if Baptism was conferred privately without sponsors, and a sponsor was employed only when the solemnities were supplied, the sponsor does not by his assistance at the latter contract the impediment.[54]

3. The *sponsors* must be designated or *appointed* as such either by the one to be baptized, or by his or her parents or guardians, or if these fail, by the minister.[55]

Therefore the formal consent of the sponsors is required; but if they do not formally and manifestly refuse when appointed, their consent may be lawfully presumed. The reason is that the sponsors must take upon themselves certain duties, such as to procure the Christian education of the child in case the parents should die or neglect their obligation.[56]

4. The sponsor must, at Baptism, hold or touch or receive the baptized person from the baptismal font or the hands of the minister.[57] In other words, he must perform the *physical act* which is generally and by custom considered as the conventional sign of sponsorship.[58]

5. If the sponsor acts by proxy, which is permissible, his representative must act like the sponsor, but spiritual relationship is contracted not by the proctor, but by the one whom he represents.[59] Whether the proctor needs to be endowed with the same qualities as the sponsor himself, is not stated in the Code. But we hardly believe that non-Catholics would be admissible as proctors.[60]

54 Can. 762, § 2; S. C. C., May 16, 1711 (Richter, *Trid.*, p. 266, n. 106): The pastor accidentally forgot to write down that the godfather assisted only at the subsequent solemnity, but the sponsor could prove the fact, and therefore the S. C. declared that no impediment existed.

55 Can. 765, 4°.

56 S. O., Sept. 15, 1869 (*Coll.*, n. 1347); Pignatelli, *Consult.*, t. VII, cons. 98, n. 7 f.

57 Can. 765, 5°.

58 S. C. EE. et RR. Regesta, 1592–93, P. 1, p. 39b.

59 Can. 765, 5°; S. C. C., March 15, 1631; Sept. 13, 1721 (Richter, *Trid.*, p. 266).

60 Cfr. can. 1657, § 1.

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6. The sponsor must *not belong to any heretical or schismatical sect,* or be excommunicated by either a condemnatory or declaratory sentence, or suffer from infamy of law, or be excluded from legal actions, or be a deposed or degraded cleric.[61] The Holy Office decided that Baptism should be conferred without sponsors rather than with heretical or schismatical ones.[62] If of two sponsors one would be a non-Catholic, he would assist merely as a witness, not as sponsor.[63] From this the conclusion may be easily drawn that non-Catholics, although baptized and apparently acting as godparents, do not contract the impediment, as it is of merely *ecclesiastical law.*

7. Finally it must be noticed that this impediment *can not be multiplied.* Therefore, even if one should be sponsor to several children of the same family, or even of a whole town, the spiritual relationship cannot be multiplied.[64]

The Commission for the Authentic Interpretation of the Code decided, June 2–3, 1918, that the spiritual relationship contracted before Pentecost 1918 ceases to be an impediment further than stated in can. 768 and can. 1076 of the Code.[65] Therefore there is no longer a relationship between the parents and the baptizing minister, nor between the sponsors and the parents of the baptized person, nor any one arising from confirmation, nor any double relation.

LEGAL ADOPTION

The Church accepted adoption as expounded in the Roman Law and made it an ecclesiastical impediment for all countries in which it contained at least the essential

61 Can. 765, 2°.

62 May 3, 1893 (*Coll. P. F.*, n. 1831 and *passim*).

63 S. O., Jan., 1763 (*Coll.*, n. 447).

64 Formerly it was multiplied, if the same sponsor stood for the same child at baptism *and* confirmation.

65 *A. Ap. S.*, Vol. X, 346.

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elements of adoption proper.[66] Hence the codes of different countries had to be inspected as to their agreement with the substance of this juridical institution. The Decree of Gratian [67] as well as the Decretals [68] presuppose the Roman notion of adoption.

Adoption was said to imitate nature,[69] because it is a legal act by which persons are assumed as sons and daughters, nephews or nieces, who are not such by nature.[70] It was natural to bestow on such adopted children all the rights of *parentela*. The Romans distinguished perfect or complete from incomplete adoption, calling the former *adrogatio*, and the latter simply *adoptio*. By *adrogatio* one entered into perfect and complete dependance upon, or came under the paternal power of, the adopter. This was the case if a Roman youth who was of age or *sui iuris*, was asked (*rogatus*) whether he was willing to pass into the power of another. Adoption in the strict sense comprised only such children as were not fully emancipated from the power of their natural parents, and hence was not followed by all the consequences attached to *adrogatio*. Both processes required certain conditions, which had to be complied with in order to obtain the civil effects. Chief among these conditions was (a) that either the supreme authority for *adrogatio* or the magistrate for *adoptio* sanctioned the act of adoption; (b) that the adopting person was capable of exercising the paternal power, *i. e.*, no eunuch, and at least eighteen years older than the adopted; and (c) that the adoption was made without conditions and personally, *i. e.*, not by proxy.[71]

66 Benedict XIV, *De Syn. Dioece.*, IX, 10, 5.

67 C. 1, C. 30, q. 3 (Nicholas I, *Ad Consulta Bulgarorum*).

68 C. nn. X, IV, 12.

69 See § 4, *Inst.*, I, 11.

70 Voet, *Comment. in Pand.*, I, 7, 1, t. 1, p. 52.

71 See §§ 4, 9, *Inst.*, I, 11; l. 5, Cod. VIII, 47; ll. 25, 34, Dig. 1, 7.

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How far the degrees prohibiting marriage were extended is uncertain. But the *legistae* of the middle ages as well as the canonists [72] distinguished *legal paternity*, legal fraternity, and legal affinity. The first, they held, annulled marriage between the adopting parents and the person adopted and the latter's children to the fourth degree. *Legal fraternity* annulled marriage between the adopted person on the one hand, and the children of the adopter on the other, because these were considered by law brothers and sisters of the adopted. *Legal affinity* extended to the adopter and the wife of the adopted and to the adopted and the wife of the adopter.

This was the status of legal adoption, so far as we can see, under the Roman law. In countries which embodied these notions in their respective codes, the Church held adoption as binding in the ecclesiastical court, no matter whether the civil law had or had not directly enacted it as a diriment impediment. Let us now hear what the Code says.

CAN. 1080

Qui lege civili inhabiles ad nuptias inter se ineundas habentur ob cognationem legalem ex adoptione ortam, nequeunt vi iuris canonici matrimonium inter se valide contrahere.

Those who are by the civil law considered as incapable of contracting marriage with each other on account of the legal relationship arising from adoption, are, by canon law, incapable of contracting marriage validly.

Two points are brought out very distinctly in this canon: (1) The Church *accepts* the civil laws concerning adoption in each country; (2) the extent of these

[72] Bernard. Pap., *Summa, ed. cit.*, pp. 161, 298; Tancred, *ed. cit.*, p. 38 ff.

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laws and their invalidating character does not depend on their conformity with the Roman law, but solely upon the wording and intention of the law as it exists.

Therefore, where the law sets up adoption as a merely prohibitive (impedient) impediment (can. 1059), the Church also regards it as such; whereas in countries which treat adoption as a diriment impediment, the Church binds the faithful to the same extent as the civil law. Whether a country admits all three: legal paternity, legal fraternity, and legal affinity, or one or the other only, depends on the wording of the civil law, and it is wrong to assert that the impediment exists only between the adopter and the adopted.[73] Note, however, that the civil law must not only describe and lay down the rules for adoption, as is done, for instance, in New Jersey,[74] but must explicitly state that the adoption, as described, constitutes a diriment impediment, otherwise, since impediments are restrictive of human liberty, adoption must be regarded either as prohibitive or a merely penal law.

With the exception of New Jersey, our United States care little about this impediment. However, as immigrants may come here from countries where adoption is established as a diriment impediment, we will mention some relevant enactments.

Belgium does not explicitly set up adoption as an impediment, though it acknowledges it as conformable to the Roman law (*Cod. Civ.*, art. 343).

The same is true concerning *Austria* (Cod., art. 179–186).

Germany (*Bürgerl. Gesetzbuch*, art. 459) regards legal paternity as an impediment.

73 Thus O'Hara, *l. c.*, p. 60.
74 Smith, *Marriage Process*, p. 127.

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Italy (*Codice Civile,* art. 60,202) treats legal adoption as an explicit impediment.

Spain (*Codigo Civil,* art. 173–180–184) establishes legal paternity and legal affinity as impediments.

Switzerland (*Zivilgesetzbuch,* art. 100, 264, 268) treats legal paternity and legal affinity as impediments.

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CHAPTER V

MATRIMONIAL CONSENT

After setting forth the divine and positive laws which negatively determine the capability of persons for the married state, the Code proceeds to consider the personal coöperation of the contracting parties. This is given in the matrimonial consent. Under the same heading certain obstacles to valid consent are pointed out which were formerly treated as impediments. They are: error, servile condition, violence or fear.

The consent may be given by proxy or through an interpreter, who are therefore also mentioned in this chapter.

THE CONSENT ITSELF

CAN. 1081

§ 1. Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus; qui nulla humana potestate suppleri valet.

§ 2. Consensus matrimonialis est actus voluntatis quo utraque pars tradit et acceptat ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad prolis generationem.

This canon merely restates the Roman law, which says: "*Consensus facit nuptias.*" The theory maintaining that the *copula* was required to render the marriage complete has no foundation in law. Hence our text says that

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marriage is effected by the legitimate manifestation of the consent of parties who are qualified thereto by law; and this consent cannot be supplied by any human power. The matrimonial consent is an act of the will by which the parties deliver and accept the exclusive and perpetual right to each other's body for the purpose of performing acts apt for the procreation of children.[1]

CAN. 1082

§ 1. Ut matrimonialis consensus haberi possit, necesse est ut contrahentes saltem non ignorent matrimonium esse societatem permanentem inter virum et mulierem ad filios procreandos.

§ 2. Haec ignorantia post pubertatem non praesumitur.

In order that matrimonial consent be possible, it is necessary that the contracting parties at least be not ignorant that marriage is a permanent union between man and woman for the purpose of begetting children. Such ignorance is not presumed in those who have reached puberty.

These two canons establish the absolute necessity of the matrimonial consent, its physiological and physical object (can. 1081), and its bearing on the mental condition of the contracting parties (can. 1082).

1. *Necessity of the Matrimonial Consent.* The matrimonial consent is said to effect the marriage, because it is the will which, proceeding from reason, produces the contract between two persons endowed with reason and will. Hence carnal intercourse is a concomitant adjunct, but not the cause of the marriage; otherwise fornication might be called lawful. Or, as St. Ambrose ex-

1 L. 30, Dig. 50, 17; l. 11, Dig. 23, 1; l. 15, Dig. 35, 1.

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presses it: "*non enim defloratio virginitatis facit coniugium, sed pactio coniugalis.*" [2]

This consent — *duorum in idem placitum consensus* [3] — must be given by two persons who are qualified by law to contract marriage. The divine, the natural, and the positive law of the Church have set up certain impediments which have been sufficiently explained in the preceding chapter. Persons who are either relatively or absolutely bound by any of the diriment impediments cannot give an absolutely valid consent, although they may consent conditionally,— provided the impediment be removed.

The term *iure habiles* has a wider scope. It implies the natural capacity of externally manifesting the consent. To speak more precisely — the consent must proceed from a deliberate act of the will and be manifested externally, because, unless so manifested, it cannot be apprehended by men, who are bound to, and led by, the senses. Therefore, the Code says, "*legitime manifestatus,*" which properly means, *manifested according to the requirements of the law,* or, in other words, *in the prescribed form.* As the form is more closely described in the next chapter, we may here take "legitimately manifested" in the sense of any appropriate manifestation, which according to common custom would be considered a marital consent.

The conditions of the consent may be explained as follows:

a) Since the consent must proceed from a deliberate act of the will, and the latter supposes the *intellect to be in a sound or normal condition,* it is evident that the parties must be able to perform a human act, that is to say, they must be in actual possession first and above all of the fac-

[2] C. 5, C. 27, q. 2; cfr. cc. 1–6 *ib;* De Smet, *l. c.*, p. 72 f.

[3] Cfr. the *dictum Gratiani* in C. 29, q. 1.

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ulties of the mind. One not *compos sui,* or in a hypnotic state, or under the influence of narcotics cannot possibly perform a human act. An interesting case is that solved by the S. C. Concilii in a Strasbourg case, 1907. The bride had been in an insane asylum two years before the marriage, but had been discharged as apparently cured. On her wedding day she commenced to act queerly, and on the second day after the marriage she had to be sent back to the asylum. The marriage was declared invalid.[4] Here it may be well to note that the so-called incubation period preceding the outbreak of a disease has also to be considered. What are styled *lucida intervalla, i. e.,* moments of apparently normal consciousness, must be taken with a good grain of salt and not easily admitted.

b) The consent is given by the will, and must be *sincere, i. e.,* given without dissimulation, and *serious.* Concerning the latter quality, it may be safely said that the matrimonial consent is never presumed to be given jocosely, because no one in his senses can be supposed to joke in such an important matter. But it may happen that there is *simulation.* The following case was proposed to the Roman Court in 1883 and 1885.[5] James contracted marriage with Gemma before the civil and the ecclesiastical court of Paris. But he did not love Gemma, but Olga, with whom he maintained illicit intercourse before and after the marriage. The reason why he married Gemma was to obtain a dowry of $50,000. He went through the formalities of the wedding, but planned to get rid of Gemma. He administered poison to her in a summer resort, but Gemma, though suffering from the effects for more than six months, recovered and instituted

4 S. C. C., Nov. 23, 1907 (*Anal. Eccl.*, t. XV, 478 ff); July 7, 1883 (*A. S. S.*, t. 16, 262 ff).

5 Cfr. *A. S. S.*, t. 18, 14 ff.

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proceedings in the ecclesiastical court. Her lawyer succeeded in having the marriage declared null on the plea that James had had no intention of contracting an indissoluble marriage, and therefore rejected the *bonum sacramenti*. Yet, since a feigned consent may not be presumed, but must be proved, the lawyer had to furnish proofs that James really intended no marriage with Gemma. Sanchez [6] offered the solution. This author, after having proved [7] that the matrimonial consent must implicitly be directed to, or at least not against, the indissolubility, says that only moral, not metaphysical, certitude is required to prove the fact of feigned consent. This certainty, not being defined by law, must be such as would satisfy a prudent man. Thus probable conjectures may produce moral certainty. The lawyer in our case proved from preceding, accompanying, and subsequent circumstances that James never intended to marry Gemma, but merely wanted her dowry. His love letters to and relations with Olga confirmed his intention to get rid of Gemma. Hence the feigned consent. The S. C. Concilii confirmed the sentence of the ecclesiastical court declaring the marriage to be invalid.

c) The consent of both parties must be *morally simultaneous*. It is not required that it be physically one. In any contract moral connection is sufficient, and the marital consent does not differ in this regard from other contracts, otherwise it would be impossible to employ a proctor. But a simultaneous act is required so that it becomes evident that the consent of one party endures and is not revoked at the time the consent of the other is given.

How much time may intervene between the consent

[6] *De Mat.*, l. II, disp. 45, § 4. [7] *Ibid.*, l. II, disp. 29, n. 11.

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of the one and that of the other party cannot be precisely stated.[8] A proximate measure may be derived from the repetition of the banns after six months.[9]

The marital consent, unlike that required for certain civil contracts, *cannot be supplied by any human power,* — parents, or guardians, or magistrates, or by the Pope.[10] This follows from the very nature of marriage. For no one can claim power over a thing that depends on the free will of another, but by marriage the parties obtain power over each other's bodies, and this must be given by free and personal consent.[11]

2. This leads us to § 2, which determines the *physiological* and *physical object of the matrimonial consent.* The physical object is the body, or rather the right to the bodies of the contracting parties. This right is determined by the perpetual and exclusive union between both parties and by the primary end of marriage, which is the procreation of offspring. Note that the two properties and the end of marriage are mentioned together. Hence if both parties intended and expressed the intention in some way or other to enter upon a mere concubinage, there would be no marriage. But such an intention must be proved in the external forum. A proof would be if a custom existed, such as that in Victoria Nyanza, where men buy women like chattels, for the mere sake of concubinage, either for a definite or for an indefinite time.[12] In Turkish Armenia some men went to the Turkish magistrate apparently to contract a marriage, but in reality to have a concubinage sanctioned. It was decided that if both parties went to the officer with the

8 Sanchez, *l. c.,* l. II, disp. 32, admits a seven or two years' interval; see, however, our text.

9 Can. 1030, § 2.

10 Pius VI, July 11, 1789.

11 S. Thomas, *Suppl.,* III, q. 45, art. 1.

12 S. O., April 3, 1889, ad 2; Aug. 19, 1857, ad 5 (*Coll.,* nn. 1700, 1147).

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same intention, namely to cover their concubinage, although they professed to contract marriage, no marriage resulted; but if only one party had that intention and lured the other into making such a contract by fraud or deceit, the marriage was valid *in foro externo,* and the guilty party must renew the consent, so as to supply his previous faulty intention.[13]

The question may arise, what sort of knowledge concerning the qualities and the end of marriage is required to make the contract valid? Obviously, the positive wish (*animus et voluntas*) to contract a dissoluble marriage amounts to a denial of the essential quality of permanency, and therefore, where such a wish and intention exist, no real marriage is contracted. But if only a vague notion of divorce existed in the mind, or the parties, though admitting polygamy or divorce, would intend to contract marriage without a positive and efficacious assertion of the right — as they claim — of divorce, the marriage would be valid.[14] Note that the question solely concerns the intellectual conviction of the contracting parties. How a condition properly so-called would affect the matrimonial consent, will be explained under can. 1086.

3. Can. 1082 is intimately related to § 2 of the preceding canon. It determines the mental condition of the contracting parties by saying that *they must at least be not ignorant of the permanent union between man and woman for the primary purpose of marriage.* This is cautious language, made necessary by the different views of individuals and the varying customs of countries. The indissolubility of the marriage bond does not flow from the primary natural law, which is the same in all and unchangeable,[15] but from the secondary natural law, which is

13 S. O., Aug. 19, 1857 (*l. c.*).
14 *Ibid.*
15 S. Thomas, I–II, q. 94, art 4 f.

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a series of conclusions drawn from the primary law. Hence it is that the pristine ideal of marriage may be obscured in the minds of men, especially in half-civilized countries and in civilized countries which admit divorce. Education and social surroundings influence the judgment of men regarding marriage. The wording of the text is negative and merely excludes complete ignorance; hence it is not required that the contracting parties should realize the full extent of indissolubility or that they should be aware of all the details of conjugal life.

§ 2 of can. 1082 says that *ignorance may not be presumed after the age of fourteen in boys, or twelve in girls.* But though nature usually teaches them what marriage is after that age, yet if one of the parties would be found incapable of giving a real matrimonial consent because of a defective mind or lack of ordinary discretion, the marriage could not be judged valid; because in such matters truth, not presumption, is always obeyed.[16] A girl of twelve years and nine months was married to a man in the diocese of Ventimiglia. But though she had reached the age of puberty, she did not know what marriage meant and required, and hence the parish priest objected to the union. The Vicar-General, however, when informed of the facts, allowed the wedding and the pastor assisted. After eight months the man left for a protracted absence, and the girl married before the civil court. The case was brought to Rome and the S. C. Concilii decided against the validity of the marriage because, as it appears, the girl lacked the necessary discretion.[17]

But even after puberty is reached there may be *an er-*

16 Gonzalez, lib. IV decret., tit. 2, ad c. 2, n. 5.

17 S. C. C., June 13, 1885; May 19, 1888; Aug. 18, 1888 (*A. S. S.*, t. 21, 162 ff).

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roneous opinion concerning the primary end of marriage, viz., the bringing forth of children. We mean strictly an erroneous opinion, not a condition formally agreed upon to avoid the purpose of marriage. Gemma married James, but refused to consummate the marriage, saying she would never have married, had she known of the *copula*. When the case was brought before the Roman Congregation, no direct answer was given, but a dispensation was granted *super matrimonio rato*.[18] This action is quite intelligible, for the girl was of age, normally developed in mind and body, and had not made any positive contrary agreement or act of the will before or at the marriage.

Finally we may add a word concerning the *civil ceremony* which in some countries is prescribed by law. How are Catholics to regard it? In itself the ceremony is not forbidden. But the Church can not accept the declaration made before a civil magistrate as the matrimonial consent which effects the marriage tie. Therefore a distinction must necessarily be made. If the matrimonial consent was lawfully given before *the civil ceremony* took place, the marriage is complete and the contracting parties are entitled to exercise the matrimonial rights. When they go before the civil magistrate to declare their consent, this declaration is merely a civil ceremony and adds nothing to the validity of the marriage already contracted.[19] But if the civil ceremony *precedes* the matrimonial consent to be lawfully given, Catholics are not allowed to have the intention of contracting marriage by the civil ceremony, nor can they validly give consent, no matter what the form prescribed. Consequently they

18 S. C. C., Dec. 18, 1869 (*A. S. S.*, t. 5, 652 ff).

19 Benedict XIV, "*Inter omnigenas*," Feb. 2, 1744, § 10; S. O., Oct. 1, 1785 (*Coll.*, n. 580).

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are not married nor entitled to the exercise of conjugal rights until they are married before the Church.[20]

ERROR — SERVITUDE

CAN. 1083

§ 1. Error circa personam invalidum reddit matrimonium.

§ 2. Error circa qualitatem personae, etsi det causam contractui, matrimonium irritat tantum:

1.° Si error qualitatis redundet in errorem personae;

2.° Si persona libera matrimonium contrahat cum persona quam liberam putat, cum contra sit serva, servitute proprie dicta.

§ 1. Error concerning the person renders a marriage invalid.

§ 2. Error concerning the quality of the person, even if it is the cause of the contract, renders the marriage invalid only:

1.° When the error about the quality amounts to an error about the person;

2.° If a free person marries one whom he supposes to be free, but who in fact is a slave in the true sense of the word.

This canon contains what were formerly called the two impediments of error and servile condition. Error is here considered as exclusively concerning the contracting parties, not the sacrament of matrimony as such. The latter was dealt with partly in the preceding canon, and shall partly be dealt with under can. 1084.

1. *Error* is a state of mind in which one mistakes one thing or person for another,[21] as, for instance, when we

20 Benedict XIV, "*Redditae Nobis,*" Sept. 17, 1746 (*Bull.*, Prati, 1, III, 462 f.).

21 C. 6, C. 22, q. 2; C. 29, q. 1.

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think A is B or a crowbar is a poker. In the first-mentioned case we have what is called an *error about the person*. Now since marriage is effected by the consent of the contracting parties, and the will can desire nothing except what is proposed to it by the intellect, it is evident that such a mistake affects the very substance of the matrimonial consent.[22] Gratian sets forth the example of Lia and Rachel, but his solution is rather quaint.[23] He could have simply answered that an error about the substance of the contract nullifies the consent.[24] It would be an error about the person if James married Olga, when he intended to marry her sister Gemma. Such errors are rare, because it is seldom that two sisters resemble each other so closely that they can hardly be distinguished.[25] An error about the person may more easily happen where marriage is celebrated by proxy. Such a case happened in China, in 1906, and was solved by the S. Romana Rota in 1913. Wang, a widower, wished to marry again. His son Paul proposed to him a widow, Lu Cecilia, of good character and fair looks. But she had no desire to remarry. Whereupon Paul asked Sang Anastasia, an old and ugly wench, to marry his father. She was ready to comply. All this was done by a mediator, John Yu, who informed Paul of the substitution. But Paul never mentioned it to his father, and the marriage took place in church. When, after the wedding, Wang saw his wife for the first time, he was greatly disgusted. The S. R. Rota naturally decided against the validity of the marriage.[26]

22 C. 14, X, IV, 1; l. 8, Cod. I, 18: "*cum errantis voluntas nulla sit*," fr. 57, Dig. 44, 7.

23 Gen. 29; C. 29, q. 1.

24 Boekhn, *l. c.*, IV, 1, n. 33.

25 Such an incident happened some years ago in Missouri; the bridegroom himself was puzzled.

26 S. R. R., April 16, 1913 (*A. Ap. S.*, V, 372 ff.).

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2. Error about the *qualities of the other party* is of more frequent occurrence. However, here a distinction must be made. It may be that the quality concerning which one is in error *affects the person merely in an accidental way.* For instance, Joseph Buro, a citizen of Bruxelles, who went by the name of Buro de Chancartier, married a baroness of Leyden, by name of Theresa Kraus, a rich widow. She protested at the trial that she would never have married Buro had she known that he was not of the nobility. This was a purely accidental quality, and no error that reflected directly or indirectly on the person, and therefore the marriage was declared valid.[27] From this it may be seen that a mistake about an accidental quality (wealth, intelligence, domestic habits, peaceful disposition, health, even concealed pregnancy caused by another man, etc.) does not alter the substance of the marriage-object, which is the person itself.

But a quality may be substantially *equivalent to the person,* and form the sole and exclusive reason determining the other party to marriage. Bernardus Papiensis puts a case in the following terms. There comes a farmer's daughter, whom James does not know at all. She tells him: "I am Mathilda, the daughter of the king of Apulia; wilt thou take me for thy wife?" James smilingly answers: "I will," because he had heard of Mathilda, and is willing to marry her, but not the farmer's daughter. The marriage is invalid, because though James personally knew neither, the quality of royal rank moved him to marry the person who pretended to be Mathilda.[28] Another case: Peter marries Antonia, whom he believes to be the first-born daughter of Count N.

27 S. C. C., Aug. 7, 28, 1745 (Richter, *Trid.*, p. 244, n. 83). A similar case was decided similarly, because the quality was wealth; S. C. C., Aug. 9, 1817; May 27, 1820 (Richter, *l. c.*, n. 84).

28 *Summa*, ed. Laspeyres, p. 293.

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He intends to marry the first-born daughter of Count N., believing that Antonia, here and now present, is that daughter. In the first case the marriage is valid, in the second case it is invalid, because the consent of Peter is directly and exclusively directed to the first-born daughter of the count.[29] This case can, practically speaking, occur only when marriage is contracted by proxy.[30] The error must be strictly proved, otherwise, on account of the *favor iuris* (can. 1014), the marriage would be reasonably held to be valid.

3. *Error as to the servile condition of the other party.* If a person who is free, contracts a marriage with one who is a slave, not knowing that he or she is a slave, this error or misapprehension annuls the marriage. If the servile condition of the one party was known to the other, there was no error or mistake, and the marriage was valid.[31]

But the Code says: *servitute proprie dicta,* slavery properly so-called. This, according to Roman law,[32] exists when one person is subjected, against nature, to the ownership of another, either by fact or birth. The slaves were called *mancipia* when regarded as a piece of property; *venales* when regarded as a saleable commodity; *famuli* when regarded as domestics; *servi* when regarded as bound to obey the commands of the master. These words in ordinary language were interchangeable and employed without distinction. From this strict notion must be distinguished another, that of *adscriptii,* who belonged to a certain property or estate and could be sold only with the land.[33] The Church, as is well known, mitigated

29 Clericatus, *Decisiones de Mat.,* ed. Venet., 1725, decis. 19, n. 30.

30 Cfr. Wernz, IV, Vol. 2, p. 14, n. 223.

31 Cfr. c. 4, C. 29, q. 2; cc. 2, 4, X, IV, 9; Smith, *Marriage Process,* p. 70.

32 Cfr. Ramsay-Lanciani, *Manual of Roman Antiquities,* 1901, p. 124; § 2, *Inst.,* I, 3.

33 Maschat, *Praecursus Juris Canonici,* 1760, p. 15.

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the condition of slaves and admitted them to a true and legitimate marriage, but retained the impediment of servile condition in the form stated above. Though it has vanished in civilized countries, slavery still exists in Africa.[34] Since servile condition is not an impediment except when it is the subject of an error, no dispensation from it can be granted, but the error must be removed and the matrimonial consent renewed, unless the circumstances of the case call for a *sanatio in radice*.

ERROR AS TO THE NATURE OF MARRIAGE

CAN. 1084

Simplex error circa matrimonii unitatem vel indissolubilitatem aut sacramentalem dignitatem, etsi det causam contractui, non vitiat consensum matrimonialem.

A simple error as to the unity, indissolubility, or sacramental character of marriage, even if it be the cause of the contract, does not vitiate the matrimonial consent.

A *simple error* is one that proceeds merely from intellectual apprehension, and has no formal condition or stipulation attached to it, nor a formal act of the will excluding a substantial feature of marriage (can. 1086, § 2). The Code emphasizes this by adding: "*etsi det causam contractui.*" This signifies that the parties had the intention of contracting a union not in conformity with the notion of Christian marriage. However, in that case, especially if the parties had the intention of entering upon a concubinage, a distinction is necessary. If *both* parties had this intention and expressed it to each other, even though there were no mutual agreement,

[34] Cfr. S. O., June 20, 1886 (*Coll.*, n. 1293, Vol. I, p. 721 f.).

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the marriage would be invalid, for their intention was directed towards a mere concubinage. On the other hand, if the intention is occult and entertained only by one party, though the marriage may be judged invalid *in foro interno,* yet *in foro externo* the judgment would favor validity.[35] Such an intention depends largely upon the customs and views of the people or race to which the couple belongs. Therefore the decisions of the Holy Office take into consideration a twofold class of contracting parties: infidels and Christians. Concerning the marriages of *infidels,* missionaries are seriously exhorted not to draw the conclusion: *"In dubio standum esse pro invaliditate matrimonii,"* because this would be contrary to the general principle that marriage enjoys the favor of the law. *Each single case must be examined and judged on its own merits.* Hence the first question is, whether a marriage was actually contracted, and the second, whether this marriage possesses the essentials of a marriage. Thus, if a woman would in good faith think herself to be the wife of a certain husband, and the husband would say nothing against that assumption, and the neighbors would not take scandal at their cohabitation, these would be signs of a real marriage by name and possession, and in such a case, though a doubt might still exist, the parties should be left in good faith, and if they wish to receive the sacraments, especially Baptism, they should not be repelled.[36] Missionaries should never fail to examine past marriages, nor are they allowed to keep silence about them, for although good faith may excuse the parties from sin, yet it can never make an invalid marriage valid. Still the mere opinion that marriage was dissoluble, even if combined with the intention to obtain a divorce in case

[35] S. C. P. F., Oct. 1, 1785 (*Coll.*, n. 580).

[36] S. O., Dec. 18, 1872 (*Coll.*, n. 1392).

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of adultery or for other reasons, would not render a marriage thus contracted invalid.[37] If a marriage is found invalid, as, for instance, among the Gallas, where slaves contract a *contubernium* or legalized concubinage, the parties must be separated until they are lawfully married. Neither are they, after Baptism, to be left in good faith concerning the dissolubility of marriage. On the contrary, they may not even be baptized until they have been instructed on the nature of Christian marriage.[38]

As to the *marriages of validly baptized persons or those whose Baptism is dubious,* the following rule must be observed. In case of error concerning the properties of marriage, if it is simple and without implicit or explicit conditions, the marriage is always presumed to be valid, because the general will of contracting marriage according to the law of Christ prevails over the individual or particular will, which is, therefore, as it were absorbed by the general will.[39]

But how may the matrimonial consent co-exist with a serious error concerning the substance of marriage, especially indissolubility, or the *bonum sacramenti?* The parties wish to contract a true marriage, as instituted by God, and do not, by a positive act of the will, exclude the essential quality of marriage, although they would exclude it if they thought of it.[40] Therefore Anna, who marries Paul under the impression that she can obtain a divorce from him in case the marriage proves unhappy, contracts validly. The thought of a possible divorce only made her more ready to give her consent, but the consent itself did not depend on this reason or expedient,

37 S. O., March 11, 1868; Feb. 4, 1891 (*Coll.*, nn. 1327, 1746).

38 S. O., June 20, 1866, ad 25 (*Coll.*, n. 1293, Vol. I, p. 722).

39 S. O., Jan. 24, 1877 (*Coll.*, n. 1465); Benedict XIV, *De Syn. Dioec.*, XIII, 22, 7.

40 C. 7, X, IV, 19; Gasparri, *l. c.*, n. 903 f.

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although it may have greatly influenced the same.[41]

The object of the simple error mentioned in our canon is either the unity, or the indissolubility, or the sacramental character of marriage. The former two may more readily exist in unbelievers, but they also exist in countries which admit divorce. The Greek schismatics and most Protestant sects, especially the Calvinists, have little scruple in permitting divorce. The sacramental dignity of marriage was denied by Luther and his followers, who looked upon marriage as a "purely worldly thing." Now no matter which of these three objects the error may concern, as long as it is a merely speculative or even practical error which causes one to give the matrimonial consent, it does not annul the marriage.

CAN. 1085

Scientia aut opinio nullitatis matrimonii consensum matrimonialem necessario non excludit.

The knowledge or belief that the marriage will be void does not necessarily exclude matrimonial consent.

The source quoted in favor of this text is an instruction of the S. C. of the Propaganda, dated Oct. 1, 1785.[42] Some Armenians, as it appears of the Uniat Church, presented themselves before the Turkish magistrates with the firm purpose of taking a wife, not a concubine. However they thought that they could not contract a valid marriage, although if they knew of the sufficiency of the

41 This is the well known case of Paul Boni de Castellane and Anna Gould, which was three times proposed to the *S. Rom. Rota*, in 1911, 1913, and 1915 (*A. Ap. S.*, IV, 146 ff., V, 312 ff., Vol. 292 ff.). The first and third decisions were in favor of validity, the second was in favor of nullity, which we could not understand, because the so-called new proofs merely affected insignificant details.— Cfr. *Irish Eccl. Record*, 1918, Vol. XII, pp. 279 ff.

42 *Coll.*, n. 580.

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civil act for contracting marriage, they would doubtless intend to contract marriage. But their error does not render the marriage invalid, because their presenting themselves before the civil officer is a mere formality and does not offset or annul the act of the will previously made. For when the error is concomitant only, and has no influence upon the substance of the act, but affects only an accidental quality, the contract remains valid. Thus also if a party thinks or implicitly believes that he is concluding a dissoluble union, without having a clear notion of the indissoluble character, the marriage is valid.[48] This appears to refer to the so-called *intentio interpretativa.* For the party would rather be inclined to contract a dissoluble marriage, yet, because the mind is not sufficiently formed or informed, it must be supposed that the natural property of marriage is to prevail over a certain *velleitas* or obscurely conceived notion. In other words, the presumption of the law interprets the intention in favor of validity.

INTERNAL AND EXTERNAL CONSENT

CAN. 1086

§ 1. Internus animi consensus semper praesumitur conformis verbis vel signis in celebrando matrimonio adhibitis.

§ 2. At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum, aut omne ius ad coniugalem actum, vel essentialem aliquam matrimonii proprietatem, invalide contrahit.

§ 1. *The internal consent of the will is always presumed to correspond to the words or signs used in the*

[48] S. C. P. F., Aug. 23, 1852 (*Coll.*, n. 1079).

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celebration of marriage. Why? Because no one is supposed to joke or to simulate consent in such a serious and important matter. Hence though one of the parties may deceive the other by directing his or her intention to something else than marriage, yet if he or she expresses his or her consent in the customary and formally valid mode, the marriage is presumed to be valid *in foro externo,* although it may be invalid in the court of conscience.[44] This is true even if one had postulated a condition in his mind. For instance, James says to himself: "I will marry her if she is pregnant, because I want to repair the wrong I have done her." If James makes no condition when expressing his matrimonial consent before the qualified witnesses and has not made any formal stipulation with her before marriage, the latter is valid.[45] For the words express precisely what they intend to convey, namely, the matrimonial consent. The same must be said concerning *equivalent signs,* for instance, nodding.[46]

§ 2 states that if one or both parties, by a *positive act of the will,* would exclude marriage itself or the right to the conjugal act, or an essential property of marriage, *the contract would be null.*

Here there is no mere error or opinion, but a positive act of the will. What is meant by the term "*positivo voluntatis actu*"? A positive act of the will is not a mere error, either about marriage itself or about the person of the other party; nor is it the so-called *conditio apposita,* an express condition. Hence a positive act of the will must lie somewhere between these two. Note that the external

44 S. C. P. F., Oct. 1, 1785 (*Coll.*, n. 580).

45 S. C. C., June 23, 1907 (*Anal. Eccl.*, t. 15, 239 ff.).

46 S. O., Aug. 22, 1860 (*Coll.*, n. 1201): "*Matrimonium firmum ac validum consistere quoties nutus, vel caeremoniae coram testibus praestitae, iuxta communem regionis existimationem, mutuum sponsorum de praesenti consensum sufficienter exprimunt*"; cfr. S. C. P. F., Feb. 4, 1664; April 17, 1820 (*Coll.*, nn. 156, 2262).

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consent, if given in the usual way, is presumed to correspond to the internal state of mind. This enables us to understand the term. A positive act of the will is an *express declaration* that one wishes to contract marriage in a manner which contradicts its very essence, object, or essential properties. Hence, like a positive law, this act of the will must be formulated and externalized or made known by means of a certain formula.[47] That no merely internal act can be intended, appears clearly from a consideration of § 1 of this canon. Besides, a merely internal act could never render a marriage invalid *in foro externo*. Direct proof that an external act is intended may be gathered from an instruction of the Holy Office.[48] After having stated that the individual will is absorbed by the general will of Christ, who raised Matrimony to a higher sphere and restored its original idea, the S. Congregation says: "But this absorption cannot take place if a formula is employed which contains an explicit or implicit condition against the perpetuity of marriage." It then sets forth certain Calvinistic tricks which were calculated to convince the contracting parties, at the very wedding, that they were entering upon a union which did not correspond to the command of Christ. Thus they abused Matt. 19, 9; 5, 32 and Heb. 13, 4 to insinuate the dissolubility of marriage.

Of course it is not required that this positive act of the will be declared to the other party; but it must somehow be manifested outwardly. A case solved by Innocent III plainly indicates that one party may deceive the other for the purpose of the *copula*. But this case also proves

47 S. O., July 22, 1840, ed. 2 (*Coll.*, n. 903): "*Matrimonium mixtum esse nullum, sc. parte acatholica expresse declarante se contrahere matrimonium de praesenti iuxta formulam perpetuitati matrimonii contrariam.*"

48 S. O., April 6, 1843 (*Coll.*, n. 965).

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that although theoretically speaking there may be no doubt as to the invalidity of a marriage contracted with the positive will not to contract marriage, yet practically speaking, or as a matter of fact, it would be hard to prove, unless circumstantial evidence could be offered to that effect.[49] A corroboration of this view is found in the answer given to the bishop of Sioux Falls concerning the marriages of Indians. He had asked whether they might be trusted if they declared under oath that they never intended to contract an indissoluble union. Yes, said the Holy Office, if each case has been duly examined as to the credibility and truthfulness of the parties concerned.[50]

The positive act of the will may exclude *marriage itself*. If one would contract a union merely for the sake of carnal gratification, it would be no marriage. Or if two persons would marry purely for friendship or for literary co-operation,[51] there would be no marriage.

Or *the positive act of the will may exclude all right to the conjugal act, i. e., ius ad copulam,* and thus deny radically the primary end of marriage. Different from the right is the *exercise* thereof. This is not essentially required for the validity of the marital contract and may therefore be omitted.[52] Hence the purpose of "avoiding offspring" would not *per se* exclude marriage.

49 C. 26, X, IV, 1, where the pope distinguishes between the fact and *quid iuris sit*, the latter being evident if no consent was given.

50 S. O., May 19, 1892; May 25, 1898 (*Coll.*, n. 1796; Vol. II, p. 367): "*Ut Indianus probet legitime se habuisse in contrahendo explicitam voluntatem repudii in causa adulterii, exterius manifestatam.*"

51 S. C. C., Aug. 6, 1881.

52 Cfr. cc. 26, 31, X, IV, 1; c. 5, X, IV, 4; *A. S. S.*, V, p. 553 f. If we say that the *exercise of the marital act is not essential to the marriage contract* it should not be construed as if we would contradict our own statements concerning impotency and vows (cfr. can. 1092). For where there is not even a radical foundation for that right existing and admitted, as in the case of impotency and vow, no right can be foregone, inasmuch as every right supposes the possession or holding of something to which a claim may be made.

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Lastly the *positive act of the will may exclude the indissolubility and unity of marriage.* Indissolubility excludes the positive will to contract marriage with the right to divorce.[53] Unity excludes polygamy. Opposed to this essential property of marriage would be the positive will to deliver the wife, or (if the woman would make the resolution) to deliver herself, to prostitution or adultery for lucre's sake.[54]

VIOLENCE AND FEAR (VIS ET METUS)

CAN. 1087

§ 1. Invalidum quoque est matrimonium initum ob vim vel metum gravem ab extrinseco et iniuste incussum, a quo ut quis se liberet, eligere cogatur matrimonium.

§ 2. Nullus alius metus, etiamsi det causam contractui, matrimonii nullitatem secumfert.

§ 1. Marriage is invalid also when it is entered into because of violence or grave fear, caused by an external agent, unjustly, to free himself from which one is compelled to choose marriage.

§ 2. No other fear, even though it would give cause to the contract, entails the nullity of marriage.

This is the so-called impediment of violence or fear, which was and still is, and must by its very nature be, of a rather fluctuating character. The Roman law, which permitted divorce,[55] looked upon marriage contracted under compulsion or fear as a contestable matter only. The Penitential books connect it with rape.[56] Gratian's De-

53 S. O., May 18, 1898 (*Coll.*, n. 1999).
54 C. 7, X, IV, 5.
55 Fr. 22, Dig. 23, 2.
56 Wasserschleben, *l. c.*, pp. 150, 170, 216, 410, 510, 641.

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cree [57] and the Decretals [58] mention it in a rather cursory way in connection with the paternal power and the espousals of *impuberes*. Freedom is strongly insisted upon in the authentic collections. But it would be difficult to find a positive text to prove that *vis et metus* were introduced either by custom or by written law as an impediment, or that the Roman tribunals ever cited such a positive law when they declared a marriage invalid.[59] Therefore it is safe to say, with the Holy Office,[60] that the impediment of violence and fear is based on the natural law, and that consequently a dispensation proper cannot and is not granted by the Church in such cases. This view is corroborated by the Code, which places violence and fear not among the impediments proper, but among the natural obstacles besetting the matrimonial consent.

1. Violence is the onset of an outward superior force too great to be repelled (*"vis est majoris rei impetus qui repelli non potest"*).[61] It may also be defined as physical coercion or constraint, which compels one to do something against one's will. In the matter of marriage compulsion signifies a violent act by which one is forced into giving one's consent, for instance, by the use of arms, or haling the other party before the minister or officer. However, it is evident, as S. Thomas says,[62] that violence cannot be done to the will as far as the proper act of that faculty is concerned, because this act proceeds from an interior principle, whilst violence comes from without. But it is also true, as the same holy Doctor says, that violence is directly opposed to the *voluntarium,* is against the very nature of free-will, and therefore causes the ac-

57 Cfr. cc. 1, 3, 4, C. 31, q. 2.
58 Cfr. X, IV, 1; c. 9, X, IV, 2; X, I, 40.
59 Wernz, *l. c.*, IV, Vol. 2, p. 52 f., n. 266.
60 S. O., Feb. 15, 1891 (*Coll.*, n. 2101).
61 L. 1, § ult., Dig. 4, 2.
62 *Summa Theol.*, I-II, q. 6, art. 4 f.

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tion of the will to be involuntary. Hence, marital consent given under such constraint would be of no account.

2. Violence causes *fear,* and is therefore related to fear as cause to effect. Fear is "a perturbation of the mind on account of an impending evil." [63] There must be a connecting link between the object of fear, or the evil threatened, and fear itself, otherwise fear could not influence the will to do one thing rather than another. In other words, fear must determine the will to perform a certain act exactly and precisely on account of the evil impending. And here it must be noted that fear does not render the act elicited or commanded or performed under its influence purely involuntary, but only under a certain aspect, *viz.,* with regard to the evil threatened.[64] However, observe that right reason would rather consider the repugnance of the will as affected by fear in a matter of such weight and with such enduring consequences as are attached to marriage. The Roman law, admitting divorce, had smooth sailing; but the Church, which rejects the dissolution of the marital tie, naturally attached more influence to fear than the Roman State. In course of time she became the sole champion of perfect liberty in matrimonial matters. The psychological element prevailed over the metaphysical of fear.

3. Fear may differ as to cause, mode and degree.

a) The *cause of fear* may come from within or from without. It comes from within when it is occasioned by a natural event, the existence of which is not dependent on a free or human agent, for instance, an earthquake,[65] a shipwreck, a fire. From without (*ab extrinseco*) fear

63 Dig., *l. c.;* Tancred., *l. c.,* p. 46.

64 Cfr. *Summa cit.,* art. 6.

65 We still remember the earthquake of Jan. 13, 1915, which caused a panic in the "Holy City" of Rome for several days.

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may be caused by a free agent, *i. e.*, man, who has it in his power to inflict it.

b) Hence the *mode* or manner of fear may be just or unjust. Fear is *unjust* when it is inflicted by one who has no authority or right to threaten the evil involved, or when it is threatened for no adequate reason, or for a reason not connected with the evil threatened. Fear is just if caused by lawful authority or by one who is entitled to make the threat, or when there is solid reason for it.

c) In *degree* fear is either grave or slight.[66] Grave fear may be absolutely or relatively grave. *Absolutely grave fear* is such as would frighten or intimidate any firm and prudent man or woman (*cadens in virum constantem*). *Relatively grave fear* is one which may affect or move to action some men or women, whilst it will not affect others. As the natural, physical and mental conditions of individuals differ, it is difficult to establish a general rule. *Slight fear* arises either from a light evil threatened, or from a grave evil which may be easily averted. Finally mention may be made of what is called *reverential fear,* which causes one to be afraid to offend his parents or superiors. This again is liable to various degrees according to education, psychological impressions, and other circumstances.

d) *The Code most reasonably refers this kind of fear to marriage.* Hence there must be a choice between marriage and the threatened evil that causes fear.[67] This is quite evident, for if marriage is not the evil threatened under the influence of fear, how could fear affect mar-

66 Cfr. Tancred., *l. c.*, p. 47.

67 Hence the so-called *opinio probabilior* of Schmalzgrueber (IV, 1, n. 398) referred to by Smith (*Marriage Process*, p. 84), that no connection between marriage and the evil is required, is now destitute of probability, as it was in fact *a priori*.

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riage, or how could it influence the will to choose that expedient?

The following propositions, taken from authentic sources, will illustrate the text of the Code.

1. *Proposition: Physical compulsion* brought to bear upon a party in order to extort the matrimonial consent, *simply annuls the marriage,* because no free consent is possible where there is physical constraint.[68]

2. *Proposition: Absolutely or relatively grave fear,* threatened *from without* for the purpose of eliciting the matrimonial consent, *annuls a marriage* if the mode or manner in which it was inflicted was *unjust,* or if there was no adequate reason for threatening the marriage. Thus if one is threatened with the galleys or marriage, he would be influenced by grave fear, but though the mode was just, because inflicted by the judge, it was unjust, because the *stuprum* imputed was only proved by rumor.[69] The detention of a woman in a fortress by force would annul a marriage.[70] If one is threatened with imprisonment or marriage, and chooses the latter, the marriage is invalid. The instigators of that imprisonment were the parents of the girl, who declared that N. had done her violence, but after the forced marriage with N. she confessed that another one had committed the crime.[71] A case of fear threatened from without, but with a mixture of intrinsic fear, was solved in favor of nullity.[72] In other cases the S. Congregation has decided in favor of validity, if the fear was caused merely by empty threats

68 C. 14, X, IV, 1; Bernard. Pap., *l. c.*, pp. 303, 347.

69 S. C. C., March 26, 1707 (Richter, *Trid.*, p. 238, n. 71).

70 S. C. C., Aug. 19, 1724; June 9, 1725 (Richter, *l. c.*, n. 74).

71 S. C. C., March 18, 1731; May 4, 1746 (Richter, *l. c.*, nn. 76, 79).

72 S. C. C., July 13, Sept. 22, 1725 (Richter, *l. c.*, 82). A grave fear may be inflicted by the refusal of the Sacraments; cfr. S. R. R., May 10, 1918 (*A. Ap. S.*, XI, 89 ff.); but the case is allied to rape.

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and admonitions, and was threatened not precisely with regard to marriage, but only to repair the honor and good name of the girl.[73] Thus it may happen, as we know from a case brought to our knowledge, that a man is forced by the brother of a girl with pistol in hand to marry her. Whether this happens on the same day or on the day before the marriage is immaterial, provided there be danger of life. But if the party thus threatened can escape by leaving the country or his home, the fear would cease, though, of course, the revengeful brother might follow him, and therefore the only real escape would be the marriage, which in that case we would not hesitate to declare invalid. Some authors[74] extend the case thus: Even if the evil threatened in connection with the marriage would affect near relatives, the fear would be sufficient to annul the marriage. Assuming, for instance, that the brother or first cousin of James is threatened,—if James would volunteer to marry the girl in order to save his brother or first cousin, he would be acting under grave fear, which would affect the validity of the marriage. The Code is not opposed to this view.[75]

3. *Proposition: Fear threatened solely from within* cannot annul a marriage because a necessary or blind cause cannot influence the will *ad hoc, i. e.,* with regard to marriage.[76]

4. *Proposition: Slight fear* (*metus levis*) *does not annul marriage* because it cannot efficaciously move the will and diminish the voluntariness of an act. Besides, if

73 S. C. C., Sept. 1, 1725; June 18, 1735; April 24, 1700; April 23, 1701 (Richter, *l. c.*, nn. 75, 77).

74 Schulte, *Eherecht*, p. 128, would include only relatives of the first and second degree, whilst v. Scherer, II, 176, extended it to more remote ones.

75 For it does not limit that fear to the person himself, and on the other hand it is perfectly true that a man with natural affection considers evil or good befalling his dear ones as affecting himself.

76 Sanchez, *l. c.*, l. IV, disp. 12, n. 3.

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slight fear would induce nullity, the appeals for annulment would become innumerable and the indissolubility of marriage a farce.[77]

5. *Proposition: Reverential fear* (*metus reverentialis*), as long as it remains such and is not accompanied by serious threats, for instance, of disinheriting, or by blows, spoliation of ornaments (earrings, jewelry) *cannot annul marriage*. But if means such as those just enumerated are used to enhance the fear, it might suffice to annul marriage, especially in the case of children of a naturally timid and affectionate disposition.[78]

The right to attack a marriage on the ground of violence and fear is restricted to the parties who suffered violence or fear; outsiders are excluded from the duty and the right of making an accusation on this score.[79]

Lastly it should be noted that a marriage contracted under the influence of grave fear cannot be revalidated by mere cohabitation or by the *copula etiam cum affectu maritali habita*,[80] but the party who suffered fear must renew the consent according to can. 1136.

MODE OF EXPRESSING THE CONSENT

CAN. 1088

§ 1. Ad matrimonium valide contrahendum necesse est ut contrahentes sint praesentes sive per se ipsi sive per procuratorem.

§ 2. Sponsi matrimonialem consensum exprimant

77 Sanchez, *l. c.*, IV, disp. 17, and Gasparri, n. 945, maintain that the ecclesiastical law rejects *metus levis*, but Wernz (IV, Vol. 2, p. 47, n. 263) justly observes that these authors could not allege a single text for their opinion, and therefore the *natura ipsius metus levis* is sufficient.

78 S. C. C., June 8, 1720; July 17, 1745 (Richter, *l. c.*, nn. 72, 78); S. Rom. Rota, July 7, 1911; June 2, 1911 (*A. Ap. S.*, III, 661; IV, 108).

79 Instructio S. C. P. F., 1883, n. 36 (*Coll.*, 1587).

80 S. C. C., June 20, 1609; Dec. 2, 1634 (Richter, *l. c.*, n. 82).

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verbis; nec aequipollentia signa adhibere ipsis licet, si loqui possint.

To contract a valid marriage the parties must be present either personally or by proxy; they must express the matrimonial consent by words, and are not allowed to use equivalent signs when they are able to speak.

Christian marriage being a sacrament administered by the contracting parties, it follows that the latter must manifest their consent in the *presence of each other* in such a way and at such a distance that the act can be perceived by the senses. § 2 expressly requires the use of *words,* because these are the usual means of human communication. Equivalent signs, for instance, nodding of the head,[81] or putting the ring on the finger are allowed only when one or both of the contracting parties are incapable of speech. However, the use of words does not affect the validity of the consent.[82]

MARRIAGE BY PROXY

CAN. 1089

§ 1. Firmis dioecesanis statutis desuper additis, ut matrimonium per procuratorem valide ineatur, requiritur mandatum speciale ad contrahendum cum certa persona, subscriptum a mandante et vel a parocho aut Ordinario loci in quo mandatum fit, vel a sacerdote ab alterutro delegato, vel a duobus saltem testibus.

§ 2. Si mandans scribere nesciat, id in ipso mandato adnotetur et alius testis addatur qui scripturam ipse quoque subsignet; secus mandatum irritum est.

81 Cfr. S. O., Aug. 22, 1860 (*Coll.*, n. 1201).

82 Cfr. cc. 23, 25, 31, X, IV, 1; *Rituale Rom.*, tit: VII, c. 2 (ed. Pustet, 1913, p. 213 f.); S. O., Aug. 22, 1860; S. C. P. F., Feb. 4, 1664; April 17, 1820 (*Coll.*, nn. 1201, 156, 2262).

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§ 3. Si, antequam procurator nomine mandantis contraxerit, hic mandatum revocaverit aut in amentiam inciderit, invalidum est matrimonium, licet sive procurator sive alia pars contrahens haec ignoraverint.

§ 4. Ut matrimonium validum sit, procurator debet munere suo per se ipse fungi.

The preceding canon simply stated that marriage may be contracted by proxy. Therefore, since the Council of Trent,[83] and now after the promulgation of the Code, marriage by proxy is lawful and valid.[84] This canon prescribes the *modus facti,* or what is required in order that a marriage by proxy be valid. After having referred to the diocesan statutes, which may require further conditions, the Code says:

1) A *special mandate* is needed to contract marriage by proxy with a *specified person.* This mandate must be in writing, must be signed by the principal and either by the pastor or the Ordinary of the place in which the mandate is given, or by a priest delegated by either the pastor or the Ordinary, or by two witnesses.

This is nothing else but an application of can. 1094, for the proxy takes the place of one party. Of course, if both would choose a proxy — which is not likely to happen — the same process would have to be applied to both proxies, and each must have a mandate signed by the principal, the respective pastor, etc.

2) If the person issuing the mandate (*mandans*) is *unable to write,* this fact is to be noted in the mandate and an additional witness must sign the document, else it is void.

3) If the *principal has revoked his mandate or become*

83 Sess. 24, c. 1, *de ref. mat.*
84 Benedict XIV, *De Syn. Dioec.*, XIII, 2, 9.

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insane before the proxy makes the contract, the marriage is invalid, even though both the proxy and the party with whom the contract was made would be unaware of the change.[85] For the consent is suspended by that incident, and does not last in the mind of the *mandans*.

4) The proxy must execute his mandate personally, not by a delegate, else the marriage will be invalid. The reason for this condition is that generally in such a matter personal qualities determine the choice. Of course, it is supposed that the proxy, when contracting marriage in the name of the *mandans,* is in a normal condition of mind and body, and especially that he is able to realize what is going on.[86]

CAN. 1090

Matrimonium per interpretem quoque contrahi potest.

Marriage can be contracted also through an interpreter.

In this case, which differs from proxy, because the parties are supposed to be present, the interpreter must faithfully translate the consent of both.

CAN. 1091

Matrimonio per procuratorem vel per interpretem contrahendo parochus ne assistat, nisi adsit iusta causa et de authenticitate mandati vel de interpretis fide du-

85 C. 9, 60, I, 19; S. C. C., July 5, 1727 (Richter, *Trid.*, p. 238, n. 69). Insanity need not be perpetual, but may be temporary, no matter what Sanchez (l. II, disp. 11, n. 12) says against other authors. The case in *Anal. Eccl.*, 1901, p. 430, offered a wrong solution.

86 The case mentioned in the preceding note depicted the proxy as acting under strong, though not overpowering, influence of alcohol; on that score he had contracted validly; but because the *mandans* had fallen into insanity at the time of the marriage contract, the latter was invalid.

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bitari nullo modo liceat, habita, si tempus suppetat, Ordinarii licentia.

The pastor shall not assist at a marriage which is to be contracted by proxy or by interpreter, unless there be a just cause for it, and no doubt exists concerning the genuineness of the mandate or the trustworthiness of the interpreter; if time permits, the Ordinary's permission should be obtained.

There would be room for doubt if the mandate were not sealed with the parochial or diocesan seal. If properly signed and sealed the document cannot be rejected. A legitimate cause justifying the pastor in assisting at such a marriage would be absence from home, or perhaps unsafe conditions arising from feudal or family dissensions, etc.

CONDITIONAL MARRIAGE

CAN. 1092

Conditio semel apposita et non revocata:

1.° Si sit de futuro necessaria vel impossibilis vel turpis, sed non contra matrimonii substantiam, pro non adiecta habeatur;

2.° Si de futuro contra matrimonii substantiam, illud reddit invalidum;

3.° Si de futuro licita, valorem matrimonii suspendit;

4.° Si de praeterito vel de praesenti, matrimonium erit validum vel non, prout id quod conditioni subest, exsistit vel non.

There are certain rare historical documents [87] which could be alleged as proving the existence of this former

87 Freisen, *l. c.*, p. 232 ff. Wernz, *l. c.*, IV, p. 433 (ed. 1) endeavors vainly to show a historical coherence.

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impediment. With the exception of two "Paleae"[88] in the Decree, Master Gratian seems to ignore it. Bernardus Papiensis is the first writer who mentions it *ex professo*.[89] The Decretals[90] deal with conditional marriage under a special title, but the Code no longer treats condition as an impediment.

A condition or stipulation is a quality added to a contract which suspends its validity or effect until the time when the condition is fulfilled. From this definition it may be seen that a condition almost invariably concerns the *future*. A condition referring to the past is not a condition in the proper sense of the term.

Stipulations may regard the *substance of marriage*, especially its indissolubility, loyalty, and primary end. They may not be repugnant to the substance of marriage, and yet be *sinful*, because of the unlawfulness of the object aimed at. They may also be *impossible* of fulfillment. This impossibility may spring from human incapability of fulfilling the stipulation, because the object is beyond man's power. A *necessary* condition is one, of which the fulfillment depends on natural, not free, causes (*eventus fortuitus*). The text proceeds according to the various conditions.

1. When a *condition has been placed to the consent and not withdrawn, if it concerns the future and is necessary or impossible or dishonest,* but not contrary to the substance of marriage, it *must be regarded as non-existing.*

a) A *necessary* condition would be, for instance: "If the sun rises to-morrow," "If your mother dies," or "If I

88 Cfr. cc. 7, 8, C. 27, q. 2; which are spurious; cfr. Berardi, *Canones Gratiani Genuini*, I, 172.

89 *Summa Decret.*, ed. Laspeyres, IV, 5, p. 146 f.

90 Cfr. X, IV, 5.

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get a good crop," for such conditions depend on circumstances over which man has no control.

b) An *impossible* condition would be: "If you will touch the sky with your fingers," [91] or "If you will not get sick," or "If you will live forever."

c) A *sinful* condition would be: "If you will embrace a non-Catholic creed," or "If you will kill your mother-in-law," or any other stipulation which involves a sin.

Now all such conditions are to be considered as non-existing, and therefore, as the canonists [92] say, they vitiate or kill themselves, not the matrimonial contract. A sensible and honest person is not supposed to contract marriage under frivolous conditions. The Church clearly wishes to safeguard the importance and seriousness of marriage by this law.

2. If the *condition concerns the future* and is *against the substance of marriage, it renders the marriage invalid.* The school [93] expressed this truth thus: A condition that is against the substance of marriage, vitiates the latter, but not the condition itself. For in every such case there are two positive acts of the will, one contrary to the other, inasmuch as the contracting party on the one side wills the marriage, because the will is bent on the marriage contract, while, on the other side, the will does not will, because it excludes or restricts the obligation and hence the right.[94] Note that we speak of a condition, which must proceed from a deliberate act of the will, and not from mere apprehension or interpretation, as when one would say: If I had known this, I should not have contracted marriage. This would be a case of error or

91 Bernard. Pap., *l. c.*; c. 7, X, IV, 5.

92 Fagnani, *Comment.*, c. 1, X, 5, nn. 2 ff.

93 Fagnani, *l. c.*, n. c. 7, nn. 2 f.

94 Gasparri, *l. c.*, n. 919 (Vol. 2, p. 41).

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misunderstanding, but there would be no formal act of the will. Besides being a condition or stipulation, it must be mutually, externally, and lastingly agreed upon (*in pactum deducta*).[95] We say *lastingly,* because the stipulation must not be retracted before the marriage consent is given. But it is not necessary that this stipulation be repeated at the wedding, and hence the parties may give their consent absolutely like other contracting parties who marry unconditionally. This point was insisted on in a certain cause brought before the S. C. Concilii.[96] However, the document drawn up before the marriage and the fact that the pastor would not, at first, assist at the marriage for the very reason that a condition against the substance of matrimony had been attached, proved clearly the existence of a mutual stipulation. Therefore the marriage was declared invalid.

The substance of marriage is embraced in the threefold good thereof: the *bonum sacramenti, fidelitatis et prolis.*

a) Opposed to the *sacrament* is solubility by which a person could marry for a certain time only, or as long as it pleased his partner. Charles and Caroline were married April 12, 1887, but he soon grew tired of living with the same woman, and after fifteen days Caroline had to return to her home. The episcopal court returned a verdict in favor of nullity because "of the evidently implied condition of contracting a soluble marriage." But the S. C. Concilii upset this sentence and pronounced in favor of validity, because there were no proofs for the existence of any such stipulation.[97] If a Catholic would

95 Thus all the quotations alleged in Card. Gasparri's edition, especially S. O., Jan. 24, 1877 (*Coll.*, n. 1465); cfr. Benedict XIV, *De Syn Dioec.*, XIII, 22, 7.

96 Ulixbon., March 16, 1720; July 8, 1724 (Richter, *Trid.*, p. 246 ff., n. 88).

97 S. C. C., Jan. 31, 1891 (*A. S. S.*, t. 23, 711 ff.).

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marry a Protestant or schismatic who was determined to make use of his sectarian conviction concerning the solubility of marriage, but would not stipulate this expressly with the Catholic party, the marriage would be valid.[98]

b) The second bonum is that of *conjugal fidelity,* which excludes polygamy and adultery. Hence if a man would marry a woman with the expressly stipulated condition: "I will marry you if you will deliver yourself up to adultery or prostitution for the sake of gain," [99] the marriage would be invalid. However, a mutual agreement would be required, otherwise the marriage would be valid, since no decent or honest person is supposed to ignore the unity of marriage, which excludes the sharing of one's body with another.

c) A condition against the *bonum prolis* would be, in the words of the decretal: "*si prolem evitaveris,*" if you will have no offspring.[1] The primary end of marriage would thereby be frustrated. But this point is disputed, especially on account of the *marriages called after St. Joseph,* and marriages contracted with the vow of perpetual chastity. To us it seems more conformable to the law and in accord with the essence of marriage to hold that the right to the body of the other partner which is conferred by the matrimonial consent is intended precisely for the purpose of bringing forth children (*ius ad copulam per se aptam ad generationem*), that in other words, it is not an abstract, but a practical right, intended for the use of marriage. Now, if the vow of perpetual chastity had been made by one party, the other would be obliged in justice not to make use of the right essentially inherent in marriage,[2] and consequently there would be the

98 S. O., Dec. 2, 1680 (*Coll.,* n. 221).

99 C. 7, X, IV, 5.

1 *Ibid.*

2 Thus Wernz IV, Vol. 2, p. 98, n. 302.

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same contradiction noted above: to will and not to will; I will marriage, but not its rights and duties. Now any contract would be invalid if the object of the contract would be absolutely, radically and permanently refused. Note well that a vow must necessarily exclude the right to use marriage, otherwise it is only an imperfect vow. Neither is it admissible to distinguish between a sinful and a lawful condition, for not only does the law [3] not distinguish between sinful and lawful conditions, but the very nature of marriage does not admit this distinction. For its primary end is offspring,[4] and if this end is in any way wilfully and efficaciously excluded, there can be no marriage. Lastly, this vow must be, and is supposed to be, a mutual agreement and not to rest only in the mind, or be a one-sided affair. For we are dealing with *stipulations*. The conclusion is: a marriage such as the one described is null and void.

But what about the so-called *historical facts:* the marriage of the Blessed Virgin with St. Joseph,[5] that of Pulcheria with the Emperor Marcian, that of St. Henry II with St. Cunegundis? Concerning the first example we may safely follow St. Thomas,[6] who says that the vow of Our Lady was conditional, not absolute, because otherwise there would have been no marriage. If it had been absolute — without reference to the will of God who wished that marriage — there would have been a condition against the good of marriage, and the latter would have been null and void. As to the marriage between Pulcheria and Marcian there are no documents

3 Neither the Decretals, c. 7, X, IV, 5, nor our Code.

4 And for that very purpose marriage was instituted by the Author of nature, whence it cannot be sinful.

5 Cfr. *Zeitschrift für Kath. Theol.*, Innsbruck, 1888, p. 663 ff., where P. Flunk, S.J., discussed the matter very thoroughly.

6 Sent., IV, Dist. 30, q. 2, art. 1, qla. 2 ad 2.

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proving an absolute vow attached to the consent in the shape of a genuine stipulation. Concerning St. Henry's union it is now morally certain that there was the impediment of impotence.[7] A rather peculiar case has been alluded to above.[8] A Portugese lady married a senator under the avowed condition, set down in writing, that she would enter a convent fifteen days after the marriage, make profession after the novitiate, never make use of her marriage rights and immediately renounce the same. (Given at Lisbon, May 6, 1718.) The marriage was declared null and void. Besides others the authority of St. Thomas was alleged, who says: "If a woman would tell a man: 'I marry you, provided you have no intercourse with me,' this would be no matrimonial consent, because the condition is repugnant not only to the act itself, but to the very purpose of carnal intercourse."[9]

A very practical case was that solved by the S. Congregation, July 17, 1904. It concerns the *onanistic use of marriage*. A man and a woman had married with the formal and explicit condition that they would have no children. The episcopal court gave a verdict of nullity, which the *defensor vinculi* tried his best to get reversed. But as the stipulation was proved by letters, supported by an oath of the man and by witnesses, the S. Congregation[10] confirmed the sentence, thus declaring the marriage invalid. Of course, if the intention to have no children would have been only a desire or wish not expressly stipulated, the verdict would have been in favor of validity.

3. If a *condition* attached to the consent and not with-

7 *Tübinger Quartalschrift*, 1905, p. 325 ff.; 1907, p. 563 f.

8 Ulixbon. (Richter, p. 246 ff., n. 88).

9 Sent., IV, dist. 28, art. 3 ad 3; other authors quoted in that case are: S. Bonaventure, Sanchez, Layman, Barbosa, etc.

10 Cfr. *Anal. Eccl.*, t. 12, 294 ff.

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drawn *concerns the future and is lawful, it suspends the validity of the marriage* until the condition can be verified. If, for instance, one would set up the condition: "I marry you if I shall be elected to Congress," or "if you bring a dowry of $10,000," it would concern the future and be licit, but unless the stipulation were mutual, formal and lasting, the marriage would never be declared invalid, nor would it be conditional.[11] Suppose James married Gemma in 1919 under the condition above quoted: "If I am elected to Congress at the next election, in 1921." Provided they had observed the prescribed form, the marriage would become valid at the moment of James's election. But both would have to abstain from cohabitation or the use of marriage rights until the election was polled and ratified. After that no renewal of consent or anything else is required, because by the verification of the condition the marriage contract becomes complete.[12] Both parties may licitly and validly relinquish the condition and in that case the consent becomes absolute and no other formality is required,[13] but *the pastor* who assisted at the conditional marriage should be notified, in order to avoid misunderstanding.

Here it may be well to note that a conditional marriage, because not approved as a general rule by liturgical books and the practice of the Church, should never be contracted without first consulting the Ordinary.[14]

If the parties had carnal intercourse whilst the condition was still pending, they are by law supposed to have

11 S. C. C., Jan. 23, 1666 (Richter, *Trid.*, p. 244, n. 85). A woman married on condition that the husband should bring 400 scudi (= $4000) as a dowry; he failed; yet the marriage was valid, because she consented *libere;* S. C. C., Nov. 17, 1708 (Richter, *l. c.*, n. 86). A condition was made, but the parties contracted absolutely, and therefore the marriage was declared valid.

12 C. nn. § 1, 60, IV, 1.

13 C. 5, X, IV, 5.

14 Wernz, *l. c.*, IV, Vol. 2, p. 88, n. 297.

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renounced the condition and thus made their conditional consent absolute. This is the doctrine of the Decretals [15] and it is not contradicted by the Code nor by the "*Consensus mutuus*" of Leo XIII, Feb. 15, 1892.[16]

The supposition that, pending the fulfilment of the condition, one can contract a valid marriage with a third person,[17] is fanciful, for now-a-days, when the form is so carefully prescribed, there is hardly a possibility of such an occurrence.

4. If the stipulated *condition* concerns *the past or present,* the marriage is either valid or invalid according to the verification or non-verification of the condition. Thus, if one would marry a woman under the condition: "If you are a virgin," the marriage would be objectively valid if the woman really were a virgin, but the marriage rights could not be made use of until the condition was verified.[18]

A case of a lawful condition not fulfilled was solved in 1918 by a commission of five Cardinals, all noted canonists. The lady had promised to marry a man if he was free from the taint of having had relations with another woman. This condition she mentioned on three different occasions to the would-be husband, and emphatically stated that her consent depended on and was subject to the quality alleged. Nor did she retract this condition before or at the marriage, though she did not formally renew it at the wedding, because, having stated it so absolutely, she could not add anything else. But the husband was found wanting in that very point, though he had asserted upon his word of honor that he had had no illicit relations with the other. After the marriage he

15 Cfr. cc. 3, 5, 6, X, IV, 5.
16 Wernz, *l. c.*, IV, Vol. 2, p. 90, n. 298.
17 Wernz, *l. c.*
18 Fagnani, in c. 7, X, IV, 5, nn. 13 ff.

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frankly admitted that he had maintained such relations for twelve years with a woman who was even now nearer to his heart than the wife he had married. The five Eminences pronounced sentence of nullity because a real condition had been added to the contract which made the consent dependent on the existence or non-existence of the condition. This condition had never been revoked, nor was it verified, because the man had deceived the woman by his word of honor, and himself admitted after marriage that he had had illicit relations with another.[18a]

A similar case would be if a man would stipulate with his would-be wife: "I take thee if thou art not pregnant by another man." But it must be added that either written or oral testimonies would have to be brought to prove the existence of the condition; otherwise the ecclesiastical court neither would nor could pronounce sentence.

CONTINUANCE OF THE CONSENT

CAN. 1093

Etsi matrimonium invalide ratione impedimenti initum fuerit, consensus praestitus praesumitur perseverare, donec de eius revocatione constiterit.

Although marriage be invalid because of an impediment, the consent once given is presumed to continue until its revocation be proved.

The impediment must here be understood to be a diriment one. Therefore the question arises whether it was known to both or to one of the parties. If it was not known, this ignorance or good faith cannot render the marriage valid,[19] and the consent is presumed to continue.

18a See *A. Ap. S.*, Vol. X, pp. 388 ff.

19 S. O., July 4, 1855, § *Animadvertendum* (*Coll.*, n. 114).

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However when such a case occurs, it must be examined, and if the impediment really existed, the consent must be renewed after the necessary dispensation has been obtained.[20] If the existence of an impediment was known, the psychological query arises: Is it possible to contract marriage in spite of an obstacle that would not permit a real union? Our Code has already settled that question in can. 1085, where it says that knowledge of the nullity of the marriage does not necessarily exclude the matrimonial consent. For the parties may persuade themselves that they are really married, although perhaps unlawfully. Here is a case: In Siam it is customary to marry without the usual ceremonies. If the parties prosper, they stay together and after four years are considered to be husband and wife. From this time onward their marriage is valid, though at the beginning it was a concubinage. The consent was not renewed after the four years, hence the first one persevered and was regarded as sufficient for a valid marriage.[21] However, it must be added that this can only take place when the marriage has the "name and claim" and resemblance of a marriage.[22] And the reason why the law most reasonably supposes the perseverance of the consent and an apparent marriage, lies in the assumption that the natural law cannot be so obscured in every race and among all men that no trace of it is left.[23]

Hence revocation of the consent must be proved. How is that done? For lack of texts we are thrown upon conjectures. Evidently a merely habitual or interpretative attitude of mind, by which one would not again consent

20 S. O., March 11, 1868 (*Coll.*, n. 1326). At the time of persecution in Japan many marriages were contracted with impediments.

21 S. O., Nov. 22, 1871 (*Coll.*, n. 1377).

22 S. O., Dec. 18, 1872 (*Coll.*, n. 1392).

23 S. O., Dec. 9, 1874, ad 2 (*Coll.*, n. 1427).

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if he would know of the nullity of the marriage, would not suffice for proof.[24] Since according to can. 1086, § 2, a positive act of the will is required in order to invalidate a marriage, it seems reasonable to assume that the act of revocation must be manifested outwardly and proved by two witnesses, or, in case of necessity, by one witness duly sworn. The assertion of the party alone would never be considered sufficient in court, since it might be that the party would have his or her own interests too much at heart. Therefore *in causa Ulixbonensi* the point of defence turned about the question whether the condition had been revoked at the moment of the wedding. And the proof that it had not been revoked was furnished by the pastor and witnesses. The similarity between that case and ours is palpable. For the rest, since the plaintiff cannot be a witness at the same time in the same case, it is but natural that a third person must testify to the fact of revocation. Of course, the other party may also testify to the revocation. This would be brought about by proving the refusal of cohabitation, or desertion, accompanied by utterances like these: "I never intended to marry you," "I was deceived when I gave my consent and I am sorry I have ever seen you," "I have learned that our marriage is invalid and therefore I will have nothing to do with you any longer," etc. This proof, if given under oath, would doubtless establish the fact of revocation.

24 Feije, *l. c.*, n. 760, p. 780 (ed. 3).

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CHAPTER VI

FORM OF CELEBRATING MARRIAGE

HISTORICAL NOTE

It is certain that Christians from the earliest times clothed the marriage union with a certain ceremony, which differed from that prescribed by the Roman law, though no doubt they also obeyed the civil laws. The letter to Diognetus[1] plainly says that Christians marry like all others. This supposes that the *Roman civil practice* was observed as far as it did not clash with their religious views. Thus marriage by *confarreatio*,[2] even

1 Cap. 5; Roberts and Donaldson, *The Antenicene Fathers*, New York, 1899, I, p. 26.

2 *Confarreatio, coemptio, usus*, were forms of a marriage *cum conventione in manu*, and *confarreatio* — from *farreus*, made of spelt, *viz.*, the cake — was a strictly religious ceremony performed in the house of the bridegroom, to which the bride had been conveyed in state, and in the presence of at least ten witnesses and the Pontifex Maximus, or one of the higher Flamens. A set form of words (*carmen, verba concepta*) was employed, and a sacred cake made of *far* (spelt) (*farreus panis*) — whence the term *confarreatio* — was either tasted or broken over the parties, who during the performance of the various rites sat side by side on a wooden seat made of an ox-yoke covered with the skin of sheep which had been previously offered in sacrifice. *Coemptio* was purely a legal ceremony, and consisted in the formal conveyance of the wife to the husband, according to the technical procedure in the sale of *res mancipii*. An imaginary sale took place on the part of the parent or guardian in the presence of five Roman citizens of mature age and a balance-holder (*libripens*), the husband or fictitious purchaser being termed *coemptionator*. A woman who remained with her husband for one whole year without absenting herself for three consecutive nights, passed in *manum mariti* by prescription (*usu*) as effectually for all legal purposes as if the ceremonies of *confarreatio* or *coemptio* had been performed. See Ramsay-Lanciani, *Manual of Roman Antiquities*, 1901, p. 295 f.; also Becker-Metcalfe, *Gallus or*

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had it not fallen into disuse at the end of the Republic, would not have been compatible with Christian sentiment. Less closely connected with pagan practices were the marriages called *coëmptio* and *usus*. However, all these were but rarely employed at the beginning of Christianity. More common was marriage without the *conventio in manu*. In that case the woman remained under the legal control of her father or guardian, or was *sui iuris*, as the case might be; and when *sui iuris*, all the property which she possessed or inherited was at her own disposal with the exception that the Roman law made for the dowry. The ceremonies that surrounded such a marriage were of a domestic or private character. Betrothment preceded the regular marriage contract or wedding. However, festive solemnities accompanied the marriage even though it was a marriage *sine manu*. Whether the early Christians followed this custom is difficult to say. But one thing is certain, the ecclesiastical authorities were not neglected when Christians entered upon that union, although the legal formalities of *nuptiae iustae* may have been set aside. Thus St. Ignatius says: "It becomes both men and women who marry to be united with the consent (μετὰ γνώμης) of the bishop, that the marriage be according to the Lord and not according to lust."[3] And Tertullian exclaims: "How could I sufficiently praise that marriage which the Church accepts, the oblation ratifies, the blessing seals."[4] On a sarcophagus in the Villa Torlonia in Rome there is a sculptured representation of a marriage. The two figures join hands upon a reader's desk (*lectorium*), or, more correctly, upon the book of the gospels lying on

Roman Scenes of the Time of Augustus, 1898, p. 153 ff.

[3] *Ep. ad Polycarp.*, c. 5 (Antenicene Fathers, I, p. 95).

[4] *Ad Uxorem*, II, 19.

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the desk. Between and above the two persons, one of whom is veiled, appears the figure of the Saviour, young and beardless. Here we no doubt have a representation of a Christian marriage celebrated before the fourth century.[5] We may also refer to some epitaphs which illustrate the Christian idea of an indissoluble union blessed by the Church.[6]

Tertullian calls a marriage not previously professed or celebrated in the Church mere concubinage.[7] We are told of the sacerdotal blessing by the IVth Council of Carthage, A. D. 398 (c. 13). This text seems to have entered a Capitulary of the Kings of France, which says that it is a sacred duty to celebrate marriages publicly, because from clandestine unions many sins arise, and therefore the parish priest must first be approached, and marriage contracted publicly before the whole congregation.[8] That Pseudo-Isidore should insist upon public weddings is but natural.[9] Jonas of Orleans mentions the necessity of sacerdotal intervention.[10] Gratian, Alexander III, and the IVth Lateran Council insist upon public marriages and the latter forbids clandestine unions most severely.[11] Yet none of them asserts that a marriage not contracted before the Church — *in facie Ecclesiae* — would be invalid, unless there was some other impediment.

TRIDENTINE DISCIPLINE

The Council of Trent (1545–1563) in its twenty-fourth session, after long discussion and thorough deliberation,

5 Armellini, *Lezioni di Archeologia Cristiana*, 1898, p. 369.
6 *Ibid.*
7 *De Pudicitia*, c. 4.
8 Mansi, *Coll. Conc.*, XVII *bis*, col. 1062 f.
9 Hinschius, *Decretales Pseudo-Isidorianae*, 1863, p. 87.
10 *De Instit. Laicali*, II, 2 (Migne, 106, col. 170 f.).
11 Ad c. 9, C. 30, q. 5; c. 4, Comp. V, IV, 4; c. 1, Comp. II, IV, 3; c. 3, X, IV, 3.

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enacted the well-known decree "*Tametsi*" (c. 1), which governed the practice of the Church for more than 350 years. The formality required was laid down as follows: "Those who shall attempt to contract marriage otherwise than in the presence of the pastor (*parochus*), or of some other priest by permission of said parish priest or of the Ordinary, and in the presence of two or three witnesses, the Holy Synod renders wholly incapable of thus contracting and declares null and void, as it also invalidates and annulls such contracts by the present decree." The Ordinaries were enjoined to see to it that the decree was published in every parish church, and it went into effect in each parish thirty days from the date of its publication.

The practice generally followed up to 1908, as embodied in this decree, is the following:

1. The *parochus* is the pastor of one or both of the contracting parties (*parochus proprius contrahentium*). This has always been held in practice and by the School.[12]

2. Pastor and witnesses *must be present*, not only bodily, but also mentally, or *cum animo, i.e.*, they must realize what is going on.[13]

3. The requisite of promulgation in each and every parish caused a great deal of confusion, not only in Catholic parishes, but also in mixed communities.

a) In *Catholic countries*, these rules prevailed:

a) If *proof was furnished* from the statutes or archives, or other authentic documents, that the "*Tametsi*" was promulgated in a certain parish, all Catholics were bound to abide by it, under penalty of invalidity.

12 Cronin, *New Matrimonial Legislation*, 1910, may claim credit for having discovered that all canonists were mistaken in assuming the *parochus proprius*.

13 Pirhing, IV, 3, § 2, q. 6; a case in point is solved by the S. Rota, May 28, 1909, in *A. Ap. S.*, I, 524 ff.

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β) *Presumption* was admitted in as far as *custom* in favor of the observance of the Tridentine form was considered proof that promulgation had been made; promulgation was presumed to have been made in a parish if it was made in the whole diocese.[14]

b) Concerning *mixed territories* a distinction was made, based on the supposition that the Tridentine law had a double character, personal and local, because it effected the contracting parties by reason of local promulgation. Three kinds of regions were distinguished in which promulgation was said to have been made:

α) In *overwhelmingly Catholic countries or territories,* where there were but few non-Catholics, who had no church or minister, and where the decree was certainly promulgated, not only *Catholics* but *non-Catholics* also were bound *to observe* it. Such countries were: Italy (with the exception of the island of Malta); France, Spain, Portugal, Belgium, Luxemburg, the Catholic Cantons of Switzerland, Austria, Bavaria, and the Spanish and Portugese colonies.

β) *Mixed countries* were those in which Catholics and non-Catholics lived promiscuously at the time of promulgation and had their ministers and temples. For the Netherlands, *e. g.,* Benedict XIV, on Nov. 4, 1741, issued his famous *Declaratio.* In all the countries to which this *"Declaratio"* was subsequently extended, ***mixed marriages*** and ***marriages between baptized non-Catholics*** were valid, even if the Tridentine form had been disregarded. In the United States the *Tametsi* was supposed to have been published, but to bind *only strictly Catholic marriages,* in the province of New Orleans, in the province of San Francisco together with the territory of

14 Benedict XIV, *De Syn. Dioec.,* XII, 5, 6; Leitner, *l. c.,* p. 300; Wernz, *Ius. Dec.,* IV, Vol. I, p. 216, n. 160.

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Utah, save that part which lies east of the Colorado River, in the province of Santa Fe, except the northern part of Colorado, in the diocese of Vincennes, in the City of St. Louis and the parishes St. Geneviève, Florissant, and St. Charles of the same archdiocese, in Kaskaskia, Cahokia, French Village, and Prairie du Rocher, all situated in the diocese of Belleville.[15]

c) Finally, there were countries of a *preponderantly non-Catholic* type, where Catholics formed a small minority at the time the promulgation of the *Tametsi* was to be made. Here, unless promulgation could be clearly proved, the decree bound neither Catholics nor non-Catholics. Thus in the *United States* the following ecclesiastical provinces were exempt: Baltimore, Philadelphia, New York, Boston, Oregon, Milwaukee, Cincinnati (except the diocese of Vincennes), St. Louis (except the City itself and the places mentioned above), and Chicago (with the exception of the places mentioned in the Belleville diocese).[16] To this class also belonged England, Scotland, Denmark, Norway, several German provinces, Greece, Russia, Turkey, Japan, and China.[17] This summary of divergent practice proves emphatically how opportune was the change introduced by the pontifical decree *"Ne temere,"* of Aug. 2, 1907, which has now entered the Code.

Present Legislation Concerning the Valid Form of Marriage

The Code embodies the *"Ne temere"* with some modifications, and the whole of chapter VI may be divided into the following topics: Requisites of formal valid-

15 *Acta et Decreta Conc. Balt., III*, 1886, p. CVIII.

16 Smith, *Elements*, I, n. 659, p. 432.

17 Cfr. Zitelli, *Apparatus Iuris Eccl.*, 1886, pp. 394 ff. Wernz, *l. c.*, IV, Vol. I, p. 223, n. 163.

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ity, requisites of valid assistance on the part of the pastor or Ordinary or delegate, requisites of licit assistance, special provisions for particular cases, local extension, prescribed rites of celebration, and registration.

REQUISITES OF FORMAL VALIDITY

CAN. 1094

Ea tantum matrimonia valida sunt quae contrahuntur coram parocho, vel loci Ordinario, vel sacerdote ab alterutro delegato et duobus saltem testibus, secundum tamen regulas expressas in canonibus qui sequuntur, et salvis exceptionibus de quibus in can. 1098, 1099.

Only such marriages are valid as are contracted before the pastor, or the Ordinary of the diocese, or before a priest delegated by either the pastor or the Ordinary, *and* at least two witnesses, in conformity, however, with the rules laid down in the two following canons, and with the exceptions mentioned in canons 1098 and 1099.

Two different kinds of persons are mentioned in the text as necessary to a valid marriage: the ministers of the Church and witnesses.

1) *The ministers of the Church* are the pastor or the Ordinary, or their delegate. Who is the *pastor?* The answer is given in can. 451. He is the priest upon whom the parish has been conferred as his own (*in titulum*) and who has the actual care of souls by the authority of the bishop. Therefore, a so-called habitual pastor is excluded. Nor are a chapter of canons or a religious superior, even though he be a prelate, if they have only habitual, not actual care of souls, entitled to assist at a marriage.[18]

What about priests in charge of so-called *stations or*

18 Can. 452 ff.

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missions. If, for instance, a mission is attached to a monastery, which sends a priest once or twice a month, who is the pastor? If the mission belongs to an abbey church, which is at the same time a parish church, the pastor of the abbey church is the actual pastor of the mission church, and therefore has the right of assisting at marriages. Where a parish church has one or more mission chapels attached to the main parish and attended by the pastor's assistants, the latter cannot be considered as pastors,[19] but the pastor of the main parish is also the pastor of the mission chapels.[20] However, in our case, the missions being attached to a monastery, not to a church, the pastor of the mission would certainly be the *excurrens* or the priest sent by the monastery. Who else could be the pastor? Not the religious superior, because he is at most only a habitual pastor, who has nothing to do with marriages. Nor the pastor of the monastery-church, because the missions are, *ex hypothesi*, not attached to his church, but to the monastery. Hence only the Ordinary of the diocese would be left, who is and, as far as we know, always has been supposed to give the necessary faculties or authority to the priest who is in charge of such a mission.

The new Code, which is law also in our country,[21]

19 Woywod, *Marriage Laws*, 1913, p. 10 f.

20 A consequence is that the banns would have to be published in the main church.

21 The decree of the S. C. Consist., Aug. 1, 1919 (*Eccl. Rev.*, Vol. 61, p. 551 f.), seems favorable to our view. The decree refers to can. 1409, 1410, 1415, III. These deal chiefly with endowment. The fact that there may not be an absolutely sufficient endowment, should not prevent the Ordinary from erecting a parish, provided there are prospects that the most necessary revenues will be forthcoming. If a rector is appointed to subsidiary or accessory chaplaincies, what is his relation to the pastor? Suppose a parish organized by decree of the Ordinary comprises one, or two, or even five counties. All the bishop has to do is to define the accurate boundary lines and declare that, for instance, the parish at the county seat is *the* parish, and the priest in charge of it *the* pastor. This pastor

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strictly prescribes the circumscription of parishes and the division of each diocese into parishes,[22] and hence there is but one secure way of settling the difficulty, *viz.:* to divide each diocese into parishes, no matter how large or small, and assign to each parish definite missions or stations. Since the State is distributed into counties, and the counties into townships, there is no reason for putting off a more definite ecclesiastical division *usque in indefinitum.* Then the priest who attends a mission or station will be dependent on the pastor of the parish to which the mission is attached, and the latter has to delegate the necessary faculties to him, either habitually — if the priest is merely an assistant of the main pastor [23]— or for each particular case.

Besides the pastor, there are others who certainly meet the requirements of the Code, *viz.:* (1) those mentioned in can. 451, § 2, n. 2, *as taking the place of a pastor* with full pastoral powers, *i.e.,* actual pastors of an incorporated parish or chapter; (2) the *oeconomi* or parochial administrators appointed by the bishops during the vacancy of a

then enjoys all the parochial rights set forth in can. 462. He publishes the banns (can. 1023), and it is not necessary that the publications be made in the subsidiary chapel, unless the Ordinary should so order. The position of the *rector* or chaplain of the subsidiary church is regulated by canons 479–486. However, there can be little doubt that the Ordinary may extend his rights. He may grant him the right to exercise parochial rights in his own chapel, though only under the supervision and with the consent of the pastor. The stole fees must be turned over to the pastor or be distributed *pro rata* according to the synodal statutes or episcopal provisions. The books must be kept by the pastor and all entries from the subsidiary chapel or church must be made in the parish books. The faculties for hearing confessions and preaching must be expressly imparted by the local Ordinary. Thus, we believe, there would be little difficulty in arranging matters according to the Code, even in case the rector has a residence distinct from that of the pastor. This was the case in former times when there was only one (the cathedral) parish in each city and the smaller rural parishes dependent upon the larger or more prominent ones.

22 Can. 216.

23 Can. 1096, § 1.

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parish;[24] (3) *Substitutes* who take the place of pastors during vacation or a sudden absence, unless the bishop or pastor excepts assistance at marriages;[25] and (4) parochial coadjutors or assistants given to a disabled priest, if they take the place of the disabled pastor in all things.[26]

2) The term *Ordinary* comprises all those mentioned in can. 198, hence also the diocesan administrator, the *Abbas Nullius,* the vicar-capitular and the vicar-general, but not the superior of an exempt religious order.

Concerning delegation nothing need be said here, as can. 1096 will call for a full explanation.

3) The *witnesses* to a marriage must be present simultaneously with the minister of the Church, and both witnesses must be present at the same time.[27]

As to the *qualities* of the witnesses, a distinction must be drawn between valid and licit assistance.

Valid assistance can be rendered by all persons of either sex who are physically and mentally able to realize the meaning of the marriage contract. Non-Catholics, pagans, and infidels are not excluded. But *licit* assistance at Catholic marriages can be rendered only by Catholics, unless the Ordinary for grave reasons permits the assistance of non-Catholics, and provided no scandal is given.[28]

With regard to the admission of *Freemasons* we could find no positive prohibition. However, it appears certain that at least prominent Masons are not easily to be admitted,[29] on account of the scandal that might arise to Catholics. But the Ordinary may judge differently.

24 Can. 473.

25 Compare can. 474 with can. 465, §§ 4 f. Note that the exception must be made explicitly.

26 Can. 475, § 2.

27 S. C. P. F., July 2, 1827 (*Coll.*, n. 794).

28 S. O., Aug. 19, 1891 (*Coll. P. F.*, n. 1765).

29 S. O., Aug. 21, 1861 (*Coll. cit.*, n. 1219) says that these should be treated *veluti publici peccatores.*

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REQUISITES ON THE PART OF PASTOR AND ORDINARY

CAN. 1095

§ 1. Parochus et loci Ordinarius valide matrimonio assistunt:

1.° A die tantummodo adeptae canonicae possessionis beneficii ad normam can. 334, § 3, 1444, § 1, vel initi officii, nisi per sententiam fuerint excommunicati vel interdicti vel suspensi ab officio aut tales declarati;

2.° Intra fines dumtaxat sui territorii; in quo matrimoniis nedum suorum subditorum, sed etiam non subditorum valide assistunt;

3.° Dummodo neque vi neque metu gravi constricti requirant excipiantque contrahentium consensum.

§ 2. Parochus et loci Ordinarius qui matrimonio possunt valide assistere, possunt quoque alii sacerdoti licentiam dare ut intra fines sui territorii matrimonio valide assistat.

§ 1. The pastor and the Ordinary may validly assist at marriages:

1.° *Only from the day* they have taken canonical possession of their benefice, or entered upon their office, provided they are not excommunicated, or interdicted, or suspended from office by a judiciary sentence, or declared suspended;

2.° Only within the *boundaries of their respective territory,* in which, however, they may validly assist at marriages not only of their own subjects, but also of non-subjects.

3.° Provided they are *not compelled* by violence or grave fear to ask and receive the consent of the parties.

§ 2. The pastor and the Ordinary of the diocese, who can validly assist at marriages, may also grant permis-

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sion to another priest to assist validly within the limits of their respective districts.

The first paragraph contains *three distinct qualifications* required in those who may validly assist at marriages:

1) The *official* or *legal qualification* is attached to the official character of the functionary, and is twofold, strictly official and juridical.

a) The *strictly official* character is acquired by the assumption of an office. Hence the Ordinary as well as the pastor must be in actual possession of his office. The *Ordinary* takes canonical possession of the diocese by presenting his papers (bulls) of appointment either personally or by proxy, to the diocesan chapter or gathering of consultors in presence of the episcopal chancellor.[30]

The same is true concerning the *Abbas or Praelatus Nullius,* because he must be confirmed by the Pope;[31] the same also concerning the Administrator Apostolic.[32] The *Vicar-capitular* is in possession of his office after he has been validly elected and has accepted the office.[33] The *Vicar-general* is in possession of his office as soon as he has received and accepted the appointment.[34] The *pastor,* in the United States, is supposed, and justly so, to have the title of parish-priest after he has received his appointment to a pastorate. However, our text says *initi officii,* which means actual entrance upon office. A pastor may enter upon his office by merely taking possession of the parsonage in an informal way, or formally with the usual ceremonies.

b) The *juridical qualities* are apparent from the nega-

30 Can. 334, § 3.
31 Can. 320, § 1.
32 Can. 313, § 1.
33 Can. 435, § 1.
34 Can. 368, § 1.

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tive description which says: *unless they (the ordinary or the pastor) be excommunicated, interdicted, or suspended from office by a condemnatory or declaratory sentence.*[35]

Three ecclesiastical censures are here mentioned, excommunication, the interdict, and suspension. No distinction between major and minor *excommunication* is made by the Code; but the difference between an excommunication inflicted by the law itself and one meted out by a judge is emphasized in the text. The former (*iure*) requires merely a *declaratory* sentence after the fact or deed which is proscribed under penalty of excommunication has been conclusively proved. But if an ecclesiastical *judge* inflicts this penalty for a crime not otherwise punishable by excommunication, he must not only have legal evidence, but formally pronounce sentence upon the culprit. It is immaterial whether the law reserves a case to the Apostolic See or to the Ordinary.[36] The Ordinary may reserve three or four cases, even under censure, and these too only need a declaratory sentence, after the culprit has been convicted.

An *interdict* is here understood to be a personal one, attended by the consequences which the Code mentions elsewhere.[37] But we believe that for its infliction a formal sentence is required.[38]

Suspension from office implies, as the Code says,[39] the loss of every spiritual power, but not of the administration of temporalities, including assistance at marriages. A priest guilty of trading with masses may be suspended,

35 Compare the *"Ne temere": "nisi publico decreto nominatim fuerint excommunicati vel ab officio suspensi."* (IV, § 1.)

36 To the Ordinary are reserved by law the excommunications mentioned in can. 2319; 2326; 2343, § 4; 2350, § 1; 2385; 2388, § 2.

37 Can. 2274 f.

38 Comp. can. 2269, § 1: *episcopus ferre potest.*

39 Can. 2279, § 1; such suspensions are mentioned in can. 2324, 2342, n. 1; 2347, n. 2; 2350, § 2; 2378; 2392, n. 3; 2394, n. 2.

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but the sentence must be not merely declaratory, but condemnatory.[40] In fact, most suspensions require a condemnatory sentence.

After a priest has been declared excommunicated, interdicted or suspended from office, or condemned to suffer such a penalty, nothing else is required for disqualifying him for the function here in debate, because the Code does not mention a declaration or condemnation by name or public decree. However, it seems reasonable to demand that the parish be notified of the verdict. If this is not done, it might happen that a *titulus putativus* would arise, based upon a general error. In that case, of course, the marriage would be valid.[41] A bishop may be censured by the Holy See only, a vicar-general, by his bishop.

2) The *local condition* is expressed by the boundaries: the pastor is authorized to assist at marriages within the limits of his entire parish, the Ordinary within the whole of his diocese. And this holds concerning all marriages, whether the parties belong to the respective parish or diocese or to a foreign parish or diocese. Here is the cardinal change, and a very practical one, from the Tridentine law.[42]

However, as no law can provide for all imaginable cases, this, too, is not without difficulties, not so much concerning the diocese, as the parish. For while dioceses are almost always well defined and circumscribed, parish limits are often uncertain and vague, especially in our country. There are, for instance, in the cathedral city of St. Joseph, Mo., eight parishes. The five English speaking congregations are pretty well defined territorially, and the two Polish churches are also set off be-

40 Cfr. can. 2324 and can. 827 f.
41 S. C. C., March 10, 1770 (Richter, *Trid.*, p. 229, n. 51).
42 Cfr. "*Ne temere*," Procem.

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tween North and South, but the German parish lies between two English speaking parishes without any boundaries.[43] A decision of the S. C. Concilii, Feb. 1, 1908, allows the pastor of the German speaking parish to assist validly at all marriages, not only in his own church or rectory, but also in any place within the entire district over which he has jurisdiction together with the other two pastors. If there were no boundary at all, the pastor of the German church might validly assist at any marriage in any of the eight churches or rectories. The consequence is that the pastors of the English speaking congregations, or of parishes with set boundaries, are worse off than this quasi-pastor of a foreign tongue.[44] Remember, we speak only of *valid* assistance; for it is within the power of the Ordinary to punish any pastor who would attempt to assist at marriages promiscuously without regard to the rights of other pastors.

What has been said so far may be applied to assistance in a *private house,* should sickness (not involving danger of death) render this advisable. For as long as the pastor keeps within the boundaries of his district, or (if his parish has no definite limits, as in the case of the German priest mentioned above) within the boundaries assigned by other parishes, he observes the law, and assistance is not limited to the church or rectory.

In another case a monastery of *exempt regulars* had charge of a church which is not a parish church, but situated within another parish. The question arose: May the parish priest assist validly in that church? Yes, said the S. Congregation.[45] Of course this also applies to Ordinaries.

43 Except, as far as we know, towards the east (Wyatt Park).

44 Cfr. Woywod, *Marriage Laws,* p. 14.

45 S. C. Sacr., March 10, 1910, ad VIII.

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Canon 464, § 2, permits the Ordinary to exempt from the pastor's care *religious houses* and *pious institutions*. Who is to assist at marriages celebrated in such places? The authentic answer[46] given is that the chaplains of these places may validly assist at the marriages of such parties as are committed to their care, but only in the place where these chaplains exercise their jurisdiction and provided they possess full parochial charge. This is supposed to be the case when exemption has been granted by the bishop.

Another case has been decided concerning a *few families* who live in one parish, but for some reason or other belong to another. May the pastor of the latter parish assist at the marriage of such parties if it takes place in the former? Yes, says a decision, provided that at least one of the contracting parties belongs to him.[47] There is no stretching allowed. The persons and families concerned must be subjects of the pastor, and we believe the Ordinary alone can decide whether a family or person may belong to another than the locally defined parish.

Military chaplains usually receive special instructions. If not, the pastor within whose district the barracks or camp lies, is *per se* competent for valid assistance at the marriages of soldiers. In the field, the military chaplain would be competent.[48]

3) The last condition may be called *ethical* because it requires an assistance that is a human act, performed

46 S. C. C., Feb. 1, 1908, ad X; cfr. Richter, *Trid.*, p. 228, n. 47.

47 S. C. C., Feb. 1, 1908, ad IX, quoted by Card. Gasparri. But the interpretation — which looks rather extensive — needed the addition: "*facto verbo cum SSmo.*" Cfr. Richter, *Trid.*, p. 228, n. 44.

48 S. C. C., May 29, 1683; Sept. 19, 1733 (Richter, *l. c.*, p. 234, n. 60 f.); S. C. C., Feb. 1, 1908, ad VII. Of course, all depends upon the instructions the army bishop has received.

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with freedom and deliberation. Such an act excludes all manner of *physical compulsion*. Hence if the pastor would be perforce compelled to assist at a marriage, say, by the police or by armed men surrounding his rectory, the marriage would be invalid. Again if serious threats of any kind would impede his freedom of action, the marriage would be invalid by reason of *grave fear*. Placed in such a position, an authorized witness may hardly be said to *ask for and receive the consent*. Note well the wording of the Latin text. Compulsion and fear must influence the act of demanding and receiving the consent, so that there is a causal connection between both. As long as this compulsion or fear lasts, the marriage would be invalid.[49] The terms "*requirere*" and "*excipere*" suppose a personal act on the part of the pastor; we might style it *coöperation*, in order to distinguish it from purely passive assistance, about which see can. 1102. Hence *surprise marriages* are almost entirely excluded. Thus a marriage whilst the pastor hears confession is hardly possible any more; it happened once at Naples, in 1724, but was declared invalid.[50] On the other hand the Code omits the words of the "*Ne temere*" decree: "*invitati ac rogati*," *i. e.*, invited and asked by the parties. Suppose a pastor is asked to a house in his parish for some reason and there requested to witness a marriage. If he demanded and received the consent of the parties without being compelled to do so by physical coercion or by grave fear, the marriage would be valid. Purely human respect is not tantamount to grave fear. Of course, the priest is supposed to know what is going on. If a formula in a foreign language of which he has not the faintest knowl-

49 Such cases may be read in Richter, *Trid.*, p. 234, n. 63; Benedict XIV, *De Syn. Dioec.*, XIII, 23. In Italy confessions are often heard publicly on benches or chairs in the church.

50 Richter, *Trid.*, p. 235 f., n. 66.

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edge were given him to read off, this act could not be properly called *human* and would therefore be insufficient for valid assistance.[51] The rite is described in can. 1100 ff.

The second section (§ 2) of canon 1095 permits *delegation or permission,* and may just as well be explained in connection with canon 1096.

REQUISITES OF DELEGATION

CAN. 1096

§ 1. Licentia assistendi matrimonio concessa ad normam can. 1095, § 2, dari expresse debet sacerdoti determinato ad matrimonium determinatum, exclusis quibuslibet delegationibus generalibus, nisi agatur de vicariis cooperatoribus pro paroecia cui addicti sunt; secus irrita est.

§ 2. Parochus vel loci Ordinarius licentiam ne concedat, nisi expletis omnibus quae ius constituit pro libertate status comprobanda.

Permission to assist at marriage, given under can. 1095, must be granted to a specified priest for a specified marriage. General delegations are excluded, except in case of assistant coadjutors for the parish to which they are appointed; in all other cases general delegation is invalid.

The pastor or Ordinary of the diocese shall not grant such a permission unless he has complied with the regulations of the law for establishing the free status of the nupturients.

Here we have the *modus* of delegation, after can. 1095

51 If the priest would merely feign or affect ignorance, the marriage would be valid; cfr. Richter, *Trid.*, p. 235, n. 63.

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has stated the fact. Section 2 sets up a necessary condition.

1) Can. 1095, § 2, provides that a pastor or Ordinary who himself can validly assist at a marriage, may give permission to another priest to assist, if the marriage is to be celebrated within the boundaries of the parish or diocese, respectively. Hence it is required that the *delegans* is himself entitled to assist. "*Nemo dat, quod non habet.*" But if a pastor or Ordinary is endowed with the qualities described in can. 1095, § 1, he may apply the two *Regulae Iuris in* 6° which say that one may do through another what one has a right to do himself, and what is done by that other is as valid as if done by the *delegans* himself.[52]

2) The *modus facti* or manner of delegation is set forth in can. 1096, § 1. Of delegation in general enough has been said in Vol. II. Here we may note:

a) The delegation must be made to a *priest,* and hence, as formerly,[53] the priestly character is absolutely required.

b) *Presumed delegation is not admissible.* This is the meaning of the word *expresse* in the text. Therefore even if probable conjectures, or former grants given without the least opposition, furnished a presumption, it could not supply express delegation, nor would it suffice for valid assistance. The fact, also, that the priest must be specified excludes presumption.

52 *Reg. Iuris* 68, 72 in 6°. Formerly even a censured pastor could give permission to another priest. Sanchez, *l. c.*, III, disp. 20, n. 7; disp. 21, n. 1 f.; Ojetti, *In Ius Pianum,* etc. Now, can. 2095, § 2, is too definite to admit such a delegation.

53 *Trid.*, sess. 24, c. 1, *de ref. mat.*: "*Vel alio sacerdote de ipsius parochi seu Ordinarii licentia,*" although the pastor himself did not need to be a priest. If we call that permission *delegation,* this is done for the sake of convenience, because it is at least similar to delegation. Wernz, *l. c.* IV, Vol. 1, p. 268.

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c) The delegated priest must be *specified,* or, as the Latin has it, *determinatus.* This is done by giving the name in full, and if there should be two priests of the same name, by adding his residence, office, or occupation. Since this permission need not be given in writing, a priest, if present, may receive the delegation there and then.

Subdelegation is not excluded, but must take place in the same specific manner. To insure the validity of delegation in cases where it is uncertain whether the priest who is asked by the pastor to assist at a marriage will be free on the appointed day or may have to request another priest to attend to the matter, it will be advisable always to add "or any priest whom you may send." [54]

d) Not only the priest, but also the *marriage must be specified.* The wording of our canon is more precise than that of the "*Ne temere.*" It means that delegation must be given for each single marriage, and not for a number of cases *in globo.* For instance, a pastor would not be allowed to grant permission to an Italian priest to assist at all Italian marriages in his parish. On the other hand, he may give permission, *e. g.,* for "the five marriages which occur during that week and the banns of which have been published," because in that case the marriages are sufficiently specified. The contracting parties cannot be permitted to choose or call any one they please without the pastor's consent.

e) The Code *excludes all general delegation.* It was formerly customary in some large cities for pastors to give permission to one another to assist at any marriage that would come up. Such a general delegation, notwithstanding the answer given by the S. Congregation,[55] July 27, 1908, is no longer to be considered valid.

[54] Woywod, *l. c.,* p. 23.

[55] S. C. C., July 27, 1908, ad IV.

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f) An *exception is made in favor of assistant priests,* as defined in can. 476, *i. e., coadiutores* or *cooperatores.* These, says the Code, may receive general delegation from the pastor. In illustration we may quote an authentic interpretation.[56] It happens, says the questioner, that assistants of pastors are appointed by the bishop without special faculties for assisting at marriages, and it has become customary that these assistants, without asking the pastor's permission, assist at marriages, because the pastor made no opposition, and they also registered the marriages under their own name; nay in larger parishes these assistant priests nearly always assist. What is to be said concerning this custom? The answer was that the marriages were valid, or rather that there was no reason for scruples, but that the prescribed rules should be observed and that the regulations laid down by a provincial council could be enforced against the pastors. Our Code makes reference to this decision.[57] In this country assistants, whose status is according to can. 476, may validly assist at marriages with the general or tacit delegation of the pastor. But this delegation is not given if the pastor expressly reserves assistance at marriages to himself.

It goes without saying that delegation entitles the assistant (or delegate) to assist at marriages *only in the district subject to the delegans.* The Ordinary, bishop or vicar-general may delegate a priest to assist at marriages in any parish of the diocese.

As to the *qualities* of the delegate our Code only says that he must be a specified priest, without mentioning the requirements or conditions laid down in the "*Ne temere*"

56 S. C. Sacr., March 13, 1910.

57 It is quoted in Card. Gasparri's edition; but must certainly be restricted to assistants as described in the text.

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(art. VI). It seems certain, however, that a censured priest could not validly be delegated, because an excommunicated priest is not allowed to perform any ecclesiastical act,[58] whilst one who is suspended from office loses the right of exercising the functions attached to that office, and in fact all rights connected therewith.[59] Besides it would doubtless be a serious neglect of ecclesiastical discipline, amounting to contempt of weighty penalties, were one to give permission to a censured priest to assist at a marriage.

§ 2 repeats the *necessity* of *ascertaining* the *free status* of the contracting parties before granting permission to another priest to assist at their marriage. Hence the pastor or Ordinary himself, and not the delegated priest, must examine the parties, attend to the publication of the banns, and, in case of doubt, conduct the necessary investigation, as explained under can. 1031. This paragraph does not affect *valid* assistance.

REQUISITES OF LICIT ASSISTANCE

CAN. 1097

§ 1. Parochus autem vel loci Ordinarius matrimonio licite assistunt:

1.° Constito sibi legitime de libero statu contrahentium ad normam iuris;

2.° Constito insuper de domicilio vel quasi-domicilio vel menstrua commoratione aut, si de vago agatur, actuali commoratione alterutrius contrahentis in loco matrimonii;

3.° Habita, si conditiones deficiant de quibus n. 2, licentia parochi vel Ordinarii domicilii vel quasi-domicilii aut menstruae commorationis alterutrius contra-

58 Can. 2263.

59 Cfr. can. 2281, 2284.

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hentis, nisi vel de vagis actu itinerantibus res sit, qui nullibi commorationis sedem habent, vel gravis necessitas intercedat quae a licentia petenda excuset.

§ 2. In quolibet casu pro regula habeatur ut matrimonium coram sponsae parocho celebretur, nisi iusta causa excuset; matrimonia autem catholicorum mixti ritus, nisi aliud particulari iure cautum sit, in ritu viri et coram eiusdem parocho sunt celebranda.

§ 3. Parochus qui sine licentia iure requisita matrimonio assistit, emolumenta stolae non facit sua, eaque proprio contrahentium parocho remittat.

§ 1. The pastor or the Ordinary of the diocese assist at a marriage licitly:

1) After having ascertained the free status of the contracting parties, as the Code prescribes (especially in can. 1029–1031), and after the publications of the banns have been made or dispensed from.

2) After having ascertained the fact of domicile or quasi-domicile or monthly stay of at least one of the parties in the place where the marriage is to take place, or of actual stay in the case of *vagi*.

Note the *four different* kinds of *local conditions* which affect, not the validity, but the licitness of assistance.

The first is *domicile,* that is to say, residence in a place combined with the intention of remaining there forever, if nothing calls one away, or actual residence for ten consecutive years.

Quasi-domicile is residence in a place with the intention of staying there the greater part of a year. This intention, as we said under can. 92, may be present on the first day on which one takes up his residence in a parish.[60] A man who was hired for one year, or an official who has

60 S. O., June 7, 1867 (*Coll. P. F.*, n. 1305).

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taken up residence at the capital for the term of his office, would certainly have a quasi-domicile. The same is true of people who have a summer and a winter residence. The *monthly stay,* although apparently new in this connection, is not entirely recent, so far as presumption is concerned. For Benedict XIV stated [61] that a sojourn of one month in a place permits the presumption (*praesumptio iuris*) that the party will stay there for the greater part of the year. Here we have the genesis of the monthly stay, which at first was merely an indication of intention, which, being internal and secret, can not easily be proved.[62] From that, in order to do away with scruples, the legislator prudently proceeded to the mere fact of a month's stay, declaring it sufficient for licit assistance.

A month must be taken as *thirty consecutive days,*[63] (though the calendar month of February would be sufficient). These thirty days must be morally uninterrupted according to common parlance. Of course one or two days' absence, even if repeated once or twice, would not, properly speaking, interrupt that term.[64] Neither is any inquiry into the intention to be made.

The last kind of local residence is *actual stay* in the case of *vagi.* A *vagus* is one who has left his or her domicile or quasi-domicile and stays in no one place for thirty days. Sometimes people move into a parish a day or two before marriage and want to get married before moving further. The evening of their arrival they go to the pastor and ask to be married the next morning. Setting aside for the moment the legal requirements, we must say that the pastor may assist at their marriage.

61 "*Paucis abhinc,*" March 19, 1758; S. O., *l. c.*

62 S. O., *l. c.*; Nov. 9, 1898 (*Coll.*, n. 2025).

63 Can. 32.

64 Vermeersch, *l. c.*, p. 32, n. 58; Wouters, *l. c.*, p. 52.

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But here there again arises the question of *diocesan domicile*. Those who have a domicile or stay for a month in a diocese cannot be called *vagi*.[65] Who may assist licitly at their marriage? The answer is: the pastor. He must inquire about them, and if he finds that they have moved about the diocese to which he belongs for at least a month, he may marry them by reason of a monthly stay in the diocese. If he finds that they have roamed about in various dioceses, he may assist by reason of their being *vagi*. However, a restriction must be made. If we say, "the pastor may assist," we suppose that the Ordinary has given him permission to do so. The reason is that, as diocesan domicile cannot be contracted in a parish,[66] the proper superior of one who has only a diocesan domicile is the Ordinary, and not the pastor.[67]

Concerning *minors, i. e.,* such as are under twenty-one years of age, they may follow the domicile[68] or monthly stay of their parents or guardians, and besides, are entitled, in case of marriage, to be treated like those who are of age, because the legislator makes no distinction.

Finally, we would draw attention to the text: *alterutrius contrahentis*. If the bride has spent a month at a place, she may get married there, although the groom has a domicile in a different parish. The same holds good concerning *vagi*. Thus if a rover has gotten a bride in one place and wishes to move with her to another, the pastor or Ordinary of the latter place, as explained above, is allowed to assist at the marriage, even though the groom returns with his wife to the latter's domicile the day after.

65 S. C. Sacr., March 13, 1910, ad V (*A. Ap. S.*, II, 197).

66 Can. 92, § 3.

67 Gennari, *Breve Commento della Nuova Legge sugli Sponsali e sul Matrimonio*, ed. 4, 33; Wouters, *l. c.*, p. 51.

68 Can. 93, § 1.

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3) If the conditions set down under the preceding number (2) are not verified, the pastor or Ordinary, in order to assist lawfully at a marriage, must have the permission of the pastor or Ordinary of the place where one of the contracting parties has a domicile or quasi-domicile or monthly stay, except in the case of *vagi*, who are actually on the road and have no residence or stay anywhere, or unless a weighty reason excuses from demanding such permission.

James and Gemma wish to get married in the cathedral parish of St. Joseph, Mo., where neither of them has a domicile or quasi-domicile or monthly habitation, their domicile being at Maryville, Mo., in the same diocese. What is to be done? The pastor of the cathedral parish must ask permission of the pastor at Maryville. But the bishop of the diocese, if he wishes to assist at the marriage in the cathedral parish, need not ask permission from the Maryville pastor, because James and Gemma are supposed to have lived in his diocese at least one month. But if both parties belonged to the Kansas City diocese, and wished to have their marriage performed by the bishop of St. Joseph, the latter would have to ask permission either from the pastor of the bride in the Kansas City diocese or from the bishop of Kansas City.

No preference is given to domicile over quasi-domicile, or to the latter over a monthly sojourn. Hence, if the bride lived only one month in a parish, the pastor thereof could give the permission, although the bridegroom might have a domicile in a parish whose pastor is to be asked for permission.[69]

This license is *not required* if there is a serious reason excusing the pastor from asking it. The text says *gravis*

[69] S. C. Sacr., March 13, 1910 ad V; S. C. C., March 28, 1908 ad V.

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necessitas, and therefore it must not be easily presumed, because it is a violation of a strictly parochial right.[70] A grave reason would be the probable fear of a civil marriage, or the refusal of the parties' own pastor to marry them — perhaps on account of some differences of opinion, or of travelling expenses, or the accidental presence of parents or friends.[71]

§ 2. Every marriage should be performed before the pastor of the bride, unless there are just reasons for breaking the rule. If the parties belong to different rites, their marriage must be celebrated in the rite and before the pastor of the bridegroom, unless particular laws dictate otherwise.

The custom favoring the *pastor of the bride* is an old one, but good or plausible reasons justify a departure from it. Thus, for instance, military chaplains are preferred.[72] Other reasons for deviating from it are sudden departure, elopement, objections raised by parents, etc. As to the different *rites,* the Code here follows the rule laid down in can. 98, and gives preference to the rite of the bridegroom, adding, however, that particular laws may dictate otherwise. Thus Benedict XIV had ruled for the Greeks of Southern Italy and Sicily that if the marriage was to take place between a Latin man and a Greek woman, the pastor of the former should assist, but if the man belonged to the Greek rite, he might choose either, Latin or Greek.[73] The bishops of the Ruthenian and Latin rites of Lemberg made an agreement (Dec. 23, 1853) to the effect that marriages should always be

70 Gennari, *l. c.,* p. 27, and Vermeersch, *l. c.,* p. 33, admit presumed reasons.

71 Wernz, l. IV, Vol. I, p. 294, prudently observes that the pastor who assisted for reasons should keep some documents at hand which would prove the existence of these reasons.

72 *Ib.,* p. 295.

73 "*Etsi pastoralis,*" May 26, 1742, § VIII, n. XI f.

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celebrated before the pastor of the bride, unless both parties demanded the contrary.[74] These regulations have not lost their force, but persons who come to the United States should not be troubled on account of them. As to the *Ruthenian Rite* in our country, the following regulations have been made by the Apostolic See: the Latin rite must be followed if the marriage is contracted between a Latin man and a Ruthenian woman; if the bride is of the Latin and the groom of the Ruthenian rite, the parties may choose the pastor of either rite.[75]

§ 3. Pastors who assist at marriages without the permission required by law, *are not allowed to keep the stole fees,* but must hand them to the parties' own pastor. This ruling follows, at least partly, from can. 463, § 3. The present canon restricts the obligation of refunding to cases of illicit assistance. Hence if the conditions prescribed in this canon have been complied with, the stole fee may be kept by the assisting pastor. This rule also obtains in cases of necessity, where no permission was required. The Ordinary is also bound by the law.

A strict parochial right can be claimed by the pastor of the bride only, and therefore, if the pastor of the bridegroom should assist against the former's will, the latter (the bride's pastor) may see the bishop or vicar-general about it. But restitution cannot be claimed in justice, wherefore the Code says that the stole fee must be refunded to the parties' own pastor, not to the bride's pastor.

Lastly the question may be asked: What about a pastor whose congregation is scattered over more than one parish — *e. g.,* an Italian pastor whose people are dis-

74 S. C. P. F., Oct. 6, 1863 (*Coll.*, n. 1243).

75 *Lit. Apost.*, June 14, 1908 (*Am. Eccl. Rev.*, Vol. XXXVII, p. 512).

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tributed throughout a city where there are other parishes territorially divided? This case, so far as we are aware, has not been authentically decided. But it stands to reason that if an Italian should marry a girl of an English speaking parish, the pastor of the latter would be entitled to assist, unless the groom refused to go to him. Besides, we believe that if the bride would join the Italian congregation a month before the marriage, the pastor of the English parish would forfeit every right to assistance.[76] At any rate the Code permits the pastor of the bridegroom to judge of the sufficiency of the reasons.

TWO SPECIAL CASES

CAN. 1098

Si haberi vel adiri nequeat sine gravi incommodo parochus vel Ordinarius vel sacerdos delegatus qui matrimonio assistant ad normam can. 1095, 1096:

1.° In mortis periculo validum et licitum est matrimonium contractum coram solis testibus; et etiam extra mortis periculum, dummodo prudenter praevideatur eam rerum conditionem esse per mensem duraturam;

2.° In utroque casu, si praesto sit alius sacerdos qui adesse possit, vocari et, una cum testibus, matrimonio assistere debet, salva coniugii validitate coram solis testibus.

If the pastor, or the Ordinary, or a priest delegated

[76] A decree of S. C. P. F., April 26, 1897, rules that anyone who is sufficiently versed in the English language may freely choose an English speaking congregation. Conversely it may justly be maintained that a party sufficiently conversant with Italian — because he or she had been in Italy for a number of years — may join an Italian congregation.

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by either, as prescribed by can. 1095 and 1096, cannot be had without great inconvenience, then:

1) In danger of death marriage may be validly and licitly contracted in the presence of two witnesses; the same holds good also where there is no danger of death, provided it may prudently be foreseen that this condition of things will last for a month.

2) In both cases, however, if a priest is available, he must be called and assist at the marriage together with the two witnesses; but the marriage is valid if contracted in the presence of the witnesses alone.

The wording of our canon betrays a modification or mitigation of the "*Ne temere*" (VII and VIII).

1. The *danger of death* need not be imminent,[77] but it must be probable or likely. Neither, of course, is it necessary that *both* parties be in danger.

2. The second case touches *peculiar conditions*. It may happen in our country that a pastor visits his mission only once a month or even less often. Note the wording of the text, which says nothing of a region or district.[78] Therefore it must now be held that provincial or regionary reasons have nothing to do with the case, but merely personal reasons, which indirectly may be due to local conditions, are here considered. But the condition must last one month (thirty days) or rather it must be foreseen that it may last that long.

3. That assistance without the pastor or the Ordinary or a delegate of either be allowable and the marriage be valid, the impossibility of having such an authorized witness must be verified. The text says: (a) if they cannot be had or reached (*haberi aut adiri*). The first term, *to have,* means that the pastor cannot come, or is

77 The "*Ne temere*" had that apposition.

78 "*Ne temere*" reads: *in aliqua regione.*

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not available because of sickness, or absence, or for some other reason. To *reach* or to approach signifies that the parties themselves have made an effort to get the pastor by calling him by ordinary means of communication, *i. e.*, letter or messenger. The telegraph and the telephone are not regarded as ordinary means, and justly so, for a country telephone line is often not only unsafe, but liable to abuse on account of the publicity involved. Moreover, conditions may be unsafe for travellers, as in times of war, flood or quarantine. (b) The text furthermore says: *without great inconvenience,* which is a rather elastic term. An inconvenience would be great if the expenses were above the means of the parties concerned, or if one party would have to leave the other alone sick. Now-a-days automobiles are a great help to swift and agreeable travelling. The parties themselves must conscientiously judge as to the character of an existing inconvenience. (c) The text also says that in case of sickness or other impossibility *a priest should be called who can be present.* This priest may be any priest, even one under censure, or of some other diocese, because "*qui adesse possit*" must, we believe, be taken in the sense of physical, not moral, possibility. But the priest must be at hand (*si praesto sit*); the parties need not search for him. The assistance of a priest at the marriage is very convenient, because he may dispense from the impediment of clandestinity and others (can. 1043) if there is danger of death. This is the meaning of an answer given by the S. Congregation [79] to the following query: "In several districts the pastors are not allowed to assist before the civil marriage is contracted; and yet this cannot be done in every instance, although for the spiritual welfare of the parties it would be expedient to have them married.

[79] S. C. Sacr., Jan. 31, 1916 (*A. Ap. S.*, VIII, p. 36 f.).

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What should the Ordinaries do? Resp. Recourse must in each case be had to the S. Congregation, except when there is danger of death, in which case any priest may dispense." (d) Lastly, calling a priest does not *affect the validity of the marriage,* which therefore may be contracted validly in the presence of only two witnesses. We hardly believe that the second case is of frequent occurrence now-a-days, except in missionary countries.

EXTENT OF THE LAW WITH REGARD TO THE FORM

CAN. 1099

§ 1. Ad statutam superius formam servandam tenentur:

1.° Omnes in catholica Ecclesia baptizati et ad eam ex haeresi aut schismate conversi, licet sive hi sive illi ab eadem postea defecerint, quoties inter se matrimonium ineunt;

2.° Iidem, de quibus supra, si cum acatholicis sive baptizatis sive non baptizatis etiam post obtentam dispensationem ab impedimento mixtae religionis vel disparitatis cultus matrimonium contrahant;

3.° Orientales, si cum latinis contrahant hac forma adstrictis.

§ 2. Firmo autem praescripto § 1, n. 1, acatholici sive baptizati sive non baptizati, si inter se contrahant, nullibi tenentur ad catholicam matrimonii formam servandam; item ab acatholicis nati, etsi in Ecclesia catholica baptizati, qui ab infantili aetate in haeresi vel schismate aut infidelitate vel sine ulla religione adoleverunt, quoties cum parte acatholica contraxerint.

§ 1. The following are bound to observe the form prescribed above:

1.° All persons baptized in the Catholic Church, as

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well as those converted from heresy or schism, even though they (whether Catholics or converts) have afterwards fallen away, as often as they contract marriage among themselves;

2.° Catholics as well as converts (n. 1) who marry non-Catholics, either baptized or non-baptized, even after having obtained a dispensation from the impediment of mixed religion or disparity of cult;

3.° Orientals who marry persons of the Latin Rite who are bound by that form.

This first section of can. 1099 positively and exhaustively enumerates all those classes of persons who are obliged to observe the form laid down in can. 1094.

1.° The first class is that of *Catholics marrying among themselves*. It is important to define more closely the terms used in the text.

(a) "*Omnes in catholica Ecclesia baptizati,*" all persons baptized in the Catholic Church. Baptized in the Catholic Church is a phrase not so easily interpreted as would appear at first sight.[80] No doubt those are "baptized in the Catholic Church" who, by their own free will, or the will of their parents or tutors, have become incorporated in the Church through Baptism. This intention is even more evident if the minister employed the Catholic rite. Neither may there be doubt as to Catholic Baptism conferred in case of necessity, if the parents are known to be Catholics; or, where one is not a Catholic, the party that exercises the decisive influence in the matter of education is a Catholic.[81] But what if the child

80 The *Am. Eccl. Rev.*, 1914, Vol. LI, p. 359, contains a case in point, but I cannot agree with the author's contention that only a child baptized by an official of the Catholic Church may be looked upon as "baptized in the Church"; the rights of parents are curtailed by this interpretation.

81 S. O., Aug. 1, 1883, ad 5 (*Coll. P. F.*, n. 1605); Wernz, l. c., IV, Vol. I, p. 305.

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was baptized in a foundling asylum or hospital, the character of which is not exactly Catholic; or if the Baptism was conferred in a Catholic asylum by a non-Catholic physician or nurse, who did not know the religion of the parents? For instance, if a Jewish physician or nurse had baptized a child, could that child be called "baptized in the Catholic Church"? To the general intention "to do what the Church does,"[82] another would have to be added, *viz.*, that of making the subject to be baptized a member of the religious body known publicly as the Catholic Church. In other words, the Jewish physician or nurse would have to have the intention of incorporating the child into the Catholic Church. Such an intention cannot be presumed, but must be proved. It may be proved by the baptismal record, which should therefore contain, in such cases, a clause indicating the minister and his intention. If it be objected that there is only one Baptism and one Church, and therefore Baptism inevitably makes the baptized person a Catholic, we reply: All that is true, dogmatically speaking, and it is also true that by Baptism one is subjected to the whole law of Christ and no longer free to reject the precepts of the Church.[83] However, the supreme legislator of the Church has the power to exempt certain individuals, or any class of individuals, from the observance of ecclesiastical laws which would otherwise be binding on them. Thus practice and theory have introduced a mitigation concerning non-Catholics, as shall be seen under § 2. The legislator, therefore, by emphasizing the term *Catholic Baptism,* doubtless wished to distinguish it from

82 The "*intentio faciendi id quod facit ecclesia*" is indeed always required, but to interpret it as the intention of the *true* Church cannot be required of non-Catholics, nor may it simply be attributed, as interpretive intention, to the child.

83 *Trid.*, sess. 7, can. 7 f., *de baptismo.*

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other baptisms, otherwise he would have simply said: *Omnes baptizati,* all baptized persons, as in can. 1015 and 1016. But no private interpreter has the right to read the words "in the Catholic Church" into a canon which does not expressly contain it.

(b) "*Ad eam ex haeresi aut schismate conversi,*" those converted to it [the Catholic Church] from heresy or schism. Whilst the former class may be styled original Catholics, this second class is that of *converts.* Conversion is a change from heretical or schismatical belief to the Catholic faith, in the sense of the text. Whether it is brought about by the converts themselves, or by extraneous agencies, is immaterial here. Thus parents may determine the religion of their children as long as these have not attained to the use of reason, and even if they have reached the age of reason, the parents may bring them up as Catholics. Even grandparents may offer their grandchildren for Catholic Baptism, provided they guarantee their Catholic training.[84] However, if children, when they commence to realize the difference between religions, object to embracing the Catholic religion, which the parents would impose on them, there is no conversion to the Catholic faith.[85] Conversion, therefore, either from heresy or schism, must have taken place knowingly or unknowingly, through the medium of parents or tutors, some time before the marriage.

(c) "*Licet sive hi sive illi ab eadem postea defecerint,*" although either these [converts] or those [original Catholics] may afterwards have fallen away. Broadly speaking, apostasy from the Catholic faith does not change, with regard to our canon, the fact of being a Catholic. An apostate is considered a Catholic before the ecclesias-

84 Benedict XIV, "*Postremo mense,*" Feb. 28, 1747, § 17.

85 Wernz, *l. c.,* IV, Vol. I, p. 306.

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tical law. We may quote here an answer given by the S. Congregation, to the effect that it does not matter whether one fell away in childhood, or youth, or later, provided he was baptized a Catholic.[86] Therefore *deficere,* to fall away, may be a voluntary or an involuntary act, brought about through the agency of others, just as in the case of conversion. The consequences will be seen in n. 2 and § 2.

(d) This law is binding on such as *contract marriage among themselves.* Therefore if James, a baptized Catholic but fallen away before marriage, wishes to marry Gemma, a Catholic convert, who renounced her religion when she became engaged to him, he has to do it before a Catholic priest and two witnesses, otherwise they are not married according to Catholic law. If it is asked, before what pastor they must marry, the answer is, any pastor may assist validly, and in our case, also licitly, within the limits of his parish.

2.° This paragraph *concerns mixed marriages.* It provides that original Catholics as well as converts are bound by the law if they marry *non-Catholics,* no matter whether the latter be baptized or not. A dispensation from the prohibitive impediment of mixed religion or from the nullifying impediment of disparity of cult does not neutralize this formal requirement. This last clause was not superfluous because confusion had arisen between the two impediments of clandestinity and mixed religion, so that some were led to assume that dispensation from the latter would also include dispensation from the observance of the required form. Surprise may be caused by the omission of the clause appended to IX, § 2 of the "*Ne temere,*" which reads: "Unless the Holy See should have

[86] S. C. C., Feb. 1, 1908: "*defecerunt, etiam in juvenili vel infantili aetate.*"

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decreed otherwise for some particular place or province." This refers to the constitution of Pius X, "*Provida,*" of Jan. 18, 1906, given for the German Empire, and only to that, every other decree, even the *Declaratio Benedictina* for the Netherlands (Nov. 4, 1741) being declared null and void.[87] Now the "*Provida*" is also abolished, because the exempting clause is omitted and no reference made to any particular legislation. Therefore also the extension to the Kingdom of *Hungary* made by the Roman Pontiff, Feb. 23, 1909, is no longer in force. There is no longer any favored country concerning this point of matrimonial law.

3.° *Orientals, i. e.,* such persons as belong to the united, not to the schismatic, Church of the Oriental rite (Greek, Syriac, Armenian; Coptic), are not bound to the new form if they contract marriage among themselves, because the Code does not legislate for them.[88] But if an Oriental wishes to contract marriage with a person of the Latin rite, he must conform to the law of the Latin Church and get married before a priest and two witnesses.[89] If an Oriental Catholic should wish to marry a non-Catholic, say an Anglican, he would not be obliged to observe the form. But if the Anglican party had been baptized in the Catholic faith, or converted to it and remained in it after childhood, the Catholic form of marriage would be required.

§ 2. Saving the rule in n. 1, § 1 of this canon, *non-Catholics,* whether baptized or not, *who marry among themselves are nowhere bound to observe the Catholic form of marriage.* Neither are those born of non-Catholic parents and baptized in the Catholic Church, but who have grown up from childhood in heresy or schism or

87 S. C. C., Feb. 1, 1908, ad IV.
88 Can. 1; S. C. C., Feb. 1, 1908, ad I.
89 S. C. C., March 28, 1908, ad II.

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infidelity, or without any religion at all, if they marry a non-Catholic party.

The two clauses of this section refer to two classes of contracting parties, the one constituting purely non-Catholics, the other supposing that one of the parties once belonged to the Catholic Church by baptism in the same.

The first category is that of *purely non-Catholics, i. e.,* such as are neither original Catholics nor converts to the Catholic faith. If they were such, or if one of the parties was such, they would fall under § 1, n. 1, and would be bound to observe the form prescribed. But purely non-Catholics, whether baptized or not, if they marry *among themselves,* are not bound by the Catholic form.[90] This is new legislation, as far as its general extent is concerned.[91]

The second clause affects persons born of non-Catholic parents and baptized in the Catholic Church. "*Ab acatholicis nati,*" born of non-Catholics, obviously means that neither the father nor the mother belonged to the Catholic Church. In the case of an illegitimate child it suffices that the mother was not a Catholic, because the father is supposed to be unknown. This may be safely extended to a child born after his father's death.[92] The text supposes that this child was *baptized in the Catholic Church,* and therefore would fall under the ruling of § 1, n. 1. But there is also a second supposition, *viz.,* that the child grew up to the *seventh year* in heresy or schism or infidelity or without any religion at all. The seventh year certainly is a line of demarcation and may be taken as a safe limit, even though signs of malice or indicating the

90 Nov. 4, 1741.

91 The *Declaratio Benedictina* and that of the S. C. C., of Nov. 4, 1741, were only made for the Netherlands.

92 Can. 90.

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use of reason may have been manifested. But after the seventh year the use of reason is presumed, and therefore the child is no longer *in infantili aetate,* unless it can be proved that it was destitute of reason after the seventh year.[93] A third supposition is that it grew up either in *heresy, or schism* (Russian, Greek, Jansenist), or *infidelity,* or *without any religion.*[94] This, of course, supposes a heretical, schismatic or irreligious education. If a child has been educated in the Catholic faith before the seventh year was completed, it can not be said to have grown up in a sectarian or irreligious atmosphere, and must therefore be considered a Catholic. The last condition is that a person baptized a Catholic,— but now practically speaking a heretic or schismatic or unbeliever, if he *marries a non-Catholic,* is not bound by the Catholic form.*

In conclusion we draw attention to the *individual character*[95] of the marriage contract which has been a rich source of canonical speculation. For it is the common teaching of canonists that, if one of the parties was exempt from the law of "*Tametsi*" (concerning the Catholic form), the other party also was free in virtue of the individual character of marriage, or rather by reason of a communication of the exemption. This principle is in itself perfectly correct and must be upheld in every bilateral contract. But the supreme legislator is empowered to declare in every single case whether or not such a communication takes place, and in the case of the impediment of clandestinity he has now spoken for the whole world, as Pius X had done in the "*Ne temere,*" in which he exempted the German empire from its observance. The redeeming word has been uttered: in the case of the law

93 Can. 89, § 3.

94 S. O., April 6, 1859 (*Coll. P. F.*, n. 1174).

* See Appendix II to this volume.

95 See *Archiv für K.-R.*, 1900, Vol. LXXX, p. 469 ff.

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obliging the observance of the Catholic form, *mixed marriages* are to be contracted like Catholic marriages as far as the mere form is concerned. Therefore, even if the non-Catholic party is not obliged to observe this form, he or she can no longer communicate his or her exemption to the Catholic party.

MARRIAGE RITES

CAN. 1100

Extra casum necessitatis in matrimonii celebratione serventur ritus in libris ritualibus ab Ecclesia probatis praescripti aut laudabilibus consuetudinibus recepti.

Outside the case of necessity, the rites prescribed in the liturgical books approved by the Church or received by praiseworthy custom are to be observed.

Wiclif and Huss depreciated the sacred rites of the Church in the administration of the Sacraments and the solemnization of marriage. Therefore those suspected of sharing their errors were asked whether they believed that a Christian contemning those rites was guilty of a grievous sin.[96] This interrogation proves that the Church insists upon the ceremonies with which she has surrounded the celebration of marriage, and that, except in cases of necessity, their omission is a grievous transgression. The rites to be observed are those contained in the *Roman Ritual,* which should be followed everywhere, unless *praiseworthy customs* have introduced a somewhat different one. In South Shantung Chinese bridal couples are excused from joining hands because this custom is repulsive to them.[97] The natives of Pondi-

96 Martin V, "*Inter cunctas,*" Feb. 22, 1418, art. 19 (Denzinger, n. 563).

97 S. O., July 30, 1890 (*Coll. P. F.*, n. 1736).

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chery use, instead of a wedding ring, an emblem called *taly,* which custom is admitted by Rome.[98] Note that the text says *praiseworthy customs,* which means that such customs must be reasonable and free from superstition.[99]

THE CATHOLIC MARRIAGE RITE

CAN. 1101

§ 1. Parochus curet ut sponsi benedictionem sollemnem accipiant, quae dari eis potest etiam postquam diu vixerint in matrimonio, sed solum in Missa, servata speciali rubrica et excepto tempore feriato.

§ 2. Sollemnem benedictionem ille tantum sacerdos per se ipse vel per alium dare potest, qui valide et licite matrimonio potest assistere.

§ 1. The pastor should take care that the spouses receive the solemn nuptial blessing, which may be imparted even after they have lived in the matrimonial state for a long time, but only at Mass, according to the special rubrics provided for the purpose, and on days not forbidden.

§ 2. The solemn blessing may be imparted only by the priest or his delegate who is validly and licitly authorized to assist at the marriage.

How seriously the law concerning the nuptial blessing is to be taken may be seen from an instruction of the Holy Office,[1] which says that absolution may be denied to those who refuse to receive that blessing. Surely a great neglect, the same instruction says, is that which spurns the special graces and the spiritual aid attached to

98 S. O., Feb. 3, 1892 (*ib.*, n. 1782); but the priest must substitute: "*tesseram hanc nuptialem.*"

99 S. O., *ib.*

1 S. O., July 6, 1817 (*Coll. P. F.*, n. 725).

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these sacred rites. Hence also the grave obligation of the pastor to instruct the people to that effect.

This blessing may also be *imparted to a couple that never received it,* no matter how long the parties have lived in the married state. But in such a case the one who blesses such a validly married couple must tell them that this blessing has nothing to do with the validity of their marriage and must not require a renewal of the marital consent. Hence the question: Wilt thou take, etc., and the "*Ego coniungo vos, etc.,* must be omitted.[2] During the forbidden seasons of Advent and Lent this blessing must not be bestowed on a couple already married.

As to § 2 the law establishes nothing new, but draws the consequence from the regulations made concerning valid and licit assistance, and extends it to the blessing to be imparted to a couple already married.

It may not be superfluous to state the *liturgical rules* for the celebration of marriage.

1. *The Ritual or Private Blessing.*[3] The priest asks the consent of both parties: N. wilt thou take N. here present, etc., to which both answer: I will. Then the priest says: *Ego coniungo vos,* etc., after which follows the blessing of the ring. The bridegroom puts the ring on the finger of the left hand of the bride. Then the priest blesses the couple: *Confirma hoc,* etc. This is all that belongs to the Ritual Blessing. This would be the form for Catholic marriages during the forbidden seasons or outside the nuptial mass. However, since, according to can. 1108, the bishop may permit the solemn blessing even during the "holy" seasons, we will now see what this is.

2 S. O., Jan. 15, 1784; S. C. P. F., 21, 1841 (*Coll. cit.,* nn. 566, 932).

3 Cfr. *Rituale Rom.,* tit. VII, c. 2 (Ed. Pustet, 1913, p. 214 f.).

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2. *The Solemn Blessing*[4] comprises (a) the Ritual Blessing just described, to be imparted by the priest vested for holy Mass, except the Maniple, which he assumes after the blessing. (b) The *Nuptial Mass,*[5] either that *Pro Sponso et Sponsa,* or a Mass of the day. The *Missa Pro Sponso et Sponsa* is a Votive Mass and must therefore be said without the *Gloria* and *Credo* and with *Benedicamus* at the end. This must also be observed when the Mass is solemnly sung, and no contrary custom may be tolerated.[6] The second or third oration must be added according to the rubrics for the respective day. This Mass also contains two prayers for the spouses, one after the *Pater Noster* (*"Propitiare"*), the other before the *"Placeat,"* both to be said by the priest facing the couple. This Mass may be said on all days not prohibited by the rubrics. The rubrics *forbid* this *Votive Mass* on the following days: all Sundays and holydays of obligation, all holydays of the first and second class within the octaves of Epiphany, Easter, Pentecost, and Corpus Christi, all privileged vigils and ferial days, excluding feasts of the 1st and 2nd class.[7]

On these forbidden days the Mass of the day (*de festo vel die occurrente*) must be said. However, the orations taken from the formulary of the Mass *Pro Sponso et Sponsa* must be inserted after the *oratio diei* and other orations, if such are prescribed in the Ordo, but before the *imperata.* On holydays like Epiphany, Trinity Sunday, Corpus Christi, or others which exclude any other orations, the *Oratio Pro Sponso et Sponsa* is to be added

4 Cfr. Wapelhorst, *Compendium S. Liturgiae,* 1915, p. 485 f.

5 S. Rit. C., March 3, 1818 (*Coll. P. F.,* n. 728).

6 S. Rit. C., Aug. 31, 1839 (*ib.,* n. 890).

7 S. Rit. C., June 14, 1918 (*A. Ap. S.,* X, 332). Vigils are the days preceding Epiphany, Pentecost, Christmas; the privileged ferial days are Ash Wednesday and Holy Week.

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sub *unica conclusione*.[8] If the bishop, according to can. 1108, permits solemn celebration during the forbidden time, even on Christmas or Easter, the same orations, *sub unica conclusione,* must be added to the oration or orations of the day. And whenever the orations *Pro Sponso et Sponsa* are said, the special orations after the "*Pater Noster*" and before the "*Placeat*" must also be recited.

We add from a decision of the Holy Office[9] the following points: When several couples are to be blessed, which is permitted, the officiating priest must ask the consent of each couple separately and say over each separately the words: "*Ego vos coniungo.*" He may bless all the rings simultaneously and also recite the prayers in the plural form. He is not obliged to apply the Mass for the parties unless he has received a stipend.[10] In "black" Masses no nuptial blessing is to be given. The same priest who has given the blessing must sprinkle the parties kneeling at the altar, but the pastor may receive the marriage consent according to the Ritual, and another priest may, with the pastor's or the Ordinary's permission, impart the nuptial blessing, *i. e.*, say the nuptial Mass.

CEREMONY FOR MIXED MARRIAGES

CAN. 1102

§ 1. In matrimoniis inter partem catholicam et partem acatholicam interrogationes de consensu fieri debent secundum praescriptum can. 1095, § 1, n. 3.

§ 2. Sed omnes sacri ritus prohibentur; quod si ex hac prohibitione graviora mala praevideantur, Ordina-

8 *Ibid.*

9 Sept. 1, 1841 (*Coll. P. F.*, n. 938).

10 Of course he may receive only one stipend, but stole fees from each couple.

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rius potest aliquam ex consuetis ecclesiasticis caeremoniis, exclusa semper Missae celebratione, permittere.

In marriages between Catholics and non-Catholics, the consent must be asked as prescribed under can. 1095, § 1, n. 3. All sacred rites are prohibited. If, however, greater evils should be foreseen from this prohibition, the Ordinary may permit one or the other of the usual ecclesiastical ceremonies, always exclusive of the nuptial Mass.

The first clause admits the so-called *passive assistance,* sometimes also styled "bare, simple, and material assistance."[11] Strictly speaking, this does not even include the words: "*Ego vos coniungo,*" etc.[12] However, since the Code requires that the consent be asked and received, it stands to reason that the term passive assistance must here be taken with a grain of salt. The question addressed to both parties separately: "Wilt thou, etc.?" cannot be omitted. After both have given their consent, they join hands and recite severally the formula, "I, N. N., etc." Thereupon the priest may say: "By the authority committed to me, I pronounce you united in the bonds of matrimony." Then the bridegroom puts the ring on the finger of the left hand of the bride, saying: "With this ring I thee wed, and plight unto thee my troth."[13] A brief sermon or exhortation before and after the ceremony is permitted if the bishop or custom allows it.[14] Of course, the priest may not wear surplice and stole, but only the black cassock.[15]

The *second clause* admits the Ritual Blessing in cases

11 S. C. P. F., Sept. 6, 1785 (*Coll.*, n. 579).

12 S. O., Aug. 1, 1821 (*Coll. cit.*, n. 762).

13 See *Excerpta ex Rituali Romano,* ed. 14, p. 243.

14 S. O., July 16, 1885 (*Coll. cit.*, n. 1638).

15 *Ibid.* A surplice is permitted if the parties demand some ornamental dress; S. O., Dec. 9, 1874 (*Coll. cit.*, n. 1427).

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where the Ordinary thinks it necessary in order to avoid greater evils, as the Instruction of the Secretary of State, Nov. 15, 1858, says. These *greater evils* are described in a letter of the Holy Office, Nov. 26, 1862, as follows:

(1.) If the refusal of said assistance would give rise to complaints and animosity on the part of non-Catholics against the faithful and the laws of the Church;

(2.) If the contracting parties would otherwise go to a non-Catholic minister or church, either before or after the marriage;

(3.) If there were reason to fear that the promises made at mixed marriages would remain unfulfilled.[16]

This enumeration must not be looked upon as exhaustive, but peculiar circumstances should be taken into consideration by the Ordinary, who is the judge as to the existence of probable evils. Only one rule is added in the last-named instruction, *viz.*: that Ordinaries should not give the permission at random and indiscriminately, nor proclaim it as a rule, but make prudent and cautious use of their power.

The *nuptial Mass* is *always excluded,* even in cases where the Blessing of the Ritual is permitted. From this rule the Roman Court has never departed. When asked[17] whether a private Mass could be said after the marriage in the presence of the bridal couple and their suite, even though the spouses would not occupy prominent seats thereat, the Holy Office answered negatively, if any suspicion could arise that the Mass would be regarded as part of the marriage ceremnoy. Of course, if the couple wishes to assist privately at a Mass said after the marriage, no one can hinder them.[18]

16 *Coll. P. F.*, n. 1169; S. O., Jan. 3, 1871 (*Coll.*, n. 1632).

17 S. O., Jan. 17, 1872.

18 The priest may even receive a stipend from the couple for that mass, but it would be imprudent to announce the fact.

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RECORDING MARRIAGES

CAN. 1103

§ 1. Celebrato matrimonio, parochus vel qui eius vices gerit, quamprimum describat in libro matrimoniorum nomina coniugum ac testium, locum et diem celebrati matrimonii atque alia secundum modum in libris ritualibus et a proprio Ordinario praescriptum; idque licet alius sacerdos vel a se vel ab Ordinario delegatus matrimonio adstiterit.

§ 2. Praeterea, ad normam can. 470, § 2, parochus in libro quoque baptizatorum adnotet coniugem tali die in sua paroecia matrimonium contraxisse. Quod si coniux alibi baptizatus fuerit, matrimonii parochus notitiam initi contractus ad parochum baptismi sive per se sive per Curiam episcopalem transmittat, ut matrimonium in baptizatorum librum referatur.

§ 3. Quoties matrimonium ad normam can. 1098 contrahitur, sacerdos, si eidem adstiterit, secus testes tenentur in solidum cum contrahentibus curare ut initum coniugium in praescriptis libris quamprimum adnotetur.

1. As soon as possible after the marriage ceremony the pastor, or whoever takes his place, shall enter in the marriage register the names of the parties and witnesses, the place and date of the marriage, as well as other data prescribed by the rituals or diocesan statutes; and this he must do even though another priest delegated by himself or the Ordinary assisted at the marriage.

The *person* who is obliged to record marriages is the *pastor,* because rights and duties are correlative; since the pastor is entitled to assist at, he is also obliged to record, marriages.

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If the pastor has a *substitute*, either temporary or permanent (assistant), the latter is likewise obliged to see to it that marriages are properly recorded. If the substitute has assisted at a marriage and records the same himself, he has to sign his own name.

If a priest was *delegated* either by the pastor or by the Ordinary, or subdelegated, if we may say so, by the assistant, it is not the delegate who must record the marriage, but the pastor or his substitute. However, the priest who has actually assisted must be named in the record. It may be added that the pastor is to be held responsible for the proper recording of marriages, though in single instances he may leave this duty to an assistant. The *time* within which the marriage must be recorded is *quamprimum*,[19] as soon as possible after the ceremony has taken place, in order to avoid the evil consequences of forgetfulness. We do not wish to set a definite time limit, as much depends upon habit and a "good memory," but the obligation is called a serious one (*gravis*) by Cardinal Gennari.[20]

The *matter* to be recorded is: the names of the couple and of the witnesses, the place and date of the marriage, mention of the dispensation if one was used, and the fact of delegation if the assisting priest was delegated by another.

It may be added that the Code mentions a *liber matrimoniorum*, thereby discouraging the custom of employing loose leaves. The form to be used in recording marriages is given in the *Rituale Romanum*.[21]

2. As noted in can. 470, § 2, the pastor shall enter every marriage contracted in his parish also in the *baptismal*

19 The "*Ne temere*," IX, § 1, had *statim*, immediately, which commentators interpreted as one day, or at most three days.

20 *Breve Commento*, ed. 6, p. 43.

21 Tit. X, c. 5 (ed. Pustet, 1913, p. 330 f.).

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record. If the parties, or one of them, were baptized elsewhere, the pastor in whose parish the wedding was celebrated shall either himself or through the episcopal chancery inform the pastor of the parish where the party or parties were baptized of the fact of the marriage, that the latter may register it in *his* baptismal record. "Red tape," some will say; but this contempt is not shared by a *defensor vinculi* or any one who has ever had to do with a matrimonial court. Rome will hardly recede from this prescription, though petitions asking for a modification are not wanting.[22] The Congregation that refused such petitions insisted that the record to be sent to the pastor of the parish of baptism should comprise the names of the contracting parties, the full [23] names of their parents, the age of bride and groom, the place and date of the marriage, and the full names of the witnesses, to be followed by the signature of the pastor and the parochial seal.[24] This document, thus signed and sealed by the pastor, may be sent to the episcopal chancery of the diocese in which the marriage took place. If it is sent thither, the pastor is free from further obligation or responsibility. The decree just mentioned enjoins Ordinaries to see to it that these regulations are conscientiously carried out, even if they should be compelled to make use of canonical penalties.

3. Whenever a marriage is contracted according to can. 1098, the priest who was present, or, if no priest was present, the lay witnesses, are bound conjointly with the contracting parties to take care that the marriage be recorded as soon as possible in the parish register.

22 S. C. Sacr., March 13, 1910, ad IX.

23 "Full" means the baptismal or first name, *v. g.*, John, and the family name, *v. g.*, Murphy; *agnomen* properly signifies the surname or an adopted name.

24 S. C. Sacr., March 6, 1911 (*A. Ap. S.*, III, 102 f.).

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The canon quoted (1098) speaks of the extraordinary case where there is danger of death and the pastor cannot perform the marriage. If a priest was present, he is bound equally with the contracting parties to see to it that the marriage is recorded. If no priest was present, the obligation is shared equally by the lay witnesses and the contracting parties; that is to say, if the parties themselves have the marriage recorded, the witnesses are free; but until the record is actually made, none of them is exempt from the obligation.

The notice should be sent to the pastor who was entitled to assist at the marriage, but it may also be sent to the diocesan chancellor, who shall forward it to the pastor.

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CHAPTER VII

MARRIAGE OF CONSCIENCE

CAN. 1104

Nonnisi ex gravissima et urgentissima causa et ab ipso loci Ordinario, excluso Vicario Generali sine speciali mandato, permitti potest ut *matrimonium conscientiae* ineatur, idest matrimonium celebretur omissis denuntiationibus et secreto, ad normam canonum qui sequuntur.

CAN. 1105

Permissio celebrationis matrimonii conscientiae secumfert promissionem et gravem obligationem secreti servandi ex parte sacerdotis assistentis, testium, Ordinarii eiusque successorum, et etiam alterius coniugis, altero non consentiente divulgationi.

CAN. 1106

Huius promissionis obligatio ex parte Ordinarii non extenditur ad casum quo vel aliquod scandalum aut gravis erga matrimonii sanctitatem iniuria ex secreti observantia immineat, vel parentes non curent filios ex tali matrimonio susceptos baptizari aut eos baptizandos curent falsis expressis nominibus, quin interim Ordinario intra triginta dies notitiam prolis susceptae et baptizatae cum sincera indicatione parentum praebeant, vel christianam liberorum educationem negligant.

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CAN. 1107

Matrimonium conscientiae non est adnotandum in consueto matrimoniorum ac baptizatorum libro, sed in peculiari libro servando in secreto Curiae archivo de quo in can. 379.

It is evident from these canons that a "marriage of conscience" is not the same as a clandestine marriage, although it may be called, as the *Summa Godfredi* says,[1] a sort of clandestine contract because it is contracted without any solemnities. In France, clandestine marriages were those which, though according to the Tridentine form, were contracted without the consent of the parents. To these refers the Constitution of Benedict XIV, "*Satis vobis,*" Nov. 17, 1741, which is the chief source of our Code in this matter.

A "marriage of conscience" is one contracted without the publication of the banns and in secret, but not without the formalities prescribed by the Church. The following canons plainly show that a priest and witnesses are supposed to be present. The Code says that no one but the *Ordinary* of the diocese, or his vicar-general if he has received a special commission *ad hoc* from the bishop, may *permit* such a marriage, for most *weighty and urgent réasons* only. Such reasons may be the following: if two live together unsuspectedly as married though they were never married;[2] if the civil law imposes conditions injurious to the freedom of marriage, if the civil power interferes with the liberty, *e. g.,* of soldiers, or if disgrace and discord would be likely to follow from iniquitous laws impeding marriage.[3] There may be, as Benedict

1 Cf. Esmein, *l. c.*, p. 182.

2 "*Satis vobis,*" § 6: "*in figura matrimonii degentes,*" really, in concubinage.

3 *Instructio S. C. P. F.*, 1758 (*Coll.*, n. 571). This was the case in Curaçao, where the Dutch Governor imposed a penalty of 50

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XIV says, other reasons, but whatever they are, they must be very grave and serious in order to outweigh the great evils resulting from secret marriages. These evils are: easy divorce, danger of concubinage and polygamy, spiritual and temporal ruin of the offspring.[4]

Can. 1105 describes the *pledge of secrecy* thus: the permission for such a marriage implies a promise and the strict obligation of secrecy on the part of the assisting priest, of the witnesses, of the Ordinary and his successors, as well as on the part of the one contracting party, as long as the other will not consent to the divulgation of the marriage. It would be safest to put all these parties, with the exception of the Ordinary, under oath. As to the contracting parties themselves, it is evident that both must consent, because marriage is a bilateral contract.

Can. 1106 *relieves the Ordinary of the obligation* of secrecy in two cases: if secrecy would cause scandal or grave injury to the sanctity of marriage, or if the spiritual ruin of the children were threatened. The first condition would be present if the community had become aware of the fact that no public marriage had taken place between the parties. The sanctity of marriage would be imperilled if infidelity to the marriage vows or divorce would ensue. The children's welfare would suffer if the parents would not have them baptized, or if they had them baptized under fictitious names, because in the latter case the children's legitimacy and their right to inherit the property of their parents would be jeopardized. Therefore the parents are obliged, and should promise in writing, to send to the Ordinary, within thirty days, notice

florins for marrying before a pastor. Cfr. Leo XIII, "*Il divisamento*," Feb. 8, 1893.

4 "*Satis vobis*," § 2 f.

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of the birth of a child and of its baptism. The parents may use fictitious names, says Benedict XIV, if only the Ordinary is informed that the child is verily theirs, that it is legitimate, and has been baptized.[5] Finally the Ordinary is not obliged to secrecy if the parents neglect the Christian education of their children.

Can. 1107 enjoins *distinct and secret recording*. A marriage of conscience should never be entered in the regular marriage records nor should note be made thereof in the common baptismal record, but in a special book which must be kept in the secret archives of the diocesan court, mentioned in can. 379. It should be a sealed book, to be opened only when another such marriage is to be recorded.[6] This suffices to show the seriousness with which the legislator wishes to see matters of this kind treated. For the rest, where civil marriage is prescribed, "marriages of conscience" will be rare.

[5] "*Satis vobis*," § 11. [6] *Ibid*, § 10.

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CHAPTER VIII

TIME AND PLACE OF MARRIAGE CEREMONIES

CAN. 1108

THE TIME

§ 1. Matrimonium quolibet anni tempore contrahi potest.

§ 2. Sollemnis tantum nuptiarum benedictio vetatur a prima dominica Adventus usque ad diem Nativitatis Domini inclusive, et a feria IV Cinerum usque ad dominicam Paschatis inclusive.

§ 3. Ordinarii tamen locorum possunt, salvis legibus liturgicis, etiam praedictis temporibus eam permittere ex iusta causa, monitis sponsis ut a nimia pompa abstineant.

1. Marriages may be contracted at any time of the year. This, says Clement III, was the custom of the Roman Church. However, taking marriage as a solemn nuptial contract, says the same Pontiff, it is customary that from Septuagesima Sunday to the Octave of Pentecost such a *solemnity* be not performed.[1] Add to this period the time of Advent, and the former forbidden times are described. But, as the same Pope says, the mere matrimonial *contract* (*consensu interveniente legitime de praesenti*) may be entered into at any time.

2. *Section two* says that the solemn nuptial blessing

1 C. 4, X, II, 9, *de feriis;* cfr. Bern. Pap., *l. c.*, p. 303; Tancred, *l. c.*, p. 69.

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may not be imparted from the first Sunday of Advent to Christmas, inclusive, and from Ash Wednesday to Easter Sunday, inclusive.[2]

3. However, *the bishops* may, for good reasons, permit solemn weddings even during the forbidden seasons, provided the liturgical rules be observed and the parties admonished to refrain from too great pomp. Whether the reasons are sufficient the bishop must judge.[3] A sufficient reason would be if the pastor visits a mission only at rare intervals or the couple lives at a great distance from church;[4] also the sudden departure of a soldier for the barracks or battlefield. The Code is very moderate and benign in this matter, which is evident also from the fact that forbidden times no longer figure among the prohibitive impediments. But if the Church is condescending, she expects the faithful to make proper use of her kindness, and hence the parties should be admonished to refrain from too much pomp, which would not be in keeping with the spirit of the season. Thus noisy banquets, balls or dances would hardly be permissible. Formerly the *traductio sponsae pomposa,* the solemn induction of the bride into the home of the bridegroom, was also forbidden;[5] but now-a-days such a pompous ceremony with pipers and singers and a choir of boys and girls is no longer customary, except in Slavic countries.

2 Formerly from the first Sunday of Advent to Epiphany (Jan. 6), and from Ash Wednesday to Low Sunday; cfr. *Trid.*, sess. 24, c. 10, *de ref. mat.*

3 S. C. P. F., June 31, 1796 (*Coll.*, n. 631).

4 *Ibid.*

5 Cfr. cc. 2, 3, 5, C. 33, q. 4; the consummation of marriage was also forbidden; cfr. Tancred, p. 69.

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THE PLACE

CAN. 1109

§ 1. Matrimonium inter Catholicos celebretur in ecclesia paroeciali; in alia autem ecclesia vel oratorio sive publico sive semi-publico, nonnisi de licentia Ordinarii loci vel parochi celebrari poterit.

§ 2. Matrimonium in aedibus privatis celebrari Ordinarii locorum in extraordinario tantum aliquo casu et accedente semper iusta ac rationabili causa permittere possunt; sed in ecclesiis vel oratoriis sive Seminarii sive religiosarum, Ordinarii id ne permittant, nisi urgente necessitate, ac opportunis adhibitis cautelis.

§ 3. Matrimonia vero inter partem catholicam et partem acatholicam extra ecclesiam celebrentur; quod si Ordinarius prudenter iudicet id servari non posse quin graviora oriantur mala, prudenti eius arbitrio committitur hac super re dispensare, firmo tamen praescripto can. 1102, § 2.

1. All *marriages between Catholics should be celebrated in the parish church.* If another church or oratory, either public or semi-public, is preferred, the permission of the Ordinary or pastor should be obtained. Although the bishops might insert the first clause of this text in their diocesan or provincial statutes, it would be wiser to follow the example of the second Provincial Council of St. Louis (1868), which enjoins pastors to *exhort* the faithful to get married in church.[6] For the common law grants the faithful the right of petitioning the pastor to marry outside the parish church. Therefore the whole canon would have to be inserted in the statutes. But the cele-

[6] Wernz, *l. c.*, IV, Vol. I, p. 276, n. 183, is very rigorous on this point, but probably he would now modify his view; *Coll. Lac.*, III, 319, n. 11.

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bration of marriage outside the parish church is permitted only in churches and public or semi-public oratories situated within the limits of the parish in which the pastor can licitly and validly assist. Of course, unless the pastor would be subject to the rector of the church or oratory who would possess full parochial power, the marriage would have to be performed by the competent pastor or his delegate. Note that *either* the Ordinary *or* the pastor may grant permission.

2. § 2 limits the power of granting permission to the *Ordinary* of the diocese, if in some extraordinary case there be a just and plausible reason for allowing a marriage to be celebrated in a *private house*. Such a reason would be illness or any "praiseworthy reason," for instance, if a benefactor of the diocese or parish has a private chapel in his home, the bishop or his vicar-general, but not the pastor, may grant permission. In such cases the nuptial Mass may be said in a private chapel according to the rubrics.[7]

In *churches or oratories of seminaries or of women religious* the Ordinary should not grant permission for marriages to be celebrated, except in cases of urgent necessity, and then only with proper precautions. What these precautions are may be surmised. The religious should not be disturbed in their discipline, and the seminarians should suffer no disturbance, and hence neither religious women nor seminarians should be allowed indiscriminately to witness the marriage ceremony.

3. *Marriages between Catholics and non-Catholics are to be performed outside the church.* However, should the Ordinary in his discretion be convinced that evil might follow from the observance of this law, he may dispense

7 S. Rit. C., Aug. 31, 1872 (*Decreta Auth.*, n. 3265): where there is no chapel, an altar should be erected if Mass is to be said.

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from it, provided can. 1102, § 2, be strictly observed.

"*Extra ecclesiam,*" outside the church, means outside the body of the Church, but does not exclude the sacristy, in which, therefore, a mixed marriage may be celebrated.[8] As a general rule such marriages are performed in the rectory, and this custom is not only safe but very proper. For the rest we refer to can. 1102, which describes the "greater evils."

The reasons why the Church treats mixed marriages so severely are stated in an Instruction of the Secretariate of State, 1858, which says that Catholics should never forget that the Church abhors such marriages and never ceases to deter the faithful from them because they are injurious to the salvation of the contracting parties themselves as well as of their offspring.

8 S. O., Jan. 17, 1877, quoted by De Smet (*l. c.*, p. 346). This decision, besides the sacristy, also admits a chapel in the church, without the candles lighted or any special adornments.

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CHAPTER IX

THE EFFECTS OF MARRIAGE

CAN. 1110

Ex valido matrimonio enascitur inter coniuges vinculum natura sua perpetuum et exclusivum; matrimonium praeterea christianum coniugibus non ponentibus obicem gratiam confert.

Valid marriage unites the contracting parties by a bond which is of its very nature perpetual and exclusive; Christian matrimony moreover imparts sacramental grace to husband and wife if they place no obstacle in its way.

After what has been said under can. 1002, no further explanation is needed. The marital contract, or *matrimonium in fieri,* is the consent duly given according to the form prescribed by the Church. This contract produces certain natural effects, *viz.: indissolubility* and *unity*. These two innate qualities, if we may so call them, are attached to *every valid marriage,* not only to a union between Christians,[1] though they receive additional dignity and firmness from the fact that Christian matrimony has been raised to the dignity of a *sacrament*. Therefore also Christian marriage has a *special grace* attached to it, which attends every Christian marriage, provided the contracting parties are in the state of sanctifying grace. If they are not in the state of grace at the moment they give the marital consent, the sacra-

1 Leo XIII, "*Arcanum,*" Feb. 10, 1880

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mental grace is conferred as soon as the obstacle is removed, because the bond is lasting (*vinculum perdurans*). It is, therefore, advisable and greatly to be recommended that the parties make a good confession before marriage, although there is neither a divine nor an ecclesiastical law that enforces this pious practice.[2]

MUTUAL RIGHTS AND DUTIES

CAN. 1111

Utrique coniugi ab ipso matrimonio initio aequum ius et officium est quod attinet ad actus proprios coniugalis vitae.

Husband and wife, from the moment when the marriage is contracted, have equal rights and duties concerning the acts pertaining to the conjugal life.

This follows from the *primary end* or purpose of marriage, which is the propagation of the human race and the education of offspring. To this end, as stated under can. 1013, the two other purposes of matrimony, mutual aid and the allaying of concupiscence, are subordinate.

This primary end, however, cannot be obtained without conjugal intercourse (*debitum coniugale*). Hence to the right of demanding that *debitum* there must necessarily correspond the obligation of rendering it. And since marriage is a bilateral contract, right and obligation are equal in both parties.[3] It may, of course, happen that one party is deprived of the right of demanding the *debitum;* in that case the other is not obliged to render it. Two cases are mentioned which may suspend or take away the right of demanding the *debitum:* vow and adultery.

2 Cfr. De Smet, *l. c.*, pp. 137 f.
3 Cfr. I Cor. 7, 3; c. 24, C. 217, q. 2; c. 3, 4, C. 32, q. 2 (these texts rather savor of rigorism).

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The *vow* here understood is one which would render the marriage illicit. Hence two vows only of those mentioned in can. 1058 refer to the *debitum, viz.:* the vow of virginity and that of perfect chastity.[4] Concerning the *vow of virginity* it must be said that the party obliged by it is not allowed to demand the *debitum,* but is bound to render it, unless he or she has lost that right. But after the consummation of the marriage by the conjugal act, the object of this vow is completely gone, and therefore the party formerly bound by the vow may after consummation also *demand* the *debitum.*

As to the *vow of perfect chastity,* the party bound by it is not allowed to *demand* the *debitum,* but is obliged to *render* it as long as the other party has not forfeited that right. Therefore this vow, unless dispensed from, lasts throughout marriage, but the right to the *copula* is not radically taken away by it, nor on the other hand is the right of the party not bound by the vow affected, so that the party bound by the vow may licitly render the *debitum.*

It may happen that one wishes to make a *vow of chastity after marriage has been contracted and consummated,*—perhaps for a number of years. Such a vow may only be made in two cases: (a) if the other party consents or (b) has forever lost the right of demanding the *debitum.* Concerning (a) note that no vow made by fraud, compulsion or threat, or in a state of melancholic depression, can take away the right to conjugal intercourse.[5] Mutual consent alone can render such a vow lawful and valid. (b) The right of demanding the *debi-*

4 The vow of celibacy does not pertain to the subject, because, after one is married, it practically ceases and has no influence on the conjugal rights.

5 Cfr. cc. 1, 3, 8, 17, X, III, 32.

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tum is forfeited by *adultery*,[6] as commonly understood, not by "spiritual adultery," such as heresy or apostasy, which have been stretched by some authors [7] as incurring this penalty. Note that adultery, whether incestuous or simple, entails the loss of the marital right only after judicial sentence of separation has been rendered.[8] This is very reasonable, because otherwise one party might suffer from hallucinations on the part of the other. As the ecclesiastical judge renders the sentence, so he is also entitled to restore the right to the *debitum*. From the vow of perfect and perpetual chastity, however, the Apostolic See alone can dispense.[9] If the vow was public, the S. C. of the Sacraments is the competent authority; if it was secret, the S. Poenitentiaria. Since the faculties granted by the latter to *our bishops* are not abolished, they may be made use of until further decisions.[10] The vow of virginity is not reserved.

If any *doubt* exists concerning the *validity of a marriage*, the party who is certain of the existence of an invalidating impediment is not allowed to *ask* the *debitum*, but must *render* it to the party who is not aware of the obstacle. If, however, the doubt has little probability and rather amounts to a scruple, the first-mentioned party may not only *render*, but also *demand*, the *debitum*.[11]

A juridical question may arise from the texts of the Decretals [12] which command a party to render the *debitum* to the other party when afflicted by leprosy or some

6 All the texts of the Decree and Decretals (c. 9, X, IV, 1) refer to the *fornicationis causa*.

7 Cfr. De Smet, *l. c.*, p. 166, note 5.

8 C. 2, X, II, 16; what we state above is based upon a careful collation of all the texts.

9 Can. 1309.

10 S. C. Conc., April 25, 1918.

11 Cfr. c. 2, X, IV, 21; c. 44, X, V, 39.

12 Cfr. cc. 1, 2, X, IV, 8, quoted by Card. Gasparri.

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other serious or contagious disease. Is this law binding on the party not afflicted with such disease? The Decretals would seem to imply that it is, but modern theologians and canonists [13] take the negative view. It must be added, however, that, though this latter opinion may safely be followed in the court of conscience, the strict right cannot be denied, and the texts quoted prove how rigorously mutual right and duty must be taken. But the case of actual drunkenness must be excepted, because such a state is neither, properly speaking, human, nor fit for a human act like the *debitum,* and, besides, may prove injurious to offspring.

With regard to the *mode of performing the debitum* we only add that it must correspond with the primary end of marriage. Husband and wife are, *per se,* allowed the *copula* only for the purpose of bringing forth children. Yet this purpose need not be exclusively and positively held in view. It is sufficient that it be not positively excluded. Hence married persons need not trouble themselves with scruples as to the right intention, as long as they do not employ unlawful means to prevent conception and perform the marital act in accordance with the laws of nature. The conjugal relation finally requires that the spouses live together in a *common home,* unless there are reasons excusing them from this obligation; [14] on which see chapter X.

13 De Smet, *l. c.*, p. 171.

14 Cfr. c. 8, X, II, 13; c. 9, X, IV, 1; cc. 1, 2, X, IV, 8 — from which we must conclude that a long and unjustified absence of one party from home is a violation of the rights of the other.

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RIGHTS OF THE WIFE

CAN. 1112

Nisi iure speciali aliud cautum sit, uxor, circa canonicos effectus, particeps efficitur status mariti.

Unless otherwise provided by special laws, the wife partakes of the state of her husband as far as canonical effects are concerned.

Since the wife becomes not the slave or handmaid of her husband, but his consort, companion, and helpmate, it is but natural that she should share his canonical status. This is practically expressed by the *domicile,* which she has in common with her husband, as long as no separation has taken place.[15] Besides, she may follow the *rite* or liturgical worship of her husband [16] and choose her burial place; if she does not select a special place (vault, family-grave), she is to be buried in the cemetery of her husband; in case she has had several husbands, the last one's burial place is also hers.[17] Concerning titles of rank, nobility or honor, the Church leaves it to civil law to determine the wife's status, though she rather favors equality.[18] Of special regulations of the Church as to different rights we know nothing.

But the Church does maintain the perfectly natural theory that the wife is subject to her husband [19] in lawful matters, and even grants him the power of paternal correction, to be exercised, however, with moderation, which excludes violence.[20] The old English law permitted a husband to scourge or whip his errant wife.[21] The hus-

15 Can. 93; c. 3, C. 13, q. 2; c. 4, C. 34, q. 1 et 2.

16 Can. 98, § 4.

17 C. 3, § 1, 6°, III, 12.

18 C. 12, C. 32, q. 2; c. 1, X, IV, 1.

19 I Cor. 11, 3; Eph. 5, 22; Col. 3, 18; c. 12–16, C. 33, q. 5.

20 Cc. 6, 10, C. 33, q. 2 (which permits a fast to be dictated).

21 Blackstone-Cooley, *Comment.,* I, 444.

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band may also nullify private *vows* of his wife which interfere with his own lawful rights, as St. Augustine says.[22] Of course this must be understood of private vows which are not reserved, as vows of abstinence, pilgrimages or devotions which would interfere with household or marital duties.[23]

The husband has the duty of providing his wife with the necessaries of life, which the civil law further details.[24] From this it may be seen how the Church stands with regard to the "emancipation" of women.

DUTIES OF PARENTS TOWARDS THEIR CHILDREN

CAN. 1113

Parentes gravissima obligatione tenentur prolis educationem tum religiosam et moralem, tum physicam et civilem pro viribus curandi, et etiam temporali eorum bono providendi.

Parents are under the gravest kind of obligation to provide to the best of their ability for the religious and moral as well as the physical and civil education of their children, and for their temporal well-being.

This law, natural as it is, is based upon the fact that not only the procreation, but also the education of children belongs to the primary end of marriage. That the *religious* part is named first should not cause surprise in a Code of ecclesiastical laws. First comes Baptism and then instruction in Christian doctrine. The *moral* education must tend towards the formation of a firm and upright character by word and example. The *physical* education begins in the mother's womb and must be con-

22 C. 16, C. 33, q. 5.
23 Gratian, ad c. 20, C. 33, q. 5.
24 Blackstone-Cooley, *l. c.*, I, 442.

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tinued throughout the stages of childhood and youth.[25] The *civil* training consists in teaching the children civic and social virtues, especially obedience to authority, justice, honesty, and patriotism.[26] *Political* knowledge may be reserved for later years and should be directed chiefly to teaching youth to abhor crookedness and graft, which corrode our body politic. We need not here recall the serious instruction of the Holy Office of Nov. 24, 1875, to the bishops of United States in the matter of public schools, of which the title on schools will offer a better opportunity to speak.

LEGITIMACY OF CHILDREN

CAN. 1114

Legitimi sunt filii concepti aut nati ex matrimonio valido vel putativo, nisi parentibus ob solemnem professionem religiosam vel susceptum ordinem sacrum prohibitus tempore conceptionis fuerit usus matrimonii antea contracti.

CAN. 1115

§ 1. Pater is est quem iustae nuptiae demonstrant, nisi evidentibus argumentis contrarium probetur.

§ 2. Legitimi praesumuntur filii qui nati sunt saltem post sex menses a die celebrati matrimonii, vel intra decem menses a die dissolutae vitae coniugalis.

The four canons 1114–1117 are intimately connected, the first two describing the signs of legitimacy by wedlock

25 Sound and moderate physical culture and a little more Spartan-like education would inure our children to hardships and toil, and the cultivation of the social life in the farming districts might prevent the flight to the cities.

26 Cfr. Leo XIII, *"Arcanum,"* 1880; *"Humanum genus,"* 1884; *"Sapientiae christianae"*; *"Rerum novarum,"* 1891; *"Graves de communi,* 1901.

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and marriage, the other two concerning legitimation. Taking marriage as the lawful basis and principle, *can. 1114* states that "those children are legitimate who are conceived or born in valid or putative wedlock." This law favors the offspring, for it supposes that a child may be conceived out of lawful wedlock, and yet be legitimate if his parents were married at the time of his birth. But legitimacy always requires a *marriage,* whether certainly or putatively valid. A marriage is certainly *valid* if contracted without an invalidating impediment and according to the form prescribed by the Church. A *putatively valid marriage* is one contracted with due observance of the prescribed form, but with an invalidating impediment, the existence of which is unknown to one of the parties. This case, of course, occurred more frequently, the more impediments were set up in course of time. Hence it was found necessary, since the time of Magister Rolandus,[27] to regard the offspring of such invalid marriages as legitimate. But *good faith* is strictly required,[28] and is assumed until sentence against the validity is given by competent authority. Hence children born out of such wedlock would be held legitimate even if the ecclesiastical court would afterwards annul the marriage.[29]

This holds true concerning any ecclesiastical impediment except clandestinity.[30] But there are two further *exceptions* made in our canon: (a) if one with *solemn religious vows,* before taking those vows,[31] contracts a valid marriage and proceeds to consummate the same, the

27 *Summa Magistri Rolandi,* ed. Thaner, p. 231 f.

28 *Ignorantia affectata* would not be an excuse; c. 10, X, IV, 17.

29 Cc. 2, 8, X, IV, 17.

30 C. 3, X, IV, 3; c. 14, X, IV, 17.

31 For, if he would have taken solemn vows before marriage, he could not validly have contracted marriage.

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fruit of such consummation being a child, this child would be illegitimate.[32] (b) If one in *higher orders* who had been married and with the consent of his wife (now by apostolic dispensation) received holy orders would consummate the marriage thus contracted, the offspring would be illegitimate.[33] These two exceptions presuppose an *illegitimate use* of a validly contracted marriage. *A fortiori* the same effect would be produced in case a religious with solemn vows or a cleric in higher orders had offspring with a concubine.

A distinction must therefore be made between different classes of illegitimate children.

1) *Natural* are those who are born of parents between whom either at the time of the conception or birth of the child a valid marriage could exist;

2) *Spurious* are those born of parents between whom at no time a valid marriage could exist. These latter are:

a) *Adulterous,* if born of parents one of whom was at the time lawfully wedded to another;

b) *Sacrilegious,* if born of parents who are bound by solemn religious vows or in sacred orders;

c) *Incestuous,* if born of an incestuous relation between persons legally related either by consanguinity or affinity in the collateral line.

d) *Nefarious,* if born of parents related in the direct line, *e. g.,* of a father and his daughter.

Prohibitive impediments can never render a child illegitimate.[34]

After laying down this general rule, the legislator explains how the *fact* of legitimacy can be proved or at least naturally presumed.

32 Cfr. c. 15, X, I, 17.

33 Cfr. cc. 1, 2, 14, X, I, 17.

34 Wernz, *l. c.,* IV, Vol. II, p. 586, n. 680. Simple religious vows (except those of the Jesuits) and those mentioned in can. 1058 do not affect the legitimacy of children.

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Can. 1115 states in the first section: He whom marriage points out as such must be considered the father, unless the contrary is evident. This is nothing else but a *praesumptio iuris.* The law naturally supposes that children are the fruit of legal unions, not of adultery or fornication; and since the mother can be proved by the birth, whereas the father's coöperation is hidden in obscurity, the law must suppose the child to be a lawful issue. Such the Roman law,[35] from which our text is taken, justly supposed. As long, therefore, as the contrary is not evidently proved, a child belongs to the father whose consort has brought him forth. The proof always lies with him who denies or doubts his legitimacy. If the validity of a marriage is clearly established by the ecclesiastical record, every child born of that marriage is presumed to be legitimate, unless there is strict proof to the contrary. There are only two ways to prove the contrary: absence of the spouses from each other and impotency. A third is hardly imaginable.[36] The absence must be proved by trustworthy witnesses under oath; impotency is a subject of medical examination.

§ 2 adds that "*children born at least six months after the date of a marriage, or within ten months after the rupture of conjugal intercourse, are presumed to be legitimate.*" Here again the Roman[37] law has been adopted, with some modification as to the number of months. For the Roman law assumed seven months, on the authority of Hippocrates, who maintained that after that time a complete birth was possible. Note the term *presumed;* strict evidence would upset this presumption.

A *dissolutio vitae coniugalis,* or rupture of conjugal

35 Cfr. l. 5, Dig. II, 4, ll. 12, 19, 23, Dig. I, 5.

36 S. C. C., Aug. 9, 1884 (*A. S. S.*, Vol. XVII, 378 ff.); not even a baptismal record was accepted as proof against the child's legitimacy.

37 L. 12, Dig. I, 5; l. 29, pr. Dig. 28, 2.

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life, may be brought about by a complete separation sanctioned by the ecclesiastical judge or by a declaration of nullity.[38] We may add that the question of legitimacy belongs to the *ecclesiastical judge,* whose sentence should be respected by the civil court.[39]

LEGITIMATION OF CHILDREN

CAN. 1116

Per subsequens parentum matrimonium sive verum sive putativum, sive noviter contractum sive convalidatum, etiam non consummatum, legitima efficitur proles, dummodo parentes habiles exstiterint ad matrimonium inter se contrahendum tempore conceptionis, vel praegnationis, vel nativitatis.

CAN. 1117

Filii legitimati per subsequens matrimonium, ad effectus canonicos quod attinet, in omnibus aequiparantur legitimis, nisi aliud expresse cautum fuerit.

Offspring is legitimated by the subsequent marriage of the parents, be that marriage contracted validly or putatively, either by a new contract or by revalidation, though not consummated, provided the parents were capable of contracting marriage between themselves either at the time of conception, or of pregnancy, or of birth.

The underlying idea of legitimation, which the Roman law [40] granted as a sort of adoption, and in virtue of the parental power, is here transparent and, we may say, "canonized." The English law is not so lenient, because it considers all children born before matrimony as bas-

[38] C. 2, X, IV, 17.
[39] C. 12, X, IV, 17; *Trid.*, sess. 24, c. 12, *de ref. mat.*
[40] Cfr. § 13, Inst. I, 10; ll. 6, 10, Cod. V, 27.

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tards. But even English law does not bastardize a child if it be born (though not begotten) in lawful wedlock, provided the parties married within a few months thereafter.[41] Our Missouri law says: "If a man, having by a woman a child or children, shall afterwards intermarry with her, and shall recognize such child or children to be his, they shall thereby be legitimate."[42] What our text (can. 1116) provides is as follows:

1. A *subsequent marriage, i. e.,* contracted after the birth of the offspring, has the power to render legitimate what would otherwise be considered illegitimate. Marriage has that power, although only by virtue of positive legislation.[43] Consequently ecclesiastical law requires the consent neither of the parents nor of the child. Nor does it, like our Missouri law, demand a formal act of recognition.

2. A marriage may be either *valid* on both sides, or *putative* because of an impediment on one side, unknown to the other.[44] Besides, a marriage may be *newly contracted* or revalidated by the renewal of consent. Now such a marriage need not follow immediately the birth of the offspring. If a woman would marry a man other than the one of whom she had conceived a child, and after her husband's death would marry the father of her child, the latter would be legitimate by virtue of the second marriage.[45] If a woman had a child from a man before marriage, and then married that man, but never *consummated* the marriage, the child would be legitimate.

3. *One condition* must, however, be added, *viz.,* that the *parents* were *capable* of contracting a marriage at any

41 Blackstone-Cooley, *Comment.*, I, 454.
42 Revised Statutes of Missouri, 1899, sect. 2917.
43 C. 6, X, IV, 17; Bened. XIV, "*Redditae Nobis,*" Sept. 17, 1746, § 39.
44 Reiffenstuel, IV, 17, n. 35 f.
45 *Ibid.*, n. 40.

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of the three stages mentioned: conception, pregnancy, birth. Therefore, if an impediment existed at the time a child was begotten, but was removed by dispensation before he was born, the child is legitimate.

4. The question arises whether natural and spurious children are legitimated by a subsequent marriage of the parents. Observe, first, that the offspring must belong to that couple and not to a different man or woman. To speak concretely: if Gemma had a child from James and would marry John, this marriage would not legitimate the child begotten from James, unless, of course, Gemma would after the marriage with John marry James. The question proper is about *spurious* children of all kinds, whether they may be legitimated by subsequent marriage, and more especially concerning an adulterine child. This case is mentioned in the Decretals [46] and elaborately expounded by Benedict XIV in his letter to the archbishop of San Domingo.[47] Gemma was lawfully married to James, but had intercourse with John during her marriage, the fruit of which intercourse was Emma. Would Emma be legitimated by a subsequent marriage of Gemma and John? Answer: If James dies before Emma is born and Gemma marries John sometime after Emma's birth, Emma is legitimated by that marriage, because at the moment of her birth both Gemma and John were capable of contracting marriage. Therefore, though conceived in adultery, Emma was born in lawful wedlock and hence cannot be called an adulterine offspring.[48] It is supposed, of course, that no impediment of crime in-

46 C. 6, X, IV, 17.

47 "*Redditae Nobis*," Dec. 5, 1744; § 2 ff. is a fine specimen of canonical *ésprit* and lore.

48 C. 6, X, IV, 17, is not contradictory, for it mentions *proles susceptа*, which in canonical language means birth or baptism, as Reiffenstuel (IV, 17, n. 40) justly remarks. Therefore we are unable to grasp the argument of Wernz, *l. c.*, IV, Vol. II, p. 595, n. 686.

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terfered. The answer applies to all ecclesiastical impediments. If the impediment was removed at the moment of birth, the child is legitimate. This seems to us the logical explanation of our canon, and it is borne out by the letter of Benedict XIV referred to.

Can. 1117 mentions the *canonical effects* of legitimation. Legitimated children partake of all the effects granted by Canon Law, unless the latter makes special exceptions. These canonical effects concern especially the capacity of being ordained without a dispensation and obtaining ecclesiastical benefices and appointments, also certain prelatures of inferior rank. The cardinalate [49] and the episcopacy [50] are excepted.

An additional remark: The Code does not mention another mode of legitimation, which was formerly in vogue and is always referred to by canonists, *viz.*, by *papal rescript*. The Pope can legitimate not only natural, but also spurious children, and the extent of a papal rescript on this subject has to be interpreted according to the general rules. Although the Code is silent about this mode of legitimation, there is no doubt that the Pope may issue such a rescript as far as canonical effects [51] are concerned. Besides, can. 1043 f. permit a legitimation in certain cases, which may be applied by the Ordinary or the pastor or any priest. Otherwise the faculty is given by the S. C. Sac. *pro foro externo*.

49 Sixtus V, "*Ad Romanum*," Oct. 21, 1588, § 3; can. 232, § 2, n. 1.

50 Can. 331, § 1, n. 1.

51 C. 13, X, IV, 17, which, however, refers to the Papal States, and must therefore be interpreted accordingly.

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CHAPTER X

SEPARATION OF MARRIED COUPLES

ART. I

DISSOLUTION OF THE MATRIMONIAL BOND

CAN. 1118

RATIFIED AND CONSUMMATED MARRIAGES INDISSOLUBLE

Matrimonium validum ratum et consummatum nulla humana potestate nullaque causa, praeterquam morte, dissolvi potest.

A valid Christian marriage, which has been consummated, can not be dissolved by any human authority or for any reason except by death.

To what has been said under can. 1013 there is little to be added. The *indissolubility* of a consummated Christian marriage (*ratum et consummatum*) was defended since at least the tenth century. Before that time we find some canons of particular synods, like those of Vermery (1752) and Compiègne (1757) which might be interpreted in the sense of a mitigated divorce.[1] The Penitential Books do not distinguish clearly between simultaneous and successive polygamy.[2] It is probable that the bishops could not strictly enforce the Christian ideal of marriage among semi-barbarous tribes. The case

1 *Verm. Syn.*, cc. 5, 9; *Comp.*, cc. 6, 9, 16.

2 Wasserschleben, *Die Bussord.*, pp. 148, 197.

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proposed by St. Boniface and solved by Gregory II, in 726, looks like an accommodation to the circumstances of a newly converted country and is perhaps the first example of a solution of an unconsummated marriage by papal intervention.[3] A somewhat wavering attitude in matters of indissolubility is still noticeable at the time of Alexander III (1159–1181), who mentions diverse customs. However, it is evident that, though "some Roman Pontiffs appeared to think differently," their decisions never partook of the nature of an infallible decree or a dogmatic definition.[4]

After the twelfth century, however, the dissentient voices are hushed, and the indissolubility of a valid Christian marriage which had been perfected in its typical significance by the conjugal act, was strenuously defended.[5] Besides the cases brought before the Roman Pontiffs by Lothair (855–869), Philip I (1060–1108), Philip Augustus (1180–1223), Charles V (1364–1380) by the King of Aragon under Clement IV, by Henry VIII of England, and finally the famous case of Napoleon I under Pius VII, should convince any unbiased student of the firmness of the Apostolic See in this important matter.

The canon says: by no *human power* may such a marriage be dissolved. This comprises the Apostolic See also, as the Pope is the supreme lawgiver in matters purely ecclesiastical. But the canon is intended as a silent rebuke and reminder to the *civil power,* which has nearly everywhere made laws favoring divorce.

3 C. 18, C. 32, q. 7; Zehetbauer, *Das K.-R. bei Bonifatius,* 1910, p. 128.

4 *Summa Magistri Rolandi,* ed. Thaner, pp. 14, 187, 200; c. 3, X, IV, 4; *Summa Bernard. Pap.,* ed. Laspeyres, p. 298; Wernz, *l. c.,* IV, p. 525 (1 ed.).

5 Bened. XII, ann. 1341, prop. 102 *Armen. damn.; Trid.,* sess. 24, can. 7, *de sacr. mat.;* Leo XIII, "*Arcanum,*" Feb. 10, 1880.

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CAN. 1119

MATRIMONIUM RATUM

Matrimonium non consummatum inter baptizatos vel inter partem baptizatam et partem non baptizatam, dissolvitur tum ipso iure per sollemnem professionem religiosam, tum per dispensationem a Sede Apostolica ex iusta causa concessam, utraque parte rogante vel alterutra, etsi altera sit invita.

An unconsummated marriage between two baptized persons, or between a baptized and a non-baptized person, is dissolved by solemn religious profession and by a dispensation granted by the Apostolic See for a just cause, if requested by both parties, or by only one, even though against the will of the other.

The historical development concerning religious profession and papal dispensation was uneven, the former being acknowledged earlier than the latter. The school of Paris opposed the *school of Bologna* with regard to the firmness of the matrimonial tie.[6] The latter maintained that a ratified but unconsummated marriage was destitute of the sacramental character and therefore liable to dissolution. The *school of Paris* ascribed the sacramental character and indissolubility to the *matrimonium ratum tantum.* Alexander III, as *Magister Rolandus,* adhered to the Bologna theory, but as Roman Pontiff paved the way for a golden mean by upholding the sacramental and truly contractual character of a ratified marriage, and at the same time maintaining the possibility of a dissolution of such a marriage by reason of a vow, affinity succeeding marriage, or complete mental

6 Cfr. Esmein, *l. c.*, p. 95 ff.; Freisen, *l. c.*, p. 190 ff.; De Smet, p. 227 f.

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estrangement.[7] The religious vow was formally acknowledged by the former Master in the well-known Decretal "*Ex publico*" (c. 7, X, III, 32) and was, though perhaps reluctantly, sanctioned by Innocent XII, A. D. 1210.[8]

Not quite so rapid was the acknowledgment of the *papal power of dispensing* from a ratified marriage. For before the beginning of the fifteenth century there are no papal documents to be found which refer to a dispensation in the case of a merely ratified marriage. Yet it may safely be maintained that some canonists (though not the theologians), recognized papal authority *in casu*.[9] This was done at the reunion councils of Lyons (II) and Florence, and in a decree of the Tridentine Council.[10] The Greeks were more inclined to admit divorce because of fornication, and prompt to accuse the Latin Church of excessive rigor. After the Council of Trent papal dispensations from such marriages are not rare, as the decisions of the S. C. Concilii sufficiently prove.

The Code says: (1) that a marriage which is *only ratified,* but not consummated, may be dissolved. Hence the fact of non-consummation must be proved, which requires a special procedure.[11] Note that consummation here means the conjugal act in the married state; a fornicarious intercourse before marriage is not styled consummation, but the *copula* must be repeated after marriage.

(2) The marriage may be contracted *either* between two baptized persons *or* between one baptized and the other not baptized. There is no further species mentioned, as for instance, a legitimate marriage, *i.e.,* one contracted lawfully between two non-baptized persons.

7 Compil. I, cc. 4, 5, X, IV, 4; c. X, III, 32; c. 2, X, IV, 13.

8 C. 14, X, III, 32; Wernz, *l. c.,* IV, Vol. II, p. 605 f.; n. 696.

9 De Smet, *l. c.,* p. 229.

10 Sess. 24, can. 7, *de sac. mat.*

11 Cfr. can. 1960–1992; Wernz, *l. c.,* IV, Vol. 2, p. 619.

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Is the following case included? James and Gemma married lawfully whilst both were not yet baptized, and consummated their marriage. Later, Gemma was baptized (in the Catholic Church), and the marriage between her and James was not consummated after her Baptism. We are aware of the controversy which exists among authors on this point. The wording of our text excludes neither opinion. Some say that the marriage in question was consummated, and consummation affects the whole marriage, as long as the bond lasts, because consummation, whether before or after Baptism, signifies the union between Christ and his Church through the Incarnation, and a union thus perfected is not weaker than a ratified marriage between baptized persons. Besides there are no instances in which the Roman Pontiff dispensed from a consummated marriage of infidels who were afterwards converted.[12] Thus the champions of the negative opinion. The defenders of the affirmative view employ exactly the opposite arguments. They say that a ratified marriage between Christians constitutes a stronger tie (*fortius vinculum*) than a consummated marriage between infidels. But when they are asked to produce documents proving that the popes exercised their power in such cases, they stretch the words of papal decisions. We rather incline to deny the power of dissolving in such cases. What, we may ask, is wanting to such a marriage? Baptism alone is wanting in the order of ratification. After Baptism you may as well call it *ratum et consummatum,* since the lawful consummation cannot be

12 Cfr. Bened. XIV, *De Syn. Dioec.*, XIII, 21, 4 f.; Feije, *De Impedimentis et Dispensat. Mat.*, 1885, ed. 3, p. 502, n. 602; Wernz, IV, Vol. II, p. 628; De Smet, *l. c.*, p. 229. But the faculty granted by Pius VII, Feb. 22, 1801 (*Collectanea S. Sedis*, Paris, 1880, n. 962, p. 433) would insinuate the fact of dispensation: "*copula carnalis praecesserat, sed nunquam subsecuta erat.*"

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undone by Baptism. Yet we must confess that the text of can. 1119 seems to favor the contrary opinion, because the wording "*non consummatum inter baptizatos*" seems to lay stress on consummation *after* Baptism, and in that case even a marriage consummated before Baptism could be dissolved, not only by the Pauline privilege, as was heretofore generally assumed, but also by religious profession and papal dispensation.

(3) *Solemn religious profession,* then, by law dissolves a marriage as described. The profession required is solemn perpetual profession acknowledged as such by the Church. It is pronounced only in religious orders. No other kind of vow or profession has the effect here in question.[13] Hence the simple vows taken in the Society of Jesus have not the power of dissolving marriage.[14]

Of course, it is understood that the solemn profession is valid and not dispensed from. As a consequence, the moment one party pronounces the formula of profession, which is accepted by the lawful superior, the other party is free and may remarry. This rule works, we may say, automatically, so that no ecclesiastical court need intervene. This is meant by the phrase *ipso iure.* All that is needed is that the party remaining in the world be apprized of the fact of the solemn religious profession of the other.[15]

But there is another meaning attached to the expression "*ipso iure.*" It refers to the general or common ecclesiastical law which introduced this mode of dissolution in favor of religious profession. As the solemnity of the vows, so also this impediment set up by positive law

13 S. C. super Statu Regul., Jan. 25, 1861.

14 Wernz, IV, Vol. II, p. 627, n. 698.

15 If a party not sufficiently informed of the other party's solemn profession would contract marriage with a third after this profession, the marriage would be valid, but illicit.

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exists by ecclesiastical institution. It would be useless to search the Bible for a text to support the divine law which some [16] have assumed. The fact that before Alexander III no pontiff gave an authentic decision in this matter should suffice to prove that the law is of ecclesiastical institution.

(4) The second mode of dissolving a non-consummated marriage between baptized persons, or a mixed marriage, is by *papal dispensation.* This power, vicarious and instrumental as it is called, cannot be validly and licitly exercised without a *just reason.* Therefore the Pope is bound by *iustae causae,* otherwise the dispensation is invalid. The reason is that the indissolubility of marriage is founded on natural and divine law, to which the Pope himself is subject,[17] and therefore he may use his power only as a steward of God, or as an instrument in the hands of God.

The following reasons are *iustae causae* of more or less frequent occurrence:

(a) Proof that one party did not have the intention of binding himself or herself forever to the other; or that deception and fraud were practiced; or that fear and violence were used in order to force the reluctant party.

These reasons may be said to be derived from lack of *freedom and perfect consent,* though there is no agreement as to terminology.[18]

(b) *Impotency* of either party is frequently alleged in cases brought before the Roman tribunals; whence may follow aversion for the *state of virginity,* to which one party might be forced by the impotency of the other.[19]

16 Wernz, *l. c.,* p. 624, has given much attention to the refutation of the divine right theory.

17 Sanchez, *l. c.,* l. II, disp. 15, n. 6; cf. n. 1, where he justly observes: "*in hac quaestione satis confuse loquuntur doctores.*"

18 Richter, *Trid.,* p. 283, n. 141, n. 143; *A. Ap. S.,* V, 553 ff.

19 Richter, *ib.,* nn. 139, 147, 150;

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(c) A desire to save the *good name* and reputation of the other party, or to avoid family troubles and feudal quarrels, or to keep up one's social status or rank.[20]

These are the reasons most frequently advanced in petitions for dispensation "*super matrimonio rato non consummato.*" The fact of non-consummation must be proved, otherwise all procedure is useless. Of this we shall hear more under Procedure in Matrimonial Cases (*infra*).

(5) A *petition* for dissolution may be submitted by both parties or by one party only, the other refusing to acquiesce. In the latter case the proof of non-consummation will be more difficult, especially if the other party is contumacious.

This may suffice for the present canon. We will only add that whether the term "*dispensation*" is to be taken in the strict or in a wider sense, is immaterial to the canonist, though we may interpret it as a declaration to the effect that in any particular case the marriage may be dissolved, and is dissolved, for a just reason by the authority set up by God.[21]

THE PAULINE PRIVILEGE

After declaring the absolute indissolubility of a Christian marriage validly contracted and consummated, and pointing out two ways of dissolving a merely ratified marriage, the Code proceeds to lay down rules concerning what is called the *privilegium fidei.* This is also styled the *Pauline privilege* because it is contained in 1 Cor. VII, 12–15, and is therefore said to have been

to this may be added contagious disease; cfr. Sanchez, *l. c.*, II, disp. 16, n. 5 f.

20 Richter, *ib.*, n. 145; but in one case of mere disparity of condition and nobility the S. C. would not dispense. Jan. 23, 1734 (Richter, *l. c.*, n. 142).

21 Wernz, *l. c.*, IV, Vol. II, p. 618.

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promulgated by the Apostle of the Gentiles, although in fact it was granted by the Lord Himself in favor of faith.[22] It would seem to follow that this privilege, though promulgated by private authority, (" for the rest I speak, not the Lord ") is based upon divine law.

Traces of the use of the Pauline privilege are very rare in ancient times. Certain apparent allusions to it in the writings of Tertullian [23] and St. Augustine are doubtful. The latter [24] speaks of forsaking an infidel wife, but is silent about the solution of the marriage tie. *Gratian* [25] refers to the matter in a rather confused way. The subject is treated more plainly by Bernardus Papiensis [26] and especially by Tancred,[27] who distinguishes three reasons for which contumely against the Creator would dissolve a marriage: — cohabitation with contempt of the Creator, danger of being drawn into infidelity, and danger of mortal sin. The *Decretals* of Gregory IX mention the case in title 19, but in a cursory way, without emphasis. A wider range was given to the Pauline Privilege after the discovery of the New World. Paul III, with his constitution " *Altitudo,*" June 1, 1537, opened a new series of papal documents.[28] Since his day innumerable decisions have been given by the Holy Office and instructions issued by the S. C. de Propaganda Fide. These decisions and instructions shall be our main guide.

22 Bened. XIV, *De Syn. Dioec.*, VI, 4, 3; S. C. P. F., March 5, 1816 (*Coll.*, n. 704).

23 *Ad uxorem*, c. 2.

24 C. 4, C. 28, q. 1.

25 C. 28.

26 *Summa de Mat.*, ed. Laspeyres, p. 291.

27 *Summa de Spons. et Mat.*, ed. Wunderlich, p. 44.

28 Cfr. can. 1125, and appendix to the *Codex Iuris Canonici*, where the text of all three is inserted.

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NATURE OF THE PAULINE PRIVILEGE

CAN. 1120

§ 1. Legitimum inter non baptizatos matrimonium, licet consummatum, solvitur in favorem fidei ex privilegio Paulino.

§ 2. Hoc privilegium non obtinet in matrimonio inter partem baptizatam et partem non baptizatam inito cum dispensatione ab impedimento disparitatis cultus.

A legitimate marriage between non-baptized persons, even though consummated, is dissolved in favor of the faith by the Pauline Privilege.

The Pauline privilege is expressed in *1 Cor. VII, 12–15:* "If any brother hath a wife that believeth not, and she consent to dwell with him, let him not put her away. And if any woman hath a husband that believeth not, and he consent to dwell with her, let her not put away her husband. . . . But if the unbeliever depart, let him depart. For a brother or sister is not under servitude in such cases. But God hath called us in peace."

Note the expressions: "consent to dwell with," "depart," and "unbeliever," around which the privilege clusters. The *favor of faith* is insinuated by the words: "not under servitude" and "peace."

(1) The *faith* in favor of which this privilege is asserted, is that of St. Paul and his brothers and sisters, therefore, the *Christian faith.* It is evident that the legislator means, first and above all, the *Catholic faith* (cfr. can. 1123). In matter of fact all the decisions [29] of the Roman congregations were prompted by Catholic mis-

29 At least the many which we perused never mention a heretical baptism. The reason is evident: non-Catholics do not appeal to the Pope.

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sionaries and prelates, and given for converts who had embraced the Catholic faith.

(2) The marriage must have been contracted between non-baptized persons, or, in the words of the Apostle, between *unbelievers*. This is an important point, for if there is a *doubt* whether one of the parties was baptized, the privilege cannot be applied to him or her. Here is a case in point. Methodist preachers had been working in Oceania and baptized some of the inhabitants. The baptisms were of doubtful validity. When one of the women thus doubtfully baptized wished to embrace the Catholic faith, her husband refused to dwell with her. The question arose: May he be considered an unbeliever and the Pauline Privilege applied to her? The answer was no.[30] She could not simply be called an unbeliever. If both parties were unbelievers, the canonist would not trouble himself about them. Therefore, one must be *converted,* or rather baptized validly, because by baptism one enters the ranks of believers. *A catechumen, i.e.,* one who is taking instructions in the faith, is not yet entitled to that privilege, as has been decided [31] and is re-affirmed in the next canon.

(3) St. Paul uses the phrases: "to consent to dwell together," and, negatively, "to depart." If *departure* takes place, it is an evident sign that the unbeliever is unwilling to dwell under one roof with the believer. It may happen that the infidel party would consent to cohabit with

30 S. O., Dec. 18, 1872 (*Coll. P. F.*, n. 1392, Vol. II, p. 59): *"Utrum pars conversa propter gravissimum dubium de baptismo in haeresi recepto aequiparari possit parti ab infidelitati conversae, et propter Paulinum privilegium ad alias nuptias transire. S. C. Respondit: Negative. . . . Utrum baptismus dubius censendus sit validus in ordine ad matrimonium etiam in eo sensu, quod invalidum sit matrimonium inter haereticum dubie baptizatum, et infidelem propter impedimentum disparitatis cultus. S. C. respondit: Affirmative."*

31 S. C. P. F., Jan. 16, 1803 (*Coll.*, n. 665).

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the faithful spouse, but the latter would be subject to unpleasant and even sinful temptations from the part of the unbeliever. *Cohabitare sine contumelia Creatoris* means to live together without injury to faith and morals, or without offense to the Creator. No matter whether the unbeliever departs physically or morally from his converted partner, the privilege may be applied to the latter.

The unbeliever departs *physically,* (a) if he unjustly leaves his faithful consort who has given him no cause for departure; (b) if he contracts a marriage with another; (c) if he is detained by another consort (*a secundo marito*) or by a creditor for unpaid debts; (d) if he departs out of hatred for the faith of his consort.[32]

Moral departure might be brought about by the following reasons: (a) refusal of the unbeliever to live with the believing party without blaspheming the name of Christ,[33] or in other words only under the condition that the unbeliever could freely blaspheme the Christian name; (b) refusal to relinquish concubinage, which is an offense to God;[34] (c) refusal to permit the Catholic education of the offspring;[35] (d) attempts to seduce the Catholic party to idolatry;[36] (e) temptation on the part of the husband (not father- or mother-in-law) to grievous sins against conjugal chastity;[37] (f) continual dissensions and quarrels, for which the faithful party has given no cause, or for which he or she has made satisfaction and amendment; but this state must be serious and endanger salvation.[38]

32 S. O., July 4, 1855; June 12, 850; Aug. 5, 1759; P. F., Jan. 30, 1807 (*Coll. P. F.*, nn. 1114, 1044, 421, 690).

33 S. O., July 4, 1855 (*Coll. cit.*, n. 1114).

34 *Ibid.*

35 S. O., Dec. 14, 1848; July 11, 1866 (*Coll. cit.*, nn. 1036, 1295).

36 S. O., Aug. 5, 1759 (*Coll.*, n. 421).

37 P. F., March 5, 1816 (*Coll. cit.*, n. 704).

38 S. O., Aug. 5, 1759; April 26, 1899 (*Coll. cit.*, nn. 421, 2044).

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Crimes committed by the faithful party before Baptism do not deprive him of the Pauline privilege; neither does he forfeit that right by crimes committed after Baptism, if they are not suspected by, or known to, the infidel party, because "when there is doubt, the verdict must be in favor of the faith." [39]

This, then, is the extent and nature of the Pauline privilege, granted in favor of the faith, which can be made use of only if the unbeliever does not wish to dwell with the faithful party, or at least not without offense to the Creator.

But, says § 2, this privilege *cannot be applied* to a marriage between a baptized and an unbaptized person contracted with a *dispensation* from the impediment of disparity of worship.[40] Hence if James was a Catholic and contracted marriage with Gemma, who was not baptized, having obtained a dispensation from the impediment of *disparitas cultus,* Gemma could not claim the Pauline privilege even though James should return to unbelief and she were willing to become a Catholic. Neither is the matrimonial tie solved when *both* consorts receive or intend to receive Baptism.[41] These are only preliminary requisites for dissolving a marriage contracted by both parties in unbelief; their marriage is not yet dissolved. The privilege requires some sort of legal verification to the effect that the required conditions are actually present. This process is called *interpellation.*

39 S. O., April 19, 1899 (*Coll.*, n. 2043).

40 S. O., March 5, 1852; July 4, 1855; Dec. 9, 1874 (*Coll.*, nn. 1070, 1114, 1427, ad 18).

41 S. O., July 11, 1866 (*Coll.*, n. 1295).

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CHARACTER AND NECESSITY OF INTERPELLATION

CAN. 1121

§ 1. Antequam coniux conversus et baptizatus novum matrimonium valide contrahat, debet, salvo praescripto can. 1125, partem non baptizatam interpellare:

1.° An velit et ipsa converti ac baptismum suscipere;

2.° An saltem velit secum cohabitare pacifice sine contumelia Creatoris.

§ 2. Hae interpellationes fieri semper debent, nisi Sedes Apostolica aliud declaraverit.

§ 1. Before the converted and baptized party may proceed to a new marriage, he must, with due regard to the conditions mentioned in can. 1125, inquire of the unbaptized party:

1.° Whether she, too, will be converted and receive Baptism;

2.° Whether she would at least consent to peaceful cohabitation without offense to the Creator.

§ 2. These interpellations must always be made unless the Apostolic See has declared otherwise.

From § 1 it is evident that this interpellation must be made *after* Baptism. This injunction has been insisted upon time and again,[42] and must be considered *the rule*. However, in extraordinary cases, the Holy Office has granted *faculties* to make the interpellation during the time of the *catechumenate*. In these extraordinary cases the whereabouts of the infidel party were entirely unknown or he or she was so far away that interpellation would have been uncertain and difficult.[43]

Note that faculties are required, and compare what is said under can. 1125.

42 S. O., April, 1859 (*Coll.*, n. 1175).

43 S. O., June 3, 1874 (*Coll.*, n. 1415).

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The interpellation must be *twofold:* (a) whether the infidel party would be willing to be converted and receive Baptism; (b) whether peaceful cohabitation would be consented to without offense to God. What the latter phrase means has been explained above.

This double question must be put even if evidence is at hand to show that the infidel party has no intention to be converted.[44] Neither is the double inquiry to be omitted in case a divorce has taken place and another marriage contracted according to civil law.[45]

The *necessity* of the twofold interpellation, as stated in § 2, has been emphatically inculcated by Benedict XIV [46] and by the Holy Office. It obliges both parties, husband as well as wife, with equal force.

It may have caused some surprise that the text says "*declaraverit,*" where we should have expected "*dispensaverit.*" But there is a solid reason for the term chosen. For the necessity is by *divine precept,* or "according to Apostolic sanction." The interpellation, therefore, is not to be looked upon as a mere formality or judiciary form. Benedict XIV's emphatic statement to this effect was adopted by the Holy Office,[47] which has declared that the *opinion* that the interpellation may be omitted whenever it cannot be made or would prove useless, *cannot be called safe in practice,* and insists upon instructing neophytes as to their obligation on this head.[48] Here, then, is the secret of the *declaraverit:* since the interpellation is part and parcel of the divine law, and the Holy See does not claim the power of dispensing from that law, the Code

44 P. F., March 5, 1816; Jan. 17, 1836 (*Coll.*, nn. 704, 845).

45 S. O., June 18, 1884; July 17, 1850 (*Coll.*, nn. 1620, 1045).

46 "*Apostolici ministerii,*" Sept. 16, 1747.

47 S. O., June 12, 1850; July 4, 1855; Sept. 16, 1824 (*Coll.*, nn. 1044, 1113, 784).

48 Bened. XIV, *De Syn. Dioec.*, VI, 4; XIII, 21; S. O., June 20, 1858 (*Coll.*, n. 1162).

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has logically adopted the term *declare,* not *dispense.* With this explanation in view, if we have used or shall use the term *dispense,* let it be understood as the Apostolic See wishes it to be understood.

CAN. 1122

MODE OF INTERPELLATION

§ 1. Interpellationes fiant regulariter, forma saltem summaria et extraiudiciali, de auctoritate Ordinarii coniugis conversi, a quo Ordinario concedendae sunt quoque coniugi infideli, si quidem eas petierit, induciae ad deliberandum, eo tamen monito, fore ut, induciis inutiliter praeterlapsis, responsio praesumatur negativa.

§ 2. Interpellationes etiam privatim factae ab ipsa parte conversa, valent, imo sunt etiam licitae, si forma superius praescripta servari nequeat; hoc tamen in casu de ipsis, pro foro externo, constare debet duobus saltem testibus vel alio legitimo probationis modo.

§ 1. The interpellations should, as a rule, be made at least in summary and extrajudicial form with the authority of the Ordinary of the converted party. The same Ordinary may grant to the unbelieving party, who asks for it, time to deliberate,— a respite,— under the explicit condition, however, that failure to reply within the term conceded will be regarded as a negative answer.

§ 2. Private interpellations made by the converted party are valid, and also lawful, if the form prescribed above cannot be followed; but in that case evidence that the interpellation has been made must be given by at least two witnesses or in some other legal form.

§ 1 explains the *canonical mode of interpellation.* We

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say *canonical,* not *judicial,* because the text admits of a summary and extrajudicial form of interpellation. But canonical procedure is not prescribed in all its rigor. Hence the regular form and order observed in canonical trials, presided over by a judge, with plaintiff and defendant, sworn witnesses and citations, etc., is not absolutely necessary. But a summary procedure is required and suffices.[49] Hence the episcopal court should at least summon the infidel party to appear or to send an answer, if possible under affidavit. What was formerly[50] prescribed concerning the posting of the summons at the church door may now be supplied by an advertisement in the newspapers, or by a letter sent by the episcopal court. In this letter a certain time must be set for answering the questions, which should be styled *peremptory,* so that the party may know that delay in answering is tantamount to forfeiture of any further claims. For, as the Regula Juris in 6° says: "Delay, if personal, hurts only the person concerned,"[51] because a personal or regular delay, especially when the debtor is admonished by the creditor to pay within a certain time, is culpable and imputable to the culprit.

Private interpellations may validly be made by the parties themselves.[52] In that case two witnesses must either hear the question, or see the instrument (paper) that was sent to the other party, in order to have a proof for the interpellation and to prevent interference from the infidel party in a new marriage or challenge of its validity. An interpellation made by a private party in a case that came before the Propaganda[53] ran like this:

49 S. O., June 11, 1768 (*Coll.*, n. 430).

50 *Ibid.*

51 Reg. 26: "*Mora sua cuilibet nociva est*"; cfr. Reiffenstuel, *in h. reg.*

52 P. F., July 21, 1841 (*Coll.*, n. 929); Gasparri, *De Mat.*, n. 1089.

53 P. F., *ibid.*

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"Will you take me again as your wife?" The answer was: "Go where you please." This was considered a sufficient interpellation. A mere bill of divorce or ejection from the home would be insufficient; even if the divorce papers could be exhibited, the interpellation must still be made, if at all possible.[54] *An interpellation once made is sufficient,* even in case the faithful party puts off marriage for a considerable time. But if the interpellation was dispensed with, it must be made, or the dispensation be renewed in case marriage is delayed for more than one year.[55] For charity's sake it may be made several times.[56]

EFFECT OF INTERPELLATION

CAN. 1123

Si interpellationes ex declaratione Sedis Apostolicae omissae fuerint, aut si infidelis eisdem negative responderit expresse vel tacite, pars baptizata ius habet novas nuptias cum persona catholica contrahendi, nisi ipsa post baptismum dederit parti non baptizatae iustam discedendi causam.

If the interpellations were omitted by virtue of a declaration of the Apostolic See, or if the infidel party has either explicitly or tacitly given a negative answer to them, the baptized party may contract a new marriage with a Catholic, unless he or she has, after Baptism, given just cause to the infidel party for departing.

54 P. F., March 5, 1816 (*Coll.*, n. 704).
55 P. F., June 26, 1820 (*Coll.*, n. 743).
56 S. O., June 12, 1850 (*Coll.*, n. 1044).

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CAN. 1124

Coniux fidelis, licet post susceptum baptismum denuo matrimonialiter cum parte infideli vixerit, ius tamen novas celebrandi nuptias cum persona catholica non amittit, ideoque potest hoc iure uti, si coniux infidelis, mutata voluntate, postea discedat sine iusta causa, vel iam non cohabitet pacifice sine contumelia Creatoris.

Although the baptized party has renewed marital relations with the infidel party after Baptism, he or she does not thereby lose the right to contract a new marriage with a Catholic, and that right may be used later if the infidel, having changed his mind, withdraws without a just cause, or refuses to cohabit peacefully without blaspheming the Creator.

These two canons manifestly complement each other, for both treat of the *effect of the Pauline privilege, viz.*, a new marriage.

§ 1. The first canon mentions the *declaration* of the Holy See, in virtue of which the interpellation was omitted.

(1) Interpellation in case of *polygamy* turns only about *one question, viz.:* whether the other party will be converted. This is done in order to cut short all superfluous interrogations, especially since there may be a doubt whether the marriage was valid precisely on account of polygamy or polyandry.[57] This may safely be called a general declaration, and therefore requires no special faculty.

(2) There is another *twofold* class of cases in which dispensation was required:

[57] S. O., March 28, 1860; June 20, 1866; May 19, 1892; Sept. 5, 1855 (*Coll. P. F.*, nn. 1188, 1293 [I, p. 716], 1796, 1117 polyandry).

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(a) *Ordinary cases,*[58] for which habitual faculties of dispensing were granted to the bishops and vicars apostolic. Ordinary cases are those in which it is impossible to find out the whereabouts of the infidel consort, or in which it is ascertained after an extrajudicial and summary investigation that the absent spouse can not be interpellated. Thus it may happen that no messenger can reach the place to which the other party has gone; or that the distance is so great that no message can be sent; or the polygamous party no longer remembers whom he first married; or the infidel party became insane and therefore could not be asked.[59]

(b) *Extraordinary cases,* "when the infidel party can be reached, but interpellation can not be made without serious damage to the faithful party or danger to Christians."[60] Damage threatened to, or feared by, the neophyte himself was declared insufficient for applying the faculty of dispensation.[61] There must be a real disadvantage, which will weigh all the heavier if it is combined with danger to a community. Note that most of the cases here cited were reported from missionary countries, China, Bengal, etc.

For the practical application of the Ordinary's power, we refer to the concluding paragraph of can. 1127. Here only note that the Constitution of Benedict XIV, "*In suprema,*" Jan. 6, 1754, may not be cited as conferring

58 S. O., Nov. 29, 1882 (*Coll.*, n. 1581): "*Ordinarius casus . . . tunc evenit, quando scilicet adhibitis antea omnibus diligentiis etiam per publicas ephemerides, ad reperiendum locum ubi conjux infidelis habitet, iisque in irritum cessis, constet saltem summarie et extrajudicialiter coniugem absentem moneri legitime non posse, aut monitum infra tempus in monitione praefixum, suam voluntatem non significasse. . . .*"

59 "*Altitudo,*" of Paul III; "*Romani Pontificis,*" of Pius V; S. O., June 8, 1836; Nov. 22, 1871 (*Coll.*, nn. 848, 1377).

60 S. O., Nov. 29, 1882 (*Coll.*, n. 1581).

61 S. O., Nov. 21, 1883 (*Coll.*, n. 1607); this faculty was given for a certain number of cases.

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that faculty, for said constitution was of a strictly local, or personal nature, as it was given to a house of converts at Venice,[62] and is not mentioned in can. 1125.

Can. 1123 admits also an *express* or a tacit *negative answer*. Here it must be noted that if the answer to the first question (whether the infidel party consents to be converted) is negative, the second question concerning peaceful cohabitation must be put; and after a negative answer the faithful party is entitled to contract a new marriage. This is the effect of an express or explicit negative answer. *A tacit negative* answer would be lapse of the term assigned for answering, no matter whether the delay was caused by malicious and intentional neglect or by physical or moral impossibility.[63] After such an answer has been received, the favor must be granted, and the baptized party is free to marry again. However the canon lays down a condition: unless he or she has given to the infidel party just cause for desertion. A *just cause* would be adultery known to the infidel party, or leading a scandalous life, or serious neglect of the marital duty and education.[64] Therefore concubinage must be given up because incompatible with Christian morals.[65]

Lastly the canon appears to exclude a marriage of the converted party with any one but a *Catholic*; that is to say, the convert must marry a Catholic. This must be considered *as a rule,* which, however, admits of exceptions. For there are several cases related in the *Collectanea P. F.* in which a dispensation from the impediment of disparity of worship was granted. Thus a woman who had married (?) a second husband, who himself

62 The *Coll. P. F.* placed it in the Appendix, n. 2252.

63 S. O., June 12, 1850 (*Coll.*, n. 1044); the supposed wife was held captive by another.

64 S. O., April 19, 1899 (*Coll.*, n. 2043); June 20, 1866 (*Coll.*, n. 1293, I. p. 716).

65 S. O., March 28, 1860 (*Coll.*, n. 1188).

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had dismissed his first wife, and borne him children, was granted a dispensation even though the husband refused to be converted.[66] And one instruction of the Holy Office[67] says, in general terms, that if out of a number of concubines who are heretics, one is to be taken as the lawful wife, with renewal of the consent, care should be taken that she become a Catholic, *lest a dispensation* from mixed religion should be necessary, which for just reasons is granted. Therefore our canon states a rule, but does not exclude exceptions.

Can. 1124 extends the privilege to the case where marital relations have been resumed between an infidel and a baptized party *after the latter's Baptism*, but the infidel *changes his* mind and vexes the convert with machinations against the faith, or tries to get him to practice idolatry, or makes attempts against conjugal loyalty, or contracts a new marriage. Here the *contumelia Creatoris* is *verified*,[68] and in all such cases the baptized party is entitled to make use of the Pauline privilege, even though there are children born after his or her Baptism. This holds even if the baptized party committed a crime, provided only that this crime is not the cause of the changed attitude of the infidel party.[69]

THREE PAPAL CONSTITUTIONS

CAN. 1125

Ea quae matrimonium respiciunt in constitutionibus Pauli III *Altitudo*, 1 Iun. 1537; S. Pii V *Romani Pontificis*, 2 Aug. 1571; Gregorii XIII *Populis*, 25

66 S. O., Sept. 12, 1855 (*Coll.*, n. 1118).

67 March 28, 1860.

68 S. O., Aug. 5, 1759; July 4, 1855; July 11, 1866; S. C. P. F., March 5, 1816 (*Coll.*, nn. 421, 1114, 1295, 704).

69 S. O., April 19, 1899 (*Coll.*, n. 2043).

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Ian. 1585, quaeque pro peculiaribus locis scripta sunt, ad alias quoque regiones in eisdem adiunctis extenduntur.

In whatever concerns marriage, the constitutions of Paul III, "*Altitudo,*" of June 1, 1537, of St. Pius V, "*Romani Pontificis,*" of Aug. 2, 1570, of Gregory XIII, "*Populis,*" of Jan. 25, 1585, though given for particular places, are [hereby] extended to all countries situated in the same circumstances.

This canon must be looked upon as a declaration, and therefore as inducing general or common law.[70] The constitution of *Paul III* was given for the West Indies and South America. The part that concerns us reads: As to marriages, we enact that those who had several wives before their conversion, but do not remember which they married first, may after their conversion choose the one whom they love best and contract marriage with her by expressing the usual consent; but those who remember whom they married first, must retain this one and dismiss the others. We furthermore permit them to marry validly persons related to them in the third degree of consanguinity or affinity. *St. Pius V's* Constitution, also directed to the Indies, considers the case of polygamy. One husband had many wives and dismissed several. After Baptism he was allowed to keep the one who was baptized together with him, whether she was his legitimate wife or not. To do away with all scruples on the part of bishops and missionaries, the Pope allowed these Indians to keep the woman who had received baptism as the lawful wife. That this favor was granted for the Indians only, and could not be extended to other regions without intervention by the

70 The constitutions themselves are reprinted in the appendix to the Code.

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Apostolic See, was duly recognized by the Archbishop of Quebec, who implored Gregory XVI to grant such an extension.[71] It was granted. The decision has a peculiar interest. It refers directly to the constitution of Pius V, whereas the Holy Office distinguished two different cases, regardless of whether the first marriage was valid or not. If the first marriage contracted with wife No. 1 was valid, the husband has to retain her if she was also converted or consented to live with him without blasphemy of the Creator. But if the first marriage was invalid, and the subsequent valid,[72] the convert was allowed to choose from among his several so-called wives the one who was ready to be baptized or any other who was not formerly his wife, provided she was ready to be baptized and the consent was renewed. The decision added: If, in case of the first marriage being valid, the husband would not take the one he married first, but the second or third, because the first wife remained an infidel, he must renew the consent, and the Ordinary must apply the faculty of dispensing from an interpellation of the first wife if such interpellation could not be made or would prove useless.[73] This sounds like a modification or interpretation of an otherwise far-going Constitution. In matter of fact the Constitution of Gregory XIII was restricted to missionary countries (Angola, Ethiopia, Brazil, and India) and to Ordinaries and missionaries, especially of the Society of Jesus, who could dispense converts married before Baptism, enabling them to contract a Catholic marriage, though the pagan consort was still alive, without as much as asking the latter's consent or expecting an answer. But the Pontiff added that

71 S. O., June 8, 1836 (*Coll.*, n. 848).

72 *Ibid.*: "*ut dubitari possit matrimonia huiusmodi ad instar belluarum censenda esse.*"

73 Bened. XIV, *De Syn. Dioec.*, XIII, c. 21.

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evidence must be furnished, at least by summary and extra-judicial investigation, that the wife could not lawfully be interpellated or that, if interpellated, she could not answer within the time prescribed in the interpellation. Marriages thus contracted by converts were declared to be valid even if it should become known afterwards that the former consorts had been prevented from giving an answer and had been converted to the true faith at the time the second marriage was contracted. Here interpellation of some sort is required. What then are the distinctive characteristics of these three constitutions? Put in order they are:

Paul III	*Pius V*	*Gregory XIII*
Supposes polygamy.— First wife to be retained if remembered; otherwise the husband may choose the one whom he prefers, whether baptized or not.— New consent required.— No interpellation.	Supposes polygamy.— Man may retain any one of the women he has married, if she embraces the faith.— No consent prescribed.— No interpellation necessary.	Does not mention polygamy, but captivity of the infidel party. — Baptized party may marry any husband who is a believer, even though of another rite.— Summary interpellation.

From this juxtaposition it will easily be perceived that the most favorable interpretation is that of St. Pius. But at the same time it is the least canonical, stretching the privilege to its very limit, because it pays regard neither to the former marriage nor to interpellation. Paul III's constitution attempts to preserve a semblance of legitimate marriage, since it requires that the first wife must be retained, if remembered, and the consent renewed. A purer notion of the Pauline privilege is manifested by the constitution of Gregory XIII.

A difficulty remains as to the consent and the necessity of interpellation by divine right. As to the *consent* necessary for every marriage, clearly no pope could have

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the intention to dispense therefrom. Hence *if a marriage* contracted in infidelity was *valid* or legitimate, no *new consent* is required if the husband after Baptism retains his legitimate wife, *i.e.,* the one, as Paul III supposes, whom he married first. If, however, the marriage contracted in infidelity was *invalid,* either for lack of consent or on account of a condition which invalidated the substance of marriage, or by reason of an existing impediment of natural or divine law,[74] the husband after his conversion was allowed to marry another woman, who, according to St. Pius's constitution, must be a Catholic; and this marriage must be contracted by *renewed consent* and with due regard to the prescribed form.[75]

What about the *necessity of interpellation,* which Paul III and Pius V seem to disregard entirely? There can no longer be any doubt that their constitutions amount to a declaration,[76] and are not a relaxation, of the law. By a declaration the Pope merely explains the divine law which prescribes interpellation, declaring that in particular circumstances, for which the declaration is given, the law ceases to bind [77] in its whole latitude, as far as interpellation is concerned.

The new Code, in general terms, extends these constitutions to all countries where the *same,* not merely similar, *circumstances* prevail. Such is the case in pagan countries chiefly. Note that these circumstances must effect the *countries,* not merely persons, as the three constitutions were issued for particular countries, not cases. We

74 Divine or natural law prohibits polygamy, wherefore Pius V may be said to suppose these polygamous marriages to be invalid.

75 Feije, *l. c.,* n. 486, p. 358.

76 Pius V says: "*declaramus*"; Paul III: "*decernimus.*"

77 Feije, *l. c.,* n. 494, p. 373, adding however: "*Quoad necessitatem retinendi primam uxorem volentem saltem pacifice cohabitare.*" This addition does not save the Constitution of Pius V.

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scarcely believe that the U. S., or even our Indian Reservations, could claim to be included in this category.

FORMER MARRIAGE DISSOLVED

CAN. 1126

Vinculum prioris coniugii, in infidelitate contracti, tunc tantum solvitur, cum pars fidelis reapse novas nuptias valide iniverit.

The bond of a first marriage, contracted in infidelity, is dissolved only when the baptized party contracts a new marriage validly. The dissolution of the former bond takes place at the moment when the baptized party gives his or her consent to a new marriage. From that moment the infidel party is free.

This doctrine may be called certain, as there is no reason to doubt that the infidel party may validly contract a new marriage, although Benedict XIV entertained a doubt on this head.[78] It is a principle of common law, as the H. O. plainly states, that if the wife is freed from the conjugal tie, the husband also is freed, for the bond is mutual, and therefore the freedom of the one entails freedom for the other.[79] And this freedom certainly involves the liberty of contracting a new marriage. Or is perhaps the favor of faith to be understood as involving a necessary disadvantage to the unbeliever? This assumption would only cause hatred against religion. But if the baptized party does not *contract a new marriage,* the unbeliever is not free, but bound to celibacy according to ecclesiastical law. The following case is to the point.

78 Benedict XIV, "*Postremo mense,*" Feb. 28, 1747, § 58; but it appears as certain in S. O., Aug. 5, 1759; July 11, 1866 (*Coll.*, nn. 421, 1295).

79 S. O., Sept. 16, 1824 (*Coll.*, n. 784, I, p. 453).

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A Chinaman who sold his wife and married another, wished to embrace the faith. Interpellation showed that the first wife was ready to become a Catholic, but could not because detained by the man who purchased her. The decision of the Holy Office was that the Chinaman could not be baptized unless he dismissed his second wife, and the first wife was told to abstain from carnal intercourse with her second husband as a condition of Baptism.[80]

Note the word "*tantum*" in the text: it excludes entry into the religious state and the reception of holy orders, because the baptized person taking such a step would not be free from the marriage bond, and therefore neither would the infidel party, who consequently could not marry validly if his consort became a religious or received higher orders. Both these steps, moreover, would require an apostolic dispensation. The party who entered religion by profession, or received orders, would not be obliged to resume his relations with the other party after religious profession or ordination. On the other hand, if the infidel party became converted and baptized before the other made religious profession or received orders, it appears but just and reasonable to maintain that the party first converted should return to the other.[81] Whether the Pauline privilege may be applied in case one party joins a non-Catholic sect, is a canonically useless question, because the Holy See would hardly be consulted in such a case.[82]

80 S. O., Jan. 29, 1805 (*Coll.*, n. 680).

81 Feije, *l. c.*, n. 500, p. 378 f.

82 Feije, *l. c.*, n. 502, p. 381.

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PRESUMPTION IN DOUBTFUL CASES

CAN. 1127

In re dubia privilegium fidei gaudet favore iuris.

In doubtful cases the law favors the privilege of faith, i.e., the liberty of the convert to remarry. Such cases have been solved by the H. O. In one case there was a doubt as to the validity of former marriages, and the husband was allowed to choose any of the women he had married, or another, provided she embraced the faith.[83] In another case, from Sioux Falls, S. D., Indians claimed they had married several women to test their character but with no intention of contracting a real marriage. The decision was that if their statement were found true, the marriages were to be held invalid; if doubtful, and the women were not baptized, they were free to marry whom they pleased.[84] In another case it was decided that crimes committed before or after Baptism were not a sufficient reason for the departure of the infidel party.[85]

A peculiarly delicate case was this: The husband became converted and continued cohabitation, but on account of continual quarrels finally left his wife, asserting that he had never intended to take her for his wife. The latter after her conversion would not return to him. May the husband marry another? If persuasion is useless, and he has given no cause for the woman's departure or made satisfaction afterwards, and if he is in danger of eternal damnation, then, after formal interpellation, he may marry another.[86] That this is the limit

83 S. O., Dec. 9, 1874 ad 13 (*Coll.*, n. 1427).

84 S. O., May 19, 1892 (*Coll.*, n. 1796).

85 S. O., April 19, 1899 (*Coll.*, n. 2043).

86 S. O., April 26, 1899 (*Coll.*, n. 2044): "*et ad mentem.— Mens est ut in dubio iudicium sit in favorem fidei.*"

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of the privilege of faith is evident from the many clauses added in the rescript.

The question may be asked: What about the *faculties of our bishops* who enjoyed the right of dispensing with gentiles (see Form I, art. II)? The answer, we believe, should be as follows:

1. This faculty in the proper sense of the word is no longer given, since the Holy See claims *no dispensation,* but merely a declaration.

2. This *declaration* may be given only by the Holy See itself (Holy Office), but by no inferior authority.

3. In *ordinary cases,* which do not fall under the three constitutions, bishops must proceed according to the Code. Therefore:

(a) The marriage must have been contracted by both parties whilst they were certainly unbaptized; a dubious Baptism would not permit the application of the privilege;

(b) After Baptism, and not before, either a summary canonical interpellation authorized by the Ordinary, or a private interpellation duly proved, must be made to the infidel party concerning the two questions;

(c) In the case of *polygamists* one question: "whether the unbeliever will be converted," is sufficient;

(d) After a negative answer, or undue delay in answering, the baptized party may contract a new marriage, in virtue of which the former marriage is dissolved and the infidel party becomes free. No other intervention on the part of the Ordinary is needed.

4. The *extraordinary case* mentioned above (under can. 1124, § 1, n. 2, b) falls under the favor of law and may therefore be solved by the Ordinary.

5. Concerning the cases mentioned in the *three constitutions,* the Ordinaries are judges whether their coun-

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try is situated in the same circumstances as those for which said constitutions were given. But they are not allowed simply to make use of that privileged declaration if the circumstances concern particular parties only; for such an extension a new papal declaration would be needed.

Here we close the consideration of the Pauline Privilege. Its importance seemed to call for a somewhat extensive treatment. For the rest, we have followed a safe guide, and abstained as much as possible from the use of secondary sources.

ART. II

SEPARATION AS TO BED, BOARD, AND DWELLING-PLACE

CAN. 1128

Coniuges servare debent vitae coniugalis communionem, nisi iusta causa eos excuset.

Married people are bound to live together unless they have a just cause for separation.

This follows mainly from the secondary purpose of marriage, *i.e.*, mutual help, which requires a common dwelling-place. However, there may be weighty reasons that excuse from conjugal cohabitation. The Council of Florence (1439–1442) maintained the indissolubility of marriage against the Greeks, but admitted separation for reason of adultery.[87] The Council of Trent declared that such a separation was permissible either forever or for a certain time.[88] But the *reason* must be one which an ecclesiastical judge will acknowledge as *canonical* and which would justify him in pronouncing sentence of sep-

87 *Decretum pro Armenis*, Denzinger, *l. c.*, n. 597.

88 Sess. 24, can. 8, *de sacr. mat.*

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aration. This also obtains when a baptized person has contracted marriage with an unbeliever, with a dispensation from disparity of worship, and the latter proves to be an adulterer.[89]

Separation must be duly distinguished from *divorce* in the proper sense. The latter generally implies dissolution of the matrimonial bond. Such a dissolution is possible only, as the preceding canons have enacted, in cases of marriage contracted between baptized persons and not yet consummated, if either solemn religious profession is made, or a papal dispensation obtained. A legitimate marriage which has been duly consummated can be dissolved by the application of the Pauline privilege. *Separation* leaves the marriage bond intact.

ADULTERY A CAUSE OF SEPARATION

CAN. 1129

§ 1. Propter coniugis adulterium, alter coniux, manente vinculo, ius habet solvendi, etiam in perpetuum, vitae communionem, nisi in crimen consenserit, aut eidem causam dederit, vel illud expresse aut tacite condonaverit, vel ipse quoque idem crimen commiserit.

§ 2. Tacita condonatio habetur, si coniux innocens, postquam de crimine adulterii certior factus est, cum altero coniuge sponte, maritali affectu, conversatus fuerit; praesumitur vero, nisi sex intra menses coniugem adulterum expulerit vel dereliquerit, aut legitimam accusationem fecerit.

§ 1. If one of the spouses commits *adultery,* the other has cause for separation, either forever or for a time, and may therefore leave hearth and home. However, sep-

[89] S. O., July 4, 1855 (*Coll.*, n. 1114).

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aration is not permitted if the second party has consented to the crime, or been responsible for it, or has either expressly or tacitly condoned it, or committed the same crime.

(1) *Adultery,* to be a cause of separation, must be certain and consummated by carnal intercourse.[90] A mere suspicion would not be sufficient,[91] but a strong presumption would. Such a presumption would be if the wife were found or seen with another man in a very compromising position.[92] But some sort of proof is required. Here it may be remarked that jealousy is a fertile motive of suspicion, which should not be accepted by an ecclesiastical judge. Fornication committed before marriage is not adultery.[93]

(2) But although one party may have committed adultery (which would of itself be a sufficient and canonical reason for dismissal) yet if any one of the four conditions mentioned in can. 1129, § 1, is present, the right of dismissal ceases. These conditions are:

(a) If the so-called innocent party has *consented* to the other's adultery. This would be the case if the husband would deliver his wife to a friend or relative for the purpose,[94] or if he would, as it were, sell her for money. But we believe that even in that case a formal or express consent is required, because no one may be supposed to deprive himself of the exclusive right conferred by marriage.

(b) If one party has *given cause* to the other for committing adultery. This happens if the husband does

90 Some, *v. g.* Feije (*l. c.*, n. 579, p. 464) require "formal" adultery, but we fail to see the necessity of adding that adjective, since a validly married person cannot commit simple fornication.

91 c. 2, C. 32, q. 1; c. 23, C. 32, q. 5, etc., all require proof.

92 C. 12, X, II, 23: *solus cum sola, nudus cum nuda.*

93 C. 25, X, II, 24.

94 C. 6, X, IV, 13.

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not support his wife decently, so that she is compelled to seek a livelihood by improper means;[95] or if he deserts her,[96] or if the wife would have frequent *lapsus carnis* with others, although perhaps not amounting to real adultery;[97] or if she would unreasonably refuse her husband the *debitum*.

(c) If the so-called innocent party would *also commit adultery*, and would not purge himself or herself of that imputation;[98] because "equal crimes are wiped out by mutual compensation."[99]

(d) If no *express or tacit condonation* or pardon has followed. The latter case is explained in § 2 of our canon which says: Adultery is *condoned tacitly*, if the innocent party has freely had marital relations with the adulterous party after knowing of the adultery; *condonation* is *presumed* if the innocent party does not expel or leave the guilty party or bring the case into court within six months.

Concerning reconciliation or condonation two rules may be regarded as certain: 1. The husband is not obliged to be reconciled to his adulterous wife, and, 2. He may, if he wishes, receive her back into his confidence.[1] The same rules apply to the wife, although the text[2] and the authors mention her case only for reasons which are more or less physiological. But the fact that marriage rights are mutual and equal must not suffer obscuration. Besides, a strict obligation on the part of the husband to dismiss his adulterous consort cannot be solidly proved.[3] Therefore our Code admits reconciliation. This must be effected by some visible or external sign,

95 C. 5, X, IV, 19.

96 C. 4, X, IV, 19; such were excommunicated; cfr. C. 32, q. 7, *passim*.

97 C. 19, X, III, 32.

98 C. 1, C. 32, q. 6.

99 C. 7, X, V, 16: "*cum paria crimina mutua compensatione deleantur.*"

1 Sanchez, *l. c.*, l. X, disp. 13, n. 1 ff.

2 C. 3, X, V, 16.

3 Sanchez, *l. c.*, nn. 6 ff.

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as the Code expresses it, by *marital conversation* or *relation.* Such would be asking the *debitum conjugale,* or other familiarities usual between married people. But these signs must be *spontaneous,* not prompted by compulsion or fear (*sponte,* says the text), and hence merely to render the *debitum* would not be a sure sign. Furthermore it is required that the fact of adultery was really and undoubtedly known (*adulterii certior factus*), because condonation is impossible as long as the injury is unknown. Hence even if marital intercourse had occurred during the time of uncertainty, this act would not preclude the use of the right of the innocent party to leave the faithless one, after certain knowledge has been obtained.[4]

The second clause of § 2, can. 1129, mentions *presumption.* The law presumes condonation of adultery if after *six months* the innocent party has not made use of his or her right under the law. The Roman law provided peremptory prescription five years after the date of knowledge, so that after this period an accusation against the adulterous party was no longer admitted.[5] The ecclesiastical law draws no limit, and therefore accusations may be brought at any time, if no condonation has taken place. The Roman law also admitted a period of sixty days, within which the father and the husband could accuse the adulteress, and four months more were granted to outsiders to bring forward the accusation. In practice six months were permitted also to the husband for accusation.[6] This custom is adopted by the Code. After the lapse of that term the lawgiver *presumes* condonation if the unfaithful party was not expelled or deserted.

4 *Ibid.*, disp. 14.

5 L. 5, Cod. IX, 9, *ad legem juliam de adult. et stupro.*

6 L. 4, dig. 48, 5, *ad legem juliam de adult. corrig.*

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This is, however, merely a presumption, which does not take away the right if evident and conclusive reasons are advanced for not having made use of it. However, it may be safely stated that an accusation brought later than six months *post factum* would require strict proof that no marital conversation or relation had taken place between husband and wife during the intervening period. The law presumes condonation in order to maintain peace in the family.

TAKING BACK THE GUILTY PARTNER

CAN. 1130

Coniux innocens, sive iudicis sententia sive propria auctoritate legitime discesserit, nulla unquam obligatione tenetur coniugem adulterum rursus admittendi ad vitae consortium; potest autem eundem admittere aut revocare, nisi ex ipsius consensu ille statum matrimonio contrarium susceperit.

The innocent spouse, if he or she has separated from the other legitimately, either by a judicial sentence or by private authority, is *under no obligation* to readmit the guilty partner to married life; they may, however, admit or recall each other, unless, with the consent of the innocent spouse, the guilty one has embraced a state incompatible with matrimony.

What we have said above is here corroborated, and therefore the controversy mentioned by Sanchez,[7] as to the obligation of dismissing the adulterous party, is now out of date. Note that the innocent spouse may depart of *his or her own accord,* without appealing to court. This should not, however, be done unless the fact of adultery [8] is proved, otherwise restitution may be claimed.

7 *L. c.*, l. X, disp. 13, n. 4.

8 Although sodomy and bestiality

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The second clause states that reconciliation or resumption of married life, though permissible in itself, becomes impossible if the guilty spouse, with the consent of the innocent one, has embraced a *state of life incompatible with Matrimony*. Such a change is brought about by entering the religious state or receiving sacred orders. Since no one can be validly admitted to religion who is bound by the matrimonial tie,[9] the circumstance of adultery must be expressed in the petition to be sent to the Holy See. Furthermore, an Apostolic dispensation is required for holy orders to be received by a married man.[10] If a dispensation is granted and religion is entered or sacred orders are received, the guiltless party has no longer any claim on the party who embraces the religious state or was ordained subdeacon.[11] *A fortiori*, the adulterous party has no right to choose another state of life without the free consent of the innocent party.[12] The term *religious state* implies not only solemn but also simple (either temporary or perpetual) vows. But it may be well to repeat that entering a religious order with solemn profession does not dissolve the bond of a consummated marriage, and that, therefore, the party remaining in the world cannot validly contract another marriage. All these consequences the disloyal spouse must attribute to his own infidelity, because one who is himself unfaithful has no right to expect loyalty from others.[13]

differ specifically from adultery, yet both would be sufficient reasons for asserting the right *in casu*, cfr. Sanchez, *l. c.*, l. X, disp. 4, n. 13 f.

9 Can. 542.

10 Can. 132, § 3.

11 Cfr. cc. 15, 19, X, III, 32; c. 4, X, IV, 19.

12 Sanchez, *l. c.*, l. X, disp. 10, n. 12 f.

13 *Reg. Iuris* 75 *in* 60: "*Frustra sibi fidem quis postulat ab eo servari, qui fidem a se praestitam servare recusat.*"

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OTHER CAUSES FOR SEPARATION

CAN. 1131

§ 1. Si alter coniux sectae acatholicae nomen dederit; si prolem acatholice educaverit; si vitam criminosam et ignominiosam ducat; si grave seu animae seu corporis periculum alteri facessat; si saevitiis vitam communem nimis difficilem reddat, haec aliaque id genus, sunt pro altero coniuge totidem legitimae causae discedendi, auctoritate Ordinarii loci, et etiam propria auctoritate, si de eis certo constet, et periculum sit in mora.

§ 2. In omnibus his casibus, causa separationis cessante, vitae consuetudo restauranda est; sed si separatio ab Ordinario pronuntiata fuerit ad certum incertumve tempus, coniux innocens ad id non obligatur, nisi ex decreto Ordinarii vel exacto tempore.

The Code now proceeds to enumerate other causes for separation besides adultery. Such causes are, for example, if the other party joins a non-Catholic sect; or gives his children an education which is not Catholic; or leads a scandalous and disgraceful life; or gravely endangers the spiritual or bodily welfare of the other; or renders the marital union intolerable by acts of cruelty. These and similar reasons give the other spouse the right to withdraw by appealing to the Ordinary of the diocese, or even without legal process, if they are proved with certainty and delay would be dangerous.

It is a commonplace of ecclesiastical writers to compare infidelity, idolatry, heresy to fornication or spiritual adultery and on this ground to admit separation.[14] This is the first cause mentioned in the text. The second is

[14] Cfr. c. 5, C. 28, q. 1; c. 7, C. 32, q. 7; c. 1, C. 33, q. 2.

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educating one's children in a non-Catholic denomination. to which category belong also the "Old Catholics." A third cause is leading a criminal or shameful life (robbery, bawdry,[15] drunkenness). A fourth cause is spiritual or bodily danger. There would be spiritual danger if the Catholic party were prevented from exercising his or her religion, or persistent onanism. Bodily danger accrues from contagious diseases of an incurable and hereditary nature.[16] By cruelty is here understood not only quarrelsome and angry wrangling, but actual maltreatment (wife-beating).[17]

Whenever such a cause is proved by facts and witnesses, the innocent party may freely depart, or invoke the episcopal court. However, says § 2, when the reasons that prompted the separation cease, the marital relation must be restored. Only after the ecclesiastical court has rendered a decision in favor of a separation, either for a limited term or indefinitely, is the innocent spouse free from the duty of cohabitation.[18] If the Ordinary should command resumption of cohabitation, or if the decree of separation was given for a limited period only, married life must be resumed. It is, therefore, always safer to invoke the ecclesiastical court in such cases.[19] A civil court may indeed give sentence of temporary divorce or separation, but this has merely the effect of private separation, unless the episcopal court accepts the evidence and verdict of the civil court and makes them its own.

15 C. 4, C. 28, q. 1.

16 The S. C. Conc., March 11; Sept. 19; Dec. 16, 1786 (Richter, *Trid.*, p. 290, n. 158) reluctantly granted separation on account of the "Celtic disease."

17 Verbal injuries are insufficient; S. C. C., June 13, 1789.

18 Cfr. c. 1, C. 33, q. 2; c. 6, X, IV, 19.

19 This is especially the case if one party has taken an oath not to accuse the other of adultery; c. 25, X, II, 24.

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EDUCATION OF CHILDREN

CAN. 1132

Instituta separatione, filii educandi sunt penes coniugem innocentem, et si alter coniugum sit acatholicus, penes coniugem catholicum, nisi in utroque casu Ordinarius pro ipsorum filiorum bono, salva semper eorumdem catholica educatione, aliud decreverit.

After the separation, the children must be educated by the innocent spouse. If one of the parties is a non-Catholic, the education of the children belongs to the Catholic party, unless in either case the Ordinary decides otherwise for the good of the children and their Catholic education is duly provided for. Hence children of a mixed marriage may be entrusted to the non-Catholic parent, if, for instance, there is a mother-in-law, or aunt, or other relative who sees to their Catholic education. The underlying reason for this law is that the Catholic Church considers herself the guardian of the faith.[20] Difficulties may occur under this canon, especially in countries which have laws determining the children's religion. The rule should be to safeguard the Catholic education of the children in the best and least offensive way.

20 C. 2, X, III, 33.

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CHAPTER XI

REVALIDATION OF MARRIAGE

A marriage, sooner or later, may be discovered to be suffering from an impediment which rendered it invalid at the time it was contracted. Marriage being a bilateral contract between two capable persons, it is evident that, if the consent was defective or the parties were prevented by an impediment, there was no marriage in any given case. This discovery may cause perplexity to the pastor or confessor and prove a source of public scandal if the existence of the impediment becomes known. What is to be done in such a case? If nothing else is required but a renewal of consent, the matter is comparatively easy. But it may happen that an impediment must be removed before the consent can be renewed. The worst trouble is encountered where the renewal of consent offers difficulties which would render revalidation impossible or jeopardize the existing union and the legitimacy of the offspring. If a marriage has been contracted invalidly but with due observance of the prescribed forms, it may be revalidated by the contracting parties renewing their consent. If one party refuses, nothing remains but to heal the marriage "in the root." The former procedure is called simply revalidation, the latter, *sanatio in radice*.

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ART. I

SIMPLE REVALIDATION

The Code in the first two canons of this article describes the act of revalidation and in the following determines the different impediments in relation to the consent; in can. 1136 it considers the defect of the original consent, and, finally, in can. 1137, deals with the lack of form.

NATURE OF REVALIDATION

CAN. 1133

§ 1. Ad convalidandum matrimonium irritum ob impedimentum dirimens, requiritur ut cesset vel dispensetur impedimentum et consensum renovet saltem pars impedimenti conscia.

§ 2. Haec renovatio iure ecclesiastico requiritur ad validitatem, etiamsi initio utraque pars consensum praestiterit nec postea revocaverit.

To revalidate a marriage which is invalid because of a diriment impediment, it is required that the impediment cease or be dispensed from, and that the consent be renewed at least by the party who is aware of the impediment.

This renewal of consent is required by ecclesiastical law for validity, even if both parties gave their consent in the beginning and never withdrew it.

RENEWAL OF THE CONSENT

CAN. 1134

Renovatio consensus debet esse novus voluntatis actus in matrimonium quod constet ab initio nullum fuisse.

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The renewal of the consent must be a new act of the will ratifying a marriage which is known to have been null from the beginning.

Two conditions are here set forth for the revalidation of an invalidly contracted marriage: removal of the impediment and renewal of the consent.

(1) The *impediment* is understood to be an *invalidating one,* because a merely prohibitive impediment does not render a marriage null. Now such an impediment may *cease* either by itself or by a dispensation. Thus the impediment of immature age ceases after the legal age has been attained, and the impediment of *disparitas cultus,* after one has received Baptism.

An impediment may also be *dispensed* from. Note, however, that some impediments admit of no dispensation (*e.g.,* a previous marriage bond, impotence, consanguinity of the first degree *in linea recta*), whilst from others the Church never dispenses, *e. g.,* the impediment of the priesthood. If an impediment cannot or may not be dispensed from, no revalidation is possible, and the parties must separate, unless, for very special reasons, a friendly cohabitation be permitted. If the impediment may be dispensed from, as in the case especially of minor impediments, revalidation may take place, provided that

(2) The *consent be renewed.* Concerning this procedure our Code, following the now prevalent opinion of the School, declares

(a) That the renewal of the consent, generally speaking, is required *only from the party who is aware of the existing impediment.* For instance, James was sponsor at the baptism of Gemma, who is now his bride. James knows of the impediment, Gemma does not. Therefore according to our canon James must renew the consent, supposing he really and truly gave it when he married

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Gemma. This seems very plain. Yet it must be added that not a few authors[1] required the renewal of the consent by both parties. Their argument was based on the theory that "a bilateral contract cannot limp." They supposed that the marital consent given at the so-called marriage was null and could therefore not continue. This argument, though by no means destitute of weight, must now be discarded as contrary to the text of the law. The marital consent once given, and certainly enduring in the party ignorant of the impediment, is supposed to exert its original efficacy and only needs, as it were, to be repeated.

(b) But the renewal is *strictly required* to validate the marriage. Hence *ecclesiastical law* has always insisted upon the renewal if no *sanatio* was applied. Note the term "*iure ecclesiastico,*" which is purposely put into the text. For if the renewal were required by natural law, as the authors mentioned above hold, no dispensation from it could be granted, and a *sanatio* would be almost, if not entirely,[2] impossible. That ecclesiastical law insisted on the necessity of a renewal, is evident from various instructions given by the Roman Court.[3] The intrinsic argument for such necessity lies in the nature of the consent, which is the instrument of marital union, and is rendered fully efficacious only after the impediment has been removed. The Church, therefore, has a right to insist upon a condition which at the same time gives full assurance of the validity of the marriage to the party that suffered from the impediment.

1 Thus Sanchez, l. VIII, disp. 35; Schmalzgrueber, IV, 16, n. 257; Boekhn, IV, 3, n. 38 f.

2 It may be explained by assuming a declaration that the natural law does not oblige under such circumstances. But it is always dangerous to tamper with the natural law.

3 S. O., Jan. 12, 1769; Dec. 9, 1874 (*Coll.*, n. 472 ad II, 5; n. 1427 ad 18).

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(c) However, says can. 1134, this renewal must be *a new act of the will* ratifying the marriage that was invalidly contracted. Therefore, James, who contracted an invalid marriage with Gemma, must renew his consent with the express intention of ratifying this marriage with Gemma and no other person. The case becomes more intricate if a man had more than one wife, and the divorce evil, as in Japan,[4] is rampant. If the divorce merely proceeds from an error and not from a positive act of the will or any strict condition, the first marriage contracted in infidelity is valid, and no dispensation for revalidating the second marriage can be granted even after Baptism. It may happen that a wife who is willing to receive Baptism, lives with a husband who claims the right of leaving her in order to contract a new marriage. In such circumstances the wife should not be refused Baptism, but should be told to make every effort to induce her husband to declare that he regards her as his lawful wife. If this is impossible, both are to be left in *bona fide*. If a baptized wife marries an infidel husband, the marriage is null and void on account of the disparity of cult, even though one or both parties are ignorant of the existence of that impediment. If there is at least the outward *semblance of a true marriage,* the dispensation from the impediment of disparity of cult should be applied for and the consent renewed, otherwise a *sanatio* must take place.[5]

Note that the renewal of the consent must be *explicit* and that an implied consent (*viz.*, one contained in the *copula cum affectu maritali*) is not sufficient.[6] Hence the renewal must be an act of the will by which the

4 S. O., March 11, 1868 (*Coll.*, n. 1327).

5 S. O., Dec. 9, 1874 (*Coll.*, n. 1427 ad 18).

6 S. O., June 12, 1850 (*Coll.*, n. 1044).

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party says: "I will take thee for my lawful husband (or wife)."[7]

MODE OF RENEWAL AFTER THE IMPEDIMENT IS REMOVED

CAN. 1135

§1. Si impedimentum sit publicum, consensus ab utraque parte renovandus est forma iure praescripta.

§ 2. Si sit occultum et utrique parti notum, satis est ut consensus ab utraque parte renovetur privatim et secreto.

§ 3. Si sit occultum et uni parti ignotum, satis est ut sola pars impedimenti conscia consensum privatim et secreto renovet, dummodo altera in consensu praestito perseveret.

§ 1. If the impediment is *public,* the consent must be renewed by both parties in the form prescribed by law.

§ 2. If the impediment is *occult* and known to both parties, it suffices that the consent be renewed by both privately and in secret.

§ 3. If the impediment is occult and known to only one of the parties, it is enough that the party who is aware of the impediment should renew his consent privately and in secret, provided the other party's consent continues.

The first section treats of *public* impediments. A case solved by the Holy Office may illustrate this law. In Uesküb many Mohammedans had embraced the Catholic faith, but the men conducted themselves outwardly like Muslems, whereas the women were not afraid to profess their faith. Of course the clergy could not assist at the marriages of such persons, and they were consequently invalid for lack of the prescribed form. What was to

[7] How this is to be done see under can. 1135, § 3.

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be done? The Holy Office decided that these occult Christians must be admonished to contract marriage according to the rite of the Church, with the renewal of consent, before the pastor and two witnesses, but without solemnities.[8] It is safe to say that can. 1098 may be applied here if the conditions therein mentioned are verified. A public impediment is especially that of disparity of cult, and it is rectified only by the consent of both parties given in the prescribed form.[9] Cases of consanguinity and affinity require the same procedure, except perhaps if both parties were ignorant of the existing impediment.[10]

§ 2 mentions an *occult* impediment known to *both parties,* such as would arise from public honesty or crime and also from disparity of worship in countries where unbelievers are in the majority, and scandal must be avoided. In such circumstances a secret and private renewal would suffice.[11]

§ 3 allows the renewal of consent by *one party* only, if the impediment is occult and unknown to the other. The impediment of crime [12] may enter here, and it may not be amiss to state that the S. C. Poenitentiaria, when granting a dispensation from an occult impediment of a defamatory character (illicit affinity) was wont to add the following clause: *"Certiorata alia parte de nullitate prioris consensus, et quatenus haec certioratio absque gravi periculo fieri nequeat, renovato consensu iuxta regulas a probatis*

8 S. O., Nov. 15, 1882 (*Coll.*, n. 1579); the decisions of S. C. C. quoted by Card. Gasparri refer to a marriage contracted from fear.

9 Bened. XIV, "*Singulari,*" Feb. 9, 1749, § 1.

10 S. O., March 11, 1868 (*Coll.*, n. 1326): "*quoad eos in bona fide soleat.*" But the times were troubled.

11 S. O., Jan. 12, 1769 (*Coll.*, n. 472, II, 15): "*sat erit ut inter solos coniuges privatim habeatur renovatio consensus, patefacta tamen, quoad fieri poterit, etiam parti infideli prioris matrimonii nullitate.*"

12 Cfr. c. 7, X, IV, 7.

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auctoribus traditas." These rules were taken from the moralists,[18] but they are no longer necessary, for the Code says that *private* and secret renewal by the party conscious of the impediment is sufficient, provided, of course, the consent of the other continues. This is the logical consequence of the theory now adopted by the Code that the renewal of the consent is required by ecclesiastical law only, and is, practically speaking, a beneficial ruling.

MARRIAGE NULL FOR WANT OF CONSENT

CAN. 1136

§ 1. Matrimonium irritum ob defectum consensus convalidatur, si pars quae non consenserat, iam consentiat, dummodo consensus ab altera parte praestitus perseveret.

§ 2. Si defectus consensus fuerit mere internus, satis est ut pars quae non consenserat, interius consentiat.

§ 3. Si fuerit etiam externus, necesse est consensum etiam exterius manifestare, vel forma iure praescripta, si defectus fuerit publicus, vel alio modo privato et secreto, si fuerit occultus.

A marriage invalid for lack of consent is validated if the party who had not consented, does consent, provided the consent given by the other party continues.

If the want of consent was merely internal, it suffices that the party who did not give his consent give it now interiorly.

If the want of consent was also external, it is necessary that the consent be manifested outwardly; and this outward manifestation must be done in the form prescribed by law if the want of consent was public, whereas a pri-

18 Cfr. Sabetti, *Theol. Moral.*, ed. 1917, p. 955, n. 929.

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vate and secret manifestation suffices if the defect was occult.

We will quote an instruction of the Holy Office[14] which illustrates these three sections. Protestants (Calvinists) in Transylvania (Hungary) believed in the dissolubility of marriage, and married with that intention. This gave rise to difficulties, which were solved as follows:

(1) If James, a Calvinist, had the intention of marrying Gemma, a Catholic, under the express condition of the dissolubility of marriage, and the want of consent was only interior, or manifested to Gemma alone, he had only to renew the consent in order to revalidate the marriage, because his consent was defective on account of a condition appended interiorly, but affecting the substance of marriage. This is still more the case if fear or intrinsic repugnance would have nullified the internal consent.

(2) But suppose James and Gemma were both Calvinists when they married; that the minister preached the wedding sermon on Math. 19, 9, instructing them that adultery would give them the right to divorce, and that they should have the intention of marrying according to the laws of the country which easily admit divorce; and both parties would marry according to this intention. A marriage contracted with such an explicit condition would be invalid. And here the distinction set forth in § 3 applies: If the defect was *externally* manifested and made known to others, which certainly would be the case here, with the supposition mentioned, because the congregation gathered at the wedding and the magistrates would know of the condition, then the marriage of James and Gemma would have to be contracted in the form prescribed by the Church (supposing they became con-

14 S. O., April 6, 1843 (*Coll.*, n. 965).

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verts); if, however, the want of consent was occult, because they married privately without telling anybody of the condition attached, the consent may be renewed privately and in secret. However, in that case it would be necessary to observe the following rule.

MARRIAGE NULL FOR WANT OF THE REQUIRED FORM

CAN. 1137

Matrimonium nullum ob defectum formae, ut validum fiat, contrahi denuo debet legitima forma.

A marriage null for want of form, to become valid, must be contracted again according to the prescribed form.

Therefore, if James became a Catholic and Gemma remained a Protestant, the marriage would have to be contracted again before the Catholic pastor and two witnesses.[15]

The same rule holds if two Catholic parties were married without observing the prescribed form. And from this condition a dispensation is granted only for very particular reasons, *e.g.*, if many marriages are to be validated which for reasons of persecution or disturbed conditions,[16] were contracted privately. In this case can. 1098 may also be applied.

15 Letter of Pius VIII, of March 25, 1830; Secret. Status, March 27, 1830 (*Coll.*, n. 811).

16 To the Vicar Apostolic of Oceania, S. O., April 6, 1843 (*Coll.*, n. 965).

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ART. II

REVALIDATION IN RADICE

NATURE OF THE SANATIO

CAN. 1138

§ 1. Matrimonii in radice sanatio est eiusdem convalidatio, secumferens, praeter dispensationem vel cessationem impedimenti, dispensationem a lege de renovando consensu, et retrotractionem, per fictionem iuris, circa effectus canonicos, ad praeteritum.

§ 2. Convalidatio fit a momento concessionis gratiae; retrotractio vero intelligitur facta ad matrimonii initium, nisi aliud expresse caveatur.

§ 3. Dispensatio a lege de renovando consensu concedi etiam potest vel una tantum vel utraque parte inscia.

§ 1. The *sanatio* of a marriage *in radice* is its revalidation, implying besides a dispensation from, or the cessation of, the impediment, the dispensation from the (ecclesiastical) obligation of renewing the consent, and, by a fiction of law, retroaction as regards the canonical effects.

§ 2. Revalidation takes place at the moment the favor is granted; the retroaction is understood to reach back to the moment of the marriage, unless the contrary be stated.

§ 3. The dispensation from the obligation of renewing the consent may be granted without the knowledge of one or of either party.

A case proposed to the S. C. Poenitentiaria may illustrate the text.[17] James and Gemma married legally in

17 *Anal. Eccl.*, 1900, t. VIII, p. 305 f.

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1867, in the diocese of Paris, but James proved a bad husband, wherefore Gemma, after having obtained a civil divorce, went to Switzerland and before the civil magistrate married John, a nominal Catholic, in 1872. After some years James died and Gemma endeavored to induce John to renew the consent before the Church authorities, but he refused, declaring that the civil marriage was sufficient for him. Nothing was left for the woman to do but to ask for a *sanatio in radice*. This was granted by the aforesaid tribunal, April 25, 1890, with the significant clause, however, that the offspring born from adultery should not be benefitted by the legitimation. Hence the offspring born to Gemma and John whilst James was still alive, was not declared legitimate. But all children born after James' death, say 1875, to the year 1890, shared in the canonical effects of the *sanatio*.

Here we have: (a) a *removal of the impediment*, which is one of the natural law, *viz.*, that of the marriage tie (*ligaminis*). This ceased by the death of James, in 1875. Thus also may a dispensation remove an impediment which the ecclesiastical law has established, supposing, of course, the Holy See is wont to grant it.

(b) There is also a *dispensation from the renewal of the consent*, which John flatly refused to give. Here again note the fact that the renewal of the consent is required not by the natural, but by an ecclesiastical law, from which, therefore, the Church, as in matters subject to her dominion, may dispense, provided, of course, as will be seen under can. 1140, that this consent was really a marital consent and that it continues.

(c) Finally there is the *retroaction* as regards canonical effects. These extend to the moment the marriage was invalidly contracted. But our case is a peculiar one, which is the reason why we chose it. We have not a

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complete and absolute *sanatio,* otherwise its effects would reach back to the year 1872, when Gemma married John, whereas the sacred tribunal extended the effects of the *sanatio* only to the time when James died, or, as we presumed, to the year 1875. If there had been only an ecclesiastical impediment between James and Gemma, and no second marriage, the effects of the *sanatio* would have reached back to 1868. The *effects* of revalidation then are: dispensation from an impediment of ecclesiastical law, validity of the marriage, and legitimation of the offspring.[18]

§ 2 determines the *moment* from which the marriage is revalidated. It is the moment when the favor has been granted — *a die datae,* and not the date of the execution of the rescript. For a genuine *sanatio* does not require a renewal of the consent, but depends entirely upon the free will of the grantor. But note that the grantor does not say — as some have foolishly understood — that the marriage is valid from the moment it was contracted. To impute such an impossible and ridiculous assertion or supposition to the Roman Congregation and tribunals is more than common sense can tolerate. Therefore the validity of the marriage once invalidly contracted, begins the moment — *ex nunc* — the Cardinal Prefect puts his signature to the decree of revalidation. Entirely different from this genuine assertion is the other that the law feigns or assumes by a *fictio iuris* the validity of the marriage from the time it was first, though invalidly, contracted. For this fiction, as in civil law, almost exclusively concerns the legal effects of the legitimation of offspring. Concerning these the *sanatio* works *ex tunc, i.e.,* from the

18 Cfr. can. 1116 f. But cardinals and bishops would be excepted from the effects on account of the "*convalidatum*" in can. 1116, which is the general term also for *sanatio in radice.*

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moment of the first celebration. But the Code adds: "Unless otherwise expressly provided." Thus we see in the decision of the S. Poenitentiaria quoted above that the adulterine offspring was expressly excluded.

§ 3 mentions the *extent of ignorance,* saying that a dispensation from the renewal of the consent may be given if both parties are unconscious of the existence of the impediment, nay of the fact that a *sanatio* was given. For not only the parties themselves, but Ordinaries and confessors may ask for such a dispensation. Thus many such dispensations were given for France after the revolution, for the diocese of Treves, and for Japan.[19]

WHEN A SANATIO IN RADICE IS POSSIBLE

CAN. 1139

§ 1. Quodlibet matrimonium initum cum utriusque partis consensu naturaliter sufficiente, sed iuridice inefficaci ob dirimens impedimentum iuris ecclesiastici vel ob defectum legitimae formae, potest in radice sanari, dummodo consensus perseveret.

§ 2. Matrimonium vero contractum cum impedimento iuris naturalis vel divini, etiamsi postea impedimentum cessaverit, Ecclesia non sanat in radice, ne a momento quidem cessationis impedimenti.

§ 1. Any marriage contracted in spite of an impediment of ecclesiastical law, or for lack of the legal form, may be revalidated *in radice,* provided a naturally sufficient, though juridically ineffective consent was given and continues.

Case: Gemma, not baptized but held to be a Catholic

19 Pius VII, Aug. 14, 1801; Feb. 7, 1809; Pius VIII, March 25, 1830; Secret. Status, March 27, 1830; S. O., March 11, 1868 (*Coll.,* nn. 811, 1326).

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by all, married James, a Catholic, in the form prescribed by the Church. Afterwards she secretly approaches the priest to whom she reveals her condition (of not being baptized), demands Baptism immediately, which is conferred, and asks that the secret be kept, especially towards her husband.[20] This marriage was revalidated, because

(a) The impediment (disparity of worship) was of ecclesiastical law, purely;

(b) The *consent* was given as for marriage, which is evident from the fact that the parties were married in church, and it continues, for she asks for Baptism;

(c) The consent was juridically ineffective, because the impediment rendered it impossible for it to produce the marriage union. Of course a *merely fornicarious* consent could not be looked upon as a marital consent. But that a consent was fornicarious if the semblance of marriage was observed, would require strong proof. It would not be enough that the party would like to get a divorce, or that one of them asked for a decree of separation. But if one of them, or both, would obtain a decree of separation under the plea of nullity, the semblance of a marriage could hardly be upheld.[21]

§ 2. A *marriage contracted with an impediment of the natural or divine law, even if the impediment afterwards disappears, the Church does not revalidate in radice, not even from the moment the impediment has ceased.*

Card. Gasparri refers to a case solved by the Holy Office.[22] James (a non-Catholic) lived in concubinage for five years, until 1898, when he contracted a civil

20 S. O., Aug. 22, 1906 ad IV (Covington; cfr. *Anal. Eccl.*, t. XV, p. 8 f.).

21 Wernz, *l. c.*, IV, Vol. 2, p. 566, n. 659.

22 March 8, 1900 (*Coll.*, n. 2078); more general, S. O., March 2, 1904 (*Coll.*, n. 2188).

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marriage with his concubine. Two children were born before that date, and one of them died soon after birth, March 29, 1896. James had, in 1896, to undergo an operation, which rendered him completely impotent.[23] Internal marital consent, and, after 1898, also the semblance and species of marriage seemed to exist and continue. The Holy Office decided that no revalidation *in radice* was possible because the natural impediment of impotence was in the way. To inquire further into the wherefor would conjure up the controversy concerning the necessity of the renewal of consent. But we cannot help observing that the answer of the S. Poenit. of April 25, 1890, alleged above, seems to be contrary to can. 1139, § 2, at least in its general wording: "*Ecclesia non sanat.*" We understood that decision as a partial but true *sanatio*.[24]

WHEN RENEWAL OF CONSENT IS IMPOSSIBLE

CAN. 1140

§ 1. Si in utraque vel alterutra parte deficiat consensus, matrimonium nequit sanari in radice, sive consensus ab initio defuerit, sive ab initio praestitus, postea fuerit revocatus.

§ 2. Quod si consensus ab initio quidem defuerit, sed postea praestitus fuerit, sanatio concedi potest a momento praestiti consensus.

§ 1. If the consent of one or both parties is wanting, the marriage cannot be revalidated *in radice,* regardless

23 Both testicles were removed (*utroque teste*).

24 Wernz, *l. c.,* IV, Vol. 2, p. 561, n. 657, perceived the difficulty, and tried to solve it by the expedient that the *sanatio* was *impropria et relativa,* which is true to some extent, but it was invalid from the moment the *impedimentum ligaminis* ceased, which is denied by our canon. No wonder the decision of the S. Poenit. is not quoted by Card. Gasparri.

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of whether the consent was wanting from the beginning, or was given at the beginning and afterwards withdrawn.

§ 2. If the consent was wanting in the beginning, but given later, the *sanatio* may be granted from the moment the consent was given.

The Bishop of Covington had asked the Holy Office for an explanation concerning the faculties granted to the bishops of the U. S.: May the faculty of revalidating a marriage *in radice* be applied if both parties know of the nullity of the marriage, but one of them cannot be induced to renew the consent, and if both parties are unconscious of the nullity of their marriage, provided one of them is afterwards informed of the *sanatio* and its effect? The answer to the first question was: *Negative,* unless it is evident that a true consent was given under the species of matrimony and that this consent continues on both sides. The answer to the second question was merely: *Negative.*[25] From this it appears that a positive remonstrance against the renewal of the consent amounts to an interruption of the same. Note the phrase, *species matrimonii,* which may be verified, not only when marriage is contracted with due regard to the ecclesiastical form, but also when the conditions of a true marriage are verified; in other words, when the consent given was a truly marital one, and both parties were regarded as husband and wife.[26] It is difficult to understand how James and Gemma may have a true marital consent, though both are aware of the nullity of their marriage. But we suppose they are either unaware of the effect of an invalidating impediment, or are not convinced of the

25 S. O., Aug. 22, 1906 (*Anal. Eccl.*, t. XV, p. 8).

26 S. O., Dec. 9, 1874 ad 18 (*Coll.*, n. 1427); Bened. XIV, *De Syn. Dioec.*, XIII, 20, 8; Id., *Quaestiones Canonicae,* Quaestio 174.

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reality of that effect, or do not believe in the power of the Church to establish impediments.[27] Faulty education or lack of opportunity for gathering information may also be a cause of ignorance. But be this as it may, a marital consent must be supposed and must precede, otherwise no *sanatio* is possible, for what does not exist cannot be revived. Wherefore, as § 2 says, revalidation reaches back only to the moment when the marital consent was given.

BY WHOM A SANATIO MAY BE GRANTED

CAN. 1141

Sanatio in radice concedi unice potest ab Apostolica Sede.

A *sanatio in radice* may be granted only by the Apostolic See. No direct traces of this power are extant before the fourteenth century. Boniface VIII seems to have been the first pope who granted such a dispensation. After the Council of Trent the practice became more frequent, especially in countries (France, Japan, etc.) with turbulent conditions.[28]

Although this power is reserved to the Pope, he may and does communicate it to others. Our *Ordinaries* have it in virtue of the decree of the S. C. Consistorialis of April 25, 1918, which says that they may revalidate marriages invalidly contracted on account of a minor diriment impediment.[29] A decree of the S. C. Consistorialis, of Aug. 2, 1918, extends this faculty to marriages invalidly contracted *ob impedimenta maiora*.[30] How long these faculties will be continued (they were granted "*praesentis belli causa*") is a question which we are unable to answer; but see what is said under can. 1048.

27 Wernz, *l. c.*, Vol. 2, p. 563.
28 Wernz, *l. c.*, IV, Vol. 2, p. 556 f.
29 *A. Ap. S.*, X, 190 ff.
30 *A. Ap. S.*, X, 363 f.

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CHAPTER XII

SECOND MARRIAGES

CAN. 1142

Licet casta viduitas honorabilior sit, secundae tamen et ulteriores nuptiae validae et licitae sunt, firmo praescripto can. 1069, § 2.

CAN. 1143

Mulier cui semel benedictio sollemnis data sit, nequit in subsequentibus nuptiis eam iterum accipere.

Although a chaste widowhood is more honorable, second and further marriages are valid and lawful, provided the former marriage has been duly dissolved and the free status proved.

A woman who has once received the solemn nuptial blessing cannot receive it again.

In the first eight or nine centuries second marriages were not favored. The Penitential Books[1] are rather severe in meting out public penances for "bigamy," as second marriage was called. There is a foundation for this idea in Holy Writ,[2] which, while it does not command, strongly counsels the faithful to abstain from a second marriage because of the typical union between the

1 Wasserschleben, *l. c.*, pp. 148, 179, etc.

2 Rom. 7, 3; 1 Cor. 7, 8, 39 f; 1 Tim. 5, 3 ff. The Montanists, Novatians and Waldenses (cfr. Innoc. III, "*Eius exemplo*," Dec. 18, 1208) made it a command; some early writers, like Irenaeus and Origen, use rather strong language against second marriage.

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Word of God and His Church. Therefore, also, a higher degree of perfection was attributed to honorable widowhood. As to widowers, title 21 of book I of the Decretals debars them from the sacred ministry, and the irregularity arising from bigamy is still a law.[3] However, the former penalties have been omitted from the Decretals, which permit second marriages, provided the former marriage tie has been duly dissolved and its dissolution proved.[4] No definite time is prescribed for mourning by ecclesiastical law, as the Roman law[5] enjoined and some modern civil codes[6] still maintain.

Can. 1143, then, rules, in accordance with the Decretals,[7] that the *solemn nuptial blessing* is not to be imparted to a widow — not a widower — who has received the same in a former marriage. Note that what is here forbidden is only the solemn nuptial blessing, which is given during Mass (whether *pro sponso et sponsa* or in the Mass of the Day) with the proper orations and special prayers; not the blessing of the Roman Ritual.[8] This solemn blessing may and should be imparted even to a widow, if she has not received it at her first marriage, even though she may be "in a family way."[9] For the purpose of this blessing (a mere sacramental)[10] is to

3 Cfr. can. 984.

4 C. 2, X, IV, 21; how it is proved see under canons 1031 and 1069.

5 Cod. VI, 40; Nov. 22, c. 43 f.

6 The Swiss Code, art. 103, requires 300 days.

7 Cc. 1, 3, X, IV, 21; for the Greeks also Bened. XIV "*Etsi pastoralis*," May 26, 1742.

8 S. C. P. F., Sept. 21, 1843 (*Coll.*, n. 971); S. O., Aug. 31, 1881 (*Coll.*, n. 1557); S. Rit. C., June 30, 1896 ad VI (*Decreta Auth.*, n. 2923).

9 S. C. P. F., July 21, 1943 ad 3 (*Coll.*, n. 932).

10 We hardly believe the statement to be correct (Leitner, *l. c.*, p. 527, ed. 1) that the couple, if they do not receive the nuptial blessing, are deprived of the graces flowing from the Sacrament. The sacramental grace is attached to the Sacrament, and the latter cannot be separated from the contract. Hence, supposing there is no *obex* to the Sacrament, the grace is received by valid consent.

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convey, we might say in a tangible way, the necessary graces for the fulfillment of a mother's most important duties. It is for this reason also that the wife is chiefly and peculiarly mentioned in those prayers.

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MATRIMONIAL TRIALS
(Book IV, Title XX, Can. 1960-1992)

CHAPTER I

THE COMPETENT COURT

COMPETENCY OF THE CHURCH

CAN. 1960

Causae matrimoniales inter baptizatos iure proprio et exclusivo ad iudicem ecclesiasticum spectant.

CAN. 1961

Causae de effectibus matrimonii mere civilibus, si principaliter agantur, pertinent ad civilem magistratum ad normam can. 1016; sed si incidenter et accessorie, possunt etiam a iudice ecclesiastico ex propria potestate cognosci ac definiri.

Matrimonial cases between baptized persons belong by proper and exclusive right to the ecclesiastical judge.

Cases which concern merely the civil effects of marriage, if these are the principal cause at issue, belong to the civil court; but if the civil effects are only incidental and accessory, they may be taken cognizance of and settled by the ecclesiastical judge in virtue of his inherent power.

To what has been said under Can. 1016 little remains to be added here. The settling of controversies concerning

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a given subject certainly belongs to him to whom the subject itself belongs. As Christian marriage is a strictly sacred thing, a sacrament, matrimonial trials, because of their intimate connection with the sacramental dignity, must be brought before the ecclesiastical judge. For "whatever in things human is of a sacred character, whatever belongs either of its own nature or by reason of the end to which it is referred, to the salvation of souls or the worship of God, is subject to the power and judgment of the Church."[1] This right belongs *properly* to the Church because marriage between baptized persons is properly called a sacred thing and the Church does not borrow this authority from the civil power, but derives it from her divine origin and constitution.[2] It is the *exclusive* right of the Church because what belongs to her by divine institution she cannot let slip from her jurisdiction, nor can she divide her power with another, it being as indivisible as sovereignty. Of course, conflicts may and do arise between the ecclesiastical and the civil power, in as much as the one defends and upholds what the other rejects and invalidates, in as much as the civil power spurns and punishes what the Church blesses and sanctifies, in as much as the State grants civil effects to a union which is declared incapable of obtaining civil and spiritual effects by the Church.[3] Such conflicts arise either from misunderstanding or failure to realize the innate power of the Church. In itself such a contradiction should be impossible, since God is the author of both powers, human and divine.[4] By good will and mutual confidence, and especially by the conclusion of treaties founded on mutual trust and loyalty — not mere "scraps

1 Leo XIII, "*Immortale Dei*," Nov. 1, 1885 (Wynne, *Great Encycl.*, p. 115).

2 *Trid.*, sess. 24, can. 12, *de mat.*

3 S. O., July 6, 1817 (*Coll.*, n. 725).

4 Leo XIII, "*Immortale Dei*," *l. c.*

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of paper"— such conflicts and misgivings can mostly be avoided.

But the question arises: What is the duty of *Catholic magistrates and lawyers when they act as judges or attorneys in matrimonial cases which require a bill of divorce?* This question was settled by the Holy Office as follows: Considering the serious circumstances of things, times and places (in France), it may be tolerated that civil magistrates and attorneys pronounce sentence or defend in matrimonial cases, provided they openly profess the Catholic doctrine (as proposed above), never pronounce, solicit or provoke a sentence repugnant to divine or ecclesiastical law, and in difficult cases have recourse to their Ordinary or to the Apostolic Penitentiary.[5] As was natural, French interpreters of this decision tried to give it a most lenient construction. Hence the Holy Office was again approached: Does a judge comply with the condition set forth above if he mentally abstracts from the validity of the marriage according to ecclesiastical laws and simply applies the civil law and pronounces a divorce, though he firmly intends to break the union only as far as civil effects and the civil contract are concerned? In other words: Is a judge allowed to make a mental restriction, which inwardly conforms to the doctrine and practice of the Church, but outwardly and in fact contradicts the same? The answer of course was, "No."[6] The same decision says that neither could the mayor, under the same restriction, pronounce a divorce if the marriage was ecclesiastically valid, nor allow the

[5] S. O., June 25, 1885 (*Coll.*, n. 1636).

[6] S. O., May 27, 1886 (*Coll.*, *l. c.*). Concerning marriages of such as are not under Catholic jurisdiction, the Church abstains from judging them. However we believe a Catholic judge would be allowed to pronounce sentence on such a marriage, because no strictly prohibitive law now exists with regard to them.

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divorced party to remarry civilly. The consequence is — also for Catholic judges and attorneys in the United States and elsewhere — that they are never allowed to pronounce a sentence of divorce upon a validly married Catholic couple as long as the Church has not declared their union invalid. If the ecclesiastical authorities have rendered a verdict of invalidity, the civil judge may pronounce sentence of divorce and a Catholic lawyer may defend the case. The same rule applies to separation, which also, according to Catholic doctrine and as expressly stated in the above mentioned decree of the Holy Office, belongs to the Church. To the latter is furthermore reserved, at least *a priori,* the legitimacy of offspring.

Can. 1961 determines, first and above all, *what the civil magistrate may do.* He may decide as to the *civil effects* of marriage, such as questions concerning property, civil rank and name, inheritance and similar purely worldly affairs.[7] But the text says: *si principaliter agantur.* This means that the civil effects, for instance, concerning property, must be the main question at issue. If the civil effects are concerned in a suit only incidentally and accessorily, whilst the principal and main quarrel concerns either the validity of the marriage, or separation, or the legitimacy of the children, then the ecclesiastical judge, in his capacity as such, is entitled to decide. For the rule is that the accessory follows the principal.[8] It stands to reason, however, that the ecclesiastical judge should either have his sentence ratified and sanctioned by the civil court, or abstain entirely from passing judgment upon civil matters, for the reason that he cannot compel acknowledgment of his sentence by the civil court.

7 Cfr. cc. 1, 3, 5, X, IV, 17 (hereditary quarrels); cc. 3, 5, 7, X, IV, 20 (dowry).

8 Reg. 42 in 6°: "*Accessorium naturam sequi congruit principalis.*"

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THE ROMAN COURT

CAN. 1962

Causas matrimoniales ad eos spectantes de quibus in can. 1557, § 1, n. 1, illa Sacra Congregatio vel illud Tribunal aut specialis ea Commissio exclusive cognoscet, cui eas toties quoties Summus Pontifex delegaverit; causas dispensationis super matrimonio rato et non consummato, Sacra Congregatio de disciplina Sacramentorum; causas vero quae referuntur ad privilegium Paulinum, Sacra Congregatio S. Officii.

CAN. 1963

§ 1. Quare nullus iudex inferior potest processum in causis dispensationis super rato instruere, nisi Sedes Apostolica facultatem eidem fecerit.

§ 2. Si tamen iudex competens auctoritate propria iudicium peregerit de matrimonio nullo ex capite impotentiae et ex eo, non impotentiae, sed nondum consummati matrimonii emerserit probatio, omnia acta ad Sacram Congregationem transmittantur, quae iis uti poterit ad sententiam super rato et non consummato ferendam.

Leaving aside the first clause of can. 1962, which decrees that the *matrimonial cases of sovereigns and their lawful heirs are reserved to the Holy See,*[9] or to the S. Congregation or a special Commission exclusively and purposely assigned by the Pontiff, we note:

1. The competent Roman Court is the *S. Congregation of the Sacraments,* whenever there is question of dispensing from a ratified but not yet consummated mar-

[9] S. C. Sacr., March 7, 1910 (*A. Ap. S.*, II, 147): all dispensations from diriment as well as prohibitive impediments are reserved.

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riage. This court is so exclusively competent that, as can. 1963 rules, no inferior judge, hence no local Ordinary, can institute a canonical trial in such cases unless the Holy See has granted faculties for that purpose. Local Ordinaries may receive this faculty from the Holy See (S. C. Sacr.) either habitually or for single cases. But it is not given by the decree "*Proxima sacra,*" April 25, 1918, nor by that of Aug. 25, 1918. And since the former faculties have ceased, the Ordinaries must be expressly reinvested with this faculty. When they receive the faculty from the Holy See, it may be well to look up can. 199, which says that jurisdictional power granted by the Holy See may be subdelegated, unless it is granted for personal reasons. If personal reasons are excluded, the Ordinary may subdelegate the trial to another ecclesiastic.[10]

However, the local Ordinaries may indirectly be concerned and empowered to institute a trial, which may lead to a sentence of a dispensation from a ratified marriage. This happens when a case of *impotency,* which the Ordinary is entitled to take cognizance of in virtue of his own authority, is brought before him. If the physicians and nurses and other witnesses required in that case are unable to prove the existence of impotency, but merely the fact that the marriage had not been consummated, the minutes must be sent to the S. Congregation, which may make use of the same to pass judgment concerning the *matrimonium ratum non consummatum.* The S. Congregation may, *iure proprio, i. e.,* without special commission

10 If the Ordinary has no faculties, he may refer the case directly to the S. C. dei Sacramenti, Cancellaria Apostolica, Corso Vittorio Emmanuele, Roma, Italy. If he sends the case to his agent, the letter must be well sealed and not opened by the agent, who has merely to forward it to the Secretary or the Card. Prefect of the S. C. (S. C. Consist., Nov. 25, 1908; *A. Ap. S.,* I, 211).

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from the Pope, transmit the case to the S. Romana Rota, which shall investigate the fact of non-consummation.[11] Of course, the S. R. Rota cannot grant a dispensation *super matrimonio rato,* as this is strictly reserved to the S. Congregation of the Sacraments. When sending in the *acta* bearing on the *factum non-consummationis,* the Ordinary should add a petition based on canonical, or at least solid, reasons why the dispensation is asked.[12]

2. The second Congregation mentioned in can. 1962 is the *Holy Office.* But here only the Pauline Privilege is concerned, whilst disparity of worship and mixed religion[13] are omitted. The reason for this omission is that only the most exclusive matters are referred to in our canon. Besides, as noted under can. 1121, § 2, there is no question of a real dispensation in the matter of the privilege of faith, but only of a declaration, and such no Ordinary is allowed to give. Hence if there is a doubt whether the interpellation must be made, recourse should be had to the Holy Office.

THE DIOCESAN COURT

CAN. 1964

In aliis causis matrimonialibus iudex competens est iudex loci in quo matrimonium celebratum est aut in quo pars conventa vel, si una sit acatholica, pars catholica domicilium vel quasi-domicilium habet.

In other matrimonial cases the competent judge is the judge of the respective place (or diocese) where the marriage was celebrated, or where the defendant has his domicile or quasi-domicile, or, if one of the parties is a

11 S. C. Cons., Jan. 28, 1909 (*A. Ap. S.*, I, 213).

12 S. O., Aug. 6, 1890, n. 7 (*Coll. P. F.*, n. 1737).

13 Cfr. can. 247, § 3.

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non-Catholic, where the Catholic party has his or her domicile or quasi-domicile.

The phrase "*in other cases*" signifies that trials of nullity arising either from one of the twelve diriment impediments or from defective consent or non-observance of the prescribed form, may all be brought before the local ecclesiastical judge, who shall also hear cases concerning the prohibitive impediments, separation, and legitimation of offspring.

By the term *judge* is understood the Ordinary of the diocese, because he is the *iudex ordinarius* of the place.[14] *Abbates Nullius* are not excluded from acting as judges in matrimonial matters.[15] The *Vicar-General*[16] as well as the *Vicar-Capitular* or Administrator are also entitled to conduct such a trial. But inferior prelates, no matter how many titles and insignia they may have, do not fall under the category of Ordinaries and therefore have no right to try such cases.

The question, who is the Ordinary, is settled by the Code when it states the two reasons which decide competency. The first is the *ratio contractus*[17] or the place where the marriage was celebrated, because marriage is a species of contract. This reason may be invoked at any time, for the fact of having contracted marriage in a certain place remains. The second reason is the *domicile* of the defendant or of the *pars conventa,* according to the well-known axiom: "*Actor sequitur forum rei.*" Equal to the domicile in our case is the *quasi-domicile,* and no preference may be claimed. Otherwise the wife gener-

14 *Trid.*, sess. 24, c. 20, *de ref.*

15 Can. 323, C. 12, X, V, 31, mentions abbots who usurped a power not their own, but they are not *abbates nullius.* Leitner, *l. c.*, p. 550, is wrong in excluding these abbots from matrimonial trials; cfr. Feije, *l. c.*, n. 586, p. 474.

16 Concerning the marriage of conscience, see can. 1104.

17 C. 20, X, II, 20.

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ally follows the forum or court of her husband according to our Code.[18] But the Instruction of 1883 makes a two-fold exception, which is admitted, at least impliedly, by the Code.[19] If the husband and wife have been *legitimately separated,* and the former wishes to petition for annullment of the marriage, he must do so before the Ordinary in whose diocese the wife has her domicile or quasi-domicile, because by a separation she regains or obtains her own domicile. If the wife demands the annullment, she must do so before the Ordinary in whose diocese the husband has his domicile. Hence in case of a separation the old principle holds: *Actor sequitur reum.*[20] The other exception is *desertion.* If the husband maliciously deserts his wife, she may institute proceedings before the bishop in whose diocese she has her domicile. But if she deserts her husband, she must follow the court of the husband, or, in other words, apply to the bishop in whose diocese the husband has his domicile or quasi-domicile.[21] Note that the monthly stay is not mentioned here and may therefore not be applied.

As to *mixed marriages* — and this holds good of disparity of worship as well as of mixed marriages properly so-called — the Code states that the domicile or quasi-domicile of the *Catholic party* decides who is the competent judge. Therefore the Ordinary in whose diocese the Catholic party has a domicile, is also entitled to judge concerning the free status of a heretical party who has been divorced by a sentence of the civil court. But if the non-Catholic party had been received into the Church, the domicile of the husband would determine the competency of the Ordinary.[22]

18 Cfr. can. 93.

19 Inst. 1883 (*Coll. P. F.*, n. 1587), for the U. S.

20 Cfr. cc. 5, 8, X, II, 2.

21 See Smith, *Marriage Process,* p. 51.

22 S. O., June 30, 1892 (*Coll.*, n. 1799); June 23, 1903 (*Anal. Eccl.*, t. 11, 381).

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After the canonical or *judicial citation* has been served on the parties, no change of domicile or quasi-domicile by either of them shall in any way change the competency of the judge so chosen or established.[23] Hence, for instance, though the parties, or one of them, would leave the diocese of St. Joseph after having been duly summoned, and reside in the diocese of Kansas City, the Ordinary of St. Joseph would have to finish the trial in the first instance, until a sentence were pronounced.

WANT OF CONSENT

CAN. 1965

Si matrimonium accusatur ex defectu consensus, curet ante omnia iudex ut monitionibus opportunis partem, cuius consensus deesse affirmatur, ad consensum renovandum inducat; si ex defectu formae substantialis vel ex impedimento dirimenti quod dispensari potest et solet, partes inducere studeat ad consensum in forma legitima renovandum vel ad dispensationem petendam.

The Code now exhorts the judge to endeavor to bring about a peaceful settlement before legal procedure is instituted. First, of course, he should ascertain the cause of the dispute. If the point of dissension is *lack of consent,* for instance, error, compulsion or fear, or conditional consent, which causes the parties to have the marriage declared invalid, the judge should try to induce the party whose consent is asserted to have been deficient to renew the same. For this purpose he may await a moment when the parties are less excited and more favorably inclined toward each other.[24] Besides, the scandal they give may be held up to them, etc.

23 Instr. of 1883, n. 2.

24 S. O., Dec. 9, 1874 (*Coll.*, n. 1427, ad. 18): *opportunitate capta alicuius momenti effusionis benevolentiae.*

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If the reason for having the marriage declared invalid arises *from want of the prescribed form or from a diriment impediment* from which a dispensation can be and generally is granted, the judge should make every effort to have the parties renew their consent in the form prescribed or ask for the necessary dispensation. Of course, if the form was not observed, the consent was invalid, and must therefore be renewed in the presence of the pastor or Ordinary or a delegated priest and two witnesses. If the marriage was invalid, not by reason of lack of form, but because of a diriment impediment, the parties should be urged to ask for a dispensation. If they are willing to do so, and the Ordinary has the faculty to grant the same, it should be applied there and then. If he has not the faculty, the parties must be told to wait until it is obtained, and in the meanwhile to abstain from conjugal intercourse. This would be the easiest way to settle the case. If only one party knows of the impediment, the chapter on revalidation must be looked up. If they insist upon an ecclesiastical trial, this must be conducted according to the rules that follow.

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CHAPTER II

CONSTITUTION OF THE TRIBUNAL

THE JUDGE

CAN. 1966

Firmo praescripto can. 1576, § 1, n. 1, unicus est iudex instructor in inquisitione pro dispensatione super matrimonio rato et non consummato.

With the sole exception of the *matrimonium ratum et non consummatum,* which requires only one judge to conduct the investigation, a *collegiate tribunal of three judges* must be set up *for every matrimonial case or trial,* and no privilege or custom may be claimed to offset this law.[1] Henceforth every diocesan court should have a board of three judges for matrimonial trials. They may either be chosen for each case as it comes up for decision, or elected for a certain term or *turnus* from the synodal judges, *i. e.,* those chosen at the synod.[2] The reason for constituting a collegiate tribunal is evidently to be sought in greater efficiency and impartiality and in the seriousness of the matter.[3] How these judges are to proceed is explained in can. 205–207.[4] We will only mention that they must act as a body and no one is allowed to decide the case without the co-operation of the others.

1 Thus can. 1576, § 1, n. 1, which simply says *causae matrimonii,* matrimonial cases, not only such as touch the marriage tie — as one might be led to infer from Woywod's translation — but all, even those of simple separation.

2 Can. 1576, § 4.

3 C. 20, X, I, 29.

4 See Vol. II, p. 185 ff.

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THE DEFENSOR VINCULI

CAN. 1967

Sive agatur de nullitate matrimonii, sive de probandis inconsummatione et causis ad dispensandum super rato, citari debet defensor vinculi matrimonialis, ad normam can. 1586.

Each diocese must have a *defensor vinculi,* who should be summoned in cases which concern either the nullity of a marriage or the gathering of proofs for non-consummation and dispensation from a marriage ratified but not consummated. This rule had been inculcated by Benedict XIV, who emphatically insisted on such a defender being chosen by the Ordinary of each diocese. His qualities are described in the same Constitution. He must be well versed in the law and of acknowledged probity. The bishop may remove him and appoint another in his place if he is prevented from taking charge of any case.[5] The *defensor* must make oath into the hands of the bishop to perform his duties faithfully, but this need be done only once, namely, when he enters upon his office.[6]

DUTIES OF THE DEFENSOR VINCULI

CAN. 1968

Defensoris vinculi est:

1.° Examini partium, testium et peritorum adesse; exhibere iudici interrogatoria clausa et obsignata, in actu examinis a iudice aperienda, et partibus aut testibus proponenda; novas interrogationes, ab examine emergentes, iudici suggerere;

5 *"Dei miseratione,"* Nov. 3, 1741, § 6; see can. 1589.

6 Can. 364. The Instruction of 1883, n. 10, requires that the oath be given by touching the book of the Gospels.

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2.° Articulos a partibus propositos perpendere, eisque, quatenus opus sit, contradicere; documenta a partibus exhibita recognoscere;

3.° Animadversiones contra matrimonii nullitatem ac probationes pro validitate aut pro consummatione matrimonii scribere et allegare, eaque omnia deducere, quae ad matrimonium tuendum utilia censuerit.

1. It is the duty of the *defensor vinculi* to be present at the examination of the parties, witnesses, and experts; to present to the judges in a closed and sealed envelope the questions to be opened by them in the act of examination, and to be proposed to the parties and witnesses; and to suggest to the judges new questions which may arise from the cross-examination.

2. He has to weigh the arguments proposed by the parties, and if necessary to contradict them, and to review the papers offered.

3. He is to set down in writing and to point out observations against the nullity of the marriage and in favor of its validity or consummation, and in general to make use of all lawful means which he deems conducive for the defence of the marriage bond.

RIGHTS OF THE DEFENSOR VINCULI

CAN. 1969

Defensori vinculi ius esto:

1.° Semper et quolibet causae momento acta processus, etsi nondum publicati, invisere; novos terminos ad scripta perficienda flagitare, prudenti iudicis arbitrio prorogandos;

2.° De omnibus probationibus vel allegationibus ita certiorem fieri, ut contradicendi facultate uti possit;

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3.° Petere ut alii testes inducantur vel iidem iterum examini subiiciantur, processu etiam absoluto vel publicato, novasque animadversiones edere;

4.° Exigere ut alia acta, quae ipse suggesserit, conficiantur, nisi tribunal unanimi suffragio dissentiat.

1. He is entitled to inspect, at any stage of the proceedings, the minutes of the trial, even though they have not yet been published, and to demand prorogation, which is to be granted according to the discretion of the judge, in order to complete his records.

2. He is entitled to be informed of all the proofs and allegations made, in order to be able to contradict them.

3. He may demand that new witnesses be introduced, or that such as have already been on the witness-stand be re-examined, even though the minutes of the trial have been completed and published; and he may also make new observations.

4. Finally he may demand that other acts, suggested by himself, be drawn up, unless the tribunal by a unanimous vote objects to this demand.

It is necessary to add that the defender must be summoned to all judicial proceedings and sessions of the court, otherwise there is danger of the acts being null and void.[7] How carefully everything should be observed that pertains to the office and rights of the defender, is apparent from many cases decided in Rome. In one instance[8] the acts were attacked and had to be revalidated on several points because the defender had not delivered to the judge or notary the points of examination in a closed and sealed envelope, had omitted to summon some witnesses in order to testify to the relationship of the

7 S. C. C., Aug. 22, 1840 (*Coll. P. F.*, n. 911); Instruction of 1883, n. 10.

8 S. C. C., Ventimil., May, 1888 (*A. S. S.*, t. 21, 162 ff.).

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septimae manus, and was absent when the witnesses were examined. It is therefore required that the acts should contain all the minutes as described above, duly examined and approved by the defender, that he was never absent from any session, or if he was absent, that he afterwards took cognizance of all the proceedings.[9]

9 Instruction of 1883, n. 11. Instructive for defenders are the cases contained in the *Thesaurus S. C. C.*, also the cases published in the *A. S. S.* and *Analecta Ecclesiastica*, as well as the *Regulae servandae in judiciis apud S. Rom. Rotae Tribunal* in *A. Ap. S.*, II, 783 ff.

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CHAPTER III

WHO MAY ATTACK MARRIAGES AND ASK FOR A DISPENSATION FROM A RATIFIED MARRIAGE

CAN. 1970

Tribunal collegiale nullam causam matrimonialem cognoscere vel definire potest, nisi regularis accusatio vel iure facta petitio praecesserit.

The board of judges cannot take cognizance of, nor decide, any matrimonial case, unless a regular accusation or a legal petition has preceded.

What a "regular accusation" means is determined in the following canon, which specifies the persons who are capable of "accusing" a marriage. A legal or lawfully drawn up petition would imply persons capable of petitioning.[1] However, since a petition implies the grant of a favor, it is evident that the petitioner should be capable of making and accepting the petition, and that it be addressed to the proper authority. Thus in case of a mixed marriage the Catholic party must make the petition and send it to the bishop or vicar-general or chancellor of the diocese in which the petitioner has his domicile or quasi-domicile.

WHO MAY BE PLAINTIFF

CAN. 1971

§ 1. Habiles ad accusandum sunt:

1.° Coniuges, in omnibus causis separationis et nullitatis, nisi ipsi fuerint impedimenti causa;

1 Instruction of 1883, n. 3. Perhaps the two terms convey one and the same idea: the *libellus litis* or writ of petition.

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2.° Promotor iustitiae in impedimentis natura sua publicis.

§ 2. Reliqui omnes, etsi consanguinei, non habent ius matrimonia accusandi, sed tantummodo nullitatem matrimonii Ordinario vel promotori iustitiae denuntiandi.

The parties, therefore, should draw up a short and clear statement setting forth the reasons why they wish to have the marriage declared invalid, together with a request that it be declared null and void. They may make this petition orally before the court, whose secretary has to put it down in writing. But the petition may also be filed for separation only, which is a process essentially distinct from that aiming at a declaration of nullity. Canon 1971 establishes who may be plaintiff, *i.e.*, ask for a bill of separation or divorce by having the marriage declared invalid.

1. And first, either one or both of the contracting parties may present the bill to the episcopal court. The parties alone are admitted to attack their marriage on the ground of defective consent, whether this defect be caused by violence and fear, or error, or lack of will, or unfulfilled conditions.[2] If one party alone is conscious of defective consent, that party alone can lawfully present the petition. Concerning impotency, too, the only competent plaintiffs are the parties themselves, because they alone can know the fact and they alone are interested in the matter.[3] The Code, however, does not limit the parties' right to these cases. Hence any impediment which was, without their own fault, placed in the way to their lawful union may be used as a reason for impugning it.

2 Instruction of 1883, n. 36.

3 *Ibid.*, n. 46 (*Coll.*, Vol. II, p. 179).

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The text says: "*nisi ipsi fuerint impedimenti causa.*" What this means is not clear. A *causa* may be either efficient, or final, or formal, etc. It is evident that the formal cause of an impediment is the law, either divine or human. A final cause can hardly be assigned in this connection, for it would be setting up an impediment to hinder a matrimonial union. Hence nothing else is left but the efficient cause. In other words, either one or both of the parties may have caused or produced the impediment. This may have been done either maliciously or without malice, sinfully or without sin. In the line of the twelve impediments, a sinful cause would be found only in rape, crime, and public honesty, because these three are really founded on unlawful actions due to human agency. There might also be question of a cause, though a purely material one, in cases of mixed religion and spiritual relationship. For the impediments of disparity of worship and mixed religion (though the latter is only prohibitive) arise from a union between two persons whom the Church has declared incapable of contracting marriage. Spiritual relationship exists between the parties if one was sponsor to the other, which may happen when one is baptized shortly before marriage.[4] We believe the intention of the lawgiver was to restrict that cause to a malicious or sinful, or at least deceitful action. In that case it would be merely an application of the well-known axiom that no one should be benefitted by a fraudulent act committed by himself ("*fraus sua nemini patrocinari debet.*") [5]

2. Besides the parties themselves, the *promotor iustitiae* or prosecuting attorney of the diocesan court may attack

4 We know of a case where a priest, by sheer distraction, asked the bridegroom to be sponsor for his bride. But luckily the former did not touch his godchild physically and hence contracted no relationship.

5 C. 15, X, I, 3.

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a marriage because of impediments which are by nature *public*. Can. 1037 defines an impediment to be public when it can be proved in court. With the exception *perhaps* of impotency and crime, all the impediments are more or less of a public character. For certainly age, *ligamen,* consanguinity, affinity, spiritual and legal relationship, religious profession, sacred orders can be proved by documents, and public honesty presupposes notoriety. As to mixed religion there may be a real doubt, because the baptismal records of non-Catholic denominations are often carelessly kept. We said with the exception *perhaps* of impotency and crime, for even impotency might become known and proved, especially in case of castrated males and eunuchs. Yet since the Instruction of 1883 seems to exclude in cases of impotency all but the parties themselves, we hardly believe that the *promotor iustitiae* would have to proceed against them *ex officio*.[6] As to crime, a different view must be taken, because not only is this impediment of a public character, but the crime itself is directed against the public welfare. Hence if the attorney should have strong indications as to the existence of a crime, and especially if there were a rumor pointing to the existence of that impediment, he would have to order further, but cautious, investigation to be made, until the truth would appear or the doubt disappear.[7]

3. All others, even blood relations, *have no right* to attack a marriage, though they *may denounce* the nullity of a marriage to the Ordinary or promoter of justice. Who are these *"reliqui omnes"?* In the first place the relatives of the couple, because they are supposed to know better than outsiders of the existence of an impediment.[8]

6 For inst., male singers of an advanced age with a soprano or alto voice cannot but be suspected; cfr. Bened. XIV, *De Syn. Dioec.*, XI, 7, 2.

7 Instruction of 1883, n. 3.

8 C. 2, C. 35, q. 6; c. 3, X, IV, 18.

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Besides these, every Catholic is allowed to "denounce"—not "accuse"—the nullity of a marriage. From this privilege no one is excluded. Hence the old law [9] which excluded from the right of denouncing such as acted from dishonest motives or had wilfully neglected denunciation at the time the banns were published, must be corrected.

ACCUSATION POST MORTEM

CAN. 1972

Matrimonium, quod, utroque coniuge vivente, non fuerit accusatum, post mortem alterutrius vel utriusque coniugis ita praesumitur validum fuisse, ut contra hanc praesumptionem non admittatur probatio, nisi incidenter oriatur quaestio.

A marriage not "accused" during the life-time of both parties is after the death of either one or both presumed to have been valid, and against this presumption no proof is admitted, except as an incidental question or side-issue. The chief reason for this canon is to protect the legitimacy and hereditary rights of the offspring. Besides, it seems improper [10] to admit one to accusation after the death of a party who may be innocently slandered. Hence the S. Congregation could confidently assert in 1842 that never before had an accusation against the validity of a marriage been admitted after the death of one of the parties.[11] The reasons for such *post mortem* trials are generally to be sought in personal interests and material gain accruing from inheritance. However, says our text, if the question was raised *incidentally*, it *might be admitted*. Thus if the principal question or point

[9] Cfr. X, IV, 18.
[10] C. 7, X, IV, 17.
[11] S. C. C., Sept. 17, 1842; July 30, Dec. 3, 1735 (Richter, *Trid.*, p. 278, n. 134; n. 135).

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would be the legitimacy of the offspring, the next or incidental question would be the validity of the marriage.[12] But it may be added that the conjectural proofs for the validity of a marriage which is dissolved by death and impugned by some near relative after the death of one party, are readily admitted, especially if not the marriage tie itself, but its consequences are at issue.[13]

CAN. 1973

Soli coniuges ius habent petendi dispensationem super matrimonio rato et non consummato.

The married parties alone have the right to petition for a dispensation from a marriage ratified but not consummated.[14]

12 Cfr. c. 7, X, IV, 17.

13 S. C. C., Barcin., Dec. 16, 1893 (*A. S. S.*, t. 26, 407 ff.)—a very interesting case for defenders.

14 Of course the petition may be made *by* others, but it must be made in the name of the parties and at their request.

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CHAPTER IV

LEGAL PROCEEDINGS

ARTICLE I

WITNESSES

CAN. 1974

Consanguinei et affines de quibus in can. 1757, § 3, n. 3, habentur testes habiles in causis suorum propinquorum.

Blood relations and *affines,* although otherwise excluded, may be admitted as witnesses in matrimonial cases of their kin, because these, as a Palea of the Decree says,[1] know their genealogy or pedigree better than strangers.

TESTIMONIUM SEPTIMAE MANUS

CAN. 1975

§ 1. In causis impotentiae vel inconsummationis, nisi de impotentia vel inconsummatione aliunde certo constet, debet uterque coniux testes, qui septimae manus audiunt, inducere, sanguine aut affinitate sibi coniunctos, sin minus vicinos bonae famae, aut alioquin de re edoctos, qui iurare possint de ipsorum coniugum probitate, et praesertim de veracitate circa rem in controversiam deductam; quibus iudex ad normam can. 1759, § 3, alios testes potest ex officio adiungere.

§ 2. Testimonium septimae manus est argumentum

1 C. 2, C. 35, q. 6; cc. 5, 22, X, II, 20; c. 3, X, IV, 17.

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credibilitatis quod robur addit depositionibus coniugum; sed vim plenae probationis non obtinet, nisi aliis adminiculis aut argumentis fulciatur.

In cases of impotency or non-consummation, unless the facts are ascertained from other sources, each of the parties must produce witnesses, called of the seventh hand (*septimae manus*), who are related to the parties by blood or affinity, or at least neighbors of good reputation, or otherwise well-informed persons, who will testify under oath to the probity of the parties and their truthfulness concerning the controverted matter. To these the judge may *ex officio* add other witnesses. This testimony of the *septima manus* is a proof of credibility which adds weight to the deposition of the consorts, but it has not the force of full proof unless it is supported by other circumstances or arguments.

The *septimae manus* proof is of Germanic origin. It was adopted by Gratian [2] and by the Decretals.[3] It means that the husband should bring forward seven persons of either sex, and any age or condition, if possible of his own kin, who are acquainted with his character, actions, and conduct. In the same manner the wife should present seven relatives, friends, or acquaintances. Thus fourteen persons, after having been duly sworn, testify to the trustworthiness and truthfulness of the married couple. But they cannot directly testify to the non-consummation of the marriage, although some indirect statements may be elicited from them. Thus they may be asked whether the couple lived together affectionately, whether there were quarrels, whether medicine was used to cure impotency or a physician was consulted.[4]

2 C. 2, C. 33, q. 1, is from a letter of Greg. I, but the text has the interpolation of *septimae manus*.

3 Cfr. cc. 5, 7, X, IV, 15.

4 *Instructio Orient.*, tit. VI, art. 5 (*Coll.*, n. 1588).

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But all these testimonies do not afford full proof unless they are supported by other evidence. Such an aid (*adminiculum*) or support would be found in the supplementary oath of the woman testifying to non-consummation.[5] But a relatively surer way is that proposed in the following canons. We say relatively surer, because in case the woman would have led a life of prostitution after a civil divorce, bodily inspection could hardly bring results.[6]

ARTICLE II

BODILY INSPECTION

CAN. 1976

In causis impotentiae aut inconsummationis requiritur inspectio corporis utriusque vel alterutrius coniugis per peritos facienda, nisi ex adiunctis inutilis evidenter appareat.

CAN. 1977

In peritis eligendis, praeter normas in can. 1792–1805 datas, serventur praescripta canonum qui sequuntur.

Cases of impotency and non-consummation require bodily inspection of both or one of the parties, which is to be performed by experts, unless circumstances — like those just mentioned — render it evidently useless. The experts must be chosen by the judges after consultation with the *defensor vinculi*. Besides, the following canons must be observed.

CAN. 1978

Ad periti munus ne admittantur qui coniuges priva-

5 C. 4, X, II, 19.

6 Cfr. *Am. Eccl. Rev.*, Vol. 9, 466, 376 (contains two decisions, but without date or source); in this case dispensation was granted on other canonical proofs.

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tim inspexerint circa factum cui innititur petitio declarationis nullitatis vel inconsummationis; licet tamen hos tanquam testes inducere.

Those shall not be admitted as experts who have privately (as physician or midwife) examined the parties concerning the vital point upon which the petition for having the nullity of marriage declared or the non-consummation chiefly hinges; such private experts may, however, be introduced as witnesses.

CAN. 1979

§ 1. Ad inspiciendum virum, duo periti medici ex officio deputari debent.

§ 2. Ad mulierem vero inspiciendam duae obstetrices, quae legitimum peritiae testimonium habeant, ex officio designentur; nisi maluerit mulier a duobus medicis ex officio pariter designandis inspici vel id Ordinarius necessarium habuerit.

§ 3. Corporalis mulieris inspectio fieri debet, servatis plene christianae modestiae regulis et adstante semper honesta matrona ex officio designanda.

1. The *two physicians* who are to inspect the man are to be appointed *ex officio*. This means that they have to promise under oath that they will perform their duty conscientiously and without human respect.[7]

2. The two *midwives* who have to inspect the woman must be legally approved (by a state diploma or county or city certificate) and must also be appointed *ex officio*. Therefore they, too, have to be sworn in and must enjoy a good reputation.[8] But the woman may, if she so chooses, or if the Ordinary deems it necessary, be in-

[7] *Instructio Orient.*, tit. VI, art. 5 (*Coll.*, n. 1588).
[8] *Ibid.*

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spected by two physicians to be appointed *ex officio*.

3. The inspection must be conducted with becoming Christian modesty and always in the presence of a worthy matron to be chosen *ex officio*. This matron is also obliged to take an oath and to keep the secret.[9]

CAN. 1980

§ 1. Mulieris inspectionem obstetrices vel periti, seorsum singuli, exsequi debent.

§ 2. Singuli medici vel obstetrices singulas relationes conficiant, intra terminum a iudice praefinitum tradendas.

§ 3. Potest iudex relationes ab obstetricibus confectas examini alicuius periti medici subiicere, si id opportunum existimaverit.

1. The midwives who perform the inspection on the woman must do it separately.

2. Each physician or midwife has to draw up a separate report within a term to be fixed by the judge. In this report, says an instruction of the Holy Office,[10] they may state the result of their inspection and what they think about the nature of the impotency, whether it is acquired or natural, absolute or relative. This report should be sworn to and handed to the chancellor of the matrimonial court.

3. The judge may, if he thinks it advisable, submit the report of the midwives to the examination of an expert physician, who should ascertain whether the inspection was made along scientific lines.[11]

9 *Ibid.* Of course, physicians and midwives are bound by professional secrecy.

10 *Instr. Orient.*, tit. VI, art. 5. How non-consummation in case of a woman destitute of ovaries and uterus may be proved we leave to physicians to decide; but they should not forget to mention that fact in their report, and what they think about impotency and sterility.

11 *Inst. cit., ibid.*

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CAN. 1981

Peracta relatione, periti, obstetrices ac matrona, seorsum singuli, a iudice interrogentur, secundum articulos a vinculi defensore antea concinnatos quibus ipsi, praestiti iuramento, respondeant.

After the report has been received, the experts, the midwives, and the matron are to be questioned separately according to the points previously drawn up by the *defensor vinculi,* and must answer under oath.

CAN. 1982

Etiam in causis defectus consensus ob amentiam requiratur suffragium peritorum, qui infirmum, si casus ferat, eiusve acta quae amentiae suspicionem ingerunt, examinent secundum artis praecepta; insuper uti testes audiri debent periti qui infirmum antea visitaverint.

The verdict of experts is required also in cases of defective consent caused by insanity. They must, if the case admits, examine the patient as well as those acts of his which cause suspicion, according to the rules of their art (psychiatry). Besides, experts who have attended the patient before his illness should be heard as witnesses.

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CHAPTER V

PUBLICATION OF THE ACTS — CLOSE OF TRIAL — SENTENCE

CAN. 1983

§ 1. Publicato processu fas adhuc est partibus novos testes, ad normam tamen can. 1786, super diversis articulis inducere.

§ 2. Si vero testes iam excussi super iisdem articulis antea propositis denuo audiendi sint, servetur praescriptum can. 1781, integro iure defensoris vinculi opportunas proponendi exceptiones.

1. Even after the publication of the process the parties are allowed to introduce new witnesses to testify on various points. To understand this ruling we must remember that the publication of the process takes place after all the evidence has been collected, before the discussion of the case begins and before sentence is pronounced. It means that the whole material, consisting of all the proofs given by the parties, the witnesses and the experts, is made known to the parties and their lawyers, so that these may inspect it, and, if they wish, demand a copy.[1] This is the *processus publicatio*. Now, in virtue of the ordinary rules,[2] new witnesses should not be admitted after the publication of the acts, lest the proceedings be drawn out indefinitely. Yet, because matrimonial trials are matters of great importance, the legislator permits the parties to bring new witnesses, provided no fraud or bribe is em-

1 Cfr. can. 1858 f. 2 Cfr. can. 1786.

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ployed, and provided both parties consent and the attorney or defender does not object. The judge has to make a formal decree permitting the introduction of new evidence.

2. If witnesses who have already been examined are to be again questioned on the same points, the examination must be performed before the depositions have been published (*antequam acta seu testificationes publici iuris fiant*), provided the judge deems it necessary and there is no danger of a secret agreement or bribery.[3] The defender always has the right to object to the reintroduction of the same witnesses on the same points.

CAN. 1984

§ 1. Defensor vinculi ius habet ut in allegando, petendo et respondendo, tam in scriptis quam in defensione orali, audiatur postremus.

§ 2. Quare tribunal ad definitivam sententiam ne deveniat, nisi prius vinculi defensor interrogatus declaraverit sibi nihil deducendum vel inquirendum superesse.

§ 3. Si vero ante praefinitum a iudice iudicii diem defensor nihil deduxerit, praesumitur eum nihil iam deducendum habere.

1. The defender is entitled to be heard last, when allegations are made, petitions filed, or answers given, and he may exercise this right either in writing or by word of mouth.

2. Hence the tribunal shall not proceed to render a verdict, unless the defender has formally declared, upon request, that he has nothing more to bring forward or to inquire into.

[3] Can. 1781.

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3. If, however, the defender has brought forward nothing to the contrary before the day set for the trial, it is presumed that he has nothing more to say.

Can. 1985

In causis quae spectant ad dispensationem matrimonii rati et non consummati, iudex instructor neque ad publicationem processus neque ad sententiam super ipsa inconsummatione et causis ad dispensandum deveniat, sed omnia acta una cum voto scripto Episcopi et defensoris vinculi transmittat ad Sedem Apostolicam.

If the case concerns a dispensation from a *matrimonium ratum non consummatum,* the judge who drafted the case may neither publish the acts nor pronounce sentence as to the non-consummation or the reasons for the dispensation, but must send all the acts together with the written view of the bishop and of the defender to the Holy See.

Note that only in case of a dispensation from a merely ratified marriage has the judge to abstain from giving sentence.[4] If the trial merely concerns impotency, the Ordinary is allowed to give sentence in the first instance, either for or against the nullity of the marriage (*constat vel non constat de impotentia in casu*). Thus also in other cases of impediments, of defect of consent and form.

From this canon it appears that, besides the three judges, there should be an *officialis* to preside over and conduct the trial and to determine the administrative rules for conducting cases.[5] Hence *index instructor* here

4 S. O., Aug. 6, 1890, ad 7 (*Coll.*, n. 1737).

5 Can. 1577.

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means the *officialis* of the diocese. But since the Code [6] permits that in smaller dioceses the offices of *officialis* and vicar-general may be held by one and the same person, it is evident that the vicar-general would in this case act as *iudex instructor*. He would therefore be the *moderator*, as he was formerly called, and as such should draw up the case, according to the petition filed by the parties. As soon as he has received this petition he shall cause the chancellor or the secretary of the matrimonial court to put it down in writing, issue rules and ordinances in accordance with the general rules on trials and with those governing matrimonial trials in particular, which are conducive to the regular and orderly compilation of the acts, convoke the tribunal, summon the parties and their witnesses, and grant delays when justly demanded. All these things must be recorded in the acts by the chancellor or secretary.[7] But the *real judge* in matrimonial matters is the Ordinary of the diocese, or rather the board of three judges. Hence the matrimonial court should be composed as follows: the moderator (*officialis* or vicar-general); the three judges; the defender and the secretary. The bishop may be personally present at every session, but it is expedient that he leave the judgment to the tribunal, over which the *officialis* of the diocese presides.[8]

The three judges must proceed *collegialiter*, as a body, and give their verdict by majority vote.[9] This is the *first instance*, but it may be that an appeal is taken. Hence the Code proceeds as described in the following chapter.

6 Can. 1573, § 1.
7 Instruction of 1883, n. 9 (*Coll.*, n. 1587).
8 Can. 1578.
9 Can. 1577.

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CHAPTER VI

APPEALS

CAN. 1986

A prima sententia, quae matrimonii nullitatem declaraverit, vinculi defensor, intra legitimum tempus, ad superius tribunal provocare debet; et si negligat officium suum implere, compellatur auctoritate iudicis.

The *defensor vinculi* must, within the time granted by law, appeal to a higher tribunal if the first sentence was in favor of the nullity of the marriage. Should he neglect to do his duty, he may be compelled thereto by the judge.

The *time* within which an appeal may be made is ten days from the date when he has received knowledge of the first sentence.[1] But an appeal may be taken only if the first sentence declared the marriage null. If the sentence was in favor of validity, and the parties are satisfied, the defender shall abstain from appealing, and the whole trial may be considered as closed.[2]

CAN. 1987

Post secundam sententiam, quae matrimonii nullitatem confirmaverit, si defensor vinculi in gradu appellationis pro sua conscientia non crediderit esse appellandum, ius coniugibus est, decem diebus a sententiae denuntiatione elapsis, novas nuptias contrahendi.

If the second sentence confirms the first given in favor of nullity, and the defender of the court of appeals (who

1 Can. 1881.

2 Benedict XIV, "*Dei miseratione*," § 8; *Instructio*, 1883, n. 25.

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is a different one from that of the first instance) does not feel himself obliged in conscience to appeal, the parties are free to marry again after the expiration of ten days from the date when the second sentence became known to them. Pending the appeal, *i. e.*, during the time between the first and second sentence, the party in whose favor the nullity was declared in the first instance is not allowed to remarry; and if he or she should have attempted a marriage before the second sentence, they must be separated, or else they are to be treated as guilty of polygamy.[3]

CAN. 1988

Decreta matrimonii nullitate, Ordinarius loci curare debet, ut de ea mentio fiat in baptismorum et matrimoniorum regestis, ubi matrimonii celebratio consignata invenitur.

After the second sentence in favor of nullity, the Ordinary should see to it that the annulment of the marriage is duly recorded in the baptismal and matrimonial registers of the place where the marriage was contracted.

CAN. 1989

Cum sententiae in causis matrimonialibus nunquam transeant in rem iudicatam, causae ipsae, si nova argumenta praesto sint, retractari semper poterunt, firmo praescripto can. 1903.

Since no sentence in matrimonial trials ever becomes a *res iudicata,* a case may be reopened at any time, provided new proofs are offered; but these proofs must be of a weighty nature and supported by documents.

A *res iudicata* is a controversy definitively settled by a

[3] Benedict XIV, "*Dei miseratione,*" § 9.

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twofold identical sentence, or by one sentence from which no appeal has been taken within the legitimate term, or from which an appeal is not admissible.[4] Therefore, even if the nullity of a marriage had been confirmed by the second instance, and the parties entered a new union, the former case may yet be reopened. This is a *favor iuris* of matrimonial cases, because marriage is indissoluble and a matter of public welfare.[5] It follows that no prescription or lapse of time may be invoked against the right of attacking a marriage. However, since the trial is conducted on such rigorous lines, it would be unjust to listen to frivolous reasons or proofs already heard and refuted. Therefore *weighty* and *new reasons* must be proposed.[6] It is evident that a verdict given by the Holy See cannot be impugned upon the ground of can. 1989, or reversed by the Ordinary without notifying the Apostolic See.

It is advisable to have a summary statement drawn up before the trial is reopened.[7]

4 Can. 1902.

5 Smith, *Marriage Process*, p. 343.

6 Benedict XIV, "*Dei miseratione*," § 11. For this purpose the acts of all matrimonial trials are to be kept in the diocesan archives.

7 Leitner, *l. c.*, p. 558.

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CHAPTER VII

CASES EXCEPTED FROM THE PRECEDING RULES

CAN. 1990

Cum ex certo et authentico documento, quod nulli contradictioni vel exceptioni obnoxium sit, constiterit de exsistentia impedimenti disparitatis cultus, ordinis, voti sollemnis castitatis, ligaminis, consanguinitatis, affinitatis aut cognationis spiritualis, simulque pari certitudine apparuerit dispensationem super his impedimentis datam non esse, hisce in casibus, praetermissis sollemnitatibus hucusque recensitis, poterit Ordinarius, citatis partibus, matrimonii nullitatem declarare, cum interventu tamen defensoris vinculi.

This canon will probably evoke a sigh of relief from more than one ecclesiastic who has to deal with matrimonial cases. For it dispenses with almost all the formalities of a regular trial, which always take time and money.

1. The *impediments* which are brought forward in order to have a marriage declared null and void are: disparity of worship, sacred orders, solemn religious profession, the bond of a previous marriage, consanguinity, affinity, and spiritual relationship,— seven in all. That the others are not included is owing partly to the nature of these impediments, partly to the difficulty of complying with the required conditions.

2. The *conditions* which govern the application of this canon are: (a) that the existence of the impediment be ascertained by a *reliable and authentic document,* which cannot be rejected or disregarded; (b) that it be

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equally certain that *no dispensation* had been granted from the impediment.

Authentic documents are such as are reliable and trustworthy because written or issued by the proper authorities. Such are the genuine acts of the Roman Court, judicial acts and documents drawn up by an ecclesiastical notary, baptismal and matrimonial records kept in the archives of a diocese, parish, or religious community, and copies made from these originals. Such are also *civil documents* of a public character, issued according to the laws of the country. All these, ecclesiastical as well as civil documents, are presumed to be genuine until the contrary is proved.[1] Thus an "*affidavit*," if issued with the proper formalities, in case of a marriage, is *prima facie* evidence of such marriage in any court of Missouri,[2] and must therefore be considered an authentic document in the ecclesiastical court.

Private documents, the Code says elsewhere,[3] afford no full proof, and are excluded by our text. It has happened that a soldier without any commission from the authorities made an investigation concerning a Baptism. The result was considered insufficient, especially since the *defensor vinculi* was not present.[4] Had the soldier obtained an authentic document from an ecclesiastical court, the investigation could not have been objected to as purely private.

A document *quod nulli contradictioni vel exceptioni obnoxium sit,* is such a one as described above, provided it is authentic, no matter whether issued by the ecclesiastical or the civil authorities. The proof that it is not genuine would have to be furnished by the plaintiff (*actor*) or

1 Can. 1813 f.
2 Revised Statutes of Mo., sect. 4563.
3 Can. 1817.
4 S. O., June 10, 1896, Albany, N. Y. (*Coll.*, n. 1940).

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his lawyer, not by the defendant (*reus*). Whether a paper received from a Protestant minister concerning Baptism is authentic must be decided from another viewpoint.[5]

It is furthermore required that *no dispensation* had been granted from said impediments. Therefore copies of all the dispensations forwarded by the diocesan court should be kept on file for cases of emergency, at least in the form of lists indexed according to the species of the various impediments. The Roman Court keeps its records in good order and in this respect may serve as an example to diocesan courts.

3. The Code adds *that in these cases the solemnities thus far mentioned* (in the preceding canons, which prescribe the regular trial) *may be omitted,* and the Ordinary, upon having summoned the parties, may declare the marriage null and void, provided the *defensor vinculi* is satisfied. This is a decided modification, not only of Benedict XIV's Constitution *"Dei miseratione,"* but also of former decrees[6] which required a summary trial when a marriage was to be declared invalid because of disparity of cult. Now the formalities of a regular trial may be omitted, and all that is required is certainty gained from authentic documents that no dispensation was granted, summoning of the parties, intervention of the defender, and a declaration of nullity. An appeal to a higher tribunal is not required if the defender is satisfied;[7] nor is recourse to the Holy See necessary in that case.[8] But can. 1988 must be observed.

5 This must be judged according to the rules given under mixed marriages. It would also require an *affidavit* issued by civil authority in order to authenticate it.

6 S. O., June 10, 1896 (*Coll.*, n. 1940).

7 S. O., June 5, 1889 (*Coll.*, n. 1706).

8 S. O., June 21, 1912 (*A. Ap. S.*, IV, 443).

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CAN. 1991

Adversus hanc declarationem defensor vinculi, si prudenter existimaverit impedimenta de quibus in can. 1990 non esse certa aut dispensationem super eisdem probabiliter intercessisse, provocare tenetur ad iudicem secundae instantiae, ad quem acta sunt transmittenda quique scripto monendus est agi de casu excepto.

If the defender prudently believes that the impediments mentioned in the preceding canon did not exist or have probably been dispensed from, he is obliged to appeal the case to the judge of the second instance, to whom all the acts must be transmitted with the notification that the case belongs to the excepted class. Reasons for doubt may arise from the nature of the documents. Thus a pastor's record, although signed and sealed by the pastor, may be doubtful because not verified by the episcopal court.[9] A case might be made out against spiritual relationship, because the names of the sponsors were illegibly written or there was doubt as to identity, especially if the name is a very common one. In cases of consanguinity error is possible as to the degree. Concerning the marriage tie doubts may arise as to the examination of the free status of the contracting parties, etc.; much depends on the character of the papers and the attitude of the defender.

CAN. 1992

Iudex alterius instantiae, cum solo interventu defensoris vinculi, decernet eodem modo de quo in can. 1990, utrum sententia sit confirmanda an potius pro-

9 Instruction of 1883, n. 31 (*Coll.*, n. 1587).

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cedendum in causa sit ad ordinarium tramitem iuris, quo in casu eam remittit ad tribunal primae instantiae.

The judge of the second instance, with the sole intervention of the defender, shall decide, as stated in can. 1990, whether the first sentence is to be confirmed or a regular trial instituted; in the latter case the matter is to be referred back to the tribunal of the first instance.

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APPENDIX I

SOME SPECIMEN PETITIONS FOR MATRIMONIAL DISPENSATIONS

For Mixed Marriages or Disparity of Worship

To the Rt. Rev. Bishop N. N.:

N....., a Catholic of this parish, wishing to marry N....., a non-Catholic, humbly prays the Right Rev. Bishop, in virtue of the faculties granted by the Holy See, to grant a dispensation from the impediment of mixed religion (or disparity of cult).

The non-Catholic party has complied with the conditions prescribed by law (can. 1061).

Or if not complied with in writing: The non-Catholic party refuses to give the promises in writing, but has made an oral promise to the same effect. The reasons are: angustia loci, aetas superadulta, periculum matrimonii contrahendi coram ministro acatholico, etc.

Please find enclosed $.... for alms.

To the Apostolic See:

Ad pedes Sanctitatis Vestrae provolutus humillime rogat N. Catholicus super impedimento disparitatis cultus, quatenus matrimonium inire valeat cum N. acatholica non baptizata, vel saltem valde dubie baptizata. Promissiones prout de iure requiruntur sunt praestitae (vel saltem oraliter factae sincere).

Causae vero sunt.....

Pro qua gratia, . . .

The Ordinary should write below the signature, or on a special paper: Petitionem hanc enixe commendat Ordinarius oratoris, cuius rationes, in quantum scit, veritate nituntur, et promissiones sincere factas esse credit.

Pro Sanatione in Radice

To the Bishop:

N....., (fictitious name), wishing to validate his (or her) marriage with B....., humbly prays the Right Rev. Bishop, in

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virtue of the faculties granted by the Holy See, to grant a revalidation (*sanatio in radice*), removing the impediment of (for ex. crime of adultery with promise of marriage), which he (or she) concealed at the time of marriage with B., who is still ignorant thereof.

The reasons for requesting a *sanatio in radice* are, on the one hand, scandal and the danger of incontinence resulting from separation if imposed; on the other hand, impossibility of obtaining the renewal of B.'s consent without serious danger of dissension.

Double Impediment

(See Can. 1050)

Beatissime Pater:

Exponitur humiliter Sanctitati Vestrae pro parte oratricis N., dioecesis N., ex loco N., quod cum dicta oratrix catholicae religioni addictissima nubere intendat viro N. non baptizato, cui etiam coniuncta est in secundo gradu affinitatis lineae collateralis, Sanctitatem Vestram humillime rogat, quatenus benigne dispensare dignetur de hoc duplici impedimento. Oratrix est vidua tribus liberis onerata, quorum senior quinquennium non excedit. Insuper propter res familiares ipsius mulieris loco huic adnexas vix alium virum invenire poterit quippe cum locus ipse acatholicis potius quam catholicis abundet et numerum focularium 100 non superet.

Pro qua gratia. . . .

Ita res se habere parochus oratricis testatur, quapropter hunc supplicem libellum enixe commendat.

N. N.
Episcopus Ordinarius Dioecesis N.

For a Sanatio in Radice to the S. Poenitentiaria

Beatissime Pater:

Ad pedes Sanctitatis Vestrae humiliter exponit parochus loci N., dioecesis N., in Statu N. Mulier quaedam nomine (fictitious name), cum esset legitime coniuncta viro (fictitious name), carnaliter cognita fuit a Ioanne, cui post primi mariti mortem nupsit in facie ecclesiae. At obstare videtur impedimentum criminis, quippe cum non solum adulterium commisit cum dicto Ioanne,

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verum etiam serio promisit perdurante eodem legitimo matrimonio se nupturum ipsi post viri mortem. Insuper fatetur mulier quod vir praesens ipsi patefecerit se nunquam fuisse baptizatum ante eorum matrimonium, quamvis tamquam catholicus se gesserit semper. At momento periculi sat proximo mortis ipse peterit baptismum, cumque nullus sacerdos poterit haberi aut adiri convenienter mulier ipsum rite baptizavit. At post recuperatam valetudinem noluit vir renovare consensum, quocumque modo oblatum, et mulier timens, ne propter anteactae vitae suae consuetudinem praefatus vir ipsam forsitan relinqueret et prolem reclamaret acatholicis tradendam, rogavit instanter, ut Sanctitas Vestra saluti eius necnon prolis benigne consulere dignetur, quatenus opus sit, per sanationem in radice. Quoad publicitatem horum impedimentorum in quantum scio, nullus est in loco isto, qui hos coniuges non crederet veros, vel quidquam mali suspiceret, et quominus divulgaretur vix timendum est.

Pro qua gratia. . . .

N. N., PAROCHUS.[1]

1 Cfr. Pyrrhus Corradus, *Praxis Dispensat. Apost.* (Migne, *Cursus Theol.* Vol. xviii); Putzer, *Commentary in Facult. Apost.*, ed. 4a, pp. 122 ff.

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APPENDIX II

(See Can. 1099, § 2, p. 303)

It may be worth while to add a few observations on this section, especially since Sabetti-Barrett (*Theologia Moral.* 27th ed. 1919, p. 940), has drawn attention to the same. Our canon evidently enumerates three classes of persons who are, or are not, respectively, obliged to observe the Catholic form of marriage. The first class is that of *Catholics,* whether they are such now, at the moment of marriage, or have been such previously and fallen away. We will designate these by the letter *A*. The second class is that of *non-Catholics* who never belonged nor now belong to the Catholic Church, regardless of whether or not they were baptized. The letter *B* shall designate them. The third class comprises persons born of non-Catholic parents, but baptized in the Catholic Church, though not raised as Catholics. The letter *C* shall stand for these. Putting the three classes into a mathematical schema we have the following possibilities:

If A marries A — Bound by Catholic form.
If A " B — " " " " .
If A " C — " " " " .
If B " A — " " " " .
If B " B — Not bound by Catholic form.
If B " C — " " " " " .
If C " A — Bound by Catholic form.
If C " B — Not bound by Catholic form.
If C " C — *Then what?*

We believe they are obliged to observe the Catholic form. Our reason is: C forms a class for itself, distinct from class B, and as the text states that one in Class C is not bound to observe the form when he marries one of Class B, the Code manifestly wishes to restrict that freedom from the observance of the law to the sole case of a marriage between C and B. Otherwise the lawgiver would have undoubtedly stated: when

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they marry among themselves — *quoties inter se contrahant.* Hence the wording, it seems to us, taken in its strict sense, would oblige parties in Class C to observe the form if they marry among themselves. The objection that they are ignorant of the law, and practically spurn it, proves nothing, for it could be urged also against § 1 of our canon, because should-be Catholics who have fallen away and marry among themselves, or with non-Catholics, are also bound by the Catholic form. The old principle that by Baptism one is bound to obey the ecclesiastical law is here again apparent (can. 87). That non-Catholics (in the strict sense) are exempted is an exception and must be strictly interpreted.

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APPENDIX III

In cases where doubts arise as to whether baptism was conferred at all, or conferred validly, and, consequently, whether a marriage contracted between two non-Catholics, or between a Catholic and a non-Catholic, was valid, the following rules[1] may with some safety be applied, since they are based upon official decisions.

1. A marriage contracted between a Catholic, or a non-Catholic who has undoubtedly been baptized, and a non-Catholic whose baptism is doubtful, is to be considered valid.

2. A marriage contracted between two non-Catholics, if the baptism of both parties is doubtful, must be held valid.

3. *Invalid* is a marriage contracted between a party whose baptism is *doubtful* and one who *certainly* never was baptized.

However, this last rule now, after May 19, 1918, must *not* be applied to such marriages as are contracted between strictly non-Catholics, *i.e.*, such as never have been Catholics either by baptism or conversion, on account of can. 1070.

On rules 1 and 2 see S. O., Nov. 17, 1830 (*Coll. P. F.*, n. 821):

"R. 1. Quoad haereticos quorum sectae ritualia praescribunt collationem Baptismi absque necessario usu materiae et formae essentialis, debet examinari casus particularis.—2. Quoad alios qui iuxta eorum rituale baptizant valide, validum censendum est Baptisma. Quoad si dubium persistat, etiam in primo casu, censendum est validum Baptisma in ordine ad validitatem matrimonii."

S. O., Sept. 9, 1868 (*Coll. P. F.*, n. 1334):

"1. Utrum, in casu dubii de valore baptismi, qui ita baptismum dubium acceperunt, in iudicando de aliis difficultatibus, v. g. circa matrimonium, iaponenses ut christiani, vel adhuc ut infideles considerandi sint.

"2. Utrum si dubium de valore baptismi remaneat, et S. Congregationi solvere dubium non visum sit opportunum, de his qui

[1] Wernz, *Ius Decretalium*, ed. 2, 1912. Vol. IV, 2, p. 384 f.

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sic dubie baptizati sunt, in rebus quae ad matrimonium spectant, ac si vere et valide baptizati fuissent iudicandum sit, vel non.

"R. Ad. 1. Generatim loquendo, ut christiani habendi sunt ii de quibus dubitatur an valide baptizati fuerint.

"Ad. 2. Censendum est validum baptisma in ordine ad validitatem matrimonii."

On rule 3 see S. O., July 14, 1880 (*Coll. P. F.*, n. 1536):

"1. Matrimonium dubie baptizati cum non baptizata estne validum?

"2. Matrimonium duorum dubie baptizatorum estne validum etiamsi sint consanguinei, affines, etc.

"R. Ad. 1. Matrimonium esse habendum uti invalidum ob impedimentum cultus disparitatis.

"Ad. 2. Matrimonium habendum esse ut invalidum ob impedimentum consanguinitatis vel affinitatis."

S. O., Feb. 4, 1891 (*ibidem*, n. 1746):

"Qui invalide baptismum receperunt, tamquam ethnici habendi sunt, ac proinde si isti matrimonia inter se contraxerunt, nisi obstet aliquod impedimentum iure naturae dirimens vera habenda erunt. Qui valide aut dubie baptizati fuerint, ii subsunt impedimentis etiam iure ecclesiastico dirimentibus.—At fieri potest ut una pars valide aut dubie, altera vero invalide baptizata fuerit. Hoc in casu eorum matrimonium nullum erit ob cultus disparitatem."

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APPENDIX IV

(On Canons 1048, 1063, and 1139.)

Our opinion was asked on the following case: James, a Catholic, had contracted marriage with Gemma, a baptized Episcopalian, A. D. 1913, but before a non-Catholic minister, therefore invalidly, on account of the form prescribed having been neglected (can. 1099). Now, A. D. 1920, he wishes to return to the Church and receive the Sacraments. His would-be wife consents to leave him perfect freedom in the exercise of his religion, is also willing to renew her consent before a Catholic priest and two witnesses, but absolutely refuses to guarantee at the present time to have the children brought up as Catholics. What is to be done?

1. According to can. 1139, 1, the marriage could be healed in the root, because it was invalid on account of defective form.

2. Can this *sanatio* be applied? A decree of the Holy Office, Dec. 22, 1916 (*A. Ap. S.*, Vol. IX), reads that in our case the *sanatio* rather than convalidation with renewal of the consent before the priest and two witnesses, should be applied, that is to say, healing in the root is preferred to simple convalidation; most probably in order not to expose the sacred minister to an (at least passive and illicit) *co-operatio in sacris*. But what about the divine-natural law which forbids granting a dispensation when the precautions are not guaranteed? For, as stated above, the non-Catholic party absolutely refuses to guarantee the Catholic education of the children. Here we can only state that the Supreme Pontiff, and he alone, can declare whether the divine-natural law which requires the guarantee of Catholic education is binding in that particular circumstance and instance. A reason for benign interpretation lies in the promise of the non-Catholic party to permit the husband to exercise the Catholic religion with perfect freedom. This concession may pave the way to the other promise being made, at least tacitly. Besides the sincere desire of being and living as a Catholic is to be greatly valued.

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3. Now the question arises whether our bishops enjoy the power of applying the *sanatio in casu*. According to the decree of Aug. 2, 1918, it would seem that our Ordinaries and those of Great Britain have that power (*supra*, p. 114). However, we would not venture to vindicate it in the case in question. For although the *sanatio* itself, as such, would cause no difficulty, because can. 1139, 1, would admit and the decree of Aug. 2, 1918, would not contradict it, yet there is an obstacle. For, as stated above, the divine-natural law requiring Catholic education is here jeopardized and needs a declaration, which, according to the view of the School, can only be given by the Supreme Pontiff, *i.e.*, by the Holy Office. This was the stand taken by the Holy Office in the above-mentioned decree. The Ordinary had asked whether the faculty of healing in the root — which he had already obtained from the Apostolic See — was contained in the faculty of healing in the root mixed marriages which were invalidly contracted on account of clandestinity or non-observance of the form presented by the "*Ne temere.*" The answer was that it was *not* contained therein and that therefore the Holy Father should be asked for the favor of healing all marriages invalidly sanated by the bishop.

Hence the case in question would have to be sent to the S. Congregation of the Sacraments, which will ask at least the *parere* or view of the Holy Office.

"Ordinarius Dioecesis N., obtenta iam facultate sanandi in radice matrimonia mixta, nulla ex capite clandestinitatis quia non celebrata ad normam Decreti 'Ne Temere,' quando pars acatholica renuit se sistere coram parocho catholico, quaerit nunc:

"1) Utrum quando pars acatholica non renuit se sistere coram parocho catholico, renuit tamen omnino praestare debitas cautiones, providendum sit per dispensationem et renovationem consensus coram parocho catholico passive se habente, vel potius per sanationem in radice: et quatenus providendum sit per sanationem in radice,

"2) Utrum facultas sanandi in radice in hoc secundo casu comprehensa censenda sit necne in facultate iam obtenta sanandi in radice matrimonia mixta, nulla ex capite clandestinitatis, vel

"3) Utrum peti debeat an non nova facultas a S. Sede.

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"In plenario conventu Supremae Sacrae Congregationis Sancti Officii, habito feria IV, die 20 nov. 1912, propositis suprascriptis dubiis, Emi ac Rmi Dni Cardinales in rebus fidei et morum Inquisitores Generales, omnibus mature perpensis, respondendum decreverunt:

"Ad Ium, Negative ad primam partem, affirmative ad secundam.

"Ad 2um, Non comprehendi.

"Ad 3um, Provisum in secundo. Et supplicandum SSmo ut sanare dignetur in radice matrimonia ex hoc capite nulla quae usque adhuc invalide ab Episcopis sanata fuerint.

"Et sequenti feria V, die 21 eiusdem mensis, SSmus D.N.D. Pius divina providentia PP. X, in solita audientia R.P.D. Adsessori eiusdem Supremae Sacrae Congregationis impertita Emorum Patrum resolutionem benigne adprobare et confirmare et sanationem in radice matrimoniorum quae ex hoc capite nulla usque adhuc invalide ab Episcopis forte sanata fuerint largire dignatus est.

"Contrariis non obstantibus quibuscumque.

"Datum Romae, ex Aedibus S. Officii, die 22 decembris 1916.

"ALOISIUS CASTELLANO, S. R. et U. E. Notarius."

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APPENDIX V

The War Faculties

Here we may add a remark concerning the *duration of the war faculties*. Do they still hold? The treaties of Versailles and St. Germain have been signed by the parties immediately concerned, but our country has reasonably delayed signing on account of intrinsic difficulties. Besides the treaties with Turkey and Bulgaria have not yet been signed. Furthermore, a state of war still exists in Russia, and Jugo-Slavia, and if it is true what we read in the papers, about twenty other wars are still going on. Hence we believe that, until formal peace is established in all countries, the war faculties can be made use of.

November, 1919.

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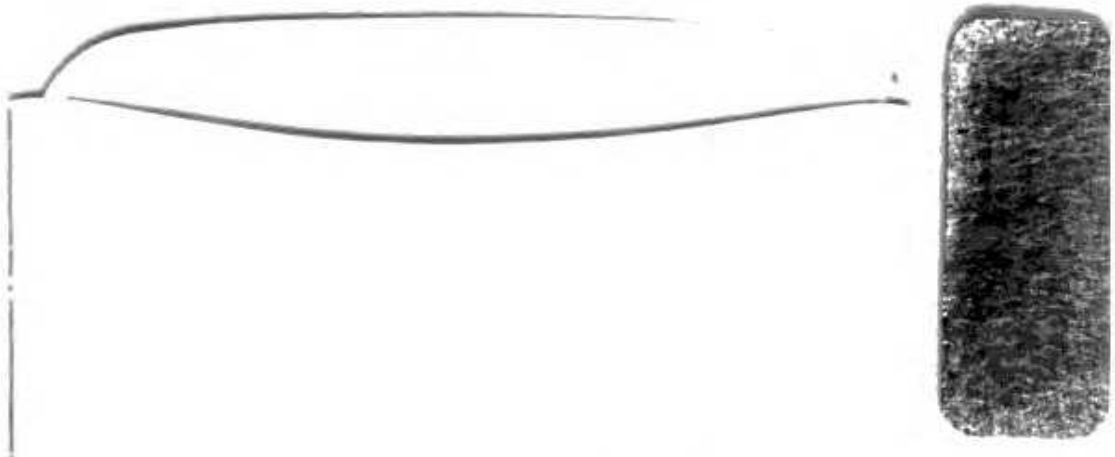
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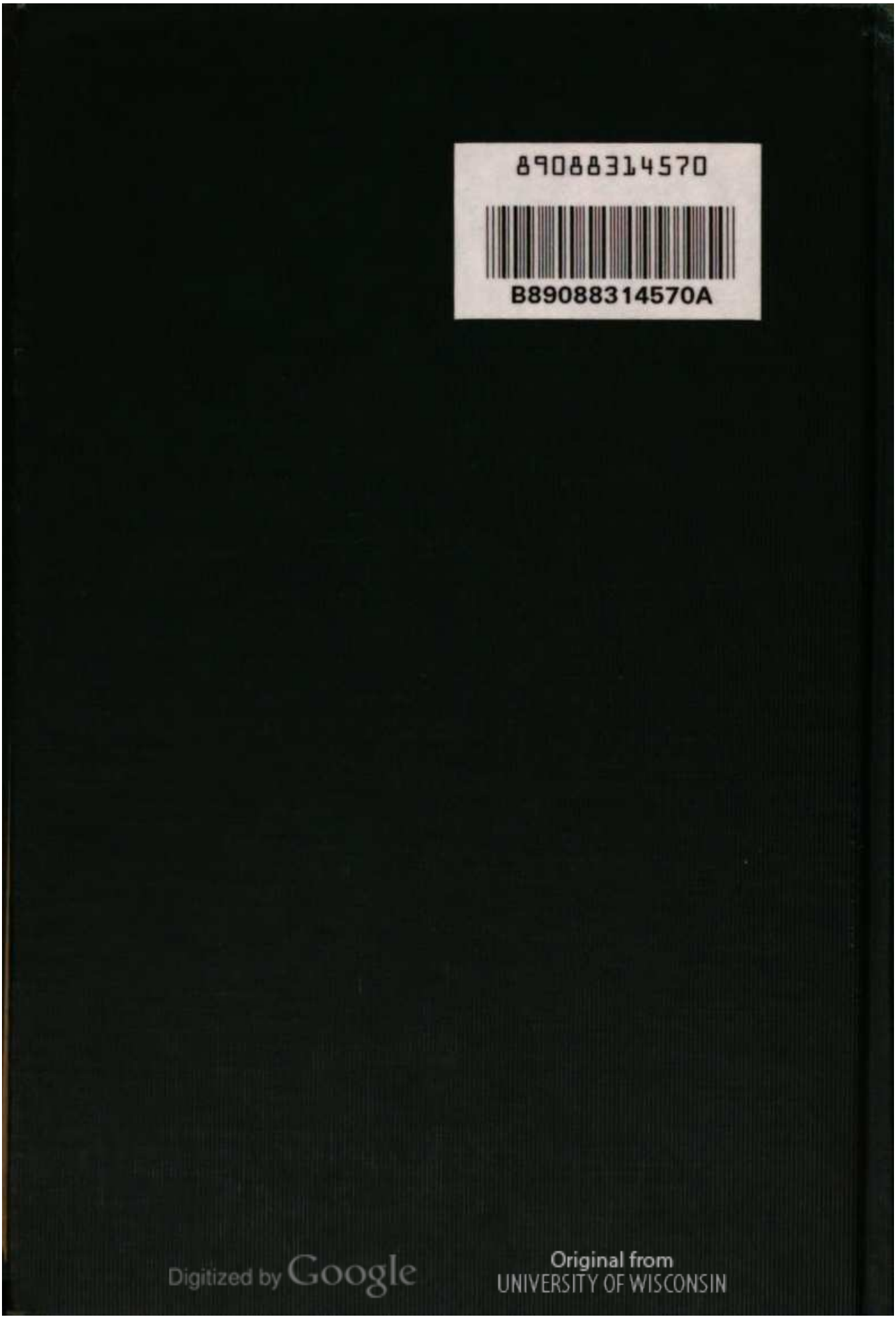


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A COMMENTARY *on* CANON LAW

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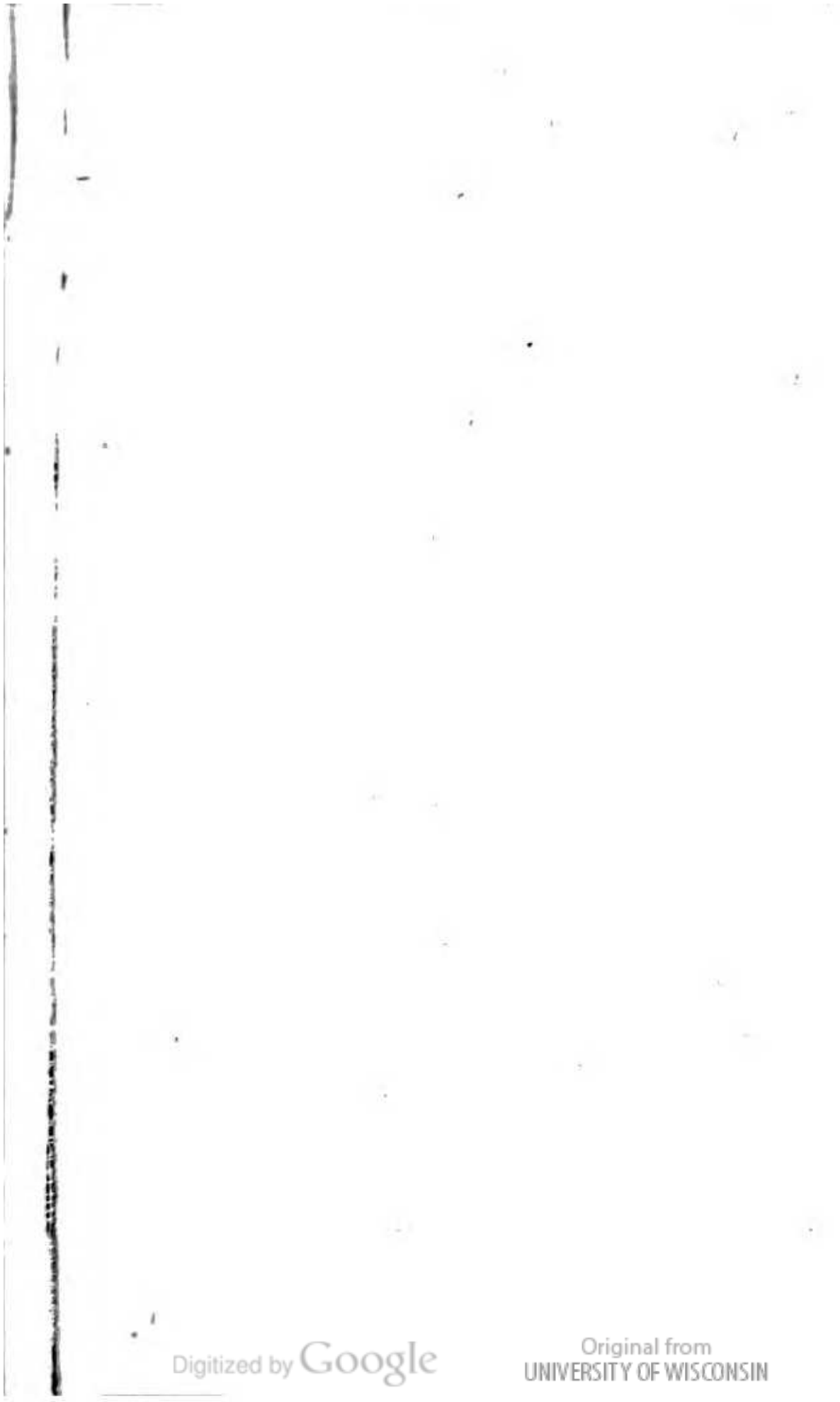
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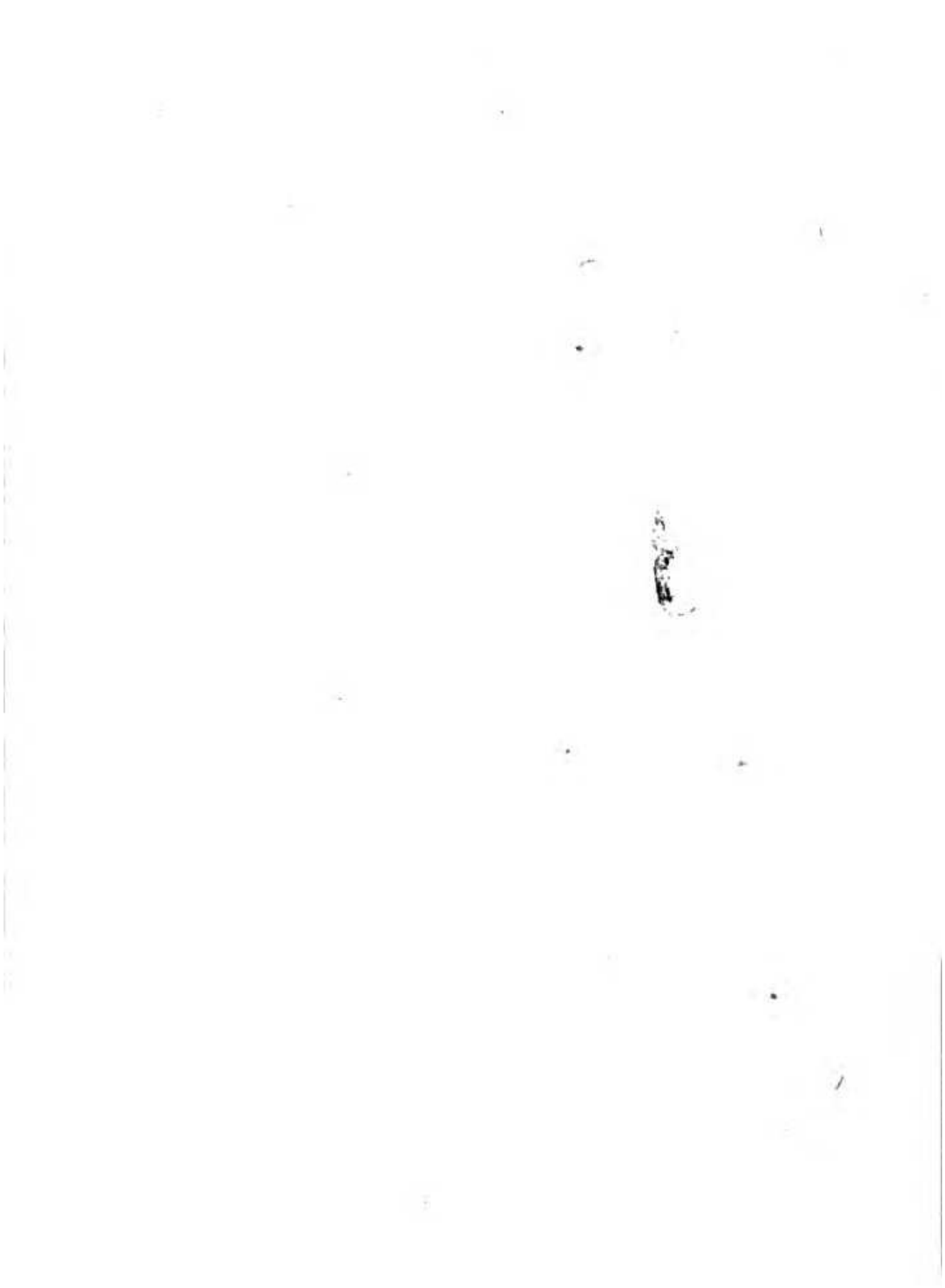
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By THE REV. P. CHAS. AUGUSTINE, O.S.B., D.D.
Professor of Canon Law

VOLUME VI
Administrative Law
(Can. 1154-1551)

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THE NEW CODE OF CANON LAW

BOOK III—PART II

SACRED PLACES AND TIMES

INTRODUCTION

After the treatise on the Sacraments and Sacramentals, we come to sacred *places* as the next subject of consideration. Sacred places partake, as it were, of the sacramental nature and may, therefore, be truly called vehicles of sanctification. Besides, being consecrated or blessed, they may be claimed by the ecclesiastical authorities as their own, and are not subject to civil power.

Means of sanctification are also sacred *times,* namely holydays and days of fasting and abstinence. These form the subject-matter of Part II of the Third Book of the Code.

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SECTION I

SACRED PLACES IN GENERAL

DEFINITION

CAN. 1154

Loca sacra ea sunt quae divino cultui fideliumve sepulturae deputantur consecratione vel benedictione quam probati liturgici libri ad hoc praescribunt.

Sacred places are places set aside for divine worship, or for the burial of the faithful, by a consecration or blessing prescribed for this purpose by the approved liturgical books.

The custom of withdrawing certain buildings from profane uses and dedicating them to the divinity, is as old as divine worship itself. The act by which a place is made sacred, is called *consecration* or *blessing*. The *canonical effects* of both are the same. These effects consist partly in the destination of an otherwise profane thing for sacred functions and worship, partly in the prohibition of profane acts being performed in sacred places. Hence Can. 1172 mentions the violation or defilement of a church if certain acts are committed therein. Besides, the sacred character is apparent from the *ius asyli* referred to in Can. 1179. Finally, though this is not specially mentioned in the text, certain profane acts must not be performed in sacred places. Such acts are civil trials, theatrical and purely secular entertainments,

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political or merely worldly meetings, and every species of buying and selling.[1]

As we said, the canonical effects of consecration and blessing are identical. But there is a difference in the sacramental effects. *Consecration* is an act performed by the bishop with certain prayers and anointing with oil and chrism, whereas a *blessing* consists of prayers and aspersions with holy water, which, even though reserved to the bishop, may also be performed by priests.[2] Consecration, therefore, is also called solemn dedication, whereas a blessing is a less solemn initiation.[3]

The liturgical books which contain the formularies for consecrations and blessings are the Roman Pontifical and the Roman Ritual.

THE MINISTER OF CONSECRATION

CAN. 1155

§ 1. Consecratio alicuius loci, quanquam ad regulares pertinentis, spectat ad Ordinarium territorii in quo locus ipse reperitur, dummodo Ordinarius charactere episcopali sit insignitus, non tamen ad Vicarium Generalem sine speciali mandato, firmo iure S. R. E. Cardinalium consecrandi ecclesiam et altaria sui tituli.

§ 2. Ordinarius territorii, licet charactere episcopali careat, potest cuilibet eiusdem ritus Episcopo licentiam dare consecrationes peragendi in suo territorio.

Our canon substantially repeats the old law, which made it very plain that no strange bishop, even though he

1 Cfr. Aichner, *Compendium Iuris Eccl.*, § 203, 3.

2 Cfr. *Pontificale Rom., De ecclesiae dedicatione sive consecratione; Rituale Rom.*, tit. VIII, c. 27.

3 Wernz, *Ius Decretal.*, III, n. 436, p. 437, ed. 1.

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has built a church at his expense in another diocese, may consecrate a temple outside his own territory.[4] Abbots were forbidden to consecrate churches and altars.[5] This provision is here reenacted, for even *regulars* have to call in the bishop in whose territory a church is to be consecrated. Only in case the local Ordinary, after repeated requests on the part of the regulars, should refuse to perform the consecration, are they permitted to call in another bishop, as Leo X had enacted at the Vth Lateran Council.[6]

A *Vicar General* who is endowed with the episcopal dignity, may consecrate sacred places only by special commission from the Ordinary, which should be repeated every time a consecration is to take place.

Cardinals who are not bishops may by law validly consecrate the churches and altars of their own title. Cardinals who are endowed with the episcopal character may, in virtue of a special privilege, consecrate churches and altars everywhere with the consent of the local Ordinary.[7]

An Ordinary who is not endowed with the episcopal character may grant the faculty of consecrating places to any bishop of the same rite. Thus a *Prelate or Abbot Nullius,* if he is not a bishop, may call any bishop of the same rite into his diocese for that purpose. The same applies to *vicars-capitular* or administrators. *Sede vacante* the regulars also must apply to the latter, who shall call in a bishop for the purpose.[8]

From all the ancient texts, which in this case have not been abolished, it follows that the *episcopal character* is

4 Cc. 1, 3, C. 16, q. 5.

5 C. 10, C. 16, q. 1.

6 "*Dum intra,*" Dec. 19, 1516, § 12.

7 See can. 239, § 1, n. 20. The Cardinal-Vicar of Rome is not entitled to consecrate titular churches and altars of other cardinals; S. Rit. C., Jan. 30, 1879 (*Dec. Auth.*, n. 3478).

8 Many, *De Locis Sacris,* 1904, p. 32.

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required for valid consecration, although this requisite is of merely ecclesiastical (but universal) law. The consequence is that the Pope, and he alone, can dispense from this law and grant the faculty to consecrate places to such as are not bishops. Benedict XIV granted to Abbot Engelbert of Kempten in Bavaria the privilege of consecrating his abbey-church. A personally granted privilege seems to be required, as Benedict XIV insinuates in his letter.[9] If an abbot claims the right to consecrate a church, he must possess a special privilege of the Apostolic See and exhibit it to the bishop who would otherwise be entitled to perform the function.[10]

A consequence of this requirement is that any validly consecrated bishop, even though he be a heretic, or a schismatic, or under censure, may validly, though not licitly, consecrate churches and altars.

Notice the term "*eiusdem ritus,*" which excludes a mixture of rites. Hence a Latin Ordinary may not licitly grant permission, say to the Ruthenian bishop of our country or Canada, to consecrate a Latin church.[11]

Observe, finally, the expression, "*Ordinarius territorii,*" which includes all Ordinaries, whether their territories are large or small, and also the abbots and prelates mentioned in can. 319, § 2.

It may be added that a metropolitan has no right to interfere with consecrations in the territories of his suffragan bishops.

9 "*Ex tuis precibus,*" Nov. 16, 1748.

10 *S. Rit. C.*, April 14, 1674 (*Dec. Auth.*, n. 1505).

11 S. O., June 16, 1831 (*Coll. P. F.*, n. 822): "*non expedire,*" which means that the consecration would be valid, but illicit.

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THE MINISTER OF A BLESSING

CAN. 1156

Ius benedicendi locum sacrum, si hic pertineat ad clerum saecularem vel ad religionem non exemptam, vel ad laicalem, spectat ad Ordinarium territorii in quo locus reperitur; si ad religionem clericalem exemptam, ad Superiorem maiorem; uterque vero potest alium sacerdotem ad hoc delegare.

The right of blessing a sacred place belongs (1) to the Ordinary in whose territory the place is situated, concerning all places which belong to the secular clergy, or to non-exempt religious, or to lay persons, even though these be an ecclesiastical corporation which constructed the church;[12] (2) to the *major superior,* if the place belongs to exempt religious, *i. e.,* who are such either in virtue of their regular character or by reason of a special privilege.

The Ordinary as well as the religious superior may delegate another priest, whether secular or religious, whether pastor or not,[13] to bless a place, but not to consecrate it.[14] Hence provincials, abbots, guardians, conventual priors and all who enjoy the power of quasi-provincials, may bless churches and altars either themselves or through others.[15]

CAN. 1157

Non obstante quolibet privilegio, nemo potest locum sacrum consecrare vel benedicere sine Ordinarii consensu.

12 S. Rit. C., Oct. 7, 1645 (*Dec. Auth.*, n. 889).

13 *Ibid.*, and Aug. 7 1875 (*ibid.*, n. 3364, ad 1).

14 S. Rit. C., Oct. 7, 1645.

15 Reg. Iuris, 68, 72 in 6°.

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No one may bless or consecrate a sacred place without the consent of the Ordinary, notwithstanding any privilege.

The Ordinary whose consent is required for consecration, is the one in whose territory the church or altar is located. This rule, we repeat, binds all, regulars and seculars, individuals and corporations, no matter whether or not they have built, or helped to build, the church or altar.[16] To *bless* a church or altar the consent of the Ordinary is required, as explained under can. 1156.

The name of Ordinary, in this latter case, also comprises the higher religious superiors.

The required consent may be given either in writing or orally, but should, in ordinary cases, be express. In urgent cases we believe consent may be lawfully presumed for a blessing, but hardly for a consecration, because a consecration is a pontifical right, which may not be exercised in alien territory.[17]

REGISTRATION AND PROOF

CAN. 1158

De peracta consecratione vel benedictione redigatur documentum, cuius alterum exemplar in Curia episcopali, alterum in ecclesiae archivo servetur.

CAN. 1159

§ 1. Consecratio vel benedictio alicuius loci, modo nemini damnum fiat, satis probatur etiam per unum testem omni exceptione maiorem.

§ 2. Si de ea legitime constet, nec consecratio nec

16 Cc. 1, 3, C. 16, q. 5; S. Rit. C., Oct. 7, 1645 (*Dec. Auth.*, n. 889).

17 *Trid.*, Sess. 6, c. 5, *de ref.*; c. 28, C. 7, q. 1, inflicts one year's suspension *a divinis*, but our Code contains no penalty.

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benedictio iterari potest; in dubio autem, peragatur ad cautelam.

After the consecration or blessing a report should be drawn up, of which one copy is to be kept in the episcopal court, and another in the archives of the church.

Consecration or blessing can be proved by one trustworthy witness, provided no damage is done to a third person.

Neither consecration nor blessing is to be repeated after legal proof has been furnished that it has taken place; but if there is doubt, the act may be performed provisionally (*ad cautelam*).

A sufficient proof would be the testimony of an authentic document or the deposition of an eye-witness.[18] Damage would be caused if a consecrated or blessed church were given over to profane uses. Formerly one who consecrated a church or an altar was entitled to the tithes offered there. Hence the requirement of an unprejudiced witness.

Reconsecration is forbidden for an analogous reason as rebaptism, *viz.:* because the ceremony imprints an indelible character.[19] For this reason canonists have taught that if a positive doubt exists as to whether a church or an altar has been consecrated, the consecration should take place, and Benedict XIV sanctioned this teaching, now embodied in the Code.[20] The mere age of a church would not create a positive doubt as to its not being consecrated or dedicated. The constantly observed anniversary of the dedication, especially if for the consecration of the main altar some kind of document were preserved, would make reconsecration unnecessary, even though there were no

18 C. 16, Dist. 1, *de cons.;* S. Rit. C., Aug. 19, 1634 ad 1 (*Dec. Auth.*, n. 611).

19 C. 3, Dist. 68; C. 10, Dist. L, *de cons.;* c. 111, Dist. 4, *de cons.*

20 "*Iam inde,*" Nov. 17, 1706.

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authentic document and no traces of the crosses appeared on the walls.[21] If neither crosses nor documents are available, and the church was entirely remodelled or rebuilt, consecration must take place.[22] If the doubt cannot be dispersed, consecration should be performed provisionally. This does not mean conditional consecration, but, as the text says, *ad cautelam,* according to the formula contained in the Roman Pontifical.

IMMUNITY OF SACRED PLACES

CAN. 1160

Loca sacra exempta sunt a iurisdictione auctoritatis civilis et in eis legitima Ecclesiae auctoritas iurisdictionem suam libere exercet.

Sacred places are exempt from the jurisdiction of the civil authority, and the lawful ecclesiastical authority freely exercises jurisdiction in them.

This is what is called *localis immunitas,* or exemption from civil power in the use and administration of these places. Even the pagans felt awe and reverence for sacred places. The very terms *ἱερόν* and *sanctum* instilled respect for the spot or district set apart for the gods. No criminal or unclean person was allowed to enter these *temene* or sacred precincts, and no animal was admitted into them. The fact that such places were either erected or protected by public authority shielded them from vexation and profanation.[23] All this goes to show that there is in man what we might call a natural instinct of

21 S. Rit. C., Nov. 27, 1706 (*Dec. Auth.*, n. 2174).

22 S. Rit. C., Dec. 17, 1875; Aug. 19, 1878 (*Dec. Auth.*, nn. 3385, 3462).

23 Cfr. Stengel, *Die Griech. Kultusaltertümer,* 1898, p. 18 ff.; Ramsay-Lanciani, *Manual of Roman Antiquities,* p. 372 ff.

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reverence for things that belong to God. It was not priestly arrogance, then, on the part of the Christian Church that she claimed these natural prerogatives and that the Christian emperors accorded them, as it were, spontaneously. A specific exemption was the *ius metatus* or right of quartering soldiers in churches. The Church would not permit secular trials, civil or criminal, to be held in sacred places, nor purely worldly meetings, markets, and political assemblies.[24] This immunity still exists. *Our States* have enacted laws which protect at least the safety and decorum of church meetings. While no church is "established" here in the European sense of the word, all are "established for the purpose of the security of the worshippers from penalties or from molestation in the act of worship."[25] Church purposes in the United States are strictly private purposes, it is true, but they are of more than passing interest to the general public.[26] This, of course, naturally implies that the administration and government of a sacred place belonging to the Catholic Church must be acknowledged and carried out according to its own constitution and laws. For without such authority the important provisions in the constitutions which guarantee the free enjoyment of religious beliefs and worship to every person would become nugatory.[27] The Catholic Church cannot permit her temples to become — as was customary before 1776[28] — places for town meetings, lectures, concerts, temperance or political meetings and for other profane purposes.

24 Cfr. cc. 1, 5, X, iii, 49; c. 2, 6°, III, 23.

25 Cfr. Zollmann, *American Civil Church Law*, 1917, p. 286.

26 *Ibid.*, p. 407: "Says the *Missouri* court in a dedication case: it is presumed that in the nineteenth century, in a Christian land, no argument is necessary to show that church purposes are public purposes."

27 *Ibid.*, p. 286.

28 *Ibid.*, p. 407.

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Here we may add some practical observations occasioned by the recent influenza epidemic. The Church is not opposed to sanitary and hygienic regulations intended to safeguard the public health and welfare. But she cannot recognize the authority of a local board of health to close a church or to command the clergy to do so. Such measures, when necessary, have to be taken through the hierarchy, *i. e.*, the bishop of the diocese, who should not shirk his duty. This is an act of jurisdiction proper to the diocesan court.

A last remark: The text does not state on what ground the Church claims immunity for sacred places, whether by divine or ecclesiastical law. The majority of canonists attribute it either to divine law or (at least) to the natural dictates of reason. The latter view may be safely defended on the basis of universal consent.

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TITLE IX

CHURCHES

DEFINITION

CAN. 1161

Ecclesiae nomine intelligitur aedes sacra divino cultui dedicata eum potissimum in finem ut omnibus Christifidelibus usui sit ad divinum cultum publice exercendum.

By the term *church* is understood a sacred building dedicated to divine worship, chiefly for the purpose that it may be made use of by all the faithful for public services.

The Latin term *ecclesia* (from ἐκκαλέω) was the first in vogue among Christians for their meeting places.[1] "Temple" was rarely used up to the fourth century, probably to avoid confounding Christian places of worship with Jewish and pagan temples.

The definition of "church" in the Code contains three characteristics: (a) *sacred building*, to distinguish it from altars and furniture and common buildings; (b) *dedicated to divine worship*, by consecration or solemn blessing; and (c) chiefly for the purpose that it be *open* to *all the faithful*. The last-named characteristic distin-

1 Cfr. I Cor. 11, 12; Tertull., *De Velandis Virg.*, 13; *De Pudicitia*, 4. The term *dominicum*, from the Greek κυριακόν, was also used early; from this latter expression the Scotch *kirk*, English *church*, and German *Kirche* arose. Other terms, like *basilica* and *martyrium*, have a specific meaning as to form or kind.

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guishes a church from an oratory, either domestic or semi-public, for oratories may vie with, or even surpass churches in size and be consecrated like them, but, unlike churches, are intended only for certain classes of people or certain families.[2]

BUILDING OF CHURCHES

CAN. 1162

§ 1. Nulla ecclesia aedificetur sine expresso Ordinarii loci consensu scriptis dato, quem tamen Vicarius Generalis praestare nequit sine mandato speciali.

§ 2. Ordinarius consensum ne praebeat, nisi prudenter praeviderit necessaria non defutura ad novae ecclesiae aedificationem et conservationem ad ministrorum sustentationem aliasque cultus impensas.

§ 3. Ne nova ecclesia ceteris iam exsistentibus detrimentum afferat, maiore fidelium spirituali utilitate non compensatum, Ordinarius, antequam consensum praebeat, audire debet vicinarum ecclesiarum rectores quorum intersit, firmo praescripto can. 1676.

§ 4. Etiam sodales religiosi, licet consensum constituendae novae domus in dioecesi vel civitate ab Ordinario loci retulerint, antequam tamen ecclesiam vel oratorium publicum in certo ac determinato loco aedificent, Ordinarii loci licentiam obtinere debent.

CAN. 1163

Benedicere et imponere primarium ecclesiae lapidem, ad eos spectat, de quibus in can. 1156.

2 S. Rit. C., May 18, 1883, ad IV, 5; June 5, 1899 (*Dec. Auth.*, nn. 3574, 4025).

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CAN. 1164

§ 1. Curent Ordinarii, audito etiam, si opus fuerit, peritorum consilio, ut in ecclesiarum aedificatione vel refectione serventur formae a traditione christiana receptae et artis sacrae leges.

§ 2. In ecclesia nullus aperiatur aditus vel fenestra ad laicorum domus; locaque, si adsint, subter ecclesiae pavimentum aut supra ecclesiam, ad usum mere profanum ne adhibeantur.

Can. 1162 provides that the *consent of the Ordinary* must be obtained for building a church. No church, says § 1, may be built without the express consent, in writing, of the diocesan Ordinary. The Vicar General cannot give this consent without a special mandate from the Ordinary.

This is partly old and partly new law, as far as the written consent is concerned. The Council of Chalcedon forbade religious to construct oratories without the consent of the diocesan.[3] Other synods also insist upon this formality.[4]

§ 2 rules that the Ordinary shall withhold his consent until he is convinced that the necessary means for building and maintaining a new church, and for supporting the ministers and defraying other expenditures of religious worship, will not be wanting. This, too, is ancient practice. Ancient councils insisted on the necessary dowry (*dos*) for every new church.[5] This requirement is also stated in the Roman Pontifical.[6] The Ordinary is

[3] C. 10, C. 18, q. 2.

[4] Cfr. c. 44, C. 16, q. 1 (Worms); c. 9, Dist. 1, *de cons.* (Orleans).

[5] C. 26, C. 16, q. 7; c. 8, x, III, 40.

[6] P. II, tit., *de benedictione et impositione primarii lapidis.*

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therefore most solemnly charged to examine the financial prospects of a new church.

§ 3 of can. 1162 adds another condition for the consent: In order that the new church may not become a detriment to churches already existing, if the loss would not be compensated by the spiritual advantage of the faithful, the Ordinary shall, before giving his consent, hear the interested rectors of the neighboring churches, with due regard, however, to can. 1676. This canon is a repetition of an old Roman Law which passed into the Decretals,[7] and rules that everyone,— in our case every rector of a church already in existence,— who believes himself to be injured by the erection of a new church, may sue for an injunction before the judge. The effect is somewhat similar to legal estoppel, but is only temporary, until the judge has decided the case. But although the new building should not be continued while the case is pending, the builder may go on with the work, provided he gives security to restore everything to the condition before the work commenced in case the sentence should be against him. Our Code grants two months to the plaintiff or objector to prove his contention. This term may be prolonged or shortened by the competent judge. Hence the bishop has to listen to the objections of the interested rectors, summon the parties and witnesses, in fact, conduct an ecclesiastical trial, at least in summary form.

§ 4 mentions *religious* who wish to build a church or public oratory. These, although they have already obtained the consent of the local Ordinary for establishing a house in the diocese or city, must obtain the permission of the local Ordinary before they can build a church or

7 Cfr. Dig. 39, 1; Cod. VIII, 10, 14; X, V, 32, *de novi operis nuntiatione;* Gasparri, *De SSma Euch.*, 1897, I, n. 125, p. 81.

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public oratory in a certain and specified place. Concerning this we have said enough elsewhere,[8] and nothing we have said needs modification. We will only add a case: A religious community had received permission to build a house in a certain city. They did so, and opened a public oratory within the boundaries of a parish church as yet in the "catacomb" or basement stage. This drew some substantial and perhaps niggardly parishioners to the new chapel, who contributed neither to the oratory of the religious nor to the parish church. The solution is evident. The bishop had to stop the new chapel or else cut off part of the parish and give it to the religious.

Note that after the promulgation of the Code no religious, however exempt, can escape the law; and if the bishop granted permission before the promulgation, he may now withdraw it, provided the building was not commenced or the site changed. For the Code says: in a certain and specified place. Besides, under § 1 of can. 1162 written consent is required.

Can. 1163 rules that the *blessing and laying of the cornerstone* belongs to those who are entitled to bless the church. Hence the Ordinary or his delegate, or the superior of exempt religious or his delegate, may bless and lay the corner-stone.

Can. 1164 admonishes Ordinaries to see to it that new churches are built and old ones repaired in accordance with the time-honored laws of Christian architecture and the rules of sacred art.

This can best be explained in the school-room, where lectures on Christian art should be given. The earliest form of church building was the *basilica,* which was

8 Cfr. Vol. III, p. 89, can. 497. Formerly they only needed the permission of the Holy See for building a monastery; c. 4, 6°, V, 7.

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evolved from the ancient Roman dwelling-house.[9] About the eighth century the Romanesque style absorbed the basilica, and later the Gothic style added its distinct and pointed features. Out of these arose two mixtures, *viz.*, Barocco and Rococo, of which the former may have some claim to the name of traditional architecture, whereas the extreme Rococo can hardly be called anything else but a mental and architectural aberration. Then there is the Byzantine style, which has found favor here and there, even in our country, and certainly comes up to the requirements of Christian art.

Our text adds that, if necessary, experts should be consulted. This is a dictate of common sense. The rules of art demand that the style should fit into the landscape and its surroundings. The financial resources also must be considered. But a well-trained taste will be able to erect a monument even of cheaper material. Finally the practical and acoustic side should receive attention. Too many and heavy pillars are hardly practicable for a parish church; too great a distance between people and altar is not compatible with the all-absorbing idea of the sacrifice. These are merely suggestions based on experience.

§ 2 of can. 1164 says that no opening or window may lead from the church into the house of lay people and that the space underneath or above the church should not be used for profane purposes.

As to the first clause it may be noted that an episcopal palace [10] or priest's residence may be built in such a way that a gate or window leads into the church. Religious, with the permission of the bishop, may have a choir built in their house leading into the church, from which they may assist at Mass or pay their visits to the Bl. Sacrament.

9 Cfr. Lowrie, *Monuments of the Early Church*, 1901, p. 83 ff.

10 This was formerly refused; cfr. Gasparri, *l. c.*, n. 127, p. 83.

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The next clause may cause surprise to more than one pastor, for it would seem to affect the so-called combination-buildings (church and school combined) so often found here. If there is nothing else attached to such a building, we believe it is not forbidden, for the text says, "*ad usum mere profanum,*" which cannot be applied to a parish school. The case is different if the basement or the hall above the church would be used for merely profane meetings or entertainments. The decisions are decidedly against such use, even if the basement were only used as a theatre for the school-children.[11] The reason is that the church together with the basement is, *as a whole, consecrated* (*per modum unius*). The decisions have consecration in view. Do they apply to churches which are blessed? There is no doubt that, as stated above, the canonical effect of consecration and blessing, as far as the church is concerned, is the same. However, there *is* a difference between consecration and blessing, and we hardly believe that a combination building could be consecrated. Besides, as shall be seen under can. 1172, the defilement of a church must affect the church itself. Hence it is commonly taught that the sacristy or tower of a church, or a crypt which has neither chapels nor a burial place, is not polluted by acts performed therein.[12] From this it would seem to follow that the basement or hall of a church is not, strictly speaking, included in the church proper. The consequence would be that the hall or basement of the church (if this were merely blessed) might be used for purposes which would otherwise be excluded.

We would also draw attention to the fact of necessity which exists in many places. However, we must add

11 S. Rit. C., May 4, 1882 (*Dec. Auth.*, n. 3546).

12 Many, *l. c.*, p. 78 ff.

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that the intention of the lawgiver certainly is to prohibit merely worldly uses which have no connection with the church. Dances, balls, and noisy banquets should not be held in these places.

We add some decisions. A dormitory, even for clerical students, is not permitted immediately above the ceiling of the chapel or church; only if it is separated by an intervening space or room provided with solid walls, may it be placed above the church.[13] There should be no cellar under the church.[14]

DEDICATION OF A CHURCH

CAN. 1165

§ 1. Divina officia celebrari in nova ecclesia nequeunt, antequam eadem vel sollemni consecratione vel saltem benedictione divino cultui fuerit dedicata.

§ 2. Si prudenter praevideatur ecclesiam conversum iri ad usus profanos, Ordinarius consensum eius aedificationi ne praebeat, aut saltem, si forte aedificata fuerit, eam ne consecret neve benedicat.

§ 3. Sollemni consecratione dedicentur ecclesiae cathedrales et, quantum fieri potest, ecclesiae collegiatae, conventuales, paroeciales.

§ 4. Ecclesia ex ligno vel ferro aliove metallo benedici potest, non autem consecrari.

§ 5. Altare consecrari potest etiam sine ecclesiae consecratione; sed una simul cum ecclesia debet saltem altare maius consecrari aut altare secundarium, si maius sit iam consecratum.

§ 1. Divine service may not be held in a new church

13 S. Rit. C., May 11, 1641; July 27, 1878 (*Dec. Auth.*, nn. 756, 3460).

14 S. Rit. C., Aug. 31, 1867 (*ibid.*, n. 3156).

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before it has been solemnly *consecrated* or at least dedicated to the worship of God by a *blessing*.

This law dates back to remote antiquity. Eusebius, the "Father of Church History," tells us that, soon after the persecutions had ceased, churches were dedicated in the presence of gatherings of bishops, priests, and a great multitude of lay-people, who counted distance nothing, being united in love and joy on the occasion. He inserts his own discourse delivered at the dedication of a church at Tyre.[15]

No special ritual for church dedications can be traced before the eighth or ninth century. According to the two most ancient *Ordines Romani*, the chief ceremony appears to have been the translation of relics. A description of the liturgical act of dedication in use in France at the beginning of the eighth century shows that it closely resembled the present rite, as found in the Roman Pontifical.[16] Thus we may say that, although at first churches were perhaps dedicated by celebrating the divine mysteries, yet from the eighth century onward a special ritual was followed, which finally developed into the present rite.

Dedication then is performed by either consecration or blessing.

Consecration essentially consists in anointing with chrism the twelve crosses which are placed on the walls or pillars of the church, with the formula: "*Sanctificetur et consecretur hoc templum in nomine Patris et Filii et Spiritus Sancti*, etc."[17] The bishop should go around the whole church three times. If this cannot be done, he

15 *Hist. Eccl.*, X, 3, 1 ff. (cfr. *Die Griech. Christl. Schriftsteller*, by Schwarz-Mommsen, Vol. II, 860 ff.)

16 Cfr. Duchesne-McClure, *Divine Worship*, 1903, p. 407 ff.

17 S. Rit. C., April 12, 1614 (*Dec. Auth.*, n. 319).

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should at least go about those parts which are accessible.[18] If (*e. g.*, on account of bad weather) the prayers and sprinkling of the outside walls cannot take place, what is to be done? The S. Congregation answered as follows: If possible, recourse should be had to the Holy See; but if the consecration cannot be delayed, the solemn function may begin in the sacristy, or in the vestibule, or in some other convenient place, and the outside walls should be sprinkled as well as it can possibly be done; but the people are not to be admitted into the church from the beginning of the ceremony.[19] One and the same bishop must consecrate the church and the main, or at least one, altar.[20]

Blessing a church consists essentially in sprinkling the upper and lower part of the walls, either inside or outside, with holy water. All churches and public oratories must be at least blessed according to the formula in the Roman Ritual.[21] Unless they are blessed no titular feast may be celebrated.[22] Nor does the fact that the cemetery is blessed create a presumption in favor of the church.[23] Before the blessing is imparted, *divine service* may not be celebrated in a church. This means that Mass may not be said, the sacraments may not be administered, and there is to be no preaching; for these offices especially constitute *divine worship* (cfr. can. 2256).

§ 2. If it can be reasonably foreseen that a church will be turned to profane uses, the Ordinary shall not consent to its being built, nor consecrate or bless it after it is built. There would be room for prudent fear if a church

18 S. Rit. C., Sept. 19, 1665, ad 1 (*ibid.*, n. 1321).

19 S. Rit. C., Feb. 22, 1888 (*ibid.*, n. 16).

20 S. Rit. C., March 3, 1866 (*ibid.*, n. 3142).

21 S. Rit. C., June 5, 1899 (*ibid.*, n. 4025).

22 S. Rit. C., Sept. 2, 1871, ad II, 3 (*ibid.*, n. 3255).

23 S. Rit. C., Feb. 21, 1896, ad IV, (*ibid.*, n. 3888).

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or public oratory belonged to a private family and thus be liable to transfer and subsequent profanation by way of sale or alienation.[24]

§ 3. *Cathedral churches* and also, as far as possible, *collegiate, conventual, and parish churches,* should be solemnly *consecrated.*

§ 4. Churches built of wood or iron, or some other metal, may be blessed, but not consecrated.

As to rural chapels and oratories of confraternities or pious associations, they may be consecrated if built of stone or brick, but if the bishop does not wish to consecrate them he may delegate a priest to bless them.[25].

Churches built of reinforced concrete (*caementum armatum*) may be solemnly consecrated, provided that the places for the twelve crosses and the door posts of the main entrance be of stone.[26]

§ 5. An altar may be consecrated even if the church is not consecrated; but together with the church the main altar (or, if the main altar is already consecrated), a side altar must be consecrated. This section embodies the substance of former decisions of the S. Congregation, as summarized in a decree of the S. Rit. C., June 8, 1896. This decree states that the consecration of a church without the simultaneous consecration of at least one altar is valid but illicit if performed without Apostolic dispensation.[27] The reason is to be sought in the integrity of the whole ceremony.

24 S. Rit. C., May 4, 1882, ad I (*ibid.*, n. 3546).

25 S. Rit. C., Aug. 7, 1875, ad 1 (*ibid.*, n. 3364).

26 S. Rit. C., Nov. 12, 1909 (n. 4240).

27 *Dec. Auth.*, n. 3907 (also nn. 1321, 2177).

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THE CONSECRATION OF CHURCHES AND ALTARS

CAN. 1166

§ 1. Ecclesiarum consecratio, quamvis quolibet die fieri possit, decentius tamen diebus dominicis aliisve festis de praecepto peragitur.

§ 2. Episcopus consecrans et qui petunt ecclesiam sibi consecrari, per eum diem qui consecrationem praecedit, ieiunent.

§ 3. Cum consecratur ecclesia vel altare, Episcopus consecrator, licet iurisdictione in territorio careat, indulgentiam concedit unius anni ecclesiam vel altare visitantibus in ipsa consecrationis die; in die vero anniversaria quinquaginta dierum, si sit Episcopus; centum, si Archiepiscopus; biscentum, si S. R. E. Cardinalis.

§ 1. Although churches may be consecrated on any day, it is meet that *Sundays* or *holydays of obligation* be chosen for that purpose.

§ 2. The consecrating bishop as well as those who have petitioned for consecration, shall *fast* on the day preceding the consecration.

This fast is of *strict obligation.* It is personal as well as local.[28] Thus if a founder asks the bishop to consecrate a church or public oratory, he is bound to fast the day before; if a chapter or corporation (*v. g.*, parish) or religious community ask for consecration, the whole chapter, etc., are bound to fast, including those who voted against the consecration.[29] But the chaplain of religious communities of sisters who asked for the favor would not have to fast, even though he submitted the petition to the

28 S. Rit. C., July 29, 1780; Sept. 12, 1840 (*Dec. Auth.*, nn. 2519).

29 Many, *l. c.*, p. 33.

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bishop. Of course, if he had asked for it personally, he too would be bound to fast.

§ 3. At the consecration of a church or altar the consecrating bishop, though he may not have jurisdiction over the territory, grants an indulgence of one year to all who visit the church or altar on the day of the consecration; of fifty days for the anniversary of the consecration; of 100 days if he be an archbishop, 200 if he be a cardinal.

ANNIVERSARY OF CONSECRATION

CAN. 1167

Festum consecrationis ecclesiae quotannis celebretur ad normam legum liturgicarum.

The feast of the consecration of a church is to be celebrated annually according to the rubrics.

The latest decrees [30] concerning this subject are: Provided the cathedral church has been consecrated and not merely blessed:

(a) The feast of the dedication is a primary feast and *festum Domini;*

(b) The anniversary must be celebrated as a first-class feast with octave throughout the diocese by the secular clergy and also by the religious clergy if the latter follow the diocesan calendar; if they have their own calendar, they must celebrate the anniversary of the dedication of the cathedral as a feast of the first class without octave;

(c) The anniversary must be celebrated on the day proper and not transferred to a Sunday; [31]

(d) The anniversary of the dedication of the cathe-

30 S. Rit. C., Nov. 1, 1911 (*A. Ap. S.*, III, 646 f.).

31 If the day is not recorded or remembered, the Ordinary, with the advice of the chapter, may *semel pro semper* assign a day.

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dral must be celebrated separately from the dedication of all the churches of the diocese; for the latter feast (*dedicatio omnium ecclesiarum dioeceseos*) a day may be designated by the Ordinary;

(e) The same rule must be observed by religious orders or congregations with regard to the celebration of the dedication of all the churches of their institute;[32]

(f) The feast of the dedication of all the churches of a diocese (or institute) must be understood in the sense that each church celebrates its own dedication.[33]

TITLES AND TITULAR FEASTS

CAN. 1168

§ 1. Unaquaeque ecclesia consecrata vel benedicta suum habeat titulum; qui, peracta ecclesiae dedicatione, mutari nequit.

§ 2. Etiam festum tituli quotannis celebretur ad normas legum liturgicarum.

§ 3. Ecclesiae dedicari Beatis nequeunt sine Sedis Apostolicae indulto.

§ 1. Each consecrated or blessed church must have its own title, which cannot be changed after the dedication.

§ 2. The titular feast is to be celebrated annually according to the rubrical laws.

§ 3. Churches cannot be dedicated to a *Beatus* without an Apostolic indult.

Titulus[34] is the name by which a church is known and distinguished from other churches. It is not unlike the name given in Baptism. If the name is that of a person,

32 S. Rit. C., Oct. 28, 1913, I, 3, c. f. (*A. Ap. S.*, V, 458).

33 S. Rit. C., Feb. 12, 1914 (*A. Ap. S.*, VI, 76).

34 Cfr. Gasparri, *De SSma Euch.*, 1907, I, n. 137 ff.; Many, *l. c.*, p. 52 ff.

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this person is called the *patron* of the church, provided he or she be a Saint (*persona creata, non increata*), for patron signifies *advocate,* which does not apply to a Divine Person.

Titles of churches may be: the Blessed Trinity or one of the three Divine Persons,[35] Jesus Christ or one of the biblical mysteries, the Blessed Virgin or any one of her special attributes, the angels and saints or some conspicuous events in their lives, as, for instance, the conversion of St. Paul.

When two saints are chosen as patrons for one church, they are generally taken *per modum unius, e. g.,* SS. Philip and James. But if at the dedication two different saints are chosen *divisim,* they are celebrated on their respective days. Sometimes it happens that a secondary title or patron is added because it has been transferred from a church forsaken or destroyed.

The text says that the *title cannot be changed.* For the title being chosen at the laying of the corner-stone and made stable or perpetual at the dedication, is the distinctive and permanent attribute of a church. Hence it has been decided more than once that the bishop cannot of his own accord change the original title, but an Apostolic indult is required for the purpose.[36] If the Holy See adds the title of an abandoned church to another, the title thus added is a secondary one.[37]

§ 3 says that no church shall be dedicated to a *Beatus, i. e.,* one who is beatified, but not yet canonized by a formal decree of the Holy See. In the case of such as have been venerated as saints by a constant tradition before the

35 God the Father is, as far as we know, not chosen, because of the fact that He is not represented as sent (*defectu missionis divinae*).

36 S. Rit. C., Sept. 6, 1834, ad 2; Sept. 12, 1857, ad 17 (*l. c.,* nn. 2719, 3059).

37 S. Rit. C., April 20, 1822, n. 1 (*ibid.,* n. 2619; t. IV, p. 221).

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time of Alexander III (1159–1181), the public veneration takes the place of the formal decree of the Apostolic See,[38] and they may therefore be chosen as patrons for churches.

§ 2 concerns the *titular feast*. The chief rules as to that are the following:

1. The titular feast of the cathedral church must be celebrated with octave by the whole clergy of the diocese, including those religious who follow the diocesan calendar. Regulars (not religious who have no calendar of their own) must observe the feast as one of the first class, but without octave, if they have their own calendar.[39] This celebration includes office and Mass.

2. The *church* whose clergy is obliged to observe the feast is any *consecrated* or *blessed* church. Oratories, either public or semi-public, are included, provided they are either consecrated or solemnly blessed; likewise episcopal chapels, oratories of seminaries, hospital chapels, chapels of religious houses, etc.[40]

3. The *clergy* obliged to say the office and Mass of the titular feast are: (a) the pastor and his assistants.[41] (b) Missionaries assigned to several missions, but residing at one, are bound only to the feast of the residential church.[42] (c) Rectors, seminary professors, and students who live in the seminary, must recite the office of the seminary church.[43]

4. *Regulars* must celebrate the feast of their own church;[44] but if they merely live in a house adjoining a

38 Many, *l. c.*, p. 54 f.

39 S. Rit. C., Nov. 11, 1911 (*A. Ap. S.*, III, 647 f.).

40 S. Rit. C., June 5, 1899 (n. 4025).

41 S. Rit. C., Sept. 2, 1871; Aug. 11, 1877 (*ibid.*, nn. 3255, 3431).

42 S. Rit. C., Aug. 25, 1882; Feb. 27, 1883 (*ibid.*, nn. 3554, 3571).

43 S. Rit. C., Feb. 27, 1847 (*ibid.*, n. 2939).

44 S. Rit. C, Sept. 18, 1877, ad 1 (n. 3437).

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church which they do not own, they are not allowed to recite the office of that church.[45] A religious community in charge of a public church must recite the office of the titular feast of that church with octave.[46]

5. *Chaplains of sisters* are not bound to say the office of the titular feast of the chapel which they serve.

6. The bishop must recite the office of the titular feast of the cathedral church, and if he has two bishoprics *aeque principaliter* united, he has to recite the office of both cathedral churches, if they have different titles.

If a church is simply called "St. Mary's," the proper title is the Assumption; "Our Saviour's" is celebrated on the feast of the Transfiguration.[47]

CHURCH BELLS

CAN. 1169

§ 1. Cuilibet ecclesiae campanas esse convenit, quibus fideles ad divina officia aliosque religionis actus invitentur.

§ 2. Etiam ecclesiarum campanae debent consecrari vel benedici secundum ritus in probatis liturgicis libris traditos.

§ 3. Earum usus unice subest ecclesiasticae auctoritati.

§ 4. Salvis conditionibus, probante Ordinario, appositis ab illis qui campanam ecclesiae forte dederint, campana benedicta ad usus mere profanos adhiberi nequit, nisi ex causa necessitatis aut ex licentia Ordinarii aut denique ex legitima consuetudine.

§ 5. Quod ad campanarum consecrationem vel ben-

45 Gasparri, *l. c.*, p. 96.
46 S. Rit. C., April 7, 1876, ad IV (n. 3397).
47 Gasparri, *l. c.*, p. 95, 97.

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edictionem attinet, servetur praescriptum can. 1155, 1156.

§ 1. It is becoming that every church have bells, by which the faithful may be called to the divine service and other religious acts.

§ 2. Church bells must be either consecrated or blessed according to the rites prescribed in approved liturgical books.

§ 3. Their use is regulated exclusively by the church authorities.

§ 4. Aside from the stipulations made by the donor with the approval of the Ordinary, a blessed bell cannot be used for merely profane purposes, except in case of necessity, or by permission of the Ordinary, or by lawful custom.

§ 5. The consecration or blessing of bells is governed by can. 1155 and 1156.

We need not dwell on the origin of bells. Suffice it to say that from the word "*signum,*" used in ancient monkish rules,[48] to *campana,* or bell proper, which appears in the *Liber Pontificalis* under Stephen II (752–757), there lie about 250 years.[49] The eighth century witnessed the development which gave rise to the use of bells for churches as we know it. Complaint was made by the regulars against prelates who forbade religious to have church bells, and Pope Gregory IX put an end to these molestations.[50]

§ 1 simply affirms the convenience and propriety of having bells in every church, whether in charge of secular or religious clergy. Nothing is said about their number or size.

48 *Reg. S. Bened.,* c. 43.

49 Cfr. *Cath. Encyc.,* II, 418 ff. Bells are often called *nolae,* which is a reminder of the legend that St. Paulinus of Nola invented them.

50 C. 16, x, V, 31.

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§ 2 mentions the *consecration and blessing of bells,* which, as § 5 enacts, must be regulated according to can. 1155 and 1156.

The formula of *consecration* is found in the *Pontificale Romanum.* It should be used for the bells of consecrated churches.[51]

According to can. 1155, the consecration of bells is reserved to the local Ordinary, and delegation to a simple priest can only be given by the Holy See.[52]

There is also a formulary for *blessing* bells in the Roman Ritual.[53] It is intended for bells to be used for church or chapel purposes.[54] For this function the Ordinary or an exempt religious superior may delegate any priest without recourse to the Holy See.[55] If the *consecration* is performed on several bells, the washings and anointings are made *per modum unius* during the recitation of the Psalms. The water must be blessed for each function, but not for each bell, if several are consecrated at the same time.

If a delegate performs the consecration and has received delegation for one bell only, whilst there are several, delegation for the others may be presumed.

If, for some reason, there is no water blessed by the bishop available, the delegate may, in case of necessity, bless water himself.[56]

One delegated to consecrate bells must strictly follow the *Pontificale;* he must not omit the anointings or muti-

51 S. Rit. C., Jan. 22, 1908 (*Dec. Auth.*, n. 4211).

52 S. Rit. C., April 19, 1687 (*ibid.*, n. 1781). The anointing may not be omitted.

53 See ed. Pustet, 1913, p. 77* ff.

54 There is also a blessing of bells not intended for church uses; see *ed. cit.*, p. 84.*

55 It is not becoming that the bishop *in pontificalibus* should climb a ladder to bless bells which cannot be taken down; S. Rit. C., July 16, 1594 (*l. c.*, n. 52).

56 S. Rit. C., April 14, 1885 (n. 3630).

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late or change the formula, and he must employ a deacon.[57]

Nothing forbids the consecration of bells made of pure iron or steel.[58]

Bells consecrated or blessed for the service of churches or chapels, are strictly sacred things and, as such, subject to the exclusive jurisdiction of the Church. They must not be rung for merely secular purposes, worldly festivities, political meetings, executions, etc. Their guardian is the pastor or the sacristan canon of the cathedral chapter, who, in case of doubt, especially when serious consequences are to be apprehended, is bound to report to the Ordinary.

§ 4 leaves a wide margin in regard to the use of church bells. (a) The will of the founder must be respected, if any stipulations have been made with the approval of the bishop. (b) Necessity justifies the ringing of church bells in time of flood, fire, war, etc.[59] (c) The permission of the Ordinary may be given for any laudable purpose, *e. g.,* to celebrate a victory or the restoration of peace, the return of soldiers, civic festivals, etc. (d) Lawful custom sanctions the use of church bells for any of the aforesaid or similar purposes.

But it must be emphasized that the ringing of bells consecrated or blessed for church purposes cannot lawfully be dictated by the civil authorities, since, as said above, by consecration or blessing these objects have a sacred character imprinted upon them.

The question whether bells used by a church are its property or belong to some one else can sometimes be

57 S. Rit. C., June 23, 1853 (n. 3015).

58 S. Rit. C., Feb. 6, 1858 (n. 3067).

59 In that case the sexton or any parishioner may ring the bell without asking the pastor or bishop, especially if there are no other means of communication.

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determined only by the intention of the founder, but unless the stipulated and proved intention of the founder [60] makes an exception, the control of church bells lies solely with the ecclesiastical authority, *i. e.*, the Ordinary of the diocese.

LOSS OF CONSECRATION OR BLESSING

CAN. 1170

Consecrationem vel benedictionem ecclesia non amittit, nisi tota destructa fuerit, vel maior parietum pars corruerit, vel in usus profanos ab Ordinario loci redacta sit, ad norman can. 1187.

A church does not lose its consecration or blessing unless it is totally destroyed, or the larger part of the walls has collapsed, or the Ordinary has turned the building over to profane uses, according to can. 1187.

It would be equal to entire destruction if the whole wall, apse and roof had been removed.[61] But a partial repair of, say, two-fifths of the walls would not require re-consecration. Thus, *e. g.*, if the framework or joists of a church were consumed by fire, or the framework of the tower had fallen upon the arch of the middle aisle and damaged the walls, no reconsecration would be required.[62] Even if the whole church is successively repaired, reconsecration is not required, provided each part repaired is smaller than the parts not repaired.[63] Furthermore, although the whole plastering (*intonaco*) were removed

60 Zollmann, *American Civil Church Law*, 1917, p. 374 f. If the civil authorities should ask the church authorities to moderate the ringing of bells, no one would object to such a petition, provided it were reasonable.

61 S. Rit. C., Sept. 4, 1875 (n. 3372).

62 S. Rit. C., July 13, 1883 (n. 3504).

63 S. Rit. C., Aug. 31, 1872 (n. 3269).

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together with the crosses, and new plastering, stucco, or marble substituted, no re-consecration or re-blessing would be necessary; but the crosses should be painted anew or replaced by new ones.[64] Even if the church is considerably enlarged and interiorly embellished with marble or stucco, as long as the old walls remain in the proportion of 3 to 2 or 5 to 3, no re-consecration or re-blessing is required, though the crosses, as stated above, must be renewed.[65]

As to the reduction of a consecrated or blessed church to profane uses we refer to can. 1187. The Ordinary alone can do this, and hence, if a church was turned over to profane uses by human malice or violence, it may be called defiled, provided Can. 1172 is verified, but it is not execrated, and execration is here to be understood.[66]

EFFECT OF CONSECRATION OR BLESSING

CAN. 1171

In sacra aede legitime dedicata omnes ecclesiastici ritus perfici possunt, salvis iuribus paroecialibus, privilegiis et legitimis consuetudinibus; Ordinarius autem, praesertim horas sacrorum rituum, potest, iusta de causa, praefinire, dummodo ne agatur de ecclesia quae ad religionem exemptam pertineat, firmo praescripto can. 609, § 3.

One of the effects of consecration or blessing is that, in every sacred edifice properly dedicated, all ecclesiastical rites may be performed, with due regard to parochial

64 S. Rit. C., May 4, 1882; June 8, 1896, ad II; Aug. 9, 1897 (*l. c.*, nn. 3345, 3907, 3962).

65 S. Rit. C., Jan. 16, 1886 (n. 3651); this holds good even if the primary intention was to repair or enlarge the whole church.

66 Many, *l. c.*, p. 66.

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rights, privileges, and lawful customs. But the Ordinary may, for a just cause, determine the hours of service, provided the church does not belong to exempt religious.

This law comprises every church or public oratory duly consecrated or blessed. The ecclesiastical rites which may be performed in such sacred edifices are the divine offices mentioned in can. 1165, § 1.

The Code adds: *salvis iuribus paroecialibus, privilegiis et legitimis consuetudinibus.* This means that a church or public oratory may be solemnly consecrated or blessed, yet, as long as it is no parish church, no parochial rights can be exercised therein, unless the parish priest should choose it for parochial functions. Besides it may happen that, for instance, a confraternity enjoys certain privileges for its members, *e. g.*, the burial right may be attached to a church, even though it is not a parish church.

Lawful custom may introduce rights which might otherwise be claimed by the parish church, for instance, that of having a *baptismal font.*[67]

As to the *hours of service,* it has been more than once decided that the bishop may, either at a synod or outside, determine the hour of the parochial Mass, as well as forbid that Mass be said in secular chapels before the parochial Mass. However, the S. Congregation has repeatedly urged pastors to say Mass at hours convenient for the faithful. The pastor is not entitled to forbid that Mass be said before the parochial Mass.[68] It was declared that an archpriest has no right to forbid chaplains of a public oratory to say Mass before the parochial Mass, unless this oratory was subject to the parish church, whose archpriest attempted to enforce the prohibition in question.[69]

67 Cfr. S. C. C., May 17, 1749 (Richter, *Trid.*, p. 131, n. 8); can. 775.

68 Bened. XIV, *Inst.*, 44, nn. 9 ff.

69 S. Rit. C., July 11, 1643 (n. 842).

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Exempt religious, even though warned by the bishop, are not obliged to abstain from celebrating Mass or performing other functions even while the bells are ringing for the parochial Mass. Thus the S. C. Concilii has decided several times.[70]

Our canon refers to can. 609, § 3, which has been sufficiently explained in Vol. III of this Commentary.

DESECRATION OF A CHURCH

CAN. 1172

§ 1. Ecclesia violatur infra recensitis tantum actibus, dummodo certi sint, notorii, et in ipsa ecclesia positi:

1°. Delicto homicidii;

2°. Iniuriosa et gravi sanguinis effusione;

3°. Impiis vel sordidis usibus, quibus ecclesia addicta fuerit;

4°. Sepultura infidelis vel excommunicati post sententiam declaratoriam vel condemnatoriam.

§ 2. Violata ecclesia, non ideo coemeterium, etsi contiguum, violatum censetur, et viceversa.

By desecration (*pollutio ecclesiae,* as it was formerly called) is here understood a moral violation of a church by diverting it from a sacred to a profane use. It is induced only by acts described in the law and differs from *execration* in as much as the latter entails the loss of consecration or blessing, whilst desecration only requires reconciliation or rehabilitation.

Up to the time of the Decree of Gratian no clear distinction can be established between desecration and execration, as may be seen from the canons the Master

70 Cfr. Richter, *Trid.*, p. 136, n. 45.

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alleges.[71] The term "*pollutio*" does not occur in the classical texts of Gratian, but was probably brought in by the glossators. *Violatio* is used by Pseudo-Hyginus.[72] *Pollutio* and *reconciliatio* are the terms employed in the Decretals.[73]

The Code has apparently omitted from the list of acts which induce violation the *seminis effusio*,[74] but instead of it has inserted a new mode of desecration, which can only be determined by subsequent practical legislation.[75]

§ 1. A church is violated (or desecrated) by the following acts, provided they are certain, notorious, and committed in the church itself, to wit:

1. The crime of homicide;
2. Injurious and serious shedding of blood;
3. Impious or sordid use to which the church was diverted;
4. The burial of an infidel or one excommunicated by a declaratory or condemnatory sentence.

§ 2. The desecration of a church does not entail the desecration of the cemetery, even though the latter adjoins the church, and *vice versa*, desecration of the cemetery does not involve desecration of the church.

Homicide must here be strictly understood, as the killing of any human being, whether young or old; hence it also covers abortion and suicide. It does not matter whether the crime is committed by poison, or hanging, or the use of a weapon.

The text further says *delicto*. A crime supposes a

71 C. 3, Dist. 68; cc. 19, 20, 27, 28, Dist. 1, *de cons.*

72 C. 19, Dist. 1, *de cons.*

73 Cc. 7, 10, x, III, 40.

74 C. 10, x, III, 40.

75 Whether the *effusio seminis humani* is included in § 1, n. 3° (as the *Irish Eccl. Record*, 1919, 460, maintains) seems doubtful, because *usus* is hardly ever employed in such connection, unless a church were used for a brothel, which is a repulsive thought.

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grievous fault, and therefore homicide committed by a child, or by an insane or frenzied person, would not desecrate a church. If a drunkard perpetrates such an act, it depends on whether the action was in any way foreseen or not. If it was not foreseen, it does not desecrate the church.[76] Lynching, however, and even the judiciary execution of a sentence of capital punishment would induce desecration. No crime is involved if one kills an aggressor in self-defence.

Iniuriosa et gravis sanguinis effusio means the shedding of human blood in such quantity that it may be called a pouring out. Hence a few drops, or the oozing from a light wound would not desecrate a church, and the authors[77] speak of a *copious* shedding of blood. The word *gravis* may have another meaning, *viz. graviter culpabilis,* grievously sinful. Hence if boys would beat one another, or if a teacher would punish boys in church, it would scarcely amount to a grievous fault.[78] If by a serious blow from another the nose would bleed copiously, some assert desecration, while others deny it.[79] The correct answer depends partly on the interpretation of *iniuriosa,* because the injury may be referred either to the sacred edifice[80] or to the person[81] injured. The text does not decide which is meant. But most probably the act must be injurious to both edifice and person, so that the person injured is really damaged, and the people who witnessed the act look upon it as a serious irreverence done to the church.

The third act which induces desecration is giving the church over *to impious or sordid uses.* Here the terms

76 Cfr. Gasparri, *De SSma Eucharistia,* n. 250, Vol. I, p. 177.
77 Gasparri, *l. c.,* n. 251; Many, *De Locis Sacris,* p. 72.
78 Reiffenstuel, III, 40, n. 16.
79 Gasparri, *l. c.*
80 *Idem, l. c.*
81 Many, *l. c.,* p. 71.

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require attention, because, as stated, this cause is new.

Impious has many meanings: ungodly, irreligious, irreverent, unnatural, detestable, etc. Hence using a church for orgies, as happened in the French Revolution, or for Masonic rites, would, in our opinion, desecrate it. Sacrilegious robbery would also have this effect.

Sordidus may be compared with the sordid or mean offices forbidden to the clergy. Thus a church may be called desecrated if it was used for a barracks, especially if it has also served to quarter horses or mules;[82] although the S. Congregation[83] in one instance of a two days' occupation by soldiers decided only for provisional reconciliation. Sordid would also be the use of a church for merely political meetings, if this should happen frequently and under great agitation.

Lastly, *the burial of an infidel* or an excommunicated person also desecrates a church. By infidels are here understood persons who have never been baptized. Catechumens must not be classed with infidels.[84] Besides, a more benign interpretation would, in our case, exclude from the class of infidels all children of Catholic parents, whether buried with the mother or not.[85] But if this be admitted, why not extend it to the husband or wife of a Catholic partner, since the unbelieving party, according to 1 Cor. VII, 14, is sanctified by the believing party? We make this suggestion with due reserve and because some canonists[86] interpret the term *pagans* and *infidels* as including grown persons only, or such as are wilful infidels. Our Code, which does *not* receive its juridical value from the spurious texts of Gratian's Decree, simply mentions

82 S. Rit. C., March 3, 1821 (*Dec. Auth.*, n. 2612).

83 S. Rit. C., Feb. 27, 1847 (*ibid.*, n. 2938).

84 Cfr. can. 1239, § 2.

85 Gasparri, *l. c.*, n. 253; Many, *l. c.*, p. 75 f.

86 Gasparri, *l. c.*; see, however, can. 1239.

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infidels, without distinction, thereby including all who are destitute of baptismal grace through their own fault.

Excommunicati must also be interpreted strictly. It includes only those who have been declared excommunicated or condemned to the penalty. It does *not* include those under suspension or interdict, and therefore the burial of a suspended or interdicted person would not desecrate a church.

Excommunicati are either *vitandi* or *tolerati.* Both kinds are here included, provided a declaratory or condemnatory sentence has been given.[87]

Concerning heretics or schismatics it may be asked whether their burial in a church would defile it. A decision of the S. Congregation [88] would seem to include all non-Catholics. However, since the Code [89] requires a declaratory sentence even for a *poenae latae sententiae,* it appears more probable, and more in keeping with the spirit of the law, that a heretic or schismatic against whom no such sentence has been passed, is not included in the category of excommunicated persons whose burial would desecrate a church.[90] The consequence is that most of our present-day heretics, so called, are not touched by this canon.

As four kinds of acts only are specified, no analogy or extension may be admitted.

Furthermore, these acts must be certain, *de iure* or *de facto*. *De iure* certain is desecration if homicide was committed; uncertain *de iure* would be the amount of blood shed. *De facto* certain is desecration if the burial of an infidel took place; *de facto* uncertain is when the

87 Cfr. can. 2259, § 2.

88 S. Rit. C., April 23, 1875 (*Dec. Auth.*, n. 3344); Gasparri, *l. c.*, n. 254.

89 Can. 2223, § 4.

90 This was, as Gasparri owns, the *sententia communis* before the promulgation of the Code.

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fact of infidelity is doubtful, because he may have secretly been baptized. The general rule is that in doubtful circumstances the minimum is taken.[91] However, provisional reconciliation would not be out of place.[92]

The acts inducing desecration must be *notorious, i. e.* known and committed under circumstances that make it impossible to hide them for any length of time.[93]

Lastly, these acts must be commited *in the church itself.* If a man would shoot through a window of the church and kill a person outside, the church would not be defiled. But if the person were killed in the church by a shot fired from outside, desecration would take place. The martyrdom of St. Thomas à Becket implied desecration.[94]

Is any church liable to desecration, or *only a consecrated* or *blessed church?* It seems the more probable and, we may say, the more common opinion, that only a consecrated or blessed church is to be understood.[95] This would seem to be the more natural interpretation if we compare can. 1165, § 1, and the following one. A building is dedicated to divine worship by consecration or blessing, and no divine services can be held in it before this ceremony has taken place. Now the effect of desecration, as stated in can. 1173, consists precisely in the prohibition of divine services. What then would be the effect of desecration with regard to churches that are neither consecrated nor blessed?

Finally, by church is to be understood the body of the internal church, exclusive of the roof, tower, sacristy, vestibule and adjoining rooms. The crypt or basement is included if it is internally connected with the upper part of the church building.[96]

91 Reg. Iuris 30 in 6°.
92 S. Rit. C., Feb. 27, 1847 (*Dec. Auth.*, n. 2938).
93 Can. 2197.
94 Gasparri, *l. c.*, n. 250.
95 Thus Gasparri, *l. c.*, n. 247.
96 Gasparri, *l. c.*, n. 250; Many, *l. c.*, p. 80 f.

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§ 2 corrects the old law[97] and admits no connection between the desecration of a church and that of a cemetery, even though the latter adjoins the former, and *vice versa.*

CONSEQUENCES OF DESECRATION

CAN. 1173

§ 1. In violata ecclesia, antequam reconcilietur, nefas est divina celebrare officia, Sacramenta ministrare, mortuos sepelire.

§ 2. Si violatio accidat tempore divinorum officiorum, haec statim cessent; si ante Missae canonem vel post communionem, Missa dimittatur; secus sacerdos Missam prosequatur usque ad communionem.

The consequences of desecration are twofold: cessation of divine services and obligation of reconciliation. Until reconciliation is effected, it would be unlawful to hold divine services in a desecrated church or to administer the sacraments or bury the dead there.[98] Hence all liturgical services which have been instituted by divine or ecclesiastical law and are performed exclusively by the clergy,[99] are strictly forbidden in a desecrated church. However, though the injunction is grievous, yet no penalty, either of censure or irregularity, is attached to the transgression.[1]

If the desecration happens *during the divine offices, these must cease immediately.* Thus the canonical hours, or preaching, or any function should be immediately stopped. Yet we believe that Baptism might be finished if the ceremony had progressed nearly to the act of pour-

97 C. un. 6°, III, 21.

98 Cfr. cc. 27, 28, Dist. 1, *de cons.*; c. 10, x, III, 40.

99 Can. 2256, n. 1.

1 Neither was a penalty contained in the Constit. "*Apostolicae Sedis.*"

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ing the water. If the desecration happens before the Canon of the Mass, or after Communion, the Mass must be discontinued. If it happens between the beginning of the Canon and Communion, Mass must be continued until Communion, *viz.*, until the *Corpus tuum*. This is the rule of the Missal.[2]

Canonists generally hold that if there is no church in a place besides the one desecrated, and reconciliation cannot be promptly effected, the Ordinary may permit the celebration of Mass therein for the people. In case of necessity, for instance, for administering the Viaticum, if no other church is available, Mass may be said in a desecrated church without consulting the bishop, if he cannot be approached.[3] Can. 1176 provides for emergencies.

THE RECONCILIATION OF CHURCHES

CAN. 1174

§ 1. Ecclesia violata reconcilietur, quam citissime poterit, secundum ritus in probatis liturgicis libris descriptos.

§ 2. Si dubitetur num ecclesia sit violata, reconciliari potest ad cautelam.

CAN. 1175

Ecclesia violata ob sepulturam excommunicati vel infidelis ne reconcilietur, antequam cadaver exinde removeatur, si remotio sine gravi incommodo fieri possit.

2 *Missale Romanum*, tit. *De Defectibus*, c. X, n. 2.

3 Gasparri, *l. c.*, 243; Many, *l. c.*, p. 83.

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CAN. 1176

§ 1. Ecclesiam benedictam reconciliare potest rector eiusdem vel quilibet sacerdos de consensu saltem praesumpto rectoris.

§ 2. Ecclesiae consecratae valida reconciliatio ad eos spectat de quibus in can. 1156.

§ 3. In casu tamen gravis et urgentis necessitatis, si Ordinarius adiri nequeat, rectori ecclesiae consecratae eandem reconciliare fas est, certiore facto postea Ordinario.

CAN. 1177

Reconciliatio ecclesiae benedictae fieri potest aqua lustrali communi; reconciliatio vero ecclesiae consecratae fiat aqua ad hoc benedicta secundum leges liturgicas; quam tamen non solum Episcopi, sed etiam presbyteri qui ecclesiam reconciliant, benedicere possunt.

The first of these four canons, all of which refer to the matter of reconciling a desecrated church, demands, like the old law,[4] that reconciliation be performed as soon as possible, according to the rites described in the approved liturgical books. If the fact of the desecration is doubtful, a provisional (*ad cautelam*) reconciliation *may* take place. The books referred to are the Roman Pontifical and Ritual (tit. viii, c. 28). Priests and bishops should beware of the assumption that a church is reconciled if Mass was said therein after desecration. Hence, even in case Mass has been said in a desecrated church reconciliation is required as a matter of necessity.[5]

Can. 1175 takes up the fourth case of can. 1172, *viz.*,

4 C. 10, X, III, 10.
5 S. Rit. C., Aug. 19, 1634, ad II (*Dec. Auth.*, n. 611).

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when a church has been desecrated by the burial of an infidel or excommunicated person. Before reconciliation *the body must be removed* if it can be done without great inconvenience. It may be difficult to recognize the remains, especially if many were buried in the church. Prudence is required under such circumstances.[6] But if the expense caused by the calling of experts and witnesses would be too great, removal would not be required.

Can. 1176 determines *the ministers of reconciliation.* A church which was only *blessed* may be reconciled by its rector or by any other priest with the (at least) presumed consent of the rector. Former decisions required that a dignitary,[7] or at least one especially appointed by the Ordinary,[8] should perform the ceremony of reconciliation. Our text requires neither dignity nor faculty. Any priest may lawfully presume the consent of the rector, unless positively forbidden by the latter, or convinced of the intention of the rector to perform the rite himself.

A *consecrated church can be validly reconciled* only by those mentioned in can. 1156. Hence the Ordinary of the diocese is entitled to reconcile consecrated churches of his own territory, which belong to the secular clergy or non-exempt religious or laymen; and the higher superior of exempt religious can reconcile churches belonging to his order.

However, says § 3 of can. 1176, in *cases of serious and urgent* necessity, if the Ordinary cannot be reached, the rector of a consecrated church may reconcile it and inform the Ordinary afterwards. This is a liberal extension unknown before. A grave and urgent case would be the celebration of a festival which could not be post-

6 S. Rit. C., April 23, 1875 (n. 3344).
7 S. Rit. C., Feb. 9, 1608 (n. 246).
8 S. Rit. C., March 3, 1821 (n. 2612).

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poned, for instance, first Holy Communion, or a wedding, or a funeral. In that case the Ordinary should be called either by telephone or telegraph; but if it is foreseen that he could not reach the place in time, it would be useless to send a message. Hence the bishop or major exempt religious superior, respectively, must simply be notified of the fact of reconciliation. It goes without saying that this information is not required for the validity of the reconciliation.

The rite to be followed by the rector of the desecrated church is that of the Roman Pontifical.

Can. 1177 says that reconciliation of a *blessed church* may be effected with ordinary holy water, whereas for a *consecrated church* water blessed according to the liturgical laws should be used. However, not only bishops, but also priests who perform the act of reconciliation, may bless this water. The Roman Ritual [9] states that a priest endowed with the faculty of reconciling a consecrated church, hence also the rector of the church in case of necessity, must wear amice, alb, cincture, stole and cope of white color. He must follow the rite prescribed in the Pontifical, and consequently use the water blessed by the bishop. If he blesses the water himself, he must follow the Roman Pontifical, at the beginning of Pars II: *De Benedictione et Impositione Primarii Lapidis.* After the water has been blessed he is to proceed according to the formulary of the Pontifical *De Ecclesiae et Coemeterii Reconciliatione,* and follow the rubrics there given. If the desecrated church was only *blessed,* the priest dresses as above, uses ordinary holy water (blessed, for instance, on Sunday before Mass), and proceeds according to the

9 Tit. III, c. 28 (ed. Pustet, 1913, p. 247 ff.). But the faculty mentioned there is no longer needed in case of necessity; nor is any faculty required for reconciling a church only blessed.

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Ritual, title viii, c. 28: *Ritus Reconciliandi Ecclesiam Violatam.*

DECORUM OF THE HOUSE OF GOD

CAN. 1178

Curent omnes ad quos pertinet, ut in ecclesiis illa munditia servetur, quae domum Dei decet; ab iisdem arceantur negotiationes et nundinae, quanquam ad finem pium habitae; et generatim quidquid a sanctitate loci absonum sit.

All to whom it pertains shall take care that the churches are kept neat, as becomes the house of God; business and fairs, even though for a pious purpose, must not be held in them, and in general everything that is incompatible with the holiness of the place.

It is unnecessary to recall all the Decretals [10] and papal constitutions which refer to this matter. The very fact that a church is a sacred place, in which tremendous mysteries are celebrated, ought to suffice to keep it neat. Luxury or magnificence, says Benedict XIV, are not required, but neatness and cleanliness are possible everywhere, even in the poorest church.[11] The Pontiff adds: You will find well-furnished and neatly adorned residences, but squalid and barren churches lacking the most necessary furniture. Lack of neatness betrays a lack of interest and perhaps of faith on the part of the priest.

Those immediately concerned are the congregation, especially the trustees and altar society, the clergy and the Ordinary. The latter should make the condition of the church a subject of examination at the time of his canonical visit and issue regulations from which no

10 C. 2, X, I, 27; c. 12, X, III, 1; cc. 1, 5, X, III, 49.

11 Const. "*Annus qui*," Feb. 19, 1749, § 1.

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appeal is admissible. He may inflict penalties against incorrigible pastors.[12] Fairs and markets are not usually held in the churches of our country; but even the vestibule and other places connected with the church should be kept free of them.

IUS ASYLI

CAN. 1179

Ecclesia iure asyli gaudet ita ut rei, qui ad illam confugerint, inde non sint extrahendi, nisi necessitas urgeat, sine assensu Ordinarii, vel saltem rectoris ecclesiae.

Churches enjoy the right of asylum, which implies that criminals seeking refuge therein may, except in case of urgent necessity, not be taken out without the consent of the Ordinary or at least of the rector of the church.

As the Greek term *asylos* indicates, an asylum was understood to be an inviolable place. Such in the old law was the altar of holocausts, the horns of which were held by the one who fled to the tabernacle or temple to seek safety from revenge or escape being killed without due trial.[13] The Greeks, too, had their statues, temples, and marked off districts which offered safety to criminals.[14] Roman temples, if consecrated, were endowed with the same privilege.[15] Christian churches claimed the *ius asyli* before the Christian emperors enacted the same into law.[16] The *Codex Iustinianus* (lib. I, tit. 12) contains a

12 Bened. XIV, "*Ad militantis*," March 30, 1742, § 6; cfr. can. 2182–2184.

13 Ex. 21, 28; III Ki. 1, 50; 2, 28 ff. Besides, there were cities of refuge; Jos. 20, 4; 21, 3.

14 The space of asylum in the temple of Artemis at Ephesus extended to one stadion or 600 feet; cfr. Stengel, *Die Griech. Kultusaltertümer*, 1898, p. 29 f.

15 Wissova, *Religion u. Kultur der Römer*, 1902, p. 405.

16 S. Ambrose, *Ep.* 20, *ad Marcell.*, n. 20 (Migne, 16, 997); *Cod. Theod.*, IX, 45.

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title: "*De his qui ad ecclesias confugiunt vel ibi exclamant,*" forbidding extradition or violent seizure of criminals and reserving the judgment to the bishop. The Decree and the Decretals[17] largely follow the Roman law. Later enactments, especially in papal constitutions, either modified or determined the extent of the right of refuge. According to a Constitution of Gregory XIV ("*Cum alias,*" May 24, 1591) highway robbers and thieves who plundered the fields, those who committed cold-blooded murder or wantonly shed blood, those guilty of lèse majesté in the person of the ruler, and those who prevented the application of the *ius asyli* were excluded from the benefit of the privilege.[18]

Our text excludes no one, but limits the right of refuge somewhat, as not only the Ordinary (*i. e.*, the bishop) can give permission to extradite, but the rector of the church also. In cases of urgent necessity no permission is required. Such a case would be that of threatening mob violence, from which the officials might save the criminal by quick action.

The churches which enjoy this privilege are those consecrated or blessed, as all authors teach and the text plainly intimates. Common jurisprudence[19] would extend it to churches and public oratories not yet blessed, but dedicated to divine worship. This view may be accepted, as the *ius asyli* is a favor and consequently liable to a broad interpretation.

No penalties against violators of this right are stated in the Code.

17 Cc. 8–10, 19, 35, C. 17, q. 4; X, III, 49.

18 Benedict XIV., "*Officii Nostri,*" March 15, 1750, § 12, reserved the grant strictly to bishops, excluding even the prelates *nullius*.

19 Cfr. Many, *l. c.*, p. 101.

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THE TITLE OF BASILICA

CAN. 1180

Nulla ecclesia potest basilicae titulo decorari, nisi ex apostolica concessione aut inmemorabili consuetudine; cuiusque vero privilegia ex alterutro capite colligantur.

No church enjoys the title of basilica, except it has been given to it by the Apostolic See or by immemorable custom. The privileges of each church are to be determined either from the concessions of the Apostolic See or from immemorable custom.

Originally the term basilica indicated the architectural style of the structure. However, the name also implied a royal or stately building characterized by great splendor or prominence. Hence the more illustrious churches, especially those dedicated to renowned martyrs or saints, became known as basilicas. Later a distinction was introduced between *basilicae majores* and *minores*. The four major basilicas are: St. John Lateran, in which the Roman Pontiff used to be enthroned and which is the proper See of Rome; St. Peter's on the Vatican, which represents Constantinople; St. Paul's on the Via Ostiense, which designates the See of Alexandria, and S. Maria Maggiore, as representative of the See of Antioch. These four are also called patriarchal basilicas. Besides these there are many minor basilicas, for instance, S. Maria in Trastevere, Monte Cassino, St. Francis of Assisi, Lourdes, etc. These *minor* basilicas came to be called thus either by the renown of their clergy or because of important events or mere antiquity or splendor.[20] But

20 S. Rit. C., Aug. 26, 1836 (*Dec. Auth.*, n. 2744, and Vol. IV, p. 357 ff.).

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unless an immemorable custom has borne constant witness to the existence of the title, it now requires a papal grant. The privileges, or rather decorative insignia, are the use of the canopaeum, the tintinnabulum, the palmatoria or bugia, and some vestments for the clergy.

ENTRANCE FEES NOT ALLOWED

CAN. 1181

Ingressus in ecclesiam ad sacros ritus sit omnino gratuitus, reprobata qualibet contraria consuetudine.

Admission to divine service must be entirely free, and every contrary custom is hereby reprobated.

Rome, and especially the S. C. Propaganda, was inexorable in rejecting the custom of demanding admission fees of any kind at the doors of churches. The Provincial Council of Cincinnati, held in 1861, thought it could permit the custom in three cities of the then Cleveland diocese. But the Prefect of the Propaganda demanded that the custom be abolished within two years. A similar amendment was prescribed for the acts of the II Plenary Council of Baltimore, in 1866, and finally for the acts of the Provincial Council of Australia, in 1869. From the last-named letter of the Propaganda our text has passed into the Code,[21] which has made the law even more emphatic by adding the reprobation clause. This renders the custom existing in many parts of our country juridically impossible, but it will take some time to eliminate it and to find other sources of revenue. The decree above mentioned forbids the placing of ushers (*collectores*) at the gate for collecting money from the faithful coming to

21 *Coll. Lac.*, t. III, coll. 220, 230, 506, 1085, 1086; S. C. P. F., Aug. 15 1869 (Coll. n. 1345).

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attend divine service and to hear the word of God. But the S. Congregation does not intend to forbid spontaneous oblations at the Offertory, nor to abolish seat or pew rent.

THE ADMINISTRATION OF CHURCHES

CAN 1182

§ 1. Firmo praescripto can. 1519–1528, administratio bonorum quae destinata sunt reparandae decorandaeque ecclesiae divinoque in eadem cultui exercendo, pertinet, nisi aliud ex speciali titulo vel legitima consuetudine constet, ad Episcopum cum Capitulo, si de ecclesia cathedrali agatur; ad Capitulum ecclesiae collegiatae, si de collegiata; ad rectorem, si de alia ecclesia.

§ 2. Etiam oblationes factas in commodum paroeciae aut missionis, aut ecclesiae sitae intra paroeciae vel missionis fines, administrat parochus vel missionarius, nisi agatur de ecclesia propriam administrationem habente, distinctam ab administratione paroeciae vel missionis, aut nisi aliud ferat ius peculiare aut legitima consuetudo.

§ 3. Parochus, missionarius, rector saecularis ecclesiae, sive saecularis is sit sive religiosus, debet huiusmodi oblationes administrare ad normam sacrorum canonum, deque eis rationem loci Ordinario reddere ad normam can. 1525.

§ 1. This canon first safeguards the administration of church property in general, as governed by can. 1519–1528, and then states *to whom* pertains the administration of the *goods destined for the repair and embellishment of churches* and of divine service in cathedral, collegiate, and other churches. In cathedral churches it be-

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longs to the bishop and the chapter conjointly; in collegiate churches, to the chapter; in all other churches, to the rector.

Wherever there is a diocesan chapter, in the canonical and full sense of the term, the administration of the funds destined for the repair and adornment of the cathedral church lies with the bishop and the chapter conjointly. Hence neither the bishop nor the chapter may proceed alone in matters pertaining to the cathedral church.[22] But what if there are no cathedral chapters, as in most of our dioceses,[23] or if they are not established along the lines of the law, as in England? After having perused the *Acta et Decreta* of our plenary councils we could perceive nothing that would be strictly to the point in our case. The third Council mentions (n. 266) a so-called Apostolic canon, which in substance commits the whole temporal affair to the bishop and then describes the mode in which church property may be held: — by fee simple, in trust, as corporation sole, or as personal property. In treating of diocesan consultors (n. 20) the Council demands the *consilium* (*sic!*) of the consultors for any alienation of church property the value of which exceeds $5000. However, this applies to ecclesiastical or diocesan property in general, and does not *per se* touch cathedral funds. Who, then, is responsible for the repair and decoration of the cathedrals in our country? Since there are no chapters, properly so-called, and the diocesan consultors certainly cannot claim any title to the administration of cathedral funds, it follows that the bishop himself is responsible. He may entrust the cathedral pastor with this important matter, but the ultimate responsibility

22 S. C. EE. et RR., May 23, 1662 (Bizzarri, *Collectanea*, p. 258).

23 There are honorary canons in the archdiocese of New Orleans, but their rights are unknown to the author.

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is the bishop's. This is more clearly enunciated in the ruling of the first Westminster Provincial Council, 1852, n. 24: "The right to the temporal and spiritual administration of the cathedral church remains with the bishop, unless the Holy See shall have provided otherwise."[24] We could not find a contrary proviso. Neither is the Code opposed to our view, for the present canon is plainly intended for chapters which measure up to all requirements of the law. However, we hardly believe this holds of English chapters.

The care for *collegiate churches,* our text says, belongs to the chapter, not to the provost or pastor. The same may justly be said concerning abbey churches, whilst churches in care of exempt religious must be taken care of by the respective rector, as is the case with all other churches not in possession of a chapter or corporation. For if a corporation (a confraternity, for instance) is in possession of a church, the oblations of which it receives and administers, the right and duty of taking care of that church belongs to the confraternity, under the supervision of the Ordinary of the diocese.[25]

§ 2. Offerings made in favor of a parish church or mission, or of a church located within the boundaries of a parish or mission, are administered by the respective pastor or missionary, unless the church in question has its own separate administration, distinct from the administration of the parish church or mission, or unless a particular law or lawful custom rules differently.

There is no difficulty to be apprehended from this regulation in our country. The only trouble that might arise would be from a sodality or confraternity. How-

24 *Coll. Lac.*, III, col. 948. The cathedral of Newport is an exception, for it has a monastic cathedral chapter (*Coll. Lac.*, III, 957 f.).

25 S. C. EE. et RR., Feb. 11, 1842 (Bizz, *l. c.*, p. 478).

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ever, these are generally ruled by the pastor or missionary. Besides, if they form a corporation acknowledged by the civil law, they have a solid basis, provided they give an account to the Ordinary. For an independent confraternity can hardly be imagined.[26] Churches or chapels governed by religious have their own administration and are dependent on the bishop only as far as the law states.

§ 3. The pastor, the missionary, the rector of a secular church, be he a secular priest or a religious, must administer these offerings according to church law and render an account to the Ordinary, as provided in can. 1525.

Those who are obliged to render an account are: (a) pastors, no matter whether they belong to the secular or religious clergy; (b) missionaries, whether secular or religious; (c) rectors of churches which by right belong to the secular clergy, although they are subject to religious.

A reasonable doubt might arise from can. 630, § 4, where the religious superior is said to administer the offerings of a church that belongs *pleno iure* to a religious community. We stated what we think of that enactment under the respective canon, *viz.:* It is impracticable for a community which has many *expositi.* But our canon speaks of all pastors alike and draws no distinction. All, it says, must administer the offerings made to their churches, all must render an account to the Ordinary. In order not to go out of the way we assume it as the logical consequence that the pastor, and not the religious superior, should administer these offerings, for which he is responsible to the Ordinary. Otherwise, if we follow can. 630, § 4, the religious superior would have to administer these offerings and render the account. There

[26] S. C. C., July 7, 1736; July 27, 1737 (Richter, *Trid.*, p. 170, nn. 8 f. and *pluries*).

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seems to be a contradiction here. The natural explanation would seem to be that the pastor actually administers those funds, and the religious superior has the supervision, if he cares to exercise it.

Which are the offerings spoken of in our canon? The description of these may safely be taken from the IInd Provincial Council of Westminster, and the IIIrd Plenary Council of Baltimore.[27] They are: pew-rent, collections at the Offertory, seat-money, and funds raised by lectures and house collections. Of all these, therefore, the administrators, as far as repair and embellishment of the church and divine service are concerned, must give an account to the Ordinary every year.[28]

TRUSTEES

CAN. 1183

§ 1. Si alii quoque, sive clerici sive laici, in administrationem bonorum alicuius ecclesiae cooptentur, iidem omnes una cum administratore ecclesiastico, de quo in can. 1182, aut eius vicem gerente, eoque praeside, constituunt Consilium fabricae ecclesiae.

§ 2. Huius Consilii sodales, nisi aliter legitime constitutum fuerit, nominantur ab Ordinario eiusve delegato et ab eodem possunt ob gravem causam removeri.

CAN. 1184

Consilium fabricae curare debet rectam bonorum ecclesiae administrationem, servato praescripto can.

27 Tit. VIII, n. X (*Coll., Lac.* III, col. 982); *Acta et Decreta Com. Baltim. III*, n. 90 (ed. 1886, p. 48 f; p. 231 f).

28 See can. 1525, § 1.

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1522, 1523; sed nullatenus sese ingerat in ea omnia quae ad spirituale munus pertinent, praesertim:

1°. In exercitium cultus in ecclesia;

2°. In modum et tempus pulsandi campanas et in curam tuendi ordinis in ecclesia atque in coemeterio;

3°. In definiendam rationem qua collectae, denuntiationes aliique actus ad divinum cultum ornatumque ecclesiae quoquo modo spectantes in ecclesia fieri possint;

4°. In dispositionem materialem altarium, mensae pro distributione sanctissimae Eucharistiae, cathedrae sive suggestus e quo ad populum verba fiunt, organorum, loci cantoribus assignati, sedilium, scamnorum, capsularum oblationibus recipiendis, aliarumque quae ad exercitium religiosi cultus spectent;

5°. In admissionem vel reiectionem sacrorum utensilium aliarumque rerum quae sive ad usum, sive ad cultum, sive ad ornatum in ecclesia vel sacrario destinentur;

6°. In scriptionem, dispositionem, custodiam librorum paroecialium aliorumque documentorum quae ad archivum paroeciale pertineant.

Can. 1185

Sacrista, cantores, organorum moderator, pueri chorales, campanae pulsator, sepulcrorum fossores, ceterique inservientes a solo ecclesiae rectore, salvis legitimis consuetudinibus et conventionibus et Ordinarii auctoritate, nominantur, pendent, dimittuntur.

Canon 1183 says that if other administrators, either clerical or lay, are chosen, these together with, and under the presidency of, the ecclesiastical administrator, consti-

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tute the board of trustees or council of the church fabric.

The members of this committee, unless otherwise legally provided, are appointed by the Ordinary or his delegate and may be removed by him for weighty reasons.

The law does not command the appointment of trustees, but only says, *if*. Hence though prudence may dictate the measure, as the IIIrd Baltimore Council states,[29] a bishop or pastor would by no means act contrary to the law by not choosing any trustees. It cannot be denied that trustees have at various times in the past acted despotically and with little deference to the spirit and laws of the Church.[30] Hence the Code desires that they be appointed and removed by the Ordinary or his delegate, who in this case may properly be the pastor. But the text admits another lawful way of choosing trustees, and hence the enactments of the IIIrd Council of Baltimore [32] are in perfect keeping with the present law and may be followed as a safe guide.

Can. 1184 commands the trustees to take due care of the church funds, according to can. 1522 and 1523, and not to interfere with the spiritual administration. They are especially forbidden to meddle:

1. With the functions of divine worship in church;

2. With the manner and time of ringing the bells or the order of services in the church and cemetery;

3. With determining the manner of taking up collections, making announcements, and other acts which refer to divine worship or the adornment of the church, and are performed in church.

4. With the arrangement of the altars, communion rails, pulpit, organ and organ loft, seats and benches, col-

29 *Acta et Decreta*, n. 284 (*ed. cit.*, p. 163).

30 Conc. Prov. Balt. I (*Coll. Lac.*, III, 20); Farley, *Life of Card. McCloskey*, 1917.

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lection boxes and other things belonging to divine service.

5. With the admission or rejection (because of unfitness according to traditional usage or the laws of the Church) of sacred utensils and other things which are destined either for divine worship or the embellishment of church or sacristy.

6. With the manner of writing, arranging or keeping the parochial books and other documents which belong to the archives of the parish.

It may be added, from the Instruction of the S. C. Propaganda [31] from which our text is substantially taken, that in these matters the pastor is to follow the laws of the Church, the diocesan statutes, and episcopal rulings. If the church funds must be used for buying or preserving things required for the adornment of the church, the board of trustees is obliged to see to it that the work is properly done. Should a dispute arise about the necessity of an expenditure, the bishop shall settle it.

Can. 1185 says that the sexton, the singers, the organist, the choir boys, the bell-ringer, the grave-diggers, and all other servers are to be appointed by, depend on, and are to be dismissed by the rector of the church, with due regard to lawful customs, concordats, and the authority of the Ordinary.

REPAIR OF CHURCHES

CAN. 1186

Salvis peculiaribus legitimisque consuetudinibus et conventionibus, et firma obligatione quae ad aliquem spectet etiam ex constituto legis civilis:

31 S. C. P. F., July 21, 1856, n. 21 (*Collectanea S. C. P. F.* ed. 1917, Vol. I, n. 1127, p. 603).

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1°. Onus reficiendi ecclesiam cathedralem incumbit ordine qui sequitur:

Bonis fabricae, salva ea parte quae necessaria est ad cultum divinum celebrandum et ad ordinariam ecclesiae administrationem;

Episcopo et canonicis pro rata proventuum, detractis necessariis ad honestam sustentationem;

Dioecesanis, quos tamen Ordinarius loci suasione magis quam coactione inducat ad sumptus necessarios, pro eorum viribus, praestandos;

2°. Onus reficiendi ecclesiam paroecialem incumbit ordine qui sequitur:

Bonis fabricae ecclesiae, ut supra;

Patrono;

Iis qui fructus aliquos ex ecclesia provenientes percipiunt secundum taxam pro rata redituum ab Ordinario statuendam;

Paroecianis, quos tamen Ordinarius loci, ut supra, magis hortetur quam cogat;

3°. Haec cum debita proportione serventur etiam quod attinet ad alias ecclesias.

CAN. 1187

Si qua ecclesia nullo modo ad cultum divinum adhiberi possit et omnes aditus interclusi sint ad eam reficiendam, in usum profanum non sordidum ab Ordinario loci redigi potest, et onera cum reditibus titulusque paroeciae, si ecclesia sit paroecialis, in aliam ecclesiam ab eodem Ordinario transferantur.

With due regard to special and lawful customs and concordats, and to the duty imposed by civil law:

I. The duty of repairing the *cathedral church* rests on the following in the order named:

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a) On the *church funds* after deduction of the expenses necessary for the upkeep of divine worship and the ordinary administration of the church;

b) On the *bishops and canons* according to their respective income, after deducting the necessary support;

c) On the *faithful of the diocese,* whom, however, the Ordinary should induce by persuasion rather than compulsion to contribute to the necessary expenses according to their means.

It is well known that formerly one of the three or four parts of which the church revenues consisted [32] was reserved for the maintenance and repair of the sacred edifices. However, in course of time the different parts were no longer distinguished and the material care of the church devolved either upon the beneficiary or together with him on all those who derived either spiritual or temporary benefit from the church funds. Besides the right of advowson involved a duty which was borne by the advowee or patron. And since this could be a corporation, it followed that the corporation or community who enjoyed the right of presentation had the obligation to provide for the material support of the church.

That local or special *customs* played and still play a part in countries where the separation of Church and State is not in effect is quite intelligible and natural. Besides, in some countries the *civil law* provides for a special board of ecclesiastical administrators. Lastly, conventions or *concordats* may regulate the obligations of the government concerning church repairs. Thus, *e. g.,* the concordats between the Holy See and Prussia (1822)

32 See cc. 23–30, C. 12, q. 2. These four parts were divided as follows: one for the bishop, one for the support of the clergy, one for the poor and orphans, one for the maintenance of the building and divine service. In Spain, however, the revenues were divided only into three portions, see c. 10, C. 10, q. 1; c. 1–3, C. 10, q. 10.

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and Russia (1847) embody regulations to that effect.[33] (By the way it may be said that such concordats bind also the new rulers.) These, then,— customs, concordats, and civil laws — are acknowledged by our Code and may be followed where they are in force. In our country the order according to which the obligation of repairing the cathedral church devolves on the various beneficiaries is: church fabric, bishop and canons, the faithful.

1. *Church funds* are moneys accruing from dowry, ordinary income, and extraordinary revenues. From these, first and above all, the expenses for the celebration of divine service[34] and for the ordinary or routine administration,— in other words,[35] the current expenses,— must be defrayed. What is left is to be employed for repairs of whatever description to be made on the cathedral church.

2. If, after deducting the necessary expenses, the church funds prove insufficient, the *bishop and the canons* must contribute to the necessary repairs, proportionately, *i. e.*, so that the salary of each is taxed *pro rata,* but the necessary support must not suffer. By this support is understood the personal maintenance of the bishop and canons, to the exclusion of relatives, for their salary is not given, as Benedict XIV says,[36] for the alimentation of the *consanguinei* or the upkeep of titles and the so-called social status. Benedict XIII allowed the so-called *media annata* or half of the income of the first year to be collected from all benefices, except such as belonged to col-

33 Cfr. Nussi, *Conventiones,* 1870, p. 206, p. 277 f., where the Russian government appears to be favorable to the Church.

34 This would include church and altar utensils, bread and wine, sanctuary oil, flowers, etc.

35 Includes the priest's salary, the support of janitor, organist, choir, the expenses for water, heating, light, insurance.

36 *Inst.,* 100, n. XIII.

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legiate chapters, parishes, benefices reserved to the Holy See and benefices which paid the same at any rate.[37] In our country the way is rather simple, because voluntary contributions or subscriptions generally cover expenses. But the bishop is not simply exempted from this duty if his income is sufficient and the cathedraticum "*sat pingue.*" Diocesan consultors cannot in justice be obliged to contribute, unless the clergy as such is taxed.

3. As to the *faithful,* we need not add anything, except that formerly the S. Congregation taxed all the cathedral members who lived in or had property within the district. This was called *per aes et libram.*[38]

II. The duty of repairing the *parish church* rests upon the following in the order named:

1. On the church funds, as described above;
2. On the advowson or *patron;*
3. On those who receive some income from the church, in proportion to the rate of such income, to be fixed by the Ordinary;
4. On the parishioners, whom the Ordinary should exhort rather than compel to contribute.

III. The rules given above also apply to other churches, with due regard to circumstances.

We will add that it would be unjust simply to call on the Ordinary for the means of repairing a church. For, as Benedict XIV says, such a procedure is unheard of in law.[39] But what we have said concerning the obligation of the bishop to contribute to the repair of the cathedral church also applies to pastors. The salary of a pastor is church money, not intended for his relatives. As to lay-

37 "*Pius et misericors,*" May 25, 1725; Gasparri, *De SSma Euch.*, n. 132.

38 S. C. C., Sept. 5, 1783; Jan. 10, 1784 *et pluries* (Richter, *Trid.*, p. 121, n. 8 f.); July 20, 1895 (*A. S. S.*, 28, 298 ff.).

39 *Inst.*, 100, n. 1 f. Therefore a well-to-do pastor might well think of his church in his last will.

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men or clergymen who receive some sort of pension from the church funds, these are certainly bound to contribute to the repairs.[40] If a monastery or university should possess a parish or other church incorporated *quoad temporalia tantum,* it would be obliged to help keep it in good repair.[41] On the other hand it must also be stated that the obligation arises only from benefices, salaries, pensions, and revenues which are derived from the respective church. Hence neither the bishop, nor pastors, nor beneficiaries are obliged to defray such expenses from their private means or patrimony, nor are they bound to share the burden of repairing other churches than their own. The *parishioners,* as stated above, are treated very leniently in our Code.[42]

Can. 1187, following the tenor of a Tridentine decree,[43] permits a dilapidated church, which is unfit for sacred use and has absolutely no funds from which repairs might be made, to be used for decent profane purposes by the Ordinary. Whenever this happens, all liabilities and revenues are to be transferred to another church by the Ordinary, and if the abandoned church was a parish church, its title, too, must be transferred.

In usum profanum non sordidum means that the secular purpose to which a church is put should be honest or decent. If the church is sold, it should first be execrated. If it is torn down, profanation is hardly possible. But even in the latter hypothesis the title, if the church was a parish church, should be transferred to another church, which may assume it as a secondary title.[44] The obliga-

40 *Trid.*, Sess. 21, c. 7 de ref.; Bened. XIV, *Instit.*, 100, n. XIII.

41 S. C. C., March 11, 1711 (Richter, *Trid.*, p. 121, n. 6).

42 Cfr. S. C. EE. et RR., Dec. 10, 1841 (Bizzarri, p. 477 f.).

43 Sess. 21, c. 7, *de ref.*

44 S. C. C., May 22, 1841; March 31, 1708 (Richter, *l. c.*, p. 121, n. 12 f).

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tions referred to in the text consist in taking over the foundation Masses and the celebration of the titular feast.[45]

[45] S C. C., May 22, 1841 (*l. c.*). The canons were obligated to assist at the solemn Mass.

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TITLE X

ORATORIES

DEFINITION AND DIVISION

CAN. 1188

§ 1. Oratorium est locus divino cultui destinatus, non tamen eo potissimum fine ut universo fidelium populo usui sit ad religionem publice colendam.

§ 2. Est vero oratorium;

1°. *Publicum,* si praecipue erectum sit in commodum alicuius collegii aut etiam privatorum, ita tamen ut omnibus fidelibus, tempore saltem divinorum officiorum, ius sit, legitime comprobatum, illud adeundi;

2°. *Semi-publicum,* si in commodum alicuius communitatis vel coetus fidelium eo convenientium erectum sit, neque liberum cuique sit illud adire;

3°. *Privatum* seu *domesticum,* si in privatis aedibus in commodum alicuius tantum familiae vel personae privatae erectum sit.

§ 1. An oratory is a place destined for divine worship, not, however, principally for the purpose of having all the faithful worship there publicly.

The term oratory occurs in the fourth century and signifies *a house of prayer* (οἶκος εὐκτέριος). Later it was restricted to small or private chapels.[1] However, mere size is not the distinctive feature. Our Code insists, like

1 Cfr. Many, *l. c.*, p. 9.

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former decisions,[2] upon another characteristic: *non universo fidelium populo usui,* it must not be destined for the use of all the faithful. This is the specific purpose of a church in the technical sense of the term. An oratory is limited to a certain class or group of people. We would also stress the term *publice colendam,* although the phrase "public service" can have only a secondary meaning.

§ 2. Distinguishes three kinds of oratories, public, semi-public, and private.

1. A *public oratory* is one built for the benefit of a certain corporation, or of private individuals, but in such a manner that *all the faithful have the right* to frequent it, at least at the time when divine services are held there.

A founder may have had the intention of constructing a private oratory for his family, say at a summer resort, yet it has become public in the course of time, either by common use or by opening an entrance into it from a public street. *Public* here means the right of the public[3] to make use of a chapel for divine service. What are the signs or marks of publicity? The Code answers: the right of the public must be *lawfully proved.* This proof may be given legally in various ways. In one case a chapel had been built in the atrium of a baron's palace. It had a belfry with a bell, a fixed marble altar and other marks of a public oratory, and was declared to be such by the S. Congregation, although there was no entrance from a public street.[4] If an oratory has been erected as a perpetual benefice, it is considered a public oratory.[5] Also if it has an entrance from a public street and is open to all

2 S. C. C., Sept. 9, 1724; S. Rit. C., Dec. 4, 1896; June 5, 1899 (*Dec. Auth.*, nn. 3934, 4025).

3 Cfr. fr. 72, Dig. 18, 1: "*Si quid sacri aut religiosi aut publici est,*" etc.

4 S. C. C., May 31, 1704 (Richter, *Trid.*, p. 130, n. 6); Gasparri, *l. c.*, n. 192.

5 S. C. C., Feb 19, 1619; Many, *l. c.*, p. 129.

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the faithful. Summing up the Roman decisions we may say: A gate opening upon a public street or road used by the faithful; an immemorable custom or authentic document issued by the founder or owner of the chapel, even though it has no public entrance; or the title of benefice permanently attached to an oratory, are considered sufficient and evident proofs that an oratory is public. It goes without saying that prescription, say of thirty years,[6] may force a public way or entrance, for instance, upon the grounds or possessions of a landlord. But a mere public entrance or opening upon a public street could hardly be styled sufficient proof that an oratory is public,[7] unless the people are accustomed to frequent it. A legal proof would also be furnished by an express document to that effect issued at the time of the consecration or blessing of the oratory. It would be well for the ecclesiastical authorities to issue such documents. Finally, a legal proof that an oratory is a public one would be the erection or existence in it of a baptismal font, in accordance with can. 774, § 2.

2. *Semi-public oratories* are such as are built for the convenience of a certain community or class of people, but are not open to all the faithful indiscriminately. Here stress is laid on the *corporate or specified class of faithful* who make up the ordinary attendance of a chapel. The rest of the faithful cannot set up a claim to be admitted, and if they are admitted, it is by mere favor, which should prejudice neither the community itself nor the parish at large. Such oratories, says a decree of the S. Rit. C., of Jan. 23, 1899, are those attached to seminaries and colleges, pious institutes living under a rule or constitution, houses of retreat, boarding schools and hos-

6 Can. 1511, § 2; Many, *l. c.*, p. 129.

7 Such a public entrance may also be made in a semi-public oratory.

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pices destined for the young, hospitals and orphanages, garrisons and prisons.

3. *Private or domestic oratories* are those erected in private homes for the convenience of a family or private individuals. The term *family* must here be taken in its strict sense, and excludes artificial persons and corporations. But it includes all the inhabitants of a house living under the authority of the same *paterfamilias*.[8] Private oratories exist in *private homes,* which signifies exclusive ownership, so that no public servitude or easement can deprive them of their private character. We find such oratories in the homes of wealthy citizens, in villas, castles, and summer resorts.

CHAPELS OF CARDINALS AND BISHOPS

CAN. 1189

Oratoria S. R. E. Cardinalium et Episcoporum sive residentialium sive titularium, licet privata, fruuntur tamen omnibus iuribus et privilegiis quibus oratoria semi-publica gaudent.

The oratories of resident or titular Cardinals and bishops, even though they be private, enjoy all the rights and privileges of semi-public oratories.

Benedict XIV solemnly declared that oratories of Cardinals and bishops were not included in the decree of the Council of Trent.[9] He said that the homes of these dignitaries cannot be considered as private dwellings and consequently the Tridentine decree forbidding seculars and regulars to say Mass in private houses does not apply to them.[10] This, however, does not mean, as our text says,

8 Becker-Metcalf, *Gallus, or Roman Scenes of the Time of Augustus,* 1898, p. 151.

9 Sess. 22, *de observandis,* etc.

10 "*Magno cum animi,*" June 2, 1757, §§ 1, 2.

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that such chapels are not private oratories in the modern sense. They *are* private, but enjoy the rights and privileges of semi-public oratories. Among these privileges is this that other priests, especially the Vicar General, may, even during the absence of the bishop or during the vacancy of the episcopal see, say Mass there either on week-days or holydays of obligation, and those who attend comply with the obligation of hearing Mass.[11] If the episcopal palace maintains a school, all the children and teachers may hear Mass in the chapel, said by any priest, and thereby satisfy their Sunday duty.[12] This privilege was extended to the chapels of all bishops, even though they were only titular bishops.[13] Other functions and offices are mentioned under can. 1193.

PRIVATE CEMETERY CHAPELS

CAN. 1190

Aediculae in coemeterio a familiis seu personis privatis ad suam sepulturam erectae, sunt oratoria privata.

Chapels erected on cemeteries by families or private individuals for their burial place, are private oratories.

Tourists in Italy may have noticed such chapels in the magnificent grave-yards of Milan and Genoa.

In a different class are the chapels erected for the whole cemetery, *e. g.*, in memory of a pioneer priest or a benefactor. If they serve the purpose of a grave-yard chapel in general, the name private oratory cannot be applied to them.

11 S. Rit. C., July 2, 1661 (n. 1196).

12 S. Rit. C., April 8, 1854 (n. 3021).

13 S. Rit. C., June 8, 1896 (n. 3906).

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PUBLIC ORATORIES

CAN. 1191

§ 1. Oratoria publica eodem iure quo ecclesiae reguntur.

§ 2. Quare in oratorio publico, dummodo auctoritate Ordinarii ad publicum Dei cultum perpetuo per benedictionem vel consecrationem, ad norman can. 1155, 1156, dedicatum fuerit, omnes sacrae functiones celebrari possunt, salvo contrario rubricarum praescripto.

§ 1. Public oratories are governed by the same law as churches.

§ 2. In a public oratory, therefore, provided it has been dedicated for permanent divine worship by the authority of the Ordinary through blessing or consecration, all sacred functions may be held which are not forbidden by the rubrics.

The *rules* laid down for the building, consecration or blessing, execration, desecration and reconciliation, rights and privileges, administration and repairs of churches also apply to public oratories.

The *ecclesiastical functions* which may be performed in public oratories are those mentioned in can. 1171, to wit:

a) All *priestly functions,* such as high and low Mass, the blessing of candles, ashes, palms, the churching of women, etc.;

b) *All the Sacraments,* Baptism [14] not excepted, may be administered;

c) All *indulgences* that can be gained by a visit to a

14 Many, *l. c.*, p. 387, excepts Baptism, but can. 774 f. leave no doubt as to the correctness of the statement in our text.

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church, can be gained also in a public oratory. The public oratories in the residences and hospices of the Capuchins enjoy the same right as the churches of their order.[15]

d) As to *burial,* it is certain that the Ordinary may grant permission to bury in these oratories, as this was authentically decided.[16]

The last-named decree calls for a remark in view of the demand of can. 1171, that the *parochial rights* should be safeguarded. If canon 1191, § 2, says that all ecclesiastical functions may be performed in public oratories, it means only those which do not clash with the strictly parochial rights described in can. 462. Can. 464, § 2, must also be considered, which permits the Ordinary to exempt some religious families from the pastor's jurisdiction. Again the local Ordinary, according to can. 1171, may determine the hours of divine service in these oratories, unless they belong to exempt religious. This power he may exercise not only at the time of consecration or blessing, but at any time and for any sound reason, provided, as stated, the oratories do not belong to exempt religious.[17] If exempt religious should cause a disturbance by holding services that trench upon parochial rights or conflict with good order, recourse may be had to the Holy See (S. C. Conc. or Rel.).

Public oratories must be *blessed* or *consecrated* and thus forever dedicated to the service of God. Roman practice requires that they be either consecrated according to the Roman Pontifical or blessed according to the Roman Ritual.[18] An oratory so consecrated or blessed is a

15 S. C. Indulg., June 11, 1732 (Prinzivalli, *l. c.,* n. 69).

16 S. Rit. C., Jan. 13, 1704, ad 20 (n. 2123).

17 Bened. XIV, "*Etsi minime,*" Feb. 7, 1741, § 14.

18 S. Rit. C., June 5, 1899 (n. 4025).

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strictly sacred place, which may not be used for profane purposes and is endowed with the *ius asyli*.

Lastly, the Code states: *salvo contrario rubricarum praescripto*. The only contrary rubrical laws we could discover touch the celebration of the titular feast and the feast of dedication. If the oratory is only blessed, no dedication feast is permitted, but only the titular feast. The calendar of a public oratory must be followed by the secular as well as the religious clergy, and the clergy attached to the oratory, or living in the house to which it is attached, must commemorate the title of the same.[19]

If the oratory is consecrated, the feast of the dedication must be celebrated with octave.

It may not be amiss to draw attention to the phrase, *auctoritate Ordinarii*. Can. 1155 and 1156 declare that the term Ordinary means not only the diocesan bishop, but also the superior of exempt religious. The diocesan bishop has the right to *consecrate* a public oratory, either personally or by a delegate; the superior of exempt religious may *bless* a public oratory in the same way.

SEMI-PUBLIC ORATORIES

CAN. 1192

§ 1. Oratoria semi-publica erigi nequeunt sine Ordinarii licentia.

§ 2. Ordinarius hanc licentiam ne concedat, nisi prius per se vel per alium ecclesiasticum virum oratorium visitaverit et decenter instructum repererit.

§ 3. Data autem licentia, oratorium ad usus profanos converti nequit sine eiusdem Ordinarii auctoritate.

§ 4. In collegiis aut convictibus iuventuti insti-

19 S. Rit. C., Sept. 28, 1872; June 27, 1899 (nn. 3279, 4043).

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tuendae, in gymnasiis, lyceis, arcibus, praesidiis militum, carceribus, xenodochiis, etc., praeter oratorium principale alia minora ne erigantur, nisi, Ordinarii iudicio, necessitas aut magna utilitas id exigat.

§ 1 forbids the erection of semi-public oratories without the permission of the Ordinary. This is in conformity with the Council of Trent.[20] Anyone may build a semi-public oratory, but only for private devotion, not for the purpose of having public services held there, especially Mass. This is the meaning of the Tridentine decree as well as of later enactments.[21] The local Ordinary may give permission to pontifical as well as diocesan institutes of non-exempt religious to found and open a semi-public oratory.[22] The superior of exempt religious may permit such an oratory to be erected for the convenience of his subjects.

§ 2. The Ordinary shall not grant this permission before he has inspected the oratory either personally or through an ecclesiastical delegate, and found it properly fitted.

§ 3. After the permission has been granted, the oratory may not be put to private uses without the authority of the same Ordinary.

Since the distinction between a semi-public and a private oratory was developed, within the last three decades (owing undoubtedly to the growth of religious communities) it became necessary to define the requisites of both more strictly. Yet it is difficult to find, either in the Roman practice or in the works of canonists, a clear-cut line

20 Sess. 22, *de observ. et evit. in celeb. Missae.*

21 Benedict XIV, "*Ad militantis,*" March 30, 1742, § 6.

22 Leo XIII, "*Conditae,*" Dec. 8, 1900, II, n. 3. The faculties mentioned in S. C. P. F., Feb. 29, 1836 (*Coll.*, n. 846), are still valid for countries subject to that S. Congregation.

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of demarcation. We surely interpret the mind of the legislator correctly if we apply the general requisites for a private oratory also to the semi-public. The Code, partly rehearsing the Tridentine decree[23] concerning private oratories, requires *inspection,* but leaves the designation of the place to the owner of the chapel. The inspection must comprise (a) the *building,* which should be such as to represent a sacred edifice and be constructed of solid materials,[24] or at least plastered; (b) the *furniture and utensils* which are required for the sacred functions, also the neatness and cleanliness of the place; (c) the *surroundings* of the oratory and its destination. § 3 clearly states that the chapel must not be used for profane purposes. The S. Congregation has in more than one instance insisted that there should be no dormitory immediately above the oratory or, if this can not be avoided, that a canopy (*baldachino*) be placed over the altar.[25] Furthermore, the chapel must not contain wardrobes, chests, or trunks for profane use, nor must it be allowed to serve as a parlor or recreation or work room; nor as a hallway, infirmary,[26] or dormitory.[27]

All these things, then, should be looked into by the Ordinary or his delegate, who may be any *vir ecclesiasticus* (not a *mulier*), even if he be only in minor orders, provided he has read the title on oratories.

§ 4. In colleges and boarding schools for the young, in high schools and lyceums (intermediate classical schools),[28] in fortresses and barracks (garrisons), in

23 Sess. 22, *cit.*

24 Private oratories must have at least three walls of stone or brick; the fourth may be supplied by a curtain or tapestry.

25 S. Rit. C., May 11, 1641; Sept. 12, 1840; Nov. 23, 1880 (nn. 756, 2812, 3525).

26 An epidemic might excuse from the observance of this rule.

27 Cfr. Many, *l. c.*, p. 157 f.

28 This is the Italian classification of schools, gymnasium standing for a five years' high school, lyceum for a three years' collegiate course.

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prisons and asylums, etc., but one principal oratory may be erected, unless the Ordinary should judge that need or great usefulness demand more. According to a decision of the S. Congregation of Rites a special faculty imparted by the Holy See was required to erect other chapels, besides the principal one, in the places mentioned.[29] The Code dispenses with this faculty and leaves the matter to the prudent judgment of the Ordinary. The Ordinary in this case is the diocesan bishop for oratories belonging to secular or non-exempt religious, and the higher superior for oratories belonging to exempt religious.[30]

The decision quoted above also mentions some reasons of *need* and *utility* that may prompt the Ordinary to grant permission to erect some minor or accessory oratories besides the principal one. Such a reason, says the S. Congr., would be a great number of priests who would have to say Mass, say in a college or hospital, or the convenience of sick persons unable to visit the main chapel. To this might be reasonably added the cost of fuel.[31] A small chapel requires less coal, and would not only diminish expenses, but increase the comfort, especially of children and persons in delicate health.

A word may also be said concerning oratories of religious erected on their farms or summer resorts, which in Latin go by the name of *grangiae,*[32] *i.e.*, houses or villas built on the property of religious for sheltering the *oeconomus* or farm boss and his subordinates, hired hands or servants. A laybrother was generally set up as superintendent, and sometimes a priest resided there to say

29 S. Rit. C., March 8, 1878, ad II (n. 3484).

30 For the text throughout this canon only speaks of the Ordinary, not the local Ordinary, and hence can. 198 may be applied.

31 When there is a coal famine this amounts to a solid reason.

32 Cfr. c. 27, X, III, 39.

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Mass. In modern terms such an oratory would be semi-public, as it serves the convenience of a least a portion of a religious community.[33] Then there are religious institutions which own a college or hospital or university with a chapel insufficient to hold the number of attendants or to permit many priests to say Mass at a convenient hour. May the superior of these religious grant permission to erect, besides the principal chapel, another accessory one? If the place is owned by the exempt religious their major superior, *i.e.*, the general, provincial, or conventual prior may grant this permission. If the place is owned by non-exempt religious, the Ordinary in whose diocese the chapel is to be erected, must be asked for permission. It is no longer necessary to have recourse to a privilege granted to the Jesuits,[34] or a communication of privileges. Exempt religious superiors are "Ordinaries" for the purposes of this canon.[35] Besides, can. 1156 dispels any misgiving in this matter. But superiors must inspect the oratory before granting the desired permission.

Can. 1193

In oratoriis semi-publicis, legitime erectis, omnia divina officia functionesve ecclesiasticae celebrari possunt, nisi obstent rubricae aut Ordinarius aliqua exceperit.

Can. 1193 provides that in semi-public oratories, lawfully erected, all divine offices and ecclesiastical functions may be held, as far as the rubrics and the rulings of the Ordinary permit.

33 Sometimes these *grangiae* or *granciae* served as summer-resorts for a vacation colony.

34 Gregory XIII, "*Decet Romanum*," May 3, 1575.

35 See can. 198.

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The *lawful erection* of a semi-public oratory implies, as we have stated, inspection and permission by the Ordinary. Is consecration or blessing required? There is no text which prescribes either. It would be somewhat hazardous to consecrate a semi-public oratory, unless its stability and perpetuity were guaranteed. However, the blessing *may* be imparted, according to the Roman Ritual, although the simple blessing (*Benedictio loci*) is sufficient.[36]

Concerning the *divine offices* and *ecclesiastical functions* that may be held in semi-public oratories, we have only to repeat what was said under can. 1191. For, as the text implies, the same rules hold for both public and semi-public oratories. But the Ordinary may *except* some functions, and the members of such communities must abide by his ruling. (Remember that the Ordinary for exempt religious is their own superior.)

The *rubrics* which must be observed are those of the calendar prescribed for the principal chapel or semi-public oratory.[37] There is no restriction as to the number of Masses allowed in such chapels, or in regard to the priests who wish to say Mass there.[38] The office may be chanted in such chapels, and Mass be said on a fixed or portable altar, even by sick or elderly priests.[39]

If a semi-public oratory has been solemnly blessed, the titular feast must be duly observed,[40] and the oration,

36 For the solemn blessing see *Rit. Rom.*, tit. VIII, c. 27; the *benedictio loci*, *ibid.*, tit. VIII, cc. 6, 7 (ed. Pustet, 1913, p. 243 ff.; p. 224 f.).

37 S. Rit. C., May 22, 1876 (n. 3910).

38 S. Rit. C., March 8, 1879, ad I, 1, 2; July 2, 1661 (nn. 3484, 1196).

39 S. Rit. C., Nov. 10, 1906, II (n. 4190); this decision ad II does not upset our contention for the *grangiae* of regulars, because can. 1192, § 4, is later than said declaration.

40 S. Rit. C., Nov. 29, 1878 (n. 3471).

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or at least the name of the titular saint, recited in the office.

PRIVATE ORATORIES

CAN. 1194

In privatis coemeteriorum aediculis, de quibus in can. 1190, Ordinarius loci permittere habitualiter potest etiam plurium Missarum celebrationem; in aliis oratoriis domesticis, nonnisi unius Missae, per modum actus, in casu aliquo extraordinario, iusta et rationabili de causa; Ordinarius autem has permissiones ne elargiatur, nisi ad norman can. 1192, § 2.

CAN. 1195

§ 1. In oratoriis domesticis ex indulto Apostolicae Sedis, nisi aliud in eodem indulto expresse caveatur, celebrari potest, postquam Ordinarius oratorium visitaverit et probaverit ad norman can. 1152, § 2, unica Missa, eaque lecta, singulis diebus, exceptis festis sollemnioribus; sed aliae functiones ecclesiasticae ibidem ne fiant.

§ 2. Ordinarius vero, dummodo iustae adsint et rationabiles causae, diversae ab eis ob quas indultum concessum fuit, etiam sollemnioribus festis permittere potest per modum actus Missae celebrationem.

CAN. 1196

§ 1. Oratoria domestica nec consecrari nec benedici possunt more ecclesiarum.

§ 2. Licet oratoria domestica et semi-publica communi locorum domorumve benedictione aut nulla benedictione donentur, debent tamen esse divino tan-

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tum cultui reservata et ab omnibus domesticis usibus libera.

Canon 1194 says, first, that in *private cemetery chapels,* mentioned under can. 1190, the *Ordinary of the diocese* may grant permission for several Masses to be said habitually. This clause marks an extension of the former law and of the Roman practice, which required a special faculty for the bishop from the Apostolic See.[41] The term *Ordinarius loci* here excludes exempt religious superiors.

In other *domestic oratories,* continues can. 1194, the local Ordinary may permit one Mass to be said, not habitually, but upon occasion, in some extraordinary case, and provided there be a just and reasonable cause. This permission presupposes that the Ordinary has inspected said oratory and found it fit. This, too, is a mitigation of the former practice. The only conditions are: (a) that only *one Mass* may be said on the occasion or day for which the petition was granted; (b) that this permission *be not a habitual* or perpetual grant, but effective only for the time being and as long the reason exists; (c) that the occasion be an extraordinary one, for instance, a first Mass, or a jubilee, or a temporary necessity as that caused by an epidemic or quarantine; (d) that the *cause* be *just* and *reasonable, i.e.,* not detrimental to others, especially to the parish organization; (e) that the Ordinary first inspect the oratory, as required by can. 1192, § 2.

Can. 1195 refers to *domestic oratories* erected by virtue of a *papal indult.* Any one may build or construct an oratory for private devotion, but to have Mass said there

41 *Trid.*, Sess. 22; S. C. C., Dec. 20, 1856; S. C. P. F., Feb. 29, 1836 (*Coll.*, n. 846); S. Rit. C., Sept. 20, 1749 ad 5 (n. 2404).

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requires a papal indult, ever since the Tridentine Council. Therefore, says our canon, unless expressly provided otherwise in said indult, only one low Mass may be said daily in such oratories, except on the more solemn feastdays, and no other ecclesiastical functions are allowed. Before the indult takes effect the Ordinary must inspect and approve the oratory, as required by can. 1192, § 2. He may also, for just and reasonable causes, other than those for which the indult was granted, permit a Mass to be said there even on higher feastdays, but only *per modum actus.*

This canon distinguishes between the right of having Mass said daily and the right of having Mass said habitually in private oratories. The Council of Trent took away the right of the bishops to permit Mass in private oratories *per modum habitus,* but left them the power of granting the permission *per modum actus* for weighty and urgent reasons.[42] The Code requires only a just and reasonable cause.

Can. 1195 speaks of a *papal indult,* granted by the S. C. of Sacraments. Such indults are almost invariably addressed to the local Ordinary, who is therefore obliged to read the document carefully and note the *clausulae.* The Ordinary in this case is an *executor mixtus, i.e.,* he is obliged to investigate the truth of the reasons alleged by the petitioner — *constito tibi de narratis* — and the condition of the oratory, as required by can. 1192, § 2; but he cannot withhold execution if he finds everything to be as required by law.[43]

The text further says that *only one low* Mass may be said *daily* in such oratories, even on Sundays, not, however, on the more solemn feastdays. This restriction was

42 S. C. C., Dec. 20, 1856; Many, *l. c.,* p. 151 f.

43 Cfr. Gasparri, *De SSma Eucharistia,* n. 235, p. 163 f.

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no doubt made for the purpose of insinuating to the grantee that he should attend his parish church on those days. After the reorganization of feasts by Pius X and the S. C. of Rites,[44] the question naturally arose on *which feasts it was forbidden to have Mass in private oratories*. The answer was that on the feasts of the Commemoration of St. Joseph, the Annunciation of the B. V. Mary, Corpus Christi, the feast of the Blessed Trinity, the Sunday within the octave of Corpus Christi, and the Sunday on which the feast of St. John the Baptist was celebrated, Mass may be said in private oratories.[45] From this decision it may safely be deduced that the term "more solemn feasts" means the holydays of obligation, which do not fall on a Sunday. The indult may read otherwise, excepting no feastday or restricting the number of other days (*nisi aliud in eodem indulto expresse caveatur*).

Under § 2 of can. 1195 the Ordinary may permit a low Mass to be said in private oratories even on more solemn feasts, under two conditions: (a) that there be a just and reasonable cause not identical with the one expressed in the indult; (b) that the grant be made *per modum actus*. If, for instance, the reason for which the indult was given was the merit of the petitioner, old age or physical weakness may be alleged for obtaining from the Ordinary the favor of having a Mass said also on the more solemn feasts. This instance also explains the second condition. Thus, if old age was the reason given, the petition may be granted until age has been turned into eternity, *i.e.*, until death. This is not stretching the tenor of the indult, for it must be remem-

44 Pius X, "*Supremi disciplinae*," July 2, 1911; S. Rit. C., July 24, 1911 (*A. Ap. S.*, III, 305 ff.; 350 f.).

45 S. C. Sacr., April 11, 1913 (*A. Ap. S.*, V, 183 f.).

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bered that the grantee or principal *indultarius* must be present in the chapel, in order that the members of his household or family may enjoy the privilege of assisting at Mass and complying with the obligation of hearing Mass on the days prescribed. Besides, the indult lasts only as long as the person in whose name it was issued lives and can enjoy it. Finally, according to canonists, the phrase *modus actus* means as long as the reason exists (*durante causa*).[46]

Having mentioned the principal grantee and his family, the rescript may mention also the *consanguinei* and *affines,* those related by blood and affinity, which is understood to extend to the fourth degree.[47] In former rescripts, issued under Leo XIII, *noble guests* were also mentioned. This term, strictly speaking, excludes all who are not of noble rank; but we hardly believe that such a rigorous interpretation could be applied to a rescript issued for our country. Hence if guests are mentioned, they too are benefited by the indult. *Familiares* are servants employed in actual service at the time of Mass, *e.g.,* those who wait upon the Master or Lady of the house at Mass, either as honorary ladies and gentlemen, or by helping a feeble lady or gentleman. Cooks, chauffeurs, or hired men in barn or field, janitors, etc., are not benefited by the indult.[48]

No other ecclesiastical functions are permissible in private oratories. This excludes all strictly parochial and other priestly or ecclesiastical functions, preaching (though a brief exhortation would not be forbidden), the administration of the Sacraments and sacramentals.

What about holy Communion? No matter what can-

46 Many, *l. c.,* p. 153.
47 *Ibid.*
48 Benedict XIV, "*Magno cum animi,*" June 2, 1751, §§ 11, 12, 19; Gasparri, *l. c.,* n. 236, p. 168.

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onists formerly held, we believe that, since frequent communion is so strongly urged, the distribution of the Eucharist would not be forbidden. At any rate, the permission of the bishop would suffice.[49]

Can. 1196 forbids domestic oratories to be consecrated or blessed like churches. They may, however, and should receive the so-called *benedictio loci* or *domus novae,* as contained in the Roman Ritual.[50]

Notwithstanding this defect of consecration or blessing, domestic oratories must be exclusively reserved for divine service and not be used for domestic purposes, as explained under can. 1192, § 3. Nevertheless, a private oratory is, properly speaking, not a sacred, but a profane place, and hence not liable to desecration, nor does it enjoy the *ius asyli.* It also remains the private property of the owner of the house.[51]

49 Cfr. Bened. XIV. *l. c.*, § 23 f.; *Institut.*, 34, n. 11 f.; Gasparri, *l. c.*, n. 1088, II, p. 332.

50 Tit. VIII, c. 6 f. (ed. Pustet, 1913, p. 224 f.); S. Rit. C., June 5, 1899, VI (n. 4025).

51 Many, *l. c.*, p. 174.

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TITLE XI

ALTARS

DEFINITION AND SPECIES

CAN. 1197

§ 1. Sensu liturgico intelligitur:

1°. Nomine altaris *immobilis* seu *fixi*, mensa superior una cum stipitibus per modum unius cum eadem consecratis;

2°. Nomine altaris *mobilis* seu *portatilis*, petra, ut plurimum, parva, quae sola consecratur, quaeque dicitur etiam *ara portatilis* seu *petra sacra;* vel eadem petra cum stipite qui tamen non fuit una cum eadem consecratus.

§ 2. In ecclesia consecrata saltem unum altare, praesertim maius, debet esse immobile; in ecclesia autem benedicta omnia altaria possunt esse mobilia.

§ 1. In the liturgical sense of the word an *immovable* or a *fixed* altar means the upper table with its supports, consecrated together as a whole with the table. A movable or *portable* altar is a stone, generally of small size, which is consecrated alone, and called portable altar or sacred stone; or the same stone with its support, though the latter was not consecrated together with the table.

§ 2. In every consecrated church at least one, preferably the main, altar must be immovable; but in

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churches that are only blessed all altars may be movable.

The earliest altar was a mere table copied after secular patterns. It consisted of a rectangular and slightly oblong top, supported by one, four, or occasionally five, legs. This simple and natural shape was retained until well into the fifth century. From the beginning, stone as well as wooden altars were employed. Gradually the Church came to discriminate in favor of stone, on account of its monumental character and greater durability. A change in the form of the altar was brought about in the sixth century by the new impetus given to the veneration of *relics*. The Holy Eucharist was brought into close relation with the tombs of the martyrs and it was regarded as a matter of prime importance that the altar be brought into the closest possible relation with the tomb, or at least be located directly above it. This was done by building a "*confessio*," *i.e.*, a chamber surrounding the tomb and connected by a shaft or gallery with the altar. The next stage in the development of the altar arose from the custom, which grew rapidly during the sixth century, of depositing the bodies of the martyrs within the churches. This often led to the construction of a true *confessio* or crypt; but more often the relics were deposited immediately beneath the plate of the altar and inclosed with a stone *cippus* or block, roughly cubical in form, hollow within, and ornamented on the front by a doorway, like a miniature tomb. Finally the altar was enclosed on all four sides by plates of stone and became a mere chest for the preservation of relics. Sometimes a sarcophagus or fully extended body was enclosed. The custom of erecting more than one altar in the same church grew out of the cult of relics. Such secondary altars came into use about the beginning of the fifth century, at first in side

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chapels, later in the main church, nay even in the nave.[1]

These brief remarks seemed necessary to explain the structure of the altar and the importance of relics for the same.

REQUISITES

CAN. 1198

§ 1. Tum mensa altaris immobilis tum petra sacra ex unico constent lapide naturali, integro et non friabili.

§2. In altari immobili tabula seu mensa lapidea ad integrum altare protendi debet, et apte cum stipite cohaerere; stipes autem sit lapideus vel saltem latera seu columellae quibus mensa sustentatur sint ex lapide.

§ 3. Petra sacra sit tam ampla ut saltem hostiam et maiorem partem calicis capiat.

§ 4. Tum in altari immobili tum in petra sacra sit, ad norman legum liturgicarum, sepulcrum continens reliquias Sanctorum, lapide clausum.

§ 1. The *table* of an immovable altar as well as a sacred stone must consist of one natural stone, whole and not easily crumbled. The altar stone is to be *one* single slab, which excludes several parts.[2] Even if the several parts should be compactly cemented together so as to appear as one stone, the altar cannot be validly consecrated.[3] A *natural* or pure stone is one that corresponds to the mineralogical definition of a stone. Any hard and compact stone is admissible, as, *e.g.,* marble, sandstone, travertine, etc. Even slate or schist is allowed, but

1 Cfr. Lowrie, *Monuments of the Early Church*, 1901, p. 159 ff.

2 S. Rit. C., June 17, 1843; Nov. 10, 1906 (nn. 2861, 4191).

3 S. Rit. C., Sept. 28, 1872; June 8, 1896; Nov. 10, 1906, ad I, II (nn. 3286, 3907, 4191), but the church would be validly consecrated.

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pumice-stone or gypsum have been rejected.[4] Because of their composite nature cement plates or blocks must be considered forbidden. The S. Congregation has always refused to admit a marble or wooden cornice or ornament surrounding the table like a wreath.[5] An altar, the nucleus of which is of stone but covered with bricks overlaid with a marble crust, has also been declared unconsecrable.[6] *Integer* means that the stone should be of one piece, without fractures or crevices. Should the stone have been perforated by cutting or chiseling the repository for relics into it, it would be sufficient to place a piece of marble or other solid slab on the part below, so that the *capsula* with the relics could be laid on it.[7] That the stone should be of a sort that will *not easily crumble* (*friabilis*) follows from the nature of stone. If it were so fragile that the fourth part or more would break off in the act of consecration, the latter would be invalid.[8]

§ 2. In an *immovable altar* the table or stone plate must extend over the whole altar and be properly joined to the support; the support itself must be of stone, or at least the side props or columns which support the table must be of stone.

§ 3. The *sacred stone* (portable altar) must be so large that at least the host and the larger part of the base of the chalice may find room thereon.

No dimensions for an altar are prescribed by the rubrics or the S. Congregation of Rites. It ought, however, to be large enough to allow a priest conveniently

4 S. Rit. C., April 29, 1887; June 13, 1899 (nn. 3675, 4032).

5 S. Rit. C., Aug. 29, 1885; April 23, 1893 (nn. 3640, 3797).

6 S. Rit. C., Dec. 14, 1888 (n. 3698), but the invalidity of consecration is not clearly pronounced.

7 S. Rit. C., Feb. 8, 1896 (n. 3884).

8 S. Rit. C., June 8, 1894, n. II (n. 3829).

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to celebrate the holy sacrifice upon it, in such a manner that all the ceremonies can be decorously observed.[9] But the S. Congregation has insisted, as does our text, that the altar-stone should cover the whole length and width of the fixed altar, without an ornamental addition.[10] If, for instance, the length of the whole fixed altar is ten feet, and its width from the tabernacle to the front twenty-two inches, the altar-stone must have the same dimensions.

It is absolutely required that the table or *mensa* be placed immediately upon the support so as to form one whole with it. In one case the S. Congregation demanded that if no connection between the altar-stone and the *stipes* had been made, stone *stipites* should be added. The consecration was declared valid, yet only by a special favor was the addition and separate anointing of these *stipites* granted.[11] From this it is evident that only a moral, though material, conjunction is required, at least for licitness.[12] But the connection must be one of stone with stone.

The support, therefore, (*stipes*) must be of stone. It may be one solid mass of granite, marble, etc., or it may consist of four or more columns. But it is absolutely necessary that these sides, columns, or small piers be of stone.[13] Columns of copper, brass, or other metal are not allowed. If the bases are of metal, the shaft, and more especially the capitals, must be of stone, or a stone layer must be placed between the columns and the table,

9 Cfr. Schulte, *Consecranda*, 1907, p. 6.

10 S. Rit. C., Aug. 29, 1885 (n. 3640); the altar was only 2.27 meters in length and 0.57 meters in width, wherefore they put a marble cornice around it.

11 S. Rit. C., June 8, 1894; July 5, 1901 (nn. 3829, 4075).

12 Many, *l. c.*, p. 204.

13 S. Rit. C., Aug. 7, 1875; Dec. 14, 1888 (nn. 3364, 3698).

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otherwise it cannot be consecrated as a fixed altar.[14] The spaces between the side walls (columns or piers) may be left open, or the spaces on the sides and back be filled with any kind of stone, brick, or cement; but the space between the two columns in front should be left open, so that a reliquary can be placed beneath the table.[15]

The portable altar is sometimes also called *altare viaticum*. Its dimensions are approximately pointed out in § 3, where it is said that the table must be large enough to hold the sacred host and the greater part of the base of the chalice.[16] Besides, as liturgists reasonably state, it should have room enough for the ciborium. In general the dimensions may range between 12 x 12, or 14 x 16 inches.[17]

§ 4. In an immovable altar as well as in an altar stone there must be, according to the rubrical prescriptions, a *sepulchre* containing relics of saints and closed with a stone.

The historical remarks made above explain this venerable custom. The sixth synod of Carthage (401) enacted that no *memoriae martyrum* should be tolerated without their relics being present or at least without some historical reminiscence connected with the place.[18] In this canon only the chapels of martyrs are mentioned. Yet, as seen above, the custom of placing relics in the altars soon extended to all churches and altars. When some missionaries in South America claimed the privilege of consecrating altars without relics, the Holy Office,[19]

14 S. Rit. C., May 24, 1901 (n. 4073).

15 S. Rit. C., Sept. 28, 1872; Dec. 20, 1864 (nn. 3282, 3126).

16 S. C. Indulg., March 20, 1846 (Prinzivalli, n. 574).

17 Schulte, *l. c.*, p. 232 f.

18 Can. 17 = c. 26, Dist. 1, *de cons.* (Hefele, *Concil.-Gesch.*, II, 72).

19 Jan. 17, 1900 (*Coll. P. F.*, n. 2076).

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without entering into an historical discussion, insisted that relics be placed in the altars, but allowed Mass to be said on altars consecrated without relics. Gregory XVI, in a time of persecution, granted to the Vicars Apostolic of the Chinese empire and adjoining realms the faculty of consecrating altars without relics.[20] Consecration without relics would certainly be invalid[21] if no faculty to the contrary had been obtained.

The *sepulchrum* is a small square or oblong opening made in the table or solid support of the altar, in which the relics are placed. In a fixed or immovable altar the *sepulchrum* may be placed either *behind the altar* or midway between its table and foot; or at the *front;* or midway between its table and foot, or *in the table* at its centre, somewhat towards the front edge, if its base be solid or hollow; or in the *centre on the top* of the support, if it be solid.[22]

In *portable altars* the *sepulchrum* is located on top of the stone, usually towards its front edge.[23] A portable altar described as consisting of two parts, the upper one of which was of stone, whereas the lower was of wood, with a hollow space between both for the relics, which thus touched both the stone and wooden parts of which the *sepulchrum* was formed, was declared inadmissible. The *sepulchrum* must be of natural stone, not of metal, or brass, or cement; the lid, too, must be of stone, though cement may be used for closing it.[24] If cement was employed for the whole *sepulchrum* the altar must be recon-

20 S. C. P. F., July 8, 1838 (*Coll.*, n. 869).

21 S. Rit. C., *Rhedon.*, Oct. 6, 1837; April 29, 1887 (nn. 2777, 3674).

22 Schulte, *Consecranda*, p. 7 ff.

23 S. Rit. C., Aug. 31, 1867 (n. 3162).

24 S. Rit. C., Sept. 16, 1881; Dec. 15, 1882 ad I; July 28, 1883 (nn. 3532, 3567, 3585). Portable altars may not be of pumice-stone or gypsum; S. Rit. C., June 13, 1899 (n. 4032).

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secrated; but the S. Congregation granted faculties to use the short formula and have it done by a delegated priest.[25] The *cement* to be used for closing the sepulchre must be blessed by the bishop according to the formula prescribed for fixed altars. The bishop must lay the cement on the sepulchre and close it, but not place his seal on it.[26]

As to the *relics* to be placed in the sepulchre, it is understood that only *authenticated* ones are admitted. If they are authenticated, it matters not whether they are of nameless Saints.[27] Doubtful or uncertain relics are not to be mixed with authenticated ones.[28] If relics lie open and no attestation of their authenticity can be found, they must be replaced by authentic ones and re-enclosed in the sepuchre.[29]

The *quality* of relics is not determined, except that they must be of *Saints*. However, it is the general practice, confirmed by official decisions, that they should be relics of at least one *martyr*, to which relics of confessors and virgins may be added.[30] Whether these relics must be taken from the body (direct relics) or may be obtained from objects connected with the Saint (indirect relics), is nowhere stated, although some writers, like Gardellini, insist on direct relics.[31]

CONSECRATION OF ALTARS

CAN. 1199

§ 1. Ut Missae sacrificium super illud celebrari possit, altare debet esse, secundum liturgicas leges,

25 S. Rit. C., Aug. 30, 1901 (n. 4082).

26 S. Rit. C., May 10, 1890 (n. 3726).

27 S. Rit. C., Sept. 7, 1630 (n. 542).

28 S. Rit. C., Dec. 5, 1851 (n. 2991 ad I).

29 S. Rit. C., Feb. 27, 1847 (n. 2941): *S. C. sanavit defectus.*

30 S. Rit. C., Oct. 6, 1837; Feb. 16, 1906 (nn. 2777, 4180).

31 Cfr. Many, *l. c.*, p. 208; Schulte, *l. c.*, p. 10, also rejects indirect relics; but c. 26, Dist. 1, *de cons.*, admits them.

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consecratum; idest vel totum, si agatur de immobili, vel ara tantum portatilis, si de mobili.

§ 2. Aras portatiles, salvis peculiaribus privilegiis, omnes Episcopi consecrare possunt; quod vero spectat ad altaria immobilia, servetur praescriptum can. 1155.

§ 3. Consecratio altaris immobilis, quae fit sine ecclesiae dedicatione, quamvis omni die fieri possit, magis tamen decet ut fiat die dominico aliove festo de praecepto.

§ 1. In order that the Sacrifice of the Mass may be celebrated upon an altar, it must be consecrated according to the liturgical laws; that is to say, if the altar is fixed, the whole must be consecrated, if it is portable, the altar table.

The resp. rites are contained in the Roman Pontifical, and no deviation from, or abbreviation of them is admissible; not even from the fast (on the day itself) when a portable altar is to be consecrated.[32] However, in forming the crosses from incense and putting on the candles, the consecrator may be assisted by priests.[33]

Fixed altars may be consecrated even in a church which is only blessed, as a church is consecrated even if the altar was not validly consecrated.[34] The vigils must also be observed before the consecration of an altar, as is evident from the Roman Pontifical.

§ 2. Besides those especially privileged, all bishops may consecrate portable altars; as to fixed altars can. 1155 must be observed.

Those *specially privileged* are the Cardinals, vicars

32 S. Rit. C., May 22, 1841 (n. 2826).

33 S. Rit. C., Jan. 14, 1910 (4244).

34 S. Rit. C., Sept. 12, 1857, ad XV; June 17, 1843 (nn. 3059, 2862).

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Apostolic and prefects Apostolic, as well as their provicars and pro-prefects during the time of vacancy, abbots and prelates *nullius*.[35] (For the rest, see can. 625 and 1147.) Besides these all bishops, whether residential or titular, may consecrate portable altars. But fixed altars can be consecrated only by bishops and prelates or abbots *nullius*, if the latter have received the blessing required.

§ 3. The consecration of a fixed altar, if performed apart from the dedication of the church in which it is stationed, may take place on *any day*, but it is becoming that this ceremony should be performed on a Sunday or holyday of obligation.

LOSS OF CONSECRATION

CAN. 1200

§ 1. Altare immobile amittit consecrationem, si tabula seu mensa a stipite, etiam per temporis momentum, separetur; quo in casu Ordinarius potest permittere ut presbyter altaris consecrationem rursus perficiat ritu formulaque breviore.

§ 2. Tum altare immobile tum petra sacra amittunt consecrationem:

1°. Si frangantur enormiter sive ratione quantitatis fractionis sive ratione loci unctionis;

2°. Si amoveantur reliquiae aut frangatur vel amoveatur sepulcri operculum, excepto casu quo ipse Episcopus vel eius delegatus operculum amoveat ad

35 Cfr. can. 239, § 1, n. 20; can. 294, § 2; can. 310, §2; can. 323, § 2; Bened. XIV, "*Ex sublimi*," Jan. 26, 1753, § 2; "*Quam ex sublimi*," Aug. 8, 1755, § 1. The decree of S. Rit. C., Sept. 27, 1659 (n. 1131), mentions no right of other abbots in this respect, and therefore only one resource remains: a directly granted privilege. This is the Roman jurisprudence, not merely our individual and subjective view.

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illud firmandum vel reparandum vel subrogandum, aut ad visitandas reliquias.

§ 3. Levis fractio operculi non inducit exsecrationem et quilibet sacerdos potest rimulam cemento firmare.

§ 4. Exsecratio ecclesiae non secumfert exsecrationem altarium sive immobilium sive mobilium; et viceversa.

§ 1. An *immovable altar* loses its consecration if the table or *mensa* is removed from its support, even if only for a moment; but in this case the Ordinary may grant permission to a priest to reconsecrate the altar with the short rite and formula.

Note that the support of a fixed altar is consecrated together with the table, as a whole, and therefore any removal, no matter for whatever reason, of the *mensa* from its support, necessitates reconsecration.[36] But if only the images, or titles, or ornaments are removed, whilst the support and the *mensa* remain united, reconsecration is not required.[37]

§ 2. A fixed as well as a portable altar loses its consecration:

1.° By a fracture which is regarded as very considerable by reason either of the break itself or of the anointed place;

2.° If the relics are removed, or the lid of the sepulchre is broken or removed, unless it be done by the bishop or his delegate for the purpose of fastening, repairing, or replacing it, or for the purpose of inspecting the relics.

The Code adopts the decision of S. Rit. C. concerning

36 S. Rit. C., May 15, 1819 (n. 2599), *et pluries.*

37 S. Rit. C., July 7, 1759 (n. 2450).

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the definition of a *fractura enormis*.[38] Two reasons determine the character of a fracture: its extent and the place where it occurs. If the *mensa* itself were split into two, three, or four pieces, especially if it touched the sepulchre, the fracture would be "enormous" in the sense of the law.[39] If an anointed corner or cross would crack, the fissure would be sufficient to require reconsecration,[40] provided of course the cross itself would be cracked. For if only a corner would break off, with the cross intact, we hardly believe that the whole altar would have to be reconsecrated. The mere breaking of the seal which is attached to the reliquary of the sepulchre would not entail loss of consecration.[41] If the removal of the stone covering the sepulchre is *doubtful,* reconsecration must take place, but the S. Congregation, upon request, may grant the use of the short formula.[42] If the stone covering the reliquary was loosened, but the sepulchre was not laid bare, and the sacristan (lay brother) applied lime or cement to fasten it, the consecration is not lost.[43] But if a priest would open the sepulchre and close it again, the consecration would be lost.[44] However, this last statement now requires a modification. If the pastor acted in the name of the bishop, as his delegate, for the purpose of fastening, or repairing, or replacing the lid of the sepulchre, or of inspecting it, no loss of consecration would be entailed. The fact of delegation, however, would have to be expressed, either habitually or *per modum actus*.

38 S. Rit. C., Oct. 6, 1837 (n. 2777).
39 S. Rit. C., June 23, 1879 (n. 3497).
40 S. Rit. C., Oct. 6, 1837 (n. 2777).
41 S. Rit. C., Dec. 5, 1851, n. I (n. 2991).
42 S. Rit. C., May 18, 1883 (n. 3575).
43 S. Rit. C., Sept. 30, 1875 (n. 3379).
44 S. Rit. C., Aug. 31, 1857, ad V (n. 3162).

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§ 3. A slight fracture of the cover of the sepulchre does not involve desecration, and any priest may fill it up with cement.

§ 4. The desecration of a church does not involve desecration of either its fixed or portable altars, and conversely. Thus, if soldiers had desecrated a church, but left the altars untouched, the latter would not need reconsecration.[45]

TITLES OF ALTARS

CAN. 1201

§ 1. Sicut ecclesia, ita quodlibet etiam ecclesiae altare, saltem immobile, proprium sibi titulum habeat.

§ 2. Titulus primarius altaris maioris idem debet esse ac titulus ecclesiae.

§ 3. De Ordinarii licentia mutari quidem potest altaris mobilis, non autem altaris immobilis titulus.

§ 4. Altaria Beatis etiam in ecclesiis et oratoriis quibus eorum officium et Missa concessa sunt, dedicari nequeunt sine Sedis Apostolicae indulto.

§ 1. Like the church, so also the altars of a church, at least those that are fixed, must have each its own title.

§ 2. The principal title of the main altar must be the same as that of the church. For instance, if the church is dedicated to the Immaculate Conception, this must also be the title of the high altar. Besides this, the altar may also bear the name of a Saint, *e.g.*, St. Columbkill.

§ 3. With the permission of the Ordinary[46] the title of a portable altar may be changed, but not the title of

45 S. Rit. C., March 3, 1821 (n. 2612).

46 The Ordinary for exempt religious is their superior major.

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a *fixed* altar. The latter requires a papal indult.[47] Thus, for instance, if a new religious congregation obtains a church that formerly belonged to an order, the old title of the altar, or church, respectively, must be retained for the main altar, and even on the side altar, if this is a fixed one, the former title under which the altar was dedicated must be placed, although a new title or image, *e.g.*, of the founder of the congregation, may also be placed there.[48]

Altars may not *be dedicated to the Blessed* without an Apostolic indult, even in churches and oratories for which the office and Mass of the resp. *Beatus* has been granted. This law binds also exempt religious, who are therefore not allowed to erect an altar in honor of a Blessed of their order without a papal indult.[49]

PROFANE USES NOT TOLERATED

CAN. 1202

§ 1. Altare tum immobile tum mobile debet esse divinis tantum officiis et praesertim Missae celebrationi reservatum, quolibet profano usu prorsus excluso.

§ 2. Subtus altare nullum sit reconditum cadaver; cadavera autem quae prope altare sepulta forte sunt, distent ab eo saltem spatio unius metri; secus Missam in altari celebrare non licet, donec cadaver removeatur.

§ 1. Immovable as well as portable altars are exclusively reserved for divine service, and every profane use must be excluded.

47 S. Rit. C., Nov. 10, 1906, ad III (n. 4191).

48 S. Rit. C., Aug. 27, 1836, ad V, VII (n. 2752).

49 S. Rit. C., April 17, 1660 (n. 1156).

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§ 2. No corpses are to be entombed beneath the altar; if corpses are buried near the altar, a space of one metre[50] at least must intervene, otherwise Mass may not be celebrated on the altar until the body is removed.

A quaint custom prevailed in the archdiocese of Durazzo. Mohammedan women, when sick, took refuge under the antipendium of the altar on which Mass was said. This was promptly forbidden by the S. Congregation.[51] A less offensive though also rejected custom is that of leaving the altar cover rolled up on a stick on the altar during Mass.[52]

Altars should not be used as store-rooms, as this is forbidden by the general rubrics.

§ 2 forbids the saying of Mass on an altar which is too near a tomb or grave which contains the corpse or body of a person not canonized or beatified. The distance of one meter (39 inches) must be taken in the full, though not strictly in the mathematical[53] sense, and the dimensions are to be measured in every direction,— height, length, width, depth, including the *predella*.[54] If an altar is separated from the tomb by a stone chamber, although the distance is less than one meter, Mass may be said.[55] This distance must be observed also in cemeteries, vaults, and subterranean chapels, no matter whether they belong to religious or seculars.[56] Removal is necessary if morally possible. The S. Congregations have permitted bodies to remain if the re-

50 One metre is equal to 39 inches. The movement for introducing the metric system into the U. S. and England can only be welcomed.

51 S. C. P. F., Feb. 25, 1837 (*Coll.*, n. 854).

52 S. Rit. C., June 2, 1883, ad II (n. 3576).

53 S. Rit. C., Jan. 12, 1897, ad II; Aug. 3, 1901 (nn. 3944, 4082).

54 S. Rit. C., Feb. 13, 1666, n. 5; July 7, 1766 (nn. 1333, 2479).

55 S. Rit. C., July 27, 1878 ad II; July 18, 1902 (nn. 3460, 4100).

56 S. Rit. C,. Sept. 28, 1872; April 21, 1873 (nn. 3283, 3294).

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moval could be effected only with difficulty.[57] One decision reads: "If it can be done conveniently."[58] Piety and expenses should also be taken into consideration.

57 S. C. P. F., Nov. 22, 1790, ad 3 (*Coll.* n. 603).

58 S. Rit. C, 2, 1875 (n. 3339): "*si commode fieri potest.*"

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TITLE XII

ECCLESIASTICAL BURIAL

BURIAL VS. CREMATION

CAN. 1203

§ 1. Fidelium defunctorum corpora sepelienda sunt, reprobata eorundem cremationе.

§ 2. Si quis quovis modo mandaverit ut corpus suum cremetur, illicitum est hanc exsequi voluntatem; quae si adiecta fuerit contractui, testamento aut alii cuilibet actui, tanquam non adiecta habeatur.

§ 1. The bodies of the faithful must be buried, cremation being reprobated.

§ 2. Should any one in any way order his body to be cremated, this order cannot lawfully be carried out, and any stipulation, will, or disposition to that effect must be disregarded.

These canons embody a constant, time-honored tradition, which, while it does not directly involve a dogma, has been repeatedly enforced, especially against the Masons. Jews, Greeks, and Romans, various as their customs were at various time, nearly always buried their dead.[1] When, towards the end of the XIIIth century, the custom was introduced of boiling the corpses of those who had died in foreign lands, in order to render them

1 Cfr. *Cath. Encycl.*, Vol. IV, *s. v.*, "Cremation."

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more easily transportable, Pope Boniface VIII strictly forbade this abuse, which he styled abominable.[2] It remained for the Freemasons who gathered at Naples, in 1869, to promote cremation and make it part and parcel of their programme. Cremation is frequently practiced in missionary countries because of various difficulties. The Vicar Apostolic of Vizagapatam in Hindustan solicited an answer to the following question: When a dying pagan asks to be baptized, the missionary baptizes him without bothering himself whether the body may be cremated or interred, being convinced that his family would not heed the desire of the deceased, even if he insisted on burial. Is this allowable? The answer was that the missionary should not approve of cremation, but remain passive with regard to it, administer Baptism, and instruct the people.[3] Another pertinent decision is that rendered by the Holy Office[4] to the effect that it is forbidden to be enrolled in a lodge or society the purpose of which is to promote cremation without danger of incurring the censures laid upon Masonic societies; and that it is also forbidden to order one's own body or the bodies of others to be cremated. The decision exhorts Ordinaries to instruct the faithful regarding the abominable custom of cremating human bodies. Another decision concerns *amputated limbs,* legs or arms. The case was reported from a hospital in the U. S. The answer was that the amputated limbs of non-Catholics may be cremated, if the physician so advises, but those of Catholics should be buried, if possible, in consecrated

2 Cfr. c. 1, Extrav. Comm., III, 6, *de sepulturis.*

3 S. C. P. F., Sept. 27, 1884 (*Coll.*, n. 1626). Instruction was necessary because cremation was considered a privilege of the caste (*raiapont*), which the pagans thought would be destroyed by the Catholic religion.

4 S. O., May 19, 1886 (*Coll. P. F.*, n. 1657); cf. also S. O., July 27, 1892 (*ibid.*, 1808).

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ground; else, anywhere. If the physician orders cremation, the sisters shall prudently and silently obey his command. The advice is added that a small consecrated lot be kept in the garden adjoining the house for the purpose of burying amputated limbs of Catholics.[5]

ECCLESIASTICAL BURIAL

CAN. 1204

Sepultura ecclesiastica consistit in cadaveris translatione ad ecclesiam, exsequiis super illud in eadem celebratis, illius depositione in loco legitime deputato fidelibus defunctis condendis.

Ecclesiastical burial consists in bringing the body to the church, holding the funeral service over the same in the church, and entombing it in a place destined for the burial of departed Catholics.

The Christian funeral rite differed greatly from the pagan, as a passage from Minuctius Felix eloquently demonstrates. The rules laid down in our canon were observed conscientiously and religiously by the early Christians. They embalmed or enshrouded the body, accompanied the corpse with tapers or torches, singing psalms and hymns, bringing an oblation, (*oblatio pro dormitione*) and celebrating the love feast.[6] The whole ceremony breathed belief in the resurrection of the body. It is therefore not surprising to read of the insistence of the Roman Court upon the full funeral rite. The custom of burying the bodies of the faithful from their

5 S. O., Aug. 3, 1897 (*ibid.* n. 1975).

6 "*Nec mortuos coronamus; nos exequies adornamus eadem tranquillitate, qua vivimus; nec adnectimus arescentem coronam, sed a Deo aeternis floribus vividam sustinemus;*" cfr. Armellini, *Lezioni di Archeologia Cristiana*, 1898, p. 89 f.

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homes, without bringing them to church, is styled an abuse to be abolished.[7] Even in missionary countries, where superstitions are mingled with the Catholic rites, the Roman Ritual should be observed and funeral Mass be said *praesente cadavere,* if at all possible.[8] This service may also be held over human ashes or bones brought from foreign countries.[9] The Church does not abhor modern conveyances, and hence, no matter what means are used for carrying the dead to the cemetery, the pastor should accompany the funeral.[10]

Note well the *three parts of a Christian funeral, viz.:* transfer of the body to the church; funeral service in the church; interment in the graveyard. All three acts are accompanied by prayers.

The Roman Ritual[11] makes a distinction between the burial of adults and that of children.

The Code now proceeds to treat of cemeteries, of funeral services, and, lastly, of the refusal of ecclesiastical burial.

7 S. Rit. C., April 21, 1873 (n. 3291).

8 S. O., April 10, 1777, ad 2 (*Coll. P. F.*, n. 521).

9 S. Rit. C., Aug. 11, 1883, ad I (n. 3693): provided, of course, no voluntary or self-ordered cremation took place.

10 S. Rit. C., July 15, 1876 (n. 3405).

11 Tit. VI, c. 3; c. 7.

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CHAPTER I

CEMETERIES

BLESSED CEMETERIES

CAN. 1205

§ 1. Cadavera fidelium sepelienda sunt in coemeterio quod, secundum ritus in probatis liturgicis libris traditos, sit benedictum, sive sollemni sive simplici benedictione ab iis data de quibus in can. 1155, 1156.

§ 2. In ecclesiis cadavera ne sepeliantur, nisi agatur de cadaveribus Episcoporum residentialium, Abbatum vel Praelatorum *nullius* in propria ecclesia sepeliendis vel Romani Pontificis, regalium personarum aut S. R. E. Cardinalium.

§ 1. The bodies of the faithful must be buried in a *cemetery,* which may be solemnly or simply blessed according to the ritual books. The solemn blessing, as contained in the Roman Pontifical, can be imparted only by the Ordinary of the diocese, according to can. 1155; the simple blessing may be imparted by the local Ordinary, if the cemetery belongs to the secular or non-exempt religious clergy. However, the bishop may delegate any priest[1] for this function. If the cemetery belongs to exempt religious, the major superior or his delegate is competent.[2]

1 *Rit. Rom.,* tit. VIII, c. 29; can. 1156; S. Rit. C., Feb. 9, 1608 (n. 246).

2 Can. 1155.

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The necessity of burying the bodies of deceased Catholics in consecrated ground has been generally insisted upon, even for pagan provinces, where it was customary to bury infants, not in the family grave, but elsewhere.[3] In Mossul it was customary for Catholics as well as schismatics to be buried in one and the same family lot or vault. This custom was tolerated, as it could not be abolished without scandal.[4]

The *cemetery must not be considered as blessed merely because the adjoining church was blessed.* These two blessings are entirely different rites.[5] If the whole cemetery was blessed, it is not necessary that the single graves be blessed again, and therefore the *benedicto tumuli* under the rubric: " when they have reached the grave, the priest shall bless it if it is not already blessed," should be omitted.[6]

There is an apparent conflict between this and a decision of the same Congregation,[7] which orders all graves even in a cemetery already blessed to be blessed again if the grave is made of new material: *quoties agitur de sepulcho ex nova materia confecto.* The contradiction is only apparent. For the last-mentioned decision regards a new grave made in the shape of a crypt or vault of stone or cement which has been newly added to the cemetery. A simple grave (*fossa*) dug in the ground already blessed does not need to be reblessed.

§ 2. *No bodies shall be entombed in churches* except — if the civil laws permit it — the bodies of resident bish-

3 S. O., Feb. 20, 1801 (*Coll. P. F.*, n. 649): this was done because of the belief that infants and unmarried persons had no one to mourn or reverence them.

4 S. O., April 13, 1896 (*Coll. P. F.*, n. 1089).

5 S. Rit. C., Feb. 21, 1896 (n. 3888).

6 S. Rit. C., May 27, 1876, ad V (n. 3400).

7 S. Rit. C., Sept. 4, 1800, ad I (n. 3524).

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ops and prelates or abbots *nullius*. These may be buried in their own church. The same privilege is accorded to the Roman Pontiff, royal personages and cardinals.

We said, "*if the civil laws permit it*," for it is a well-known fact that in Rome even Cardinals must be buried in the common city cemetery. Although this law is not in perfect keeping with the mind of the Church, yet it cannot be styled iniquitous as far as the mere prohibition of burial in churches is concerned, though in as far as it compels the promiscuous burial of baptized with non-baptized, and of criminals with distinguished prelates, it certainly is unjust and savors of intolerance. The first part of the law, to wit, forbidding burial in churches, would not be objected to by the ecclesiastical authorities, for, as will be seen from the following canon, the Code only demands free possession of cemeteries, whether situated inside or outside of church buildings. If a prelate mentioned in § 2, can. 1205, is buried in a church, his grave, though made in the middle of the choir, must be even with the floor and may not project over the altar of the *confessio*.[8] Besides, the distance of a meter from the altar must be observed, as prescribed in can. 1202, § 2.

RIGHTS OF THE CHURCH IN REGARD TO CEMETERIES

CAN. 1206

§ 1. Ius est catholicae Ecclesiae possidendi propria coemeteria.

§ 2. Sicubi hoc Ecclesiae ius violetur nec spes sit ut violatio reparetur, curent locorum Ordinarii ut coemeteria, societatis civilis propria, benedicantur, si, qui in eis condi solent, sint maiore ex parte catholici,

8 S. Rit. C., Feb. 20, 1627 (n. 433).

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aut saltem ut in eis catholici spatium habeant, idque benedictum, sibi reservatum.

§ 3. Si ne hoc quidem obtineri possit, toties quoties benedicantur, secundum ritus in probatis liturgicis libris traditos, singuli tumuli.

§ 1. The Catholic Church has the right to possess her own cemeteries.

§ 2. Where this right of the Church has been violated, and there is no hope of recovering it, the local Ordinaries shall take care that the civil cemeteries be blessed, provided the majority of the persons to be buried in them belong to the Catholic faith, or at least that Catholics be granted a separate space, which should be blessed.

§ 3. If not even that much can be obtained, then the single graves must be blessed according to the liturgical books.

§ 1 is nothing else but a corollary from the doctrine of the corporate nature of the universal Church and its autonomous parts. Besides the sacred character of the burial grounds, the right of possessing them exclusively and independently of any outside corporation or society should be guaranteed to the Church. This right is evident from the principle of canon law: "With those with whom we have had no communion when living, we do not communicate when dead."[9] This right, inherent as it is in her very constitution, the Church can exercise effectively only if she possesses her own burial grounds.

§ 2 and § 3 are taken from an authentic answer of the Holy Office,[10] necessitated by the tendencies of the so-called Liberal school. A further declaration says that in common cemeteries, destined for Catholics and non-

[9] C. 12, x, III, 28; Pius IX, "*Nunquam certe*," June 22, 1868.

[10] S. O., Feb. 12, 1862 (*Coll. P. F.*, n. 1227).

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Catholics alike, a separate plot with a separate entrance should be obtained for Catholic burials.[11]

In the *United States* the Church has so far been allowed to possess her own cemeteries. "Rights of burial under churches or in cemeteries are so far public that private interests in them are subject to the control of the public authorities having charge of police regulations."[12] This, of course, also implies expropriation in case of public utility or health. Otherwise no state or county or municipal authority shall interfere with the right of the Church in matters of cemeteries and burial.[13]

INTERDICT, VIOLATION, ETC., OF CEMETERIES

CAN. 1207

Quae de interdicto, violatione, reconciliatione ecclesiarum canones praescribunt, etiam coemeteriis applicentur.

The regulations of canon law concerning the interdict, the desecration and reconciliation of churches also apply to cemeteries. Hence we refer to can. 1172 ff. Note well can. 1172, § 2, in order not to apply the old canons. What is to be said on interdicts will find its place under the respective heading.

OWNERS OF CEMETERIES

CAN. 1208

§ 1. Paroeciae suum quaeque coemeterium habeant, nisi unum pluribus commune ab Ordinario loci sit legitime constitutum.

11 S. C. P. F., March 29, 1830 (*ibid.*, n. 812).

12 Zollmann, *American Civil Church Law*, 1917, Ch. XVI, p. 439.

13 *Ibid.*: "While thus the right

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§ 2. Religiosi exempti possunt habere coemeterium proprium, a communi coemeterio distinctum.

§ 3. Etiam aliis personis moralibus vel familiis privatis permitti potest ab Ordinario loci peculiare sepulcrum, extra commune coemeterium positum, et ad instar coemeterii benedictum.

§ 3. Etiam infantium corpuscula, quatenus commode fieri potest, speciales et separatos ab aliis loculos et sepulturas habeant.

§ 1. Each parish should have its own cemetery, unless the local Ordinary assigns a common cemetery to several parishes.

and duty of a cemetery owner to vacate it in a proper case is perfectly plain, his right to determine who may be buried in it is equally clear. Without such right, church societies might find their cemeteries interminable sources of trouble. Not only might the peace of the society be disturbed by the burial of a person objectionable to its members, but the society itself might thereby actually be disrupted. To prevent such a result religious organizations may not only establish cemeteries exclusively denominational, but may also guard and protect them by such rules and regulations as make effective the objects and purposes of their organization. These rules and regulations will enter into and become a part of every contract for a lot in such cemetery, unless the proof is clear and convincing that a contract of a different kind was properly made with the lot owner by a duly authorized agent of the organization. When a party applies for a burial plot at the office of a distinctly Roman Catholic cemetery, it is with the tacit understanding that he is either a Roman Catholic, and as such eligible to burial, or at least that he applies on behalf of those who are in communion with the Church. The entire business is transacted on that basis. It follows that the mere payment of fees and charges confers the privilege of burial only 'in the mode used and permitted by the corporation.' While, therefore, the trustees of a church society who hold a cemetery as a 'free' burial ground cannot prevent the burial of a church member beside her husband where there is space left for that purpose; a person who has separated himself from the society, or who according to its decision had ceased to be a member of it, is not entitled as a matter of right to be buried in such cemetery, though he had contributed to it while still a member. Nor may even a member of such organization bury his profligate son in such cemetery over the objection of the organization, nor be buried himself with ceremonies which are objectionable to it."

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§ 2. Exempt *religious* may have their own cemetery, distinct from the common cemetery of the faithful.

§ 3. The Ordinary of the diocese may permit other corporations and private families to have their own burial places separate from the common one and blessed like a cemetery.

CAN. 1209

§ 1. Tum in coemeteriis paroecialibus, ex licentia scripta Ordinarii loci eiusve delegati, tum in coemeterio alius personae moralis, ex licentia scripta Superioris, fideles sibi suisque exstruere possunt sepulcra particularia; quae, de consensu eiusdem Ordinarii aut Superioris, possunt quoque alienare.

§ 2. Sepulcra sacerdotum et clericorum, ubi fieri potest, a sepulcris laicorum separata sint ac decentiore loco sita; praeterea, ubi id commodum fuerit, alia pro sacerdotibus, alia pro inferioris ordinis Ecclesiae ministris parentur.

§ 1 permits *lots or vaults* (*sepulchra particularia*) to be constructed with the written consent of the local Ordinary or his delegate on the parish cemetery. The same written consent may be given by the superior, either local or major, of the corporation on whose cemetery such a private sepulchre is chosen by the faithful. These private sepulchres, or graves, or lots may, with the consent of the Ordinary or Superior, be alienated. Alienation is, of course, here to be understood of a conveyance for burial purposes.

If suspicion of simony should arise from the term *alienation,* it may be observed that this is only an apparent difficulty, easily removed. If a certain sum would be charged for the grave itself, by reason of its being con-

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secrated ground, there would indeed be simony. However, here there is question only of the exclusive right of usufruct, which is reserved to a determined person or family with regard to a specified lot. The cemetery itself or any part thereof is not sold or leased. But the exclusive right to a determined and honorable place has a material value and its sale, therefore, does not imply simony.[14]

§ 2. *Priests and clerics* should, if possible, have a special burial place, located in a more prominent part of the cemetery; the priests' lot should, if it can conveniently be done, be distinguished from that of the lower clerics.

§ 3. The burial place of infants should be separated from that of adults, as there is also a special rite for the burial of infants. Exempt religious, too, if they have plots for elective sepulture in their cemeteries, should set apart lots for the burial of children.[15]

KEEPING OF CEMETERIES

CAN. 1210

Quodlibet coemeterium sit undique apte clausum et caute custoditum.

CAN. 1211

Quodlibet coemeterium sit undique apte clausum et ad quos spectat, ne in coemeteriis epitaphia, laudationes funebres ornatusque monumentorum quidquam prae se ferant a catholica religione ac pietate absonum.

14 Cfr. Many, *l. c.*, p. 253 f.
15 S. Rit. C., Dec. 12, 1620 (n. 383).

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CAN. 1212

Praeter coemeterium benedictum alius, si haberi queat, sit locus, clausus item et custoditus, ubi ii humentur quibus sepultura ecclesiastica non conceditur.

Every cemetery shall be properly closed and carefully guarded.

The local Ordinaries, pastors and superiors, whom it concerns, shall take care that the inscriptions on the tombstones, eulogies, and adornments of the monuments be in keeping with Catholic faith and piety.

Besides the cemetery, or that part which is blessed, there should be a special plot, properly enclosed and guarded, to serve as burial-place for those who are denied ecclesiastical sepulture.

WAITING TIME

CAN. 1213

Nullum corpus sepeliatur, praesertim si mors repentina fuerit, nisi post congruum temporis intervallum, quod satis sit ad omnem prorsus de vero obitu dubitationem tollendam.

No body should be buried, especially in case of sudden death, until sufficient time has elapsed to disperse all doubt as to death having really set in. This admonition was originally given to missionaries,[16] probably for lack of civil provisions on the subject. For where civil laws and the coroner attend to this matter, this canon is superfluous. For the rest, the process of embalming, properly

16 S. O., April 10, 1777 (*Coll. P. F.*, n. 321).

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performed, will obviate the danger of burying anyone alive.

EXHUMATION

CAN. 1214

§ 1. Nullum cadaver perpetuae sepulturae ecclesiasticae ubivis traditum exhumare licet, nisi de licentia Ordinarii.

§ 2. Ordinarius licentiam nunquam concedat, si cadaver ab aliis corporibus certo discerni nequeat.

§ 1. No body that has been laid to final rest by ecclesiastical burial, can be exhumed without the permission of the Ordinary.

§ 2. The Ordinary shall never grant this permission, if the corpse cannot with certainty be distinguished from other bodies.

This law is merely a corollary of the right of the Church to possess her own cemeteries. Difficulties may arise where the cemeteries belong to the municipality. Yet even there the Ordinary's permission is required, because a grave must be considered as sacred, since it has been blessed, and the Church is the quasi-custodian even of the bodies of the faithful.

In closing this chapter it may be well to note briefly what rights the civil government may claim with regard to cemeteries and the burial of Catholics.

It has the right (1) to confine cemeteries to a district lying outside of the community of the living; (2) to determine the order of the graves and their depth, and to empty the graves after a certain lapse of time; (3) to establish a certain interval between death and burial, and to postpone burial in case of sudden death or crime, so

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as to ensure an autopsy; (4) to demand exhumation through the proper authority; (5) to ordain, through the proper authorities, that during epidemics, or the prevalence of contagious diseases, corpses be taken directly to the cemeteries.[17]

17 Cfr. Many, *l. c.*, p. 371.

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CHAPTER II

FUNERAL SERVICES AND INTERMENT

CONVEYING BODIES TO CHURCH

CAN. 1215

Nisi gravis causa obstet, cadavera fidelium, antequam tumulentur, transferenda sunt e loco in quo reperiuntur, in ecclesiam, ubi funus, idest totus ordo exsequiarum quae in probatis liturgicis libris describuntur, persolvatur.

Unless there is a weighty reason for the contrary, the bodies of the faithful must, before interment, be taken from the place where they are (place of death) to a church, where the entire funeral service prescribed by the sacred liturgy shall be held.

The clergy of Brescia, Italy, had some doubts as to the admissibility of the ecclesiastical rites when a corpse was conveyed from the house to the church and from there to the cemetery by a vehicle. But the S. Congregation decided that the manner of conveyance does not interfere with the sacred liturgy and that the clergy should accompany the funeral to the graveyard,[1] as the people desired.

The text says: *nisi gravis causa obstet.* Since the sacred rites involve a grievous obligation, only a real, not an imaginary, reason can dispense from their observance,

1 S. Rit. C., March 5, 1870 (n. 3212).

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though we do not wish to deny that a reasonable custom may be admitted, especially in large cities. It is more important to bring the body to church, than to accompany it to the grave-yard, provided the grave has been blessed.

PAROCHIAL RIGHTS IN REGARD TO BURIAL

CAN. 1216

§ 1. Ecclesia in quam cadaver pro funere transferri debet, ex iure ordinario est ecclesia propriae defuncti paroeciae, nisi defunctus aliam funeris ecclesiam legitime elegerit.

§ 2. Si defunctus plures habuerit paroecias proprias, ecclesia funeris est ecclesia paroeciae in cuius territorio decessit.

§ 1. By common law the corpse of a departed Catholic is to be brought to the parish church of the deceased, unless he lawfully chose another church before his death.

§ 2. If the deceased belonged to several parishes, the funeral should be held in the church of the parish within which he died.

When the claim of another church is doubtful, the right of the deceased's parish church must prevail.

The canon law formerly distinguished three reasons which entitled a priest to bury a deceased person: elective sepulture, the family grave, and the parish burial.[2] Our Code mentions but two: parish burial and elective sepulture. But can. 1218, § 3, and 1229 admit the ancestral right, although only in a subordinate way, as is evident from the very position in our canon, which vindicates the first, or at least general and ordinary right to the

2 Cfr. c. 1, x, III, 28; c. 3, 60, III, 12, where the *sepulcrum maiorum* occupies the first place, because, says the text, this was the custom of the patriarchs.

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parish church of which the deceased was a member during life. However, the right of choosing his own burial or last resting place is acknowledged and granted to everyone not excluded by law, as determnied by can. 1223–1226. Provided, then, that no special church was designated before death by the persons who are allowed to choose either for themselves or for others, the body must be brought to the parish church, *i. e.*, the one to which the deceased belonged as a member when living, and of which he was a communicant.[3] This connection between church and parishioners is established by domicile or quasi-domicile, either being sufficient to render one a member of a parish. To *linguistically distinguished parishes* the same principle applies. The personal right of the parishioners prevails over territorial considerations.[4]

§ 2 of our canon provides for a case which may arise from the fact that one belongs to several parishes. Here a pertinent decision: A family had its domicile in the city and belonged to St. James' parish. The same family also had a summer villa in the parish of St. Mary, where the wife and mother lived every year for about eight months, and where she died, after having received the sacraments at the hands of St. Mary's pastor, and was buried by him. The S. Congregation decided that the pastor of St. Mary's was entitled to hold the funeral service and to receive the fee.[5] This decision was perfectly natural. One may have two domiciles or quasi-domiciles which suffice for contracting parish rights, and

3 Reiffenstuel (III, 28, n. 6) justly remarks: "*ss. canones in ordine ad sepulturam non attendunt locum, ubi quis in extremis reficitur, sed ubi in vivis coelesti pabulo refici consuevit.*"

4 Pignatelli, *Consultationes Canonicae*, Vol. III, Cons. 48, n. 22.

5 S. C. C., March 12, 1881 (*A. S. S.*, t. XIV, 209 ff.).

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servants, hired hands, soldiers, students, nurses, teachers, etc., may contract a quasi-domicile, although they retire to their homes several times each year, and have no intention of staying longer than necessary. If they reside anywhere continuously the greater part of the year this is sufficient to contract a quasi-domicile.[6]

CAN. 1217

In dubio de iure alius ecclesiae, ius propriae ecclesiae paroecialis semper praevalere debet.

In *doubtful cases,* says can. 1217, the right of one's own parish church prevails. The reason lies in the right of the pastor, which corresponds to his duty of administering the sacraments, and he should not be deprived of the honor and material advantage.[7] Therefore if either the fact or the right are doubtful, the deceased's own parish comes first. The *fact* is doubtful if it is uncertain where one died or was killed. The *right* is doubtful if membership in the one or the other parish cannot be clearly established, or the will of the deceased regarding sepulture cannot be proved.

TRANSFER TO ONE'S OWN CHURCH

CAN. 1218

§ 1. Licet mors acciderit extra propriam paroeciam, cadaver tamen in ecclesiam paroeciae propriae quae vicinior sit, ob funus transferendum est, si ad eam commode pedestri itinere asportari possit; secus in ecclesiam paroeciae in qua mors accidit.

§ 2. Ordinarii est pro suo territorio, inspectis pe-

6 *A. S. S., l. c.,* p. 214.
7 Cfr. cc. 2, 3, 6, x, III, 12; c 2, § *Verum ne,* Clem. III, 7.

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culiaribus circumstantiis, distantiam aliaque adiuncta designare, quae translationem cadaveris ad ecclesiam funeris aut locum sepulturae incommodam reddant; et si paroeciae ad diversas dioeceses pertineant, designatio attenditur Ordinarii dioecesis in qua defunctus supremum diem obiit.

§ 3. Licet translatio ad ecclesiam funeris aut ad locum sepulturae incommoda sit, semper tamen integrum est familiae, heredibus, aliisve quorum interest, cadaver illuc deferre, susceptis translationis expensis.

§ 1. Even though a person has died outside his own parish, the corpse must be brought for the funeral service to his own parish church, if it is the nearest, and the corpse can be conveniently carried there on foot (*pedestri itinere*); otherwise it is to be carried to the church of the parish in which the person died.

This section must be understood in the light of the old law, which exempted transportation to the parish church in case of danger.[8] Transport was by most canonists presumed to be dangerous when it took a day's journey. Others more reasonably held that the judgment regarding the existing danger must be left to the family of the deceased. In our country and day of automobiles and motor hearses this canon has little practical value. However, we believe that the term *iter pedestre* is here to be taken, not exclusively as the mode of conveyance, but as a conditional supposition, as if we should say: supposing or provided the funeral journey could be made on foot.[9]

§ 2 provides for a more practical mode of judging distance and inconvenience. The Ordinary may, after examining the special circumstances, determine — prefer-

8 C. 1, Extrav. Comm., III. 6.

9 In Rome the bodies of prisoners were brought on foot to the church; S. Rit. C., Jan. 15, 1667 (n. 1346).

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ably at a synod and by means of diocesan statutes — when and under what conditions the transportation of the corpse to the church or place of burial is inconvenient. If the parishes belong to different dioceses, the decision lies with the bishop in whose diocese the person died. Supposing a man was accidentally killed in a parish of the Des Moines diocese, but belonged to a parish of the diocese of St. Joseph, if there were no one to defray the transportation expenses and to claim the body, we suppose the Ordinary of Des Moines would decide in favor of burial in that city — *recto tramite.*

§ 3 grants to the *family* of the deceased, his *heirs, or other interested persons,* the right of having the body conveyed to the church where the funeral services are to be held, or to the burial place. And this even if the transfer were quite inconvenient, provided the relatives or heirs are willing to pay the expenses.

BURIAL OF CARDINALS AND BISHOPS

CAN. 1219

§ 1. Si S. R. E. Cardinalis in Urbe decesserit, corpus transferendum est, funeris causa, in ecclesiam quam Romanus Pontifex designaverit; si extra Urbem, in ecclesiam insigniorem civitatis seu loci ubi mors accidit, nisi Cardinalis aliam elegerit.

§ 6. Defuncto Episcopo residentiali, etiam cardinalitia dignitate aucto, aut Abbate vel Praelato *nullius,* corpus, funeris causa, transferri debet in ecclesiam cathedralem, abbatialem vel praelatitiam, si id commode fieri possit; secus, in ecclesiam insigniorem civitatis seu loci, nisi in utroque defunctus aliam ecclesiam elegerit.

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§ 1. If a *cardinal* dies *in* the city (of Rome), his body is to be brought for the funeral service to the church which the Roman Pontiff may designate for that purpose; if he dies *outside* the city, the corpse must be carried to the more prominent church of the city or town where the cardinal died, unless he chose another.

§ 2. On the death of a *residential bishop,* even if he was a cardinal, or an abbot or prelate *nullius,* the body must be brought for the funeral service to the cathedral or abbatial or prelatial church, if this can be done conveniently; if not, to the more prominent church of the city or town, unless the prelate chose another.

FUNERAL OF BENEFICIARIES

CAN. 1220

Beneficiarii residentiales ad ecclesiam sui beneficii transferendi sunt, nisi aliam sibi elegerint ecclesiam funeris.

The *bodies of resident beneficiaries* must be brought *to the church of their benefice,* unless they have selected another church for their funeral.

The burial of cathedral and collegiate canons and other beneficiaries, provided they are really resident, is to take place from the church where they held a benefice. If they had their domicile or quasi-domicile in another parish [10] of the city or town, the stole fee must be given to the pastor of that parish.[11]

Concerning the canons of cathedral churches in *Eng-*

10 *Resident* does not imply that the canons and beneficiaries must reside at the cathedral or collegiate church, because this may not be a parish church.

11 S. C. C., May 12, 1685 (Richter, *Trid.*, p. 462, n. 10); S. Rit. C., May 16, Dec. 18, 1756, ad 11 (n. 2441).

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land, the provincial council of Westminster (1852) decided nothing about their funeral; but since these are not really canonical prebends, as a decree of the S. C. P. F., April 21, 1852, clearly states,[12] it follows that the present canon cannot be applied to them. It has in view only beneficiaries in the strict sense.

FUNERALS OF RELIGIOUS

CAN. 1221

§ 1. Professi religiosi ac novitii, defuncti cum sint, transferendi sunt, funeris causa, ad ecclesiam vel oratorium suae domus vel saltem suae religionis, nisi novitii aliam ecclesiam ad suum funus elegerint; ius autem levandi cadaver et illud deducendi ad ecclesiam funerantem pertinet semper ad Superiorem religiosum.

§ 2. Si longe moriantur a domo, ita ut in ecclesiam suae domus vel saltem suae religionis nequeant commode asportari, funerandi sunt in ecclesia paroeciae ubi decedunt, nisi novitius aliam ecclesiam ad funus elegerit, et salvo Superioribus iure de quo in can. 1218, § 3.

§ 3. Quae de novitiis dicta §§ 1, 2, valent quoque de famulis actu servientibus et intra domus septa stabiliter commorantibus, qui tamen, si extra religiosam domum decesserint, funerandi sunt ad normam can. 1216–1218.

§ 1. The bodies of professed religious and novices must be brought for the funeral service to the church or oratory of their house, or at least to a church of their institute, unless the deceased was a novice and selected another church.

12 *Coll. Lac.,* III, 956.

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The right to remove the body and accompany it to the church belongs to the religious superior. Hence the pastor in whose parish a religious or novice died, even though the house or hospital be under the pastor's jurisdiction, is not entitled to interfere or claim compensation.[13]

Note that the Code simply says "religious," without drawing a distinction between exempt and non-exempt. Not intended are those that are not religious in the sense of the Code.[14]

§ 2. If a professed religious or novice dies in a place so *far distant from his religious house* that the body cannot conveniently be conveyed to a church of his own house, or order, or congregation, he must be buried where he died, unless a novice has chosen another church for the funeral service. Here again distance is mentioned without further determination. According to canonists,[15] "distance" is one day's journey. But this term must be taken in a relative sense; expenses, means of transportation, and the condition of the corpse must be duly considered. If the corpse cannot be conveniently transported, it must be buried where death occurred and religious have no right to choose the burial place.[16] Novices, however, may choose.

Our canon refers to can. 1218, § 3, which permits the family to remove the body wherever they please, provided they defray the expenses. This right is here vindicated to the superior, either local or higher. If he should choose to have the body transferred from the place of

13 Cfr. c. 16, x, V, 31; c. 5, 6°, III, 12; S. C. EE. et RR., July 21, 1848 (Bizzarri, *l. c.*, p. 563 f).

14 Can. 673; unless of course they enjoy a special privilege to that effect.

15 Ferraris, *Prompta Bibliotheca, s. v.* "*Sepultura,*" n. 41.

16 Formerly the choice was not denied; c. 5, 6°, III, 12.

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death to a church of his institute, he may do so without consulting or excusing himself to the pastor in whose parish the religious died.[17]

The pastor, even though he may have administered the last Sacraments to the deceased religious, is not entitled to any stole fees.[18]

Religious superiors are not exempt from this law, *i. e.*, they are not allowed to choose their own burial place,[19] but are to be treated just like ordinary religious.

§ 3. What has been established concerning novices also applies to *servants* actually employed by religious and living permanently within the premises of a religious house (farm hands, janitors, mechanics, teachers, etc.). To enjoy the privilege here granted they must be actually serving the religious *and* live within the precincts of the convent or religious house.[20] If they boarded outside, the second condition would be lacking; if they worked without being hired or employed, the former condition would not be verified.[21] If they die outside the religious house the privilege ceases.

GUESTS AND STUDENTS OF RELIGIOUS

CAN. 1222

Quod attinet ad defunctos qui in domo etiam regulari vel collegio degebant ratione hospitii, educationis vel infirmitatis, et ad defunctos in hospitali, standum est canonibus 1216–1218, nisi constet de iure particu-

17 S. C. C., June 10, 1620, ad 10; Ferraris, *l. c.*, n. 35 f.

18 S. C. EE. et RR., May 22, 1615; Ferraris, *ibid.*; however, compensation would not be against either the letter or the spirit of the law.

19 Cfr. can. 1224, 2°.

20 Cfr. *Trid.*, Sess. 24, c. 11; Sess. 25, c. 11, *de rég.*: "*subque eorum obedientia vivunt.*"

21 S. C. EE. et RR., July 21, 1848 (Bizzarri, *l. c.*, p. 563 ff.) Cfr. Vol. III, p. 142 f. of this Commentary.

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lari aut privilegio; quod vero ad illos attinet qui in Seminario moriuntur, servetur praescriptum can. 1368.

Guests, students or sick persons who have lived in a religious house, even though this belong to regulars, or in a college, and die there, as well as those who die in a hospital, are to be buried like other secular persons, *i. e.*, according to can. 1216–1218, unless a particular law or privilege exempts them from the common law.

Seminarians are to be buried by the authorities of the seminary, unless the Holy See has ruled otherwise with regard to certain seminaries.

The favor granted these persons by virtue ot can. 514 may not be extended to the funeral service, as the S. Congregations have constantly decided.[22] Of course, these persons are allowed to choose burial in the church of religious, provided this church is capable of being selected (can. 1125) and the person free to choose. But in that case the stole fees belong to the parish priest who would otherwise be entitled to perform the burial.[23]

The text admits exemption by reason of a particular law or privilege. A particular law would be one issued according to can. 464, § 2, *viz.:* when the Ordinary exempts a religious family from the parish organization. The Barnabites were granted a privilege permitting their guests and all those who died suddenly in their houses or colleges to be buried by these religious.[24]

Our text requires that the privilege must be certain or evident (*nisi constet de privilegio*). All religious, therefore, who can claim neither a particular law nor a privi-

22 S. C. EE. et RR., Dec. 1674; Dec. 14, 1753 (Bizzarri, *l. c.*, pp. 271 f; 379), S. C. C., April 21, 1742 (Richter, *Trid.*, p. 462, n. 13).

23 S. C. C., *l. c.*

24 Greg. XV, 1621, *apud* Bizzarri, *l. c.*, p. 564.

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lege, must permit the pastor in whose parish their house is situated, to perform the funeral service.[25]

SELECTION OF SEPULTURE

CAN. 1223

§ 1. Omnibus licet, nisi expresse iure prohibeantur, eligere ecclesiam sui funeris aut coemeterium sepulturae.

§ 2. Uxor et filii puberes in hac electione prorsus immunes sunt a maritali vel patria potestate.

CAN. 1224

Ecclesiam funeris aut sepulturae coemeterium eligere prohibentur:

1.° Impuberes; verum pro filio aut filia impubere, etiam post eorum mortem, hanc electionem facere possunt parentes vel tutor;

2.° Religiosi professi cuiuslibet gradus aut dignitatis, non tamen si sint Episcopi.

Canon 1223 ordains (§ 1) that all may freely choose their funeral church or burial place, unless they are expressly forbidden to do so by law. Those forbidden are boys who have not yet completed the fourteenth and girls who have not yet completed the twelfth year.[26] In their stead, even after their death, the parents or guardians may make the choice. Whether the mother alone may do so, was not quite certain hitherto, because a Constitution of Innocent X seems to debar her if there is no local custom in her favor.[27] Our text leaves no doubt that

25 S. C. C., April 21, 1742 (Richter, *l. c.*, nn. 4, 13).

26 See can. 88, § 2.

27 "*Ex injuncto*," Nov. 16, 1645 (Richter, *l. c.*, p. 461, n. 6).

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mothers, too, may choose burial church and burial place for their children.

If the parents have a family lot, the children should be buried there, otherwise, if no contrary choice is made, they are to be buried from the parish church and in the parish cemetery.[28]

According to § 2, can. 1223, the wife as well as boys and girls who have completed the age of fourteen or twelve, respectively, are free to make their choice, and are not hampered in this matter by marital or parental power.[29] If this be true, we cannot see, as stated above, why the mother should be debarred from choosing, provided, of course, the father eithers consents, or is dead, or does not care. *Guardians,* too, are admitted.

Professed religious of whatever rank or dignity, except *bishops,* are deprived of the right of choosing their funeral church or burial place. The reason is that religious have no power either to "*velle*" or "*nolle.*"[30] Cardinals who are religious enjoy the right here denied by virtue of can. 1219, bishops, by virtue of can. 1224. As the text speaks of bishops in general, all, resident and titular, are included.

CAN. 1225

Ut electio ecclesiae funeris valeat, cadat necesse est vel in ecclesiam paroecialem, vel in ecclesiam regularium, non tamen monialium (nisi agatur de mulieribus quae famulatus, educationis, infirmitatis aut hospitii causa intra clausuram eiusdem monasterii non precario commorabantur), vel in ecclesiam iuris pa-

28 S. C. C., Nov. 16, 1645; Feb. 22, 1646 (Richter, *l. c.*, n. 2 f.)

29 S. C. EE. et RR., June 8, 1731 (Bizzarri, *l. c.*, p. 343); Many, *l. c.*, p. 267 f.

30 C. 5, 6°, III, 12.

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tronatus, si agatur de patrono, vel in aliam ecclesiam funerandi iure praeditam.

Can. 1225 determines *which churches* may be chosen for *funeral services*. They are parish churches and churches of regulars, churches of advowson in favor of the advowee, and any other church endowed with the *ius funerandi*.

The first class, *i. e.*, parish churches, were the exclusive possessors of this right before the thirteenth century, except where the Popes had granted a special privilege.[31]

The Friars Preachers and the Friars Minor obtained such a privilege, and it was extended to all regulars by way of communication.[32] Now it has ceased to be a mere privilege but is common law. However, this law favors only churches of *regulars* to the exclusion of other religious, even though exempt.

The third class consists of churches which are subject to the *ius patronatus*, but only in favor of the patron or advowee.

There is a fourth class consisting of such churches as are expressly endowed with the *ius funerandi*.

The Code distinguishes between a church for funeral services and a cemetery for sepulture. The two are not identical. *Ius funerandi*, sometimes called *jus sepeliendi*, or *tumulandi*, here means strictly the right to funeral services, without the burial place. This is apparent from the fact that the church is called *ecclesia funeris, i. e.*, the church where the funeral service takes place.

Which churches have the *ius funerandi* besides those mentioned in the text? Note two facts: (1) The burial right is a strictly parochial right, and (2) all eccle-

31 Cfr. c. 3, X, III, 28; c. 3, 6°, III, 12.
32 Cfr. c. 2, Clem. III, 7.

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siastical functions may be held in all public oratories and also in semi-public oratories, unless excepted by the Ordinary.[33] The funeral service is an ecclesiastical function. Hence, unless the Ordinary forbids this function to take place in semi-public oratories, funeral services may be held there as well as in public oratories. This does not interfere with strictly parochial rights because, as will be seen under can. 1230, § 4, these rights are safeguarded by law.

Churches of nuns (*monialium*) may not be used to hold funeral services for outsiders. This was the traditional practice of the Roman Court.[34] However, female[35] servants, women who lived habitually within the enclosure of the convent for the sake of study, or because of sickness, or as guests, may have their funeral services performed in the nuns' church. *Moniales* must here be taken in the strict sense, excluding female religious with simple vows only. This distinction is clearly based on the nature of enclosure. Hence the many decisions against the permissibility of funeral services and burial in such churches. If anyone is buried in such a church, the stole fees belong to the parish church.[36]

Here may be added a decision concerning *confraternities* in churches of regulars. The members of these pious societies must be buried from the parish church, unless they have lawfully chosen the church of the regulars for burial.[37] Neither are tertiaries or oblates to be buried from the church of the respective religious order, but

33 Cfr. can. 462, 5°; can. 1191, § 2; can. 1193.

34 Ferraris, *Prompta Bibliotheca, s. v.* "*Sepultura,*" n. 137; Many, *l. c.*, p. 301 f.

35 Male servants are to be buried from the parish church; S. C. C., Jan. 21, 1723, *et pluries* (Richter, *Trid.*, p. 462, n. 14).

36 S. C. C., Nov. 28, 1711; July 28, 1731 (Richter, *l. c.*, nn. 18 f.).

37 Innocent X, "*Ex injuncto,*" Feb. 22, 1645 (Richter, *l. c.*, n. 16); S. C. EE. et RR., March 13, 1744, ad 8 (Bizzarri, *l. c.*, p. 364).

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their funeral services must be held in the parish church, unless they have chosen another, *i. e.*, the church of the regulars.[38]

CAN. 1226

§ 1. Ecclesiam funeris aut coemeterium sepulturae quis eligere potest per se vel per alium cui legitimum mandatum dederit; factamque electionem aut mandati concessionem quolibet legitimo modo probare licet.

§ 2. Si electio fiat per alium, hic suum mandatum explere potest etiam post mortem mandantis.

Can. 1226 determines the *manner in which the choice of a funeral church or cemetery may be made,* and how it is to be proved. One may do this personally or through another commissioned for that purpose. This choice is similar to a last will.[39] Hence § 2 states that the *mandatarius* may carry out the mandate either before or after the death of the *mandans* or person who has made the commission. Of course the *mandatarius* must abide by the wording of the disposition.

The second clause of § 1 says that the choice made, and the fact of commission, may be *proved* in legal form. Thus the form which is required for a last will, in the presence of two witnesses and a notary public, would certainly be sufficient.[40] Even two witnesses without a notary public, provided they testify under oath before the parish priest, are admissible.[41] In case the person should be speechless, signs and nods which indicate his desire shall not be rejected.[42] Even the pastor's testimony, if it is not in his own favor, is admissible. The Ordinary or

38 S. C. EE. et RR., Dec. 11, 1615 (Bizzarri, *l. c.*, p. 245).

39 C. 13, x, III, 26.

40 S. C. C., Feb. 13, 1666; April 24, 1723; July 4, 1722 (Richter, p. 461, n. 8).

41 S. C. C., Dec. 19, 1739 (*ibid.*, n. 9).

42 S. C. C., Feb. 13, 1666, ad II (*l. c.*)

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the pastor may, if they wish, demand a document or proof of the choice made before burial takes place.[43] *Synodal* acts may more closely determine the requisites of proof, but if they contravene this canon, they have no force. Thus the S. Congregation sustained a choice made by a woman before her confessor, her father, and another witness, though the synodal law required the presence of the pastor, and the father of the woman was dead at the time of the trial.[44]

CAN. 1227

Religiosi et clerici saeculares districte vetantur ne quos ad vovendum, iurandum vel fide interposita seu aliter promittendum inducant ut apud ipsorum ecclesias funus aut apud ipsorum coemeterium sepulturam eligant, vel factam electionem non immutent; quod si contra factum fuerit, electio aut immutatio sit nulla.

Can. 1227 strictly forbids *all clergymen,* whether secular or religious, *to induce* any person to choose a particular church for funeral service or cemetery for burial, or to change his choice. If such an inducement was made, the choice is null and void. Note, however, that this influence or persuasion must be brought to bear on the person by vow or oath, by pledging his word of honor, or by simple promise. Our text is taken substantially from the Decretals and contains only one penalty, to wit, the nullity of the promise.[45] It may also be noticed that only clergymen are mentioned. This is done in order to procure the necessary liberty to laymen and to prevent jealousy and dissension among the clergy.

43 S. C. EE. et RR., Sept. 19, 1732, ad 2 (Bizzarri, p. 344 f.).

44 S. C. EE. et RR., Feb. 6, 1852 (*ibid.*, p. 602 f.).

45 C. 1, 6°, III, 12; C. 3, Clem. V, 8: also interdict and excommunication.

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CAN. 1228

§ 1. Si electa fuerit sepultura in coemeterio diverso a coemeterio propriae defuncti paroeciae, cadaver in illo sepeliatur, dummodo nihil obstet ex parte eorum a quibus coemeterium pendet.

§ 2. Electa sepultura in coemeterio religiosorum, ut cadaver inibi sepeliri queat, requiritur et sufficit consensus Superioris religiosi, ad normam constitutionum cuiusque religionis.

Can. 1228 repeats in a somewhat different form the enactment of Boniface VIII, mentioned above, concerning the incineration or boiling of bodies.[46] The text merely says that the body must be *buried* in the cemetery chosen by the person, even though it be different from the cemetery of the parish to which the deceased belonged. However, the authorities of the cemetery chosen by the deceased must give their, at least negative, consent. If the cemetery thus specially selected belongs to religious, the consent of the respective superior is required and suffices. The superior is the one whom the constitution of the religious point out as competent for giving the consent. If the constitutions contain nothing to the contrary, or no enactment at all on this subject, the local superior is certainly competent.

ANCESTRAL TOMBS

CAN. 1229

§ 1. Si quis, sepulcrum maiorum in aliquo coemeterio possidens, non electa alibi sepultura, decesserit, in eodem sepeliendus est, si illuc commode asportari possit, salvo praescripto can. 1218, § 3.

46 C. 1, Extrav. Comm., III, 6.

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§ 2. Pro uxore attenditur sepulcrum viri, et, si plures habuerit, sepulcrum ultimi.

§ 3. Plura si sint maiorum aut viri sepulcra, defuncti familia aut heredes sepulturae deligant.

§ 1. If a person who has an ancestral tomb or grave in some cemetery dies without having chosen a burial place somewhere else, the body, if it can be conveniently transferred, must be buried there. The same holds good if his family, heirs or friends insist upon burial in the ancestral grave, and defray the expenses.

§ 2. A wife is to be buried in the ancestral tomb of her husband; and, if she had several husbands, in the ancestral tomb of her last husband,—always provided, of course, that she had not chosen another burial place.

§ 3. If there are several ancestral tombs or family tombs, the family or heirs of the deceased may choose his burial place. In Europe there used to be different ancestral graves or tombs: strictly *family* plots, where only members of the family were buried; *hereditary* tombs, in which only heirs were buried, and *mixed* tombs for both members of the family and heirs.[47] Our text allows the family to choose between these different kinds of tombs where they exist. The right to be buried in the ancestral tomb also belongs to infants and children.[48] Hence can. 1209 cannot be urged in this case.

DUTIES AND RIGHTS OF PASTORS IN REGARD TO BURIALS

CAN. 1230

§ 1. Proprius defuncti parochus non solum ius sed etiam officium habet, excepto gravi necessitatis casu,

47 Many, *l. c.*

48 S. C. C., Oct. 21, 1613 (Richter, p. 461, n. 1).

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levandi per se vel per alium cadaver, illud comitandi ad suam ecclesiam paroecialem ibique exsequias persolvendi, firmo praescripto can. 1216, § 2.

§ 2. Quod si mors acciderit in loco alienae paroeciae, et cadaver ad ecclesiam propriae paroeciae commode asportari possit, parochi proprii est, praemonito parocho loci, illud levare, comitari ad suam ecclesiam ibique exsequias peragere.

§ 3. Si ecclesia funeris sit ecclesia regularis aliave exempta a iurisdictione parochi, parochus, sub cruce ecclesiae funerantis, cadaver levat ac deducit ad ecclesiam; sed exsequias rector ecclesiae celebrat.

§ 4. Si vero ecclesia funeris non sit exempta a iurisdictione parochi, celebratio exsequiarum, salvo peculiari privilegio, pertinet non ad rectorem ecclesiae funerantis, sed ad parochum in cuius territorio ecclesia sita est, dummodo defunctus parocho subiectus fuerit.

§ 5. Religiosas et novitias, in religiosa domo defunctas, ad clausurae limen deferant aliae religiosae; indeque, si de religiosis agatur iurisdictioni parochi non obnoxiis, ad propriam religiosae domus ecclesiam vel oratorium deducit et exsequias peragit cappellanus; si de aliis religiosis, valet praescriptum § 1; quod vero ad religiosas attinet extra domum defunctas, serventur generalia canonum praescripta.

§ 6. Defuncto S. R. E. Cardinali aut Episcopo extra Urbem in civitate episcopali, servetur praescriptum can. 397, n. 3.

§ 7. Si cadaver mittatur ad locum ubi nec defunctus propriam paroeciam habebat, nec ecclesia funeris legitime fuerat electa, ius levandi cadaver, peragendi exsequias, si peragendae sint, et cadaver ad sepulturam deducendi, pertinet ad ecclesiam cathedralem eiusdem loci; quae si desit, ad ecclesiam paroeciae in

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qua coemeterium situm est, nisi aliud ferant loci consuetudo aut dioecesana statuta.

§ 1. The pastor of a deceased Catholic is entitled and obliged, unless excused by grave necessity, to go himself or send a delegate (assistant priest, curate) to the house to receive the body (*levare corpus*),[49] accompany it to the parish church, and there to hold the exequies, with due regard to can. 1216, § 2. Needless to say, this is not customary in our country, where distance often renders it impossible to comply with this ruling. Therefore the law most reasonably adds: *excepto gravi necessitatis casu.*

§ 2. If a person has died in a strange parish, and the body can be conveniently brought to his own parish, the pastor has the right and duty to perform the ceremonies described in § 1, after previously informing the pastor of the parish where the person died. Thus, for instance, if a person dies in a hospital or asylum located in a strange parish, his or her pastor is entitled and obliged to perform the sacred rites, unless, of course, the hospital or asylum enjoys exemption from the jurisdiction of the pastor.[50]

§ 3 draws a distinction between exempt and non-exempt churches. In exempt churches the *parochus proprius* may take up the body and accompany it to the exempt church; but the cross behind which the funeral procession marches must be that of the exempt church, and the rector of the latter is entitled to hold the funeral service. It required a great many decisions to make this rule clear. If a church in charge of regulars was chosen for the funeral service, the regulars had to invite the pastor or chapter, and even accompany them to the

[49] *Levare corpus* properly means to raise or take up the body (compare: *levare e sacro fonte*), and is used for the first funeral act performed by sprinkling the coffin with Holy Water.

[50] S. C. C., June 22, 1907 (*Anal. Eccl.*, XV, 284 ff.).

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church. But if the pastor or chapter made the fathers wait more than an hour, they could go to the house of the deceased and conduct the funeral. The pastor or chapter were allowed to sprinkle the body, but not to intone any antiphon or psalm, etc. In fact they had to remain outside the church whilst the exequies were performed.[51] This last-mentioned ruling might reasonably be revoked.

§ 4. In *non-exempt churches* the celebration of the funeral service belongs to the pastor in whose parish the church selected for the funeral is located, provided the deceased was a subject of his. Therefore the rector or chaplain of the church in which the exequies are held must make way for the *parochus proprius* of the deceased. If the latter refuses to perform the services the rector or chaplain of the *ecclesia funerans* may hold them.[52] Thus, if a member of a *confraternity* which has a public oratory within the limits of a parish dies, the pastor of the parish is entitled to hold the funeral services in such public oratory, provided the deceased was his parishioner.[53] If the deceased was not a parishioner of the parish within the boundaries of which the *ecclesia funerans* is situated, the chaplain of the confraternity may perform the funeral rites.[54] If the public oratory is situated within the limits of a collegiate or cathedral parish, the pastor, and not the first dignitary of the collegiate or cathedral church, is entitled to perform the services, unless the chaplain enjoys this right.[55] This may be by

51 S. C. EE. et RR., Aug. 22, 1670; Sept. 23, 1735; April, 1717 (Bizzarri, *l. c.*, pp. 263, 346 f., 304).

52 S. Rit. C., Dec. 22, 1629 (n. 523).

53 S. Rit. C., Jan. 12, 1704, ad 20 (n. 2123).

54 S. Rit. C., July 9, 1718, ad 4; May 13, 1719, ad 7 (nn. 2251, 2263).

55 S. Rit. C., Sept. 13, 1670, ad 1 (n. 1409).

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reason of exemption, or by a *special privilege* which is sometimes given, especially to arch-confraternities.

§ 5 treats of the *burial of female religious and their novices.* If *they die* in their religious house, their bodies must be brought to the threshold of the enclosure, whence the chaplain conducts the funeral procession to the church or oratory, where he holds the exequies. But the chaplain is entitled to this privilege only if the religious are exempt from the jurisdiction of the pastor. If they are subject to the pastor in whose parish the religious house is located, the latter is obliged and entitled to conduct the funeral.

If sisters or novices *die outside their religious house,* the common law takes effect. Canons appear to have taken a particular interest in the funeral of *moniales,* since the decisions, the substance of which is embodied in our text, chiefly regard them. The confessor or chaplain of nuns (with solemn vows) has the exclusive right of accompanying the corpse from the threshold of the enclosure into the outer church, to hold the funeral service there, and then to accompany the body to the grave-yard. If it is a custom of long standing that canons or other priests are invited, they may continue to observe the custom, but without prejudice to the confessor or chaplain, who, on his part, should beware not to enter the papal enclosure under pretext of a funeral service.[56]

This, then, is the rule for all nuns or *moniales,* no matter whether they are subject immediately to the Holy See or to the bishops or prelates regular.[57] The local Ordinary, according to can. 464, § 2, may exempt certain *religious communities* from the pastor's jurisdiction and place

[56] S. C. EE. et RR., May 30, 1856; Sept. 17, 1858 (Bizzarri, *l. c.*, pp. 648, 657); S. Rit. C., April 20, 1641; May 10, 1805 (nn. 751, 2559).

[57] S. C. C., Feb. 24, 1872 (*A. S. S.*, VII, 161 ff.).

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them directly under a chaplain appointed by him.[58] However, it must be plainly understood and maintained that the mere appointment of a chaplain does not derogate from the rights of the pastor in the matter of burial. And this is true of every non-exempt religious institute of women, no matter whether approved by the Holy See or by the Ordinary only.[59] The consequence is that unless the Ordinary formally exempts a religious community of women, or of men, which belongs to the class of non-clerical congregations, the pastor's rights in the matter of burial must be sustained.

The last clause of § 5, can. 1230, states that concerning female religious *who die outside their religious house* the common law must be observed. What is the common law on this point? No doubt that part of the present title which affects secular persons, otherwise the text would simply have referred to can. 1221, treating of male religious. Therefore the pastor's rights are here still more evidently safeguarded. But the question may not be useless, whether such female religious are allowed to choose their burial places. This, we believe, must be denied, for the reason that they do not have their own will. But the parish church or parish cemetery as well as the ancestral tomb may safely be vindicated for them. For the rest, a religious community may claim the right granted by can. 1218, § 3.

Here it may be permitted to add a note which might have been placed under can. 1221, but also fits here. If a religious who has been pastor or teacher for years, were buried in the place of his activity, we believe it would not be reprimanded by the lawgiver, because "convenient conveyance" might suffer on account of discontent on the

58 Cfr. can. 514, § 3, 4.
59 Leo XIII, "*Conditae*," Dec. 8, 1900, II, n. 8.

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part of the people. Piety also has its claims, provided, of course, that the distance between the religious house and the deceased person's last residence amounts to a good many miles, and the superior's permission is obtained.

§ 6. When a *cardinal* or *bishop* dies outside the city of Rome, in his episcopal city, the cathedral canons shall provide an appropriate funeral service and burial.[60] Note that any cardinal of the Holy Roman Church, whether he was bishop of the city or diocese in which he lived, or not, is entitled to this honor.

§ 7. If a corpse is sent to a place where the deceased person neither had parish rights nor had chosen a burial place, the conduct of the funeral belongs to the cathedral church of that place; — supposing, of course, the body was shipped to the episcopal city; for if the corpse is sent to another city, the clergy of the parish in which the cemetery is located must attend to the funeral, unless custom or diocesan statutes decide otherwise.

BURIAL

CAN. 1231

§ 1. Expletis in ecclesia exsequiis, cadaver tumulandum est ad normam librorum liturgicorum in coemeterio ecclesiae funeris, salvis praescriptis can. 1228, 1229.

§ 2. Qui exsequias in ecclesia peregit, non solum ius, sed etiam officium habet, excepto gravi necessitatis casu, comitandi per se vel per alium sacerdotem cadaver ad locum sepulturae.

After the exequies held in church, the body must be buried in the cemetery of the church in which the service

60 Can. 397, n. 3.

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was held, unless the burial in another cemetery or the ancestral tomb was chosen by the deceased. The officiating priest or his substitute is entitled and obliged to accompany the casket to the grave-yard. The bishop cannot issue synodal acts or diocesan statutes forbidding the officiating clergy to accompany the funeral procession. Nor may the cemetery chaplain take care of all the bodies that are brought to the cemetery. The clergy should not discriminate between rich and poor, but accompany all alike, no matter what the distance,[61] provided, of course, the cemetery belongs to the parish. Exception is made in cases of grave necessity. Such a necessity would be physical indisposition of the clergyman or perhaps a long-standing tradition against accompanying funeral processions, based on the fact that they gave rise to disturbances. If the clergy does go to the grave-yard, surplice and stole, or at least the stole, should be made use of.[62]

We may add that religious who have lost their convent by suppression, but continue to officiate in their former church, have the right of performing the funeral service and conducting corpses to the grave.[63]

FUNERAL PROCESSIONS

CAN. 1232

§ 1. Sacerdos qui cadaver comitetur ad ecclesiam funeris vel ad locum sepulturae, libere transire poterit, cum stola quoque et cruce elevata, per territorium

61 S. C. C., Jan. 26, 1907 (*Anal. Eccl.*, XV, 12 ff.).

62 S. C. P. F., Sept. 12, 1884, ad II (n. 3619) mentions stole and surplice, but S. Rit. C., April 23, 1895, ad II (n. 3854), only refers to the stole; the latter custom is therefore admissible.

63 S. C. EE. et RR., May 7, Sept. 17, 1880 (*A. S. S.*, XIII, 409 ff.); S. Rit. C., Sept. 12, 1884 (n. 3619).

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alius paroeciae vel dioecesis, etiam sine parochi vel Ordinarii licentia.

§ 2. Si cadaver tumulandum sit in coemeterio ad quod commode asportari nequeat, parochus vel rector ecclesiae funeris nequit sibi vindicare ius illud comitandi extra fines civitatis vel loci.

§ 1. The priest who conducts a body to the funeral church or the grave-yard is entitled to pass with stole and raised cross through a strange parish or diocese, without the permission of either pastor or Ordinary. The term "*cruce elevata*" is chosen in order to do away with the presumption that when passing through strange territory, the cross had to be lowered, to show subordination or at least tacit acknowledgment of the jurisdiction of the pastor through whose district the procession wended its way. This right belongs also to regulars when they conduct a funeral through strange territory.[64] The pastor has the same right, even when the cathedral chapter is present. If the funeral procession has to pass through strange territory, the shortest route should be taken,[65] in order not to provoke others or "make a show."

§ 2. The right of accompanying the body outside the city or town limits cannot be claimed in case the corpse is to be buried in a cemetery to which it cannot conveniently be transported, for in that case the whole funeral procession might easily turn into a farce.

MOURNERS AND EMBLEMS

CAN. 1233

§ 1. Nequit parochus, sine iusta et gravi causa ab

64 S. C. EE. et RR., Nov. 24, 1713 (Bizzarri, *l. c.*, p. 301); Sept. 17, 1880 (*A. S. S.*, XIII, 410).

65 S. Rit. C., April 23, 1895 (n. 3854).

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Ordinario probata, excludere clericos saeculares, religiosos ac pia sodalitia quae familia vel heredes advocare velint ad deducendum cadaver ad ecclesiam funeris et ad sepulturam, et assistendum funeri; clerici tamen ipsi ecclesiae addicti a familia vel heredibus prae aliis omnibus invitari debent.

§ 2. Nunquam admittantur societates vel insignia religioni catholicae manifeste hostilia.

§ 3. Associantes cadaver tenentur morem gerere parocho circa ductum funeris, salvis uniuscuiusque praecedentiae iuribus.

§ 4. Laici cadaver, generis aut dignitatis cuiusvis ille fuerit, clerici ne deferant.

§ 1. Except for a weighty and just reason approved by the Ordinary, the pastor has no right to prevent secular or religious clerics, or pious societies whom the family or the heirs wish to invite, from accompanying the body to the church and grave-yard and assisting at the funeral. But the clergy of the respective church should be invited above all others by the family of the deceased or his heirs.

Confraternities and regulars, in particular the Friars Minor, had often to recur to the Roman Court to defend the right enunciated in our text. The pastor must consult the Ordinary to judge whether reasons for non-compliance are just and weighty. But the Ordinary has no right to issue synodal decrees forbidding either confraternities or regulars to accompany the funeral procession, if (at least implicitly) invited by the family of the deceased.[66] Even if the cathedral chapter should not have been invited, the members of a confraternity may be

66 S. C. EE. et RR., Nov. 24, 1713; May 13, 1744 (Bizzarri, *l. c.*, p. 307, 363), S. Rit. C., Aug. 18, 1629; April 22, 1633; Jan. 14, 1640; Dec. 7, 1641 (nn. 516, 604, 696, 784).

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called and assist.[67] The invitation to regulars or members of a fraternity may be issued by the family or heirs without the pastor's knowledge.[68] No definite or proportionate number of regulars, seculars and confraternity members is prescribed.[69] Nor is it required that the secular clergy should be invited before the regulars.[70] When the regulars are called by the family to accompany a funeral which is to take place in the cathedral church, they are allowed to enter it.[71] These are the most important decisions rendered in this matter. A timely admonition is that of the last clause of our section to show respect to one's own clergy.

§ 2. No *societies* or *emblems* manifestly *inimical to the Catholic religion* are to be admitted. Concerning the emblems of Masonic lodges — for these are here chiefly intended — the Holy Office has decided as follows: Ecclesiastical sepulture may be given only to such members of a condemned sect as have received the sacraments and have not, after receiving them, demanded to be buried with or under these insignia, or have formally retracted their desire. If such emblems are placed on the coffin against the will of the deceased, they must be removed before the funeral starts (*ante associationem cadaveris*).[72] The same rule applies to banners or standards.

§ 3. Those who accompany the funeral must obey the orders of the pastor concerning the arrangement of the funeral cortège, with due regard, of course, to the rights

67 S. Rit. C., June 8, 1630 (n. 533).

68 S. C. EE. et RR., Dec. 10, 1729 (Bizzarri, *l. c.*, p. 340).

69 S. C. EE. et RR., Nov. 24, 1713; May 13, 1744 (Bizzarri, *l. c.*, pp. 301, 363).

70 S. Rit. C., Nov. 22, 1643 (n. 852).

71 S. C. EE. et RR., April 13, 1723 (Bizzarri, *l. c.*, p. 313).

72 S. O., Dec. 2, 1840; July 5, 1878 (*Coll. P. F.*, nn. 915, 1495).

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of precedence. The pastor may decide in which direction or through which streets the funeral procession should march.[73] Concerning regulars and members of confraternities, it has often been decided that they should not join the funeral procession at some corner, but should meet at the church and join the rest of the clergy and march together with them.[74]

As to *precedence,* the general rule is that the pastor "precedes," *i. e.,* takes the last place in the procession.[75] However, if the cathedral chapter or, where custom admits, the collegiate chapter assists in a body, it marches behind the pastor. In that case the first dignitary of the chapter should wear stole and cope, whilst the pastor wears only the stole (and surplice).[76] With regard to the rest of the clergy, secular and religious, the general rules of precedence, as laid down and explained under can. 106 and 491, must be observed.

§ 4. Clerics shall never act as pall-bearers for a defunct layman, no matter what his rank or dignity may have been. The reason is because the clerical dignity transcends every secular rank and degree.

FUNERAL FEES

CAN. 1234

§ 1. Locorum Ordinarii indicem funeralium taxarum seu eleemosynarum, si non exsistat, pro suo territorio, de consilio Capituli cathedralis, ac, si opportunum duxerint, vicariorum foraneorum dioecesis et parochorum civitatis episcopalis, conficiant, attentis legitimis consuetudinibus particularibus et omnibus

73 S. Rit. C., Dec. 19, 1671, ad 5 (n. 1440).

74 S. Rit. C., Sept. 7, 1670; April 8, 1854 (nn. 1408, 3080).

75 S. C. C., May 12, 1635; May 14, 1644 (*Coll. P. F.*, nn. 82, 111).

76 S. Rit. C., April 23, 1895, ad III (n. 3854).

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personarum et locorum circumstantiis; in eoque pro diversis casibus iura singulorum moderate determinent, ita ut quaelibet contentionum et scandali removeatur occasio.

§ 2. Si in indice plures classes enumerentur, liberum est iis quorum interest classem eligere.

CAN. 1235

§ 1. Districte prohibetur ne quis, sepulturae vel exsequiarum seu anniversarii mortuorum causa, quidquam exigat ultra id quod in dioecesano taxarum indice statuitur.

§ 2. Pauperes gratis omnino ac decenter funerentur et sepeliantur, cum exsequiis, secundum liturgicas leges et dioecesana statuta, praescriptis.

§ 1 of can. 1234 provides that the local Ordinaries shall, each one for his own territory, draw up a list of funeral fees, if none such exists, with the advice [not consent] of the Cathedral chapter, and, if deemed advisable, with the coöperation of the rural deans and pastors of the episcopal city. In drawing up this list they shall take into account the lawful customs of the district as well as the circumstances of persons and times. The stole fees should be moderate and so determined that every occasion for quarrel and scandal is removed.

§ 2. If the list contains several classes of funeral services, arranged by degrees, those interested may choose any of these.

But, says can 1235, § 1, no clergyman may demand more than is officially allowed for burial or funeral services or anniversaries.

§ 2. The poor shall by all means be given a decent funeral and burial, inclusive of the exequies, free of

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charge, according to the sacred liturgy and the diocesan statutes. Alexander VII and Clement X enjoined especially on the missionaries of the East Indies, that they should bury the poor gratis, and not go about among the neighbors and relatives to beg alms for this purpose.[77]

PORTIO PAROECIALIS

CAN. 1236

§ 1. Salvo iure particulari, quoties fidelis non funeratur in ecclesia paroeciali propria, proprio defuncti parocho debetur portio paroecialis, excepto casu quo cadaver in ecclesiam propriae paroeciae commode asportari nequeat.

§ 2. Si quis habeat plures paroecias proprias ad quas cadaver commode deferri posset, et alibi funeretur, portio paroecialis dividenda est inter omnes parochos proprios.

CAN. 1237

§ 1. Detrahi debet portio paroecialis ex omnibus et solis emolumentis, quae statuta sunt pro funere et tumulatione in taxa dioecesana.

§ 2. Si quacunque de causa primum sollemne officium funebre non statim, sed intra mensem completum a die tumulationis fiat, licet hoc die non defuerint minora publica officia, portio tamen paroecialis ex huius etiam funeris emolumentis debetur.

§ 3. Quantitas portionis paroecialis determinetur in taxa dioecesana; et si ecclesia paroecialis et ecclesia funerans ad diversas dioeceses pertineant, quantitas

77 Alexander VII, "*Sacrosancti*," Jan. 18, 1658, § 2, n. 19; Clement IX, "*In excelso*," Sept. 13, 1669, n. 19.

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portionis paroecialis attenditur secundum taxam ecclesiae funerantis.

§ 1. The *quarta funeris,* or pastor's portion, must be given to the deceased's pastor if the funeral is not held in the parish church. There is no exception to this rule unless a particular law provides otherwise or unless the body cannot conveniently be brought to the deceased's own parish church.

§ 2. If the deceased had several parish churches, to which his body might be carried, yet is buried elsewhere, the pastor's portion must be divided among the different pastors.

Our Code calls the portion due to the pastor *portio paroecialis.* Formerly it went by the name of *portio canonica,*[78] because established by the canons, or *quarta funeris,*[79] because one-fourth of all funeral offerings, either in alms or candles, belonged to the *parochus proprius.* It was justly considered meet that he who nurtured the deceased whilst living, should also receive his due on the occasion of his funeral.[80] The pastor's portion, therefore, is nothing but a material token of gratitude and respect.

The text says, *quoties, i. e.,* whenever a deceased parishioner is buried in or from a church other than his own parish church, no matter whether he himself made the choice or the family had him buried in the ancestral chapel or tomb.[81] Even the canons of cathedrals and collegiate churches owe the *portio canonica* to their own church within the boundaries of which they had their domicile or quasi-domicile, though they may be buried in

78 C. 4, x, III, 28; c. 2, 6°, III, 12.

79 *Trid.* Sess. 25, c. 13, *de ref.*

80 Cfr. cc. 1, X, III, 28; c. 2, Clem., III, 7.

81 C. 1, X, III, 28.

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their own cemeteries.[82] But no pastor's portion is to be paid by male religious or nuns whose superior or confessor performs the funeral service.[83] Nor does it appear proper that female religious should pay the *quarta,* even though their members die outside the religious house. Yet the law would seem to permit the pastor to demand it, because can. 1230, § 5, provides no exception for them.

§ 2 says that if one had several parishes, all the pastors concerned are entitled to an equal share of the *portio paroecialis.* If *vagi* are buried, the *quarta* need not be paid.[84]

Can 1237, § 1, determines the offerings, and the quantity of the same, from which the pastor's portion is to be deducted. *All the fees* established by synodal decree for funerals and burials are to be rated for subtracting the pastor's portion. The question is reduced to simple terms where the funeral fees are clearly fixed. Note the term for funeral and burial (*pro funere et tumulatione*). We generally include both in the name *funeral service,* to wit, the service in church and at the grave. No doubt this is the intention of the lawgiver. Hence it is not customary to make an itemized statement for the use of candles, torches, utensils, etc. Neither is the pastor's share to be deducted from the celebration of the third or seventh day, or the "month's mind."[85] Nor is any free offering which the family may make to the priest who accompanies the body to the grave, to be taxed or shared by the pastor.[86] Nor are pastors to demand a larger share if the burial

82 S. C. C., Sept. 12, 1699; 1 and 22 March, 1766.

83 Cfr. Many, *l. c.,* p. 322.

84 C. 2, 6°, III, 12; S. C. C., Nov. 29, 1851; Many, *l. c.,* p. 324.

85 S. Rit. C., July 24, 1638 (n. 649).

86 S. C. EE. et RR., Sept. 17, 1880 (*A. S. S.,* XIII, 421).

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takes place in or from a church of regulars, than when it is held from a church in charge of secular clergy.[87]

§ 2. If, for any reason, the solemn funeral service is held, not immediately, but within a month from the date of the burial, the pastor's share must be paid from the fees received for that solemn, though belated, service. Suppose a man dies on Sept. 1, and his body is taken either to the door of the church, or directly to the cemetery, where the grave is blessed by the priest because the civil authority for some reason or other would not permit the corpse to be taken into the church. On Oct. 1, the exequies are held, with Mass and *absolutio ad tumbam*. Now, if these exequies are held in a church which was not the deceased's parish church, and by a priest who was not his pastor, and the regular stole fee is paid, the pastor would be entitled to his share.[88] But the stole fee was supposed to have been offered only for the solemn function, which means not a sung Mass, but the funeral service, with either low or high Mass, and the absolution or *Libera*. For *minor* services, such as accompanying the body to the grave and blessing it, or even a private Mass, are not liable to the *portio paroecialis*. The meaning of the text, therefore, is that the pastor is entitled to his share of the fees even if the full funeral service is held a month from the date of burial.

§ 4. The *quantity of the pastor's portion* should be determined by the synodal tax. If the parish church and the funeral church are different and belong to different dioceses, the *portio poroecialis* must be refunded according to the tax established in the funeral church.

It may not be amiss to add here a decision which is

87 S. C. C., April 3, 1745 (Richter, *l. c.*, 463, n. 27).

88 S. C. C., July 29, 1905; Feb. 23, 1907 (*Anal. Eccl.*, XII, 330; XV, 58 ff.).

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very appropriate, and we dare say, very reasonable. It is to the effect that where there is an immemorable custom between parish churches of not demanding the *quarta funeris,* it should be observed.[89] This permits us to say that the Code is not against such a custom, as is evident from the clause placed in § 1, can. 1236: "*salvo iure particulari,*" and we believe it would be conducive to peace and charity if this *quarta funeris* would be relaxed, especially with regard to religious, because they, too, work for the benefit of the diocese and religion in general and help the secular clergy.

RECORDING OF DEATHS

CAN. 1238

Expleta tumulatione, minister in libro defunctorum describat nomen et aetatem defuncti, nomen parentum vel coniugis, tempus mortis, quis et quae Sacramenta ministraverit, locum et tempus tumulationis.

After the funeral services the minister shall enter in the book of the dead the name and age of the deceased, the name of the parents or consort, the date of death, who administered the Sacraments, what Sacraments, and the place and date of the funeral.[90]

89 S. C. C., Feb. 9, 1732 (Richter, *l. c.*, p. 463, n. 28).

90 The formula in the *Rituale Rom.*, tit. X, c. 2, n. 7.

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CHAPTER III

ECCLESIASTICAL BURIAL, TO WHOM GRANTED OR DENIED

TO WHOM GRANTED

CAN. 1239

§ 1. Ad sepulturam ecclesiasticam non sunt admittendi qui sine baptismo decesserint.

§ 2. Catechumeni qui nulla sua culpa sine baptismo moriantur, baptizatis accensendi sunt.

§ 3. Omnes baptizati sepultura ecclesiastica donandi sunt, nisi eadem a iure expresse priventur.

§ 1. Baptism, being the Sacrament of initiation and sign of communion with the Church and membership in the same, is the fundamental condition of receiving a Catholic burial. Baptism may be received by desire — *baptismus flaminis* — and this is generally supposed in those who had received instructions in the faith (catechumens). Hence our canon in its first section states that *no person who has died without Baptism* may be admitted to ecclesiastical burial. This includes even unbaptized infants, though it is generally admitted that a child not yet born may be buried together with the mother in consecrated ground.[1] Besides, it appears, at least to many, very awkward and offensive if this law should be applied to burial in the ancestral grave. Yet, unless non-compli-

[1] Cfr. Many, *l. c.*, p. 353.

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ance must be tolerated in order to avoid greater evils, the law should be enforced.[2]

§ 2. *Catechumens,* or such as are preparing to embrace the Catholic faith, may be given ecclesiastical burial, if they have died without baptism through no fault of their own. For they are to be compared to baptized persons.[3] Thus if a would-be convert would die suddenly, with no priest at hand, as may happen in places which missionaries seldom visit, he could receive ecclesiastical burial.

§ 3 says that, although one may be baptized, he must be *deprived of ecclesiastical burial if he has been expressly declared worthy of that penalty in law.* For ecclesiastical burial is a sign of honor and respect given by the Church to her dead children, and a consolation and favor to the living. Denial of that favor must be looked upon as a *post mortem* penalty for the dead, and a warning to the living.

However, being a penalty, the denial of ecclesiastical burial must be strictly interpreted, and not extended beyond the cases stated in the law. These now follow.

TO WHOM ECCLESIASTICAL BURIAL MUST BE DENIED

CAN. 1240

§ 1. Ecclesiastica sepultura privantur, nisi ante mortem aliqua dederint poenitentiae signa:

1.° Notorii apostatae a christiana fide, aut sectae haereticae vel schismaticae aut sectae massonicae aliisve eiusdem generis societatibus notorie addicti;

2 S. O., Jan. 4, 1888, where n. 389 of Conc. Balt. II is explained as mere tolerance *ad praecavenda maiora mala;* S. O., March 30, 1859 (*Coll. P. F.*, n. 1173).

3 Cfr. c. 2, x, III, 43.

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2.° Excommunicati vel interdicti post sententiam condemnatoriam vel declaratoriam;

3.° Qui se ipsi occiderint deliberato consilio;

4.° Mortui in duello aut ex vulnere inde relato;

5.° Qui mandaverint suum corpus cremationi tradi;

6.° Alii peccatores publici et manifesti.

§ 2. Occurrente praedictis in casibus aliquo dubio, consulatur, si tempus sinat, Ordinarius; permanente dubio, cadaver sepulturae ecclesiasticae tradatur, ita tamen ut removeatur scandalum.

§ 1. Unless they have given signs of repentance before death, the following are deprived of ecclesiastical burial:

1.° *Notorious apostates from the Christian faith and persons who notoriously belonged to a heretical or schismatical sect, or to the Masonic sect, or to other societies of the same kind.*

The term *apostates* evidently includes pagans and Jews as well as infidels or unbelievers who have fallen away from the Christian faith and whose defection is notorious. A Catholic who was an unbeliever, but not known as such to others, because he kept his unbelief to himself, or expressed himself only to the one or other friend, who kept the secret, could be buried ecclesiastically. For notoriety implies public knowledge, or such as could not be concealed by any artifice.[4]

Heretics and schismatics are those who have pertinaciously forsaken the Catholic faith or abjured obedience to the Pope.[5] Heresy and schism, too, must be notorious to have the effect here under consideration. What was said of apostates applies also to heretics and schismatics.

4 Can. 2197, 30; Cfr. c. 12, x, III, 28.
5 Can. 1325, § 2.

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Thus a non-Catholic may be taken for a Catholic, because he acts like one, although he is not convinced of the truth of every Catholic dogma. Such a one might be given ecclesiastical burial, provided, of course, that his heresy was not notorious and he desired such a burial. The reason lies in the fact that by Baptism he belonged to the body of the Church, and in his mind may even have belonged to the soul of the Church.

The next class is that of members of *Masonic sects.* The adjective "*damnatae*" being omitted, it appears that *all* Masonic rites are included. *Eiusdem generis* means all societies whose principal purpose is to promote cremation,[6] or which have tendencies similar to those of Freemasonry.

What is to be done if the relatives or friends of such a person insist upon his receiving ecclesiastical burial? If the priest was called and found the patient unconscious or speechless, the relatives or friends must tell the priest that the sick man had desired to see a priest and gave signs of repentance.[7] Besides, the body of the deceased must not be carried into the Masonic hall or temple. If this was desired by the deceased himself, ecclesiastical burial must be denied, but if the Masons carry the coffin against the will of the defunct, ecclesiastical burial may be granted.[8]

2.° Persons *excommunicated and interdicted after a condemnatory or declaratory sentence.* The text requires that a sentence of excommunication or interdict has been pronounced. Whether this sentence be one declaring that the person had *de facto* incurred excommunication, or one directly inflicted by the ecclesiastical judge, is of no

6 S. O., Dec. 15, 1886 (*Coll. P. F.*, n. 1665).

7 S. O., Sept. 19, 1877 (*ibid.*, n. 1483).

8 S. O., Aug. 1, 1855 (*ibid.*, n. 1116).

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importance. It is also immaterial whether the *excommunicatus* be *vitandus* or only *tolerandus*. Stress, however, is laid on the sentence.[9] The *interdict* is here to be understood of the personal interdict, which requires a declaratory or condemnatory sentence and is generally accompanied by a personal sentence.[10]

3.° *Those who have deliberately killed themselves.* As a rule, says the Holy Office,[11] those who commit suicide from despair or in wrath (*desperatione vel iracundia*) cannot be given ecclesiastical burial. But when insanity has been proved, or was evident, and attested by the verdict of a conscientious physician, ecclesiastical sepulture is permitted with all its ceremonies. When there is a doubt as to the suicide's mental state, ecclesiastical burial may be granted, but all pomp and solemn exequies must be avoided. This would mean that the funeral service may be held from the church, but that the Requiem Mass should be omitted, as well as preaching, for this is certainly a species of "pomp." A private Mass may be said.

4.° *Those who died in a duel or from a wound received in a duel.* The term duel (*duellum, monomachia*) signifies a contest with deadly weapons which takes place by agreement between two persons on account of some private quarrel.[12] Hence our prize-fights, in which no deadly weapons are used, and bull-fights, cannot be styled duels. It is otherwise with the so-called "*Mensuren*" of students and officers, as practiced chiefly in Austria and Germany.[13] This "detestable custom," as it

9 "*Ad evitanda*," of Martin V, 1418, cannot be interpreted, as Many does (*l. c., p.* 354), so as to admit *tolerandi;* see can. 2259 f.

10 C. 1, Clem. III, 7.

11 S. O., May 16, 1866 (*Coll. P. F.*, n. 1290).

12 Cfr. *Cath. Encycl.*, V, 184 ff.

13 S. C. C., Aug. 9, 1890 (*Coll. P. F.*, n. 1739).

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is called by the Council of Trent and Benedict XIV,[14] was and still is wide-spread, especially in Teutonic countries, where it also had its origin in pagan times. The Church tried to eradicate this savage custom and inflicted severe penalties on the perpetrators.[15] One of these is precisely the denial of ecclesiastical burial.

Our text says that only those who died in the act of duelling, or from a wound received in a duel, are to be deprived of ecclesiastical burial. Benedict XIV, in a well-known Constitution, uses a similar expression: "*a decedente quoque extra conflictus locum ex vulnere ibidem accepto.*" Therefore a connection between cause and effect must be maintained. In other words, the wound received in a duel must be the cause of death. And it seems that a *direct* cause is required, for it may be that a wound received in a duel causes some other disease, after a time, and in this case we hardly believe that the penalty could be sustained.

5.° *Those who ordered their body to be cremated.* Of this enough has been said under can. 1203, § 2. Such persons must have retracted their order before death, otherwise they cannot receive ecclesiastical burial.

6.° *Other public and manifest sinners.* This phrase is rather wide, but may be contracted to a few categories in the light of former legislation. By sin must here be understood a *delictum publicum,* or crime, which is such intrinsically as well as in the eyes of sensible persons. To this class belong: (a) manifest and public *usurers and robbers,* unless they have made restitution;[16] public profiteers and bank or train robbers; (b) those who ac-

14 Sess. 25, c. 19, *de ref.*; Bened. XIV, "*Detestabilem,*" Nov. 10, 1752.

15 Cfr. cc. 1, 2, x, V, 13; Gregory XIII "*Ad tollendum,*" Dec. 5, 1582; Clement VIII, "*Illius vices,*" Aug. 17, 1592.

16 Cfr. cc. 3, 5, x, V, 19; c. 2, x, V, 17; c. 2, 6°, V, 5.

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tually *live a sinful and scandalous life, e. g.,* in public concubinage, or conduct a notoriously meretricious trade, or panderage;[17] (c) those who have *habitually violated the precepts of annual confession and communion.* As to the last-named class of persons the Roman Ritual[18] says that their fault must be evident, which means that they must have omitted their Easter duty for several years and be known to the faithful as having been guilty of serious neglect.[19]

Note that all the persons mentioned under n. 1–6 are deprived of ecclesiastical burial only if they *have given no signs of repentance.* If they have given such signs, they may be buried like faithful Catholics, because it is the desire of the Church that all should return to God's grace by contrition and be restored to communion with the mystic body of Christ.[20]

Signs of repentance would be kissing the crucifix, acts of devotion, oral prayers, etc. But these signs, especially in case of public sinners, must be known and divulged to the bystanders and the faithful. If this has been done, ecclesiastical burial may be given; but if possible, pomp and solemn exequies should be omitted.[21]

Benedict XIV excluded duellists from ecclesiastical burial, even when they had given certain signs of penance.[22] This too rigorous clause has been softened in our code, as is manifest from the position of the phrase, "*nisi ante mortem aliqua dederint signa poenitentiae.*"

§ 2. It may be in the six cases mentioned that the pastor has a doubt, for instance, concerning a suicide, or a wound received in a duel, whether it was the direct cause

17 Cfr. Many, *l. c.*, p. 361.
18 Tit. II, c. 2, n. 6; c. 12, x, V, 38.
19 Many, *l. c.*, p. 360.
20 S. O., Aug. 1, 1855 (*Coll. P. F.* n. 1116).
21 S. O., July 6, 1898 (*ibid.*, n. 2007).
22 "*Detestabilem,*" § 9.

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of death. If time permits, he should inform the Ordinary and abide by his decision.[23] If the doubt remains even after the pastor has been advised by the Ordinary, ecclesiastical burial may be granted, provided no scandal is given. Scandal may be removed by divulging the fact that the deceased gave public signs of repentance, or that, for instance, the suicide was committed in a moment of mental aberration according to the physician's verdict.

CAN. 1241

Excluso ab ecclesiastica sepultura deneganda quoque sunt tum quaelibet Missa exsequialis, etiam anniversaria, tum alia publica officia funebria.

For those who have been deprived of ecclesiastical burial no [public] Requiem Mass, no anniversary, or other public funeral service may be held.

We enclose the word "public" within brackets, but it no doubt expresses the intention of the legislator. For private Masses may be said for any of the persons mentioned under n. 1–6, provided there be no *communicatio in sacris*. Thus it has been decided that a private Mass may be said for one who ordered his body to be cremated.[24] In cases of doubt the Ordinary, who has to be consulted in the matter, may grant permission to have solemn funeral services if he deems it expedient.[25]

23 S. O., July 6, 1898 (*l. c.*); Sept. 19, 1877 (*l. c.*, n. 1483).

24 S. O., July 27, 1892 ad II (*Coll. P. F.*, n. 1808).

25 S. O., Sept. 19, 1877; Dec. 15, 1886; July 6, 1898 (*ibid*, nn. 1483, 1665, 2007).

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EXHUMATION OF CORPSES

CAN. 1242

Si fieri sine gravi incommodo queat, cadaver excommunicati vitandi qui, contra canonum statuta, sepulturam in loco sacro obtinuit, exhumandum est, servato praescripto can. 1214, § 1, et in loco profano de quo in can. 1212, reponendum.

If it can be done without great inconvenience, the body of an *excommunicatus vitandus,* who obtained burial in sacred ground against the law, should be exhumed, with the permission of the bishop,[26] and be buried in a lot especially assigned for that purpose.[27]

26 Can. 1214, § 1.
27 Can. 1212; see c. 12, x, III, 28.

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SECTION II

HOLY SEASONS

CAN. 1243

Tempora sacra sunt dies festi; iisque accensentur dies abstinentiae et ieiunii.

Holy seasons are feastdays; to them must be added days of abstinence and fast.

Already in remote antiquity civilized people found a call to the worship of God in the changing seasons. Sacred times and places are common to all religions. The change of seasons, bringing with it changes in nature, made a religious impression upon mankind. Man sanctified certain seasons and dedicated them to God. The days thus consecrated to God were known as festivals. They were marked by two features: rest from labor or worldly affairs, and consecration to the worship of God. The first was expressed in the ancient Roman term *feria.* Both ideas are contained in the Hebrew word *sabbath,* which means a day of rest and sanctification. The Church did not at first change the Sabbath of the Jewish calendar, at least we have no evidence thereof. But gradually the *prima sabbati* or first day of the Jewish week commenced to be held in honor as the day of the resurrection of Christ and was called the Lord's Day[1] (*dies dominica*). . Besides these weekly recurring festivals there were others to commemorate the chief events

1 Cfr. Apoc. 1, 10.

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in the life of the Lord. Among these in the order of time, Easter holds the first place. Gradually were developed all the feasts as we have them now, forming that rich and carefully thought out system of feasts which is proper to the Catholic Church.[2] The old Canon Law contains two lists of festivals, the one presenting the state of things in the twelfth,[3] the other that in the thirteenth century.[4] In the course of centuries the number of feasts increased, so much so, in fact that their multitude led to a reaction on the part not only of civil governments but also of bishops. Pope Urban VIII revised the list.[5] The present arrangement was made by Pius X.[6]

As to days of *fast and abstinence* it must be said that the fast before Easter seems to be the most ancient of all. But its duration varied according to localities. Some fasted one day, others two, and yet others many days, whilst some simply observed a fast of forty hours. The *forty days' fast* became the rule at Rome in the seventh century, and was soon adopted throughout the West, except at Milan. In the eighth and ninth centuries an increase took place in the number of fasting vigils, nearly all the feasts, especially those of the Apostles,[7] obtaining the dignity of a vigil. The *embertides* were said to be of Apostolic origin by Leo the Great, but there is no document testifying to the *feriae* observed as embertides earlier than the *Liber Pontificalis*.[8] There were originally three. In St. Leo's day four embertides were observed. The present arrangement was made by Gregory VII and is distinctly Roman.[9]

2 See Kellner, *Heortology* (Eng. tr.) 1918, Introduction.
3 C. 1, Dist. 3 *de cons.*
4 C. 5, X, II, 9 *de feriis.*
5 "*Universa,*" Sept. 13, 1642.
6 Motu proprio "*Supremi disciplinae,*" July 2, 1911.
7 Funk, *Manual of Church History,* 1913, Vol. I, pp. 74, 296 f.; II, 164.
8 *Liber Pontificalis,* ed. Duchesne, I, 141.
9 Kellner, *l. c.,* p. 183 ff.

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CAN. 1244

§ 1. Dies festos itemque dies abstinentiae et ieiunii, universae Ecclesiae communes, constituere, transferre, abolere, unius est supremae ecclesiasticae auctoritatis.

§ 2. Ordinarii locorum peculiares suis diœcesibus seu locis dies festos aut dies abstinentiae et ieiunii possunt, per modum tantum actus, indicere.

The *supreme authority of the Church* alone can establish, transfer, or abolish holydays as well as days of abstinence and fasting. This rule, as may be seen from the historical note, was impressed upon the Christian people ever since the Council of Trent.[10] Hence not even a chapter, be it cathedral or collegiate, can impose a holyday of obligation not observed by the Roman Church, whereas the feastdays appointed by the latter oblige everywhere,[11] unless, of course, otherwise provided. Nor can a synod or *conciliabulum* transfer movable feasts to a Sunday.[12]

But the *local Ordinaries* may, *per modum tantum actus* (i. e., for a transient reason and for the time being, but not forever or habitually), prescribe the observance of a feastday or of a day of fast and abstinence. Thus, for instance, the Ordinary is not entitled to establish the feast of the patron saint of the main or episcopal city as a holyday of obligation for the whole diocese.[13] Nor can the Ordinary make a feastday which is *ex voto* obligatory for an exempt religious community, *de praecepto* for them if the feast is not found in the list of feasts of obli-

10 Urban VIII, "*Universa*," Sept. 13, 1642, § 3 (*Dec. Auth.*, n. 812).

11 S. Rit. C., June 8, 1630 (n. 535).

12 *Prop. 74 damn. per "Auctorem fidei,"* Aug. 28, 1794 (Denzinger, n. 1437).

13 S. Rit. C., Aug. 18, 1725 (n. 2277).

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gation prescribed for the universal Church. Feasts which have been introduced by exempt religious by reason of a vow oblige only the persons bound by the latter.[14] Of course, since the vow of a community lasts as long as the community itself who made the vow, these feasts must be observed that long; as to later generations see can. 1310.

It may not be superfluous to add that our text mentions *local* Ordinaries, which term does not include religious superiors. The latter are, therefore, not entitled to impose a feastday upon their communities. The vow mentioned in the last paragraph concerns the community as such.

DISPENSATIONS

CAN. 1245

§ 1. Non solum Ordinarii locorum, sed etiam parochi, in casibus singularibus iustaque de causa, possunt subjectos sibi singulos fideles singulasve familias, etiam extra territorium, atque in suo territorio etiam peregrinos, a lege communi de observantia festorum itemque de observantia abstinentiae et ieiunii vel etiam utriusque dispensare.

§ 2. Ordinarii, ex causa peculiari magni populi concursus aut publicae valetudinis, possunt totam quoque dioecesim seu locum a ieiunio et ab abstinentia vel etiam ab utraque simul lege dispensare.

§ 3. In religione clericali exempta eandem dispensandi potestatem habent Superiores ad modum parochi, quod attinet ad personas, de quibus in can, 514, § 1.

§ 1. Not only the local *Ordinaries,* but also pastors, may in individual cases and for a just cause dispense their

14 S. Rit. C., June 23, 1703 (n. 2113).

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subjects from the common law of keeping feasts and from the observance of abstinence and fast, or from both fast and abstinence at the same time. Ordinaries could always dispense in certain circumstances and cases by law,[15] but the right of the pastor to dispense rested on custom [16] rather than on written law. Now it has become part of the general law. But in order to act licitly, they must observe the conditions laid down in this canon, which is partly a repetition of the old law.

a) They can dispense only in *individual cases* as they occur. Hence Ordinaries cannot issue synodal acts dispensing persons and families from the common law, or grant a habitual dispensation. Each case stands for itself and none can establish a precedent;[17] each must be examined like a physician makes his diagnosis.

b) They may dispense only *single individuals* and *single families subject* to their jurisdiction by reason either of domicile or quasi-domicile, or by actual residence in the territory over which their jurisdiction extends. Subjects by reason of domicile or quasi-domicile may make use of such a dispensation also outside of the territory of the grantor. But *peregrini* or transient residents are benefited by the dispensation only as long as they reside in the district of the grantor.

c) Finally there must be a *just reason* for dispensing, since every dispensation involves a violation of the common law. Such a cause would be sickness [18] and impossibility of obtaining abstinence food, although the higher cost of such was not deemed a sufficient reason by Benedict XIV.[19] The climate, the nature of one's work, and

15 Urban VIII, "*Universa*," § 3.

16 Cfr. Putzer, *Comment. in Facult. Apost.*, p. 36, n. 24.

17 *Reg. Iuris 28 in 6°*. This is called "*toties quoties opus fuerit concedenda*" by Bened. XIV, "*Non ambigimus*," May 30, 1741, § 3.

18 C. 2, X, III, 46.

19 "*Libentissime*," June 10, 1745, § 18.

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physical debility must be taken into consideration. The grantor himself is the judge of the sufficiency of the reasons advanced.[20]

§ 2. The Ordinaries may, because of a great concourse of people, or for reasons of public health, also dispense the *whole diocese* or any place therein from the law of fasting and abstinence, or from both combined. This liberal concession renders special faculties (not particular indults; see can. 1253) superfluous. What is meant by a *great concourse of people* has been authentically explained by the Holy Office.[21] It is not necessary that people from other towns or cities are present, but a multitude of inhabitants of the same city or town assembled for an occasion suffices. Of course, the occasion should be Catholic and religious, for instance, a centenary, a pilgrimage, a large meeting of Catholic societies, etc. As our county and State fairs offer a serious occasion for violating the law of fast and abstinence, such a one would constitute a sufficient reason for dispensing the participants. Our Code is not against this authentic interpretation, for it simply says: a great concourse of people. The danger of violating the law must be general, which is often the case on great festivals.

We may add that another decision of the Holy Office[22] requires for a dispensation from the law of abstinence on a holyday proper, that the abstinence be anticipated. The Code is silent about anticipation, and therefore this rule may be considered as abolished. It was, in fact, already abrogated by decree of the S. C. C., which directed the Ordinaries to make ample use of dispensation for the

20 S. C. P. F., Aug. 2, 1781 (*Coll.*, n. 548).

21 S. O., March 28, 1896 (*Coll., P. F.*, n. 1922).

22 S. O., Dec. 5, 1894 (*ibid.*, n. 1884), where *nundinae* (fairs), are especially mentioned.

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holydays suppressed by Pius X, without mentioning anticipation at all.[23]

The other reason mentioned in § 2 of can. 1245 is the *public health.* An example which recalls the influenza is given by Benedict XIV in his Constitution "*Libentissime.*" The disease, to justify a dispensation, must affect the people or territory, not merely a few individuals, in other words, it must be epidemic, as is explained in the same Constitution. Benedict XIV requires the testimony of physicians to verify the existence of an epidemic. The local or State Board of Health would be the proper adviser in our country.[24]

Note that these are the only two general cases in which the Ordinaries may grant a general dispensation: a great concourse of people and reasons of public health. Beyond those they should not stretch the power now granted to them by the common law, which was formerly given only in the form of a "faculty" with the significant clause: "*non tamen per generale indultum, sed in casibus particularibus.*"[25] The Code has removed this restriction, but, as stated above, only for two general reasons, which cannot be extended at random.

It may be asked: *How far does the power of dispensing* in individual as well as in general cases *extend?* Benedict XIV, in three Constitutions,[26] drew certain limits, to wit, (a) that only one full meal of flesh meat could be taken a day; (b) that no mixing of meat and fish was permitted; (c) that the meal hours be not inverted, e. g., dinner substituted for supper or lunch and

23 May 3, 1912 (*A. Ap. S.*, IV, 341).

24 June 10, 1745, § 23; *inflammatio pectoris*, which was raging in 1730, 1733, 1740.

25 S. O., March 17, 1883 (*Coll. P. F.*, n. 1594); Facult. I, art. 27 (Putzer, *l. c.*, p. 292, n. 169).

26 "*Non ambigimus,*" May 30, 1741; "*In suprema,*" Aug. 22, 1741; "*Libentissime,*" June 10, 1745.

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vice versa. Restrictions (b) and (c) are certainly removed by can. 1251, § 2. But how about the *unica comestio,* upon which Benedict XIV insisted so emphatically? The difficulty may be solved, not by recourse to special faculties, which have ceased *in foro externo* since the decree of April 25, 1918, but by interpretation. The Code grants the ordinaries power to dispense from both fasting and abstinence. Hence the petitioner must clearly state the extent of his demand, and if the grantor fulfils his wishes to their full extent, there can be no doubt that the petitioner may eat fleshmeat more than once a day. Everything, therefore, depends upon the tenor of the dispensation. The grantor can restrict the use of flesh meat to one meal a day; see can. 1251.

§ 3. *Religious superiors of exempt clerical institutes enjoy the same powers as pastors with regard to all the persons mentioned in can. 514, §1.* A difficulty may perhaps arise from can. 1253, which says that by these canons nothing is changed in the constitutions and rules of the various religious organizations. Elsewhere [27] we have stated that exempt superiors may dispense the whole community from fasting and abstinence. This statement must be restricted to the days prescribed by the rule or constitutions, since the religious superior of exempt institutes can dispense only *ad modum parochi, i. e.,* like a pastor, and a pastor can dispense only single individuals and families. Hence the superior cannot dispense the whole community as such from the duty of fasting or abstinence as prescribed by the common law. However, provided no vow is involved, we believe that the exempt superiors may, in urgent cases, unless the constitutions expressly forbid it, dispense the whole community by

27 Vol. III, p. 300, of this Commentary.

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virtue of § 2, can. 1245, for reasons of public health. For the text simply says "ordinaries," and this term includes the exempt religious superiors. The diocesan Ordinary could not grant that dispensation to exempt religious by reason of exemption, and why exempt religious should be worse off in such extraordinary circumstances than other people is not easily intelligible. *Religious* who are employed *in the missions,* even as prefects apostolic, and are entitled to dispense their subjects from the law of fasting and abstinence, must apply to their superiors for a dispensation.[28] However, this applies only to exempt religious; for non-exempt religious, as well as exempt religious belonging to lay institutes, the competent superior is the local Ordinary. Besides, it is evident that exempt religious who are vicars apostolic or bishops, are not bound to apply to their religious superiors for dispensation. To do so would contravene can. 627, § 2, and be unworthy of their rank. But the rule applies to exempt religious who are pastors or assistants (curates), who, therefore, must have recourse to their superiors, either local or higher, according to the constitutions, in order to obtain a dispensation from fasting and abstinence which they themselves need, though, as pastors, they may by law dispense single individuals or families without having recourse to their superiors.

RECKONING OF FEASTS AND FAST DAYS

CAN. 1246

Supputatio diei festi, itemque diei abstinentiae et ieiunii, facienda est a media nocte usque ad mediam noctem, salvo praescripto can. 923.

28 S. O., April 12, 1742 (*Coll. P. F.*, n. 337).

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Feastdays as well as the days of fasting and abstinence run from midnight to midnight, *i. e.*, twenty-four hours, counting from midnight to twelve o'clock of the following night, according to the time in vogue at the time of celebration. If the new time has been adopted, this is to be followed; if the old time was retained, it may be taken as standard. The time for gaining indulgences is regulated in can. 923.

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TITLE XIII

HOLY-DAYS

CAN. 1247

§ 1. Dies festi sub praecepto in universa Ecclesia sunt tantum: Omnes et singuli dies dominici, festa Nativitatis, Circumcisionis, Epiphaniae, Ascensionis et sanctissimi Corporis Christi, Immaculatae Conceptionis et Assumptionis Almae Genitricis Dei Mariae, sancti Ioseph eius sponsi, Beatorum Petri et Pauli Apostolorum, Omnium denique Sanctorum.

§ 2. Ecclesiastico praecepto dies festi Patronorum non subiacent; locorum autem Ordinarii possunt sollemnitatem exteriorem transferre ad dominicam proxime sequentem.

§ 3. Sicubi aliquod festum ex enumeratis legitime sit abolitum vel translatum, nihil inconsulta Sede Apostolica innovetur.

§ 1. *Feastdays of obligation for the universal Church are:* All Sundays; Christmas (Dec. 25th); the Circumcision of our Lord (New Year's Day, Jan. 1st); Epiphany (Jan. 6th); the Ascension of Our Lord; Corpus Christi (Thursday after Trinity Sunday); the Immaculate Conception of the B. V. M. (Dec. 8th); the Assumption of the B. V. M. (Aug. 15th); St. Joseph's day (March 19th); the festival of SS. Peter and Paul (June 29th), and All Saints' Day (Nov. 1st).

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The holy-days of obligation for the universal Church, therefore, are ten in number, and no Ordinary or religious community may introduce others with equal obligation for all the faithful.

Hence § 2 provides that the patron feast of a diocese, or city, or town does not oblige by ecclesiastical precept, though the Ordinaries may transfer the external celebration of the same to the following Sunday.

The custom of calling a church after a saint, or dedicating it to his honor, grew out of the old *martyria*. The faithful were wont to observe the feast of a prominent martyr as a general festival, whether it fell on a weekday or on a Sunday. In the ninth century diocesan statutes command this celebration. But the obligation of celebrating the festivals of patron saints was not imposed by the decretal of Gregory IX. Urban VIII, in his Constitution "*Universa,*" of Sept. 13, 1642, directed that the feast of the principal patron of every kingdom, province, city or town be observed as a holyday of obligation. The people at large were not pleased with the sweeping innovation caused by the French revolution, and consoled themselves by transferring the abrogated holydays to the following Sunday.[1] This transfer is permitted by the Code as far as the external celebration is concerned; the *officium chori* must be celebrated on the proper or occurring day, but the *officium fori,* or the celebration with solemn Mass and ceremonies, decoration of the Saint's picture, etc., may be transferred to a Sunday.

§ 3. If any of the above named (ten) holydays (of obligation) has been anywhere abolished or transferred, nothing shall be changed without the advice of the Apostolic See.

1 See Kellner, *Heortology,* p. 194 ff.

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In the United States, under a decree of the S. C. Propaganda Fide of Nov. 25, 1885, there are *six* holydays of obligation, namely, the feast of the Immaculate Conception, Christmas, New Year's Day (the Circumcision), the Ascension, the Assumption of the B. V. M., and All Saints' Day.[2]

In *Canada* the provincial council of Quebec (1854) asked for an arrangement of feasts similar to that made for the United States. The S. Congregation answered affirmatively, but commanded to retain the feast of the Epiphany and to omit the Assumption.[3] Hence they, too, have six holydays of obligation; but instead of the Assumption they observe Epiphany.

On the islands of *Trinidad* and *Dominica* (dioceses of Port of Spain and Roseau, or Charlottetown) the feasts of the Assumption and of SS. Peter and Paul are transferred to the following Sunday, but the office and ceremonies must be held on the day proper.[4]

These examples may suffice to interpret the meaning of § 3, can. 1247.

OBLIGATIONS CONNECTED WITH HOLYDAYS

CAN. 1248

Festis de praecepto diebus Missa audienda est; et abstinendum ab operibus servilibus, actibus forensibus, itemque, nisi aliud ferant legitimae consuetudines aut peculiaria indulta, publico mercatu, nundinis, aliisque emptionibus et venditionibus.

2 Cfr. *Acta et Decreta Conc. Balt. III*, 1886, p. CV f.

3 S. C. P. F., May 25, 1855 (*Coll. Lac.*, III, 614, 664).

4 S. C. P. F., March 1, 1868 (*Coll. Lac.*, III, 1112, 1116). Regarding other English-speaking countries, Great Britain, Ireland, etc., we could find nothing special.

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As stated in the historical note, every holyday of obligation is a day of rest and worship. Hence on these days *Mass must be heard.* This obligation obliges all the faithful of the Latin Church and the inhabitants of China and other missionary countries under the S. C. P. F.[5] The obligation is grievous, binding under mortal sin. One does not comply with this precept by hearing two or even four parts of Masses said simultaneously by different priests.[6] It may not be amiss to set forth here what the S. C. P. F. answered the Vicar Apostolic of Ueskub in Servia; for it has a general bearing. Not only distance, but also the condition of roads, as well as age, sex, and mental attitude of the faithful must be taken into consideration where there is question of excusing them from the obligation of attending Mass on holydays of obligation. If going to church would cause a great inconvenience, one may be freed from the duty; but if the distance is not great, or the fatigue would be but small, the obligation does not cease.[7] The decision refers to the theories of the moralists, who may therefore be consulted.[8]

The second obligation is to *abstain from servile work,* including all kinds of forensic acts (unless lawful custom or a particular indult permits them), the holding of public markets, fairs, sales, etc. *Servile works* are such as are performed by the bodily faculties and destined chiefly for the use and support of the body. Some think that the element of slavery or drudgery might have been added.[9] But now-a-days there is no reason why this ele-

5 S. O., March 23, 1656 ad 1; Nov. 13, 1669; S. C. P. F., Sept. 12, 1645 (*Coll.*, nn. 126, 189, 114).

6 S. O., propp. 52, 53 damn., March 4, 1679 (Denzinger, n. 1069 f.).

7 S. C. P. F., Sept. 26, 1840, dub. 16 (*Coll.*, n. 914).

8 See Sabetti-Barrett, *Theol. Moralis*, ed. 27a, 1919, p. 240, n. 240 ff.

9 Thus most moralists (see Sabetti-Barrett, *l. c.*, n. 252, p. 248). The ancient Roman idea that such menial labors were performed only by slaves had its influence upon theologians.

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ment should be introduced into the definition of servile work. Farm work, such as ploughing, planting, harvesting, is certainly servile; but a farmer would object to being called a slave or mercenary. The same is true of professional labors.

Forensic acts are all trials held in civil as well as criminal (even ecclesiastical) courts and the routine business of administration conducted therein. Extraordinary and urgent acts of administration may be excepted. The term *forensic,* at least in ecclesiastical language, also includes military operations.[10] This does not mean that the cleaning of barracks and polishing of arms or an hour of gymnastic exercise could not be permitted or at least tolerated. *Public markets and fairs* or sales, for instance, of stock or produce, are not allowed by the civil law in our country, and a check issued on a Sunday is invalid. Benedict XIV had to deal chiefly with Italians, who were and still are wont to hold fairs (*fiere*) on holydays. These fairs were more leniently dealt with than public markets, which the Pope forbade.[11] Hence the clause: "unless lawful custom and special indults permit." There is nothing in the text which would forbid *baseball or athletic games or sports.* Neither can the Constitution of Benedict XIV be invoked against them,[12] for it forbids such games and plays — our "movie" shows would perhaps deserve a severer censure[13] for the reason of indecency and lasciviousness. Athletic games, if properly conducted, *i. e.,* with due regard to Christian modesty, belong rather to the liberal arts and cannot be condemned. The S. Congregation has instructed missionaries to be

10 S. C. EE. et RR., Dec. 14, 1674 (Bizzarri, *l. c.,* p. 272): "*militaribus praesidiis aliisque forensibus.*"

11 "*Paternae charitatis,*" Aug. 24, 1744; "*Ab eo tempore,*" Nov. 5, 1745.

12 "*Nihil profecto,*" Aug. 12, 1742.

13 See Koch-Preuss, *Moral Theology,* Vol. III, St. Louis, 1919, pp. 52 sqq.

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more lenient towards servants and bakers who have to work on holydays and therefore can not assist at Mass.[14] Equal leniency is admissible for workingmen engaged in the service of public utilities, such as railroads, fire departments, light, power, and heat plants, etc.[15]

WHERE MASS MAY BE HEARD

CAN. 1249

Legi de audiendo Sacro satisfacit qui Missae adest quocunque catholico ritu celebretur sub dio aut in quacunque ecclesia vel oratorio publico aut semi-publico et in privatis coemeteriorum aediculis de quibus in can. 1190, non vero in aliis oratoriis privatis, nisi hoc privilegium a Sede Apostolica concessum fuerit.

The law of hearing Mass may be complied with by attending a Mass said in any Catholic rite (Latin, Greek, Syriac, Coptic, or Armenian). Hence Ordinaries or priests are not allowed to forbid the faithful to frequent a church of another rite, although they may exhort them to come to their own church, especially on holydays.[16] One restriction, or rather natural condition, must, however, be added. The law requires that Mass be *heard*. If a Catholic of the Latin rite would enter a Greek Church, not knowing what kind of celebration or function he was attending, he certainly could *not* be said to hear Mass, although we readily admit that external attention only is required.

The second clause of our canon states that one may

14 There is a great deal of servile work connected with running machines which require constant attention. There is, from this point of view, more excuse for a decent theatre than for the psychologically, physiologically and morally objectionable "movies."

15 S. C. P. F., Sept. 26, 1840, *ad dub.* 15 (*Coll.*, n. 914).

16 S. C. P. F., April 30, 1862, ad 1 (*Coll.*, n. 1228).

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hear Mass in the *open air, or in a church or a public or semi-public oratory.* In such oratories, according to our Code,[17] all ecclesiastical functions may be held. One may also hear Mass and fulfill the obligation in a *private cemetery chapel,* as described in can. 1190.

Domestic or *private chapels erected with an indult of the Apostolic See* are only for the benefit of the grantee and those mentioned in the indult, as explained under can. 1195, and hence others do not comply with the law by hearing Mass in them.

As to *chapels on ships or vessels,* the S. Congregation has decided that these must have a fixed or permanent place, *i. e.,* they must be dedicated for the purpose of divine worship, and form, as it were, a special and separate compartment for that sole purpose, as long as the vessel lasts. If this is the case, the chapel is to be considered a public oratory, and all who assist at Mass therein, even while the ship is in port, comply with the precept of hearing Mass. If the chapel has no permanent place, it is to be regarded as a portable altar.[18]

17 See can. 1191, § 2; can. 1193.

18 S. Rit. C., March 4, 1901; May 10, 1901 (n. 4069); Many, *l. c.,* p. 132.

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TITLE XIV

ABSTINENCE AND FASTING

THE LAW OF ABSTINENCE

CAN. 1250

Abstinentiae lex vetat carne iureque ex carne vesci, non autem ovis, lacticiniis et quibuslibet condimentis etiam ex adipe animalium.

The law of *abstinence* forbids the eating of flesh meat and broth or soup made of meat; but it does not forbid eggs, *lacticinia,* and seasoning with fat of animals. The new law here is milder than the old, for *lacticinia* were not always permitted by the Church, as may be seen from some Constitutions of Benedict XIV.[1] The term *lacticinia* includes everything that is produced from milk, as well as the milk itself,— cheese, butter, margarine, etc. These, therefore, may be used even on days of abstinence.[2] *Fat of animals* was defined as the fat, grease, or lard of any animal, not only of hogs.[3]

THE LAW OF FASTING

CAN. 1251

§ 1. Lex ieiunii praescribit ut nonnisi unica per diem comestio fiat; sed non vetat aliquid cibi mane et

1 "*Non ambigimus*"; "*In suprema*"; "*Libentissme.*" Cooking with oil only was permitted.

2 S. O., May 13, 1896; Sept. 1899 (*Coll. P. F.*, nn. 1928, 2067).

3 S. O., May 1, 1889 (*ibid.*, n. 1704).

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vespere sumere, servata tamen circa ciborum quantitatem probata locorum consuetudine.

§ 2. Nec vetitum est carnes ac pisces in eadem refectione permiscere; nec serotinam refectionem cum prandio permutare.

The law of fasting permits *only one full meal a day,* but it does not forbid the taking of some food for breakfast and supper.

The quantity and quality of this repast is left to local custom. Care must be taken that one does not take "something" between meals too often on days of fast, as this might eventually constitute a considerable quantity or amount almost to a full meal.[4]

Those who are not obliged to fast on the days prescribed, and have received either a general or a particular indult to eat meat, may eat flesh meat every time they take a meal.[5] Thus aged or sickly persons or laborers, who are dispensed from observing the fast, may eat flesh meat three times or oftener a day. This, too, is a modification of former papal constitutions.[6] Besides, the S. Penitentiary has decided that if the head of the family (*pater familias*) is dispensed from the law of abstinence, all members of the family subject to him (*quae sunt in potestate patris familias*) may also eat flesh meat. However, those who are bound to fast may use flesh meat only once a day, at the principal or full meal.[7] If a son or daughter, or other member of the family is lawfully dispensed from abstinence on account of sickness, the head of the family may extend that favor to the other members, under the same condition as stated above, *viz.*,

4 S. O., prop. 29 damn. March 18, 1666 (Denzinger, n. 1000).

5 S. Poenit., Feb. 24, 1819; March 16, 1882 (*Coll. P. F.*, nn. 734, 1569).

6 Especially of those of Benedict XIV, quoted above.

7 S. Poenit., Jan. 10, Jan. 16, 1834 (*Coll. P. F.*, n. 832).

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that flesh meat may be used only once a day by those who are otherwise obliged to fast.[8]

Another mitigation of the law of fasting is here generalized: Flesh meat and fish may be taken at the same meal, and dinner and supper may be interchanged. Thus, for instance, if one, because of his studies, or for any other reason, should prefer to take lunch at about 10 or 11 o'clock, and dinner at 5, there could be no reasonable objection.[9] Note also canon 1252.

DAYS OF ABSTINENCE AND FASTING

CAN. 1252

§ 1. Lex solius abstinentiae servanda est singulis sextis feriis.

§ 2. Lex abstinentiae simul et ieiunii servanda est feria quarta Cinerum, feriis sextis et sabbatis Quadragesimae et feriis Quatuor Temporum, pervigiliis Pentecostes, Deiparae in caelum assumptae, Omnium Sanctorum et Nativitatis Domini.

§ 3. Lex solius ieiunii servanda est reliquis omnibus Quadragesimae diebus.

§ 4. Diebus dominicis vel festis de praecepto lex abstinentiae, vel abstinentiae et ieiunii, vel ieiunii tantum cessat, nec pervigilia anticipantur; item cessat Sabbato Sancto post meridiem.

§ 1. The law of *abstinence only* must be observed on all Fridays.

§ 2. The law of *abstinence and fasting* must be observed on Ash Wednesday, on the Fridays and Saturdays

8 *Ibid.*; the reason why this favor may be used is not the indult, but the physical inability of the *filii familias* to procure other food.

9 S. O., July 29, 1859; Sept. 17, 1862 (*Coll. P. F.*, un. 1146, 1230); cfr. *Eccl. Review*, 1920, Vol. 62, p. 309 f.

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of Lent, on the emberdays, on the vigils of Pentecost, the Assumption, All Saints' Day, and Christmas.

§ 3. The law of *fasting only* must be observed on all other days of Lent.

§ 4. On Sundays and holydays of obligation (except holydays in Lent) the laws of fasting and abstinence do not bind; nor must vigils of holydays of obligation, which fall on a Sunday, be observed on the preceding day. Thus if the feast of the Assumption or All Saints or Christmas should fall on a Monday, the vigil need not be observed on the preceding Saturday or Sunday. Not on Saturday, because, as the text says, "*nec pervigilia anticipantur*"; not on Sunday, because there is no fast. Only holydays of obligation are thus favored.

The Lenten fast and abstinence cease at noon on Holy Saturday, that is to say, at 12 o'clock.

PARTICULAR LAWS

CAN. 1253

His canonibus nihil immutatur de indultis particularibus, de votis cuiuslibet personae physicae vel moralis, de constitutionibus ac regulis cuiusvis religionis vel instituti approbati sive virorum sive mulierum in communi viventium etiam sine votis.

These canons leave unchanged particular indults, the vows relating to fasting and abstinence made by individuals or corporations, and the constitutions and rules of approved orders or congregations of religious, male as well as female, and of those who live in common without vows.

I. As regards *particular indults of the Apostolic See*, it must first of all be observed that the decree of the S. C. Consistorialis of April 25, 1918, cannot simply be applied

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to particular indults, because it refers to habitual faculties of Ordinaries granted for the external forum. Indults are not identical with faculties, as the latter comprehend various kinds of concessions or favors, whilst indults are given for specific purposes, generally designated very minutely, and to individual persons. It must, however, be admitted that these two terms are frequently employed synonymously. But there is a more stringent reason: it would be absurd to hold that the S. Congregation would nullify a canon without as much as specifying it in its decree. Canon 1253 distinctly maintains and upholds particular indults. The adjective *particular* must be explained according to the significance of a particular law, which implies local or provincial legislation, or such as differs from universal legislation. Hence a particular indult may affect a diocese or province, or even a nation, in contradistinction to the whole Church. These considerations premised, the following indults may concern the United States.[10]

1. The indult of July 25, 1858, which permits the eating of flesh meat on Saturdays when the law of fasting does not oblige. This indult is out of date,[11] for these Saturdays are now abolished by general law, and unless a vow is in the way, they need not be observed.

2. The indult granting the use of flesh meat on *Wednesdays of Advent,* given Sept. 2, 1837, is partly out of date,[12] for the law of abstinence no longer obliges in Advent, except on Wednesday of embertide. However, since the S. C. P. F. granted permission to use flesh meat on all Wednesdays of Advent, including the Wednesday

10 Concerning Great Britain we were unable to find any particular indults.

11 *Coll. Lac.*, III, 17; it ceases also for the province of St. Louis (*ibid.*, III, 319, 321).

12 *Coll. Lac.*, III, 61.

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of the emberdays, we believe that this part of the indult still holds. But as this day is not included in the indult of Aug. 3, 1887, given by the Holy Office [13] and ratified by Leo XIII, it would seem to follow that the latter must be considered binding, especially since Saturday was accepted as exempt from abstinence.

3. The indult of Aug. 3, 1887, granted by the Holy Office reads: (a) The use of flesh meat, eggs, and *lacticinia* is allowed on every Sunday of Lent, at every meal, and on every Monday, Tuesday, Thursday, and Saturday of Lent at the principal meal, except on the Saturdays of Ember week and Holy Week. There is added a clause forbidding the promiscuous use of meat and fish; this clause is now abolished by can. 1251, § 2. (b) *Lacticinia* and eggs are permitted on every day of Lent on which no flesh meat is allowed at the main meal and lunch (supper). (c) Some bread may be taken, together with coffee, tea or chocolate. (d) Where the principal meal cannot be taken at noon, the order of lunch and dinner may be inverted. For this no indult is now needed. (e) Lard or fat may be used for cooking. No indult required. (f) Those exempt from the law of fasting may eat flesh meat, eggs, and *lacticinia* several times a day on all days on which their use is permitted to all the faithful (as on the Sundays of Lent).

This indult was given for ten years, and express mention of it must be made each year in the Lenten regulations. We suppose it has been renewed, and thus remains in force. Of practical value are only points (a) and (f), and the latter only *ad quietem conscientiae*. Under this indult in Lent the Wednesdays are observed instead of the Saturdays, with the exception of Ember week and

13 Cfr. Putzer, *Comment. in Fac. Ap.*, p. 295.

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Holy Week, when Wednesday, Friday, and Saturday must be observed as days of abstinence.

One more remark: the indult of Aug. 3, 1887, in the very beginning mentions the fact that the favors it grants are intended for *Lent only*. What then of the other Ember days? Must all three days of the other three Ember weeks be kept? Custom, we are told,[14] has extended this favor to all the other fast days. But certainly not by virtue of the indult; for although we are allowed to interpret favors broadly, we have no right to extend a favor beyond the tenor of the indult by which it is granted.[15] We do not deny the force of custom in the matter, nor are we obstinately bent on enforcing the "magro." Since even the last Plenary Council of Baltimore (n. 1112) had to confess that uniformity in the discipline of fasting was impossible, we fear that the conditions of custom are verified. Recourse to the Holy See would certainly be safer.

4. The indult granted by Pius IX to *our soldiers and sailors* is still in force. In virtue of this indult they are obliged to abstain from flesh meat only on six days of the year: Ash Wednesday, the three last days of Holy Week (or now rather only Good Friday and Holy Saturday to twelve o'clock), on the vigils of the Assumption and of Christmas. This favor is granted to all who are in active service, but not when they are on leave of absence. The families who eat with these soldiers at the same table, enjoy the same favor. The special faculties granted to our army bishop were given only for the time of war.

II. *Vows* are not affected by these canons. The Minims have a special vow of perpetual abstinence. A municipality or government may vow to observe the fast

14 Putzer, *l. c.*, p. 297, according to Konings and Kenrick.
15 *Ibid.*

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or abstinence on a certain day, for instance, on account of an epidemic or earthquake.[16]

III. The *constitutions and rules* of religious institutes may prescribe days of fasting and abstinence besides those appointed in the Code. If nothing specific is determined on this head, the members are allowed to observe the days mentioned in can. 1252. Besides, the superiors may grant dispensations, as far as can. 1245, § 3, permits, and provided the constitutions do not forbid. A declaration of the S. C. Rel., of Sept. 1, 1912, says: The mitigations and dispensations of fasting and abstinence prescribed by the general law of the Church also benefit religious, but fasts and abstinence prescribed by their rule and constitutions are not mitigated by a general indult or law, unless such indult or law expressly includes religious. Our Code emphatically states that the approved rules and constitutions of religious institutes are *not* changed by the general law. Those religious, therefore, who do not observe their peculiar laws concerning fasting and abstinence transgress their rule, but not the law of the Church, and therefore are liable to punishment only in so far as their constitutions declare them guilty and punishable.[17] Most constitutions do not bind under pain of sin.

WHO IS OBLIGED TO FAST AND ABSTAIN

CAN. 1254

§ 1. Abstinentiae lege tenentur omnes qui septimum aetatis annum expleverint.

§ 2. Lege ieiunii adstringuntur omnes ab expleto vicesimo primo aetatis anno ad inceptum sexagesimum.

16 See can. 1310.

17 *A. Ap. S.*, IV, 626 f.

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The law of *abstinence* binds all who have completed the seventh year of age. This law obliges even on the vigils of suppressed feasts if these vigils were observed by reason of a particular precept or vow.[18]

The law of *fasting* obliges all Catholics from the twenty-first year of age, completed, until the beginning of the sixtieth year. The general tenor of this law, from which no one in the Latin Church is exempt, was explained above.[19] Here two condemned propositions may be mentioned: (1) All officials employed by the State in physical labor are excused from the law of fasting, nor is it necessary to be morally certainly whether fasting and work are compatible. (2) All those riding on horseback, whether the journey be necessary or not, even if it lasts only one day, are absolutely excused from fasting.[20]

Concerning working men, professional men, builders, servants, etc., employed by non-Catholics or lax Catholics, the Holy Office has decreed that they may eat meat on forbidden days, provided it is not purposely served to spite the Catholic Church, and provided also they can find no other employment.[21] For the rest the moralists should be consulted.

18 S. C. C., Sept. 18, 1911 (*A. Ap. S.*, III, 480); see can. 1310.

19 See S. O., March 23, 1656; S. C. P. F., Sept. 12, 1645 (*Coll.*, nn. 126, 114).

20 Propp. 30, 31 damn. March 18, 1666 (Denzinger, n. 1001 f.).

21 S. O., May 27, 1671; Dec. 14, 1482 (*Coll. P. F.*, nn. 195, 960).

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PART III

DIVINE WORSHIP

Divine worship is an essential feature of the Church, originating in the relation of the creature to the Creator. Foremost, of course, in this worship is God himself. But as the Second Person of the Blessed Trinity is, as it were, more closely connected with the Church, in whose temples He dwells, the Blessed Eucharist and all that is related to it deserves closer consideration. Around the Divinity there clusters a crown of Saints, to whom men pay homage. Hence a special section of the Code is devoted to the worship of the Saints. The worship of God being the outcome of the virtue of religion, may show itself in external acts, and the same is true of the veneration of the saints. Hence mention is made of processions. Lastly, man may bind himself more immediately to the worship of God by vows and the solemn invocation of the Divine Name.

The Code deals with Divine Worship logically after treating of sacred places and seasons, because these latter form the setting or frame of the interior picture, or, as we might say, the *continens* of the *contentum*. We must again remind the reader that dogmatic exposition is not the purpose of these canons, although they offer matter for lengthy elucidation.

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CAN. 1255

§ 1. Sanctissimae Trinitati, singulis eiusdem Personis, Christo Domino, etiam sub speciebus sacramentalibus, debetur cultus latriae; Beatae Mariae Virgini cultus hyperduliae; aliis cum Christo in caelo regnantibus cultus duliae.

§ 2. Sacris quoque reliquiis atque imaginibus veneratio et cultus debetur relativus personae ad quam reliquiae imaginesque referuntur.

§ 1. To the Blessed Trinity as well as to each of the three Persons, to Christ our Lord, also under the sacramental species, is due the cult of *latria;* to the Blessed Virgin Mary, the cult of *hyperdulia;* to the other Saints reigning with Christ in heaven, the cult of *dulia.*

Latria, from the Greek word λατρεύω, means service, worship; *dulia,* from δουλεία, also signifies service. From this it may be seen that the original etymology hardly indicates an essential distinction between the two terms. It was the theologians who introduced this well-known distinction.

The difference between *dulia* (including *hyperdulia*) and *latria* is as vast as the gulf that separates the creature from its Creator. The relation between *dulia* and *latria,* like that between creature and Creator, is purely analogical. Their formal objects are separate and distinct. The formal object of *latria* is the *virtus religionis,* or virtue of religion, which is based upon justice; that of *dulia* the *virtus observantiae,* as St. Thomas says.[1] This distinction is sufficient to disprove the odious charge, sometimes made against Catholics, that they *adore* the Virgin Mary and the Saints. Of its very nature the

1 *Summa Theol.,* II–II, q. 102 sq.

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worship we give to the Saints has nothing in common with idolatry.[2]

§ 2. To the sacred *relics and images* a relative veneration and worship are due, in as far as these relics and images refer to persons. The *dulia* which we exhibit to the person of a Saint is absolute, in contradistinction to the merely relative worship which we give to relics and images. Another essential difference is that relics and images, being inanimate objects, may be venerated but not invoked. "Honor or reverence," says St. Thomas, "is due solely to rational creatures; those devoid of reason can be honored or reverenced only with respect to some rational nature."[3] Thus it would not be impious or unlawful to venerate the image of God the Father seated on a throne, which may be placed in a Christian temple.[4] For the veneration or worship is exhibited not to the image as such — this would be sheer idolatry or fetichism — but to the Sacred Person of God the Father.

Here a few rules may be given concerning the veneration of the Holy Cross and other instruments of the Passion and death of our Lord. If a relic of the *true Cross* is exposed publicly and in a visible or perceptible way, a genuflection on one knee is made *in accessu et recessu,* as often as the faithful or clergy pass by the middle of the altar. The priest who incenses the sacred relics also makes the genuflection on one knee, but incenses it standing. If the sacred relic is hidden in a tabernacle or custody, the head is bowed.[5] Sacred *thorns* receive the same signs of veneration as relics of the Holy Cross.[6]

2 Pohle-Preuss, *Mariology,* 1914, p. 140.

3 *Summa Theol.,* III, q. 25, art. 4; Pohle-Preuss, *l. c.,* p. 141.

4 Prop. 25 damn., Dec. 7, 1690 (Denzinger, n. 1182).

5 S. Rit. C., May 7, 1846; March 29, 1869; May 23, 1835 (nn. 2391, 3201, 2722).

6 S. Rit. C., Sept. 7, 1897 (n. 3966).

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Before the *Crucifix* (without relics of the Holy Cross) a bow is sufficient (*inclinatio profunda*), but from the *adoratio crucis* on Good Friday to the None of Holy Saturday, inclusively, a genuflection on one knee is made.[7] To *sacred linens* miraculously soaked with the species of the sacred blood, the same signs of veneration are paid as to the relics of the true Cross, and to the same extent.[8] The image of the *Infant Jesus* (Bambin' Gesu), exposed on the main altar during Christmas time, is incensed like the Cross.[9]

PUBLIC AND PRIVATE WORSHIP

CAN. 1256

Cultus, si deferatur nomine Ecclesiae a personis legitime ad hoc deputatis et per actus ex Ecclesiae institutione Deo, Sanctis ac Beatis tantum exhibendos, dicitur *publicus;* sin minus, *privatus.*

Worship exhibited to God, the Saints, and the Blessed Virgin in the name of the Church, by ministers lawfully appointed for that purpose and through acts established by the Church, is called *public;* otherwise it is *private.*

Note here three requisites for public worship: it must be offered (1) in the name of the Church, (2) by her ministers (3) by acts established by her. For instance, veneration may be paid to a person who died in the odor of sanctity by pious persons, but it cannot be called a public cult before the person has been declared a Saint or Blessed;[10] such a cult would be purely private and of very doubtful merit. Again prayers may be publicly re-

7 S. Rit. C., May 9, 1857 (n. 3049).

8 S. Rit. C., June 27, 1868 (n. 3176).

9 S. Rit. C., Feb. 15, 1873 (n. 3288).

10 Cfr. Bened. XIV, "*Quamvis justo,*" April 30, 1749, § 12.

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cited, but if they are not approved by the Church, they have a private character.

APPROBATION OF THE LITURGY

CAN. 1257

Unius Apostolicae Sedis est tum sacram ordinare liturgiam, tum liturgicos approbare libros.

The Apostolic See alone has the right to prescribe the sacred liturgy and to approve liturgical books.

Hence neither patriarchal nor cathedral nor collegiate chapters may change or add anything to the liturgical books.[11] Neither archbishops nor bishops — still less, of course, inferior prelates — may act as judges in answering doubts concerning sacred rites and ceremonies.[12] This, of course, must be understood of authentic answers. If one has consulted the rubrics and looked up the authentic decrees of the S. Congregation of Rites, he may state what in his opinion has been authentically decided. A bishop cannot extend to the whole diocese the office of a Saint who is venerated in the cathedral church.[13]

Concerning the *liturgical books,* the following general decree [14] serves as a guide.

1. The liturgical books, as far as they require official approbation, are: the Roman Breviary, the Missal, the Ritual, the Pontifical and excerpts from them, as well as the Roman martyrology. Then, the *Caeremoniale Episcoporum,* the *propria* of the Breviary and the Missal of a diocese, a religious order or a congregation, the *Memo-*

11 S. Rit. C., May 2, 1612 (n. 297).

12 S. Rit. C., June 11, 1605 ad 1 (n. 179).

13 S. Rit. C., Jan. 16, 1607 (n. 225).

14 S. Rit. C., May 17, 1911 (n. 4266).

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riale of Benedict XIII for smaller churches, the *Instructio Clementina* for Forty Hours' Devotion, the *Collectio Decretorum S. Rit. C.*

2. The editions of these books are either *typicae* or *iuxta typicas*. The typical editions may be printed only by the Vatican Press or by publishers who have obtained that privilege from the S. Congregation of Rites. The same Congregation revises every single sheet of the typical edition, and every typical edition must contain the decree of the S. Rit. C., certifying that this edition is a typical one and that editors must conform their editions to it.

Editors, after issuing a typical edition, must send two copies thereof to the S. Rit. C., in whose archives they are preserved.

3. *Any publisher* may, with the consent and approval of the Ordinary, print editions called *iuxta typicas,* provided they agree perfectly with the typical edition. To make sure of this the Ordinaries shall appoint a revisor or censor, who shall carefully compare each edition with the *typica* and grant the *imprimatur* only after it is found a faithful copy thereof.

4. If there is no typical edition of the *propria Missarum* or *Officiorum* of a diocese, the local Ordinary in whose diocese they are printed, shall declare them conformable to the original and give the *imprimatur.* As to the *propria* of a strange diocese, and those of religious orders and congregations, the local Ordinaries to whose jurisdiction the editors (*typographi*) belong, shall give the imprimatur, after the Ordinary of the strange diocese or the religious superior to whom the *propria* pertain, shall have deciared that the edition is conformable to the original.

The rules for publishers of typical editions as well as

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reprints of liturgical books are laid down in the Constitutions of Pius V, Clement VIII, and Urban VIII, which are contained in the preface to every Roman Breviary. These rules must be accurately followed even as to punctuation, grammatical rules, position and sequence of hymns, chapters, and so forth.[15]

Manuals of sisterhoods which are used for the investiture of novices and for making the religious profession must be approved by the Holy See, or at least by the Ordinary.[16] The formula of profession must be contained in the Constitutions.

COMMUNICATIO IN SACRIS

CAN. 1258

§ 1. Haud licitum est fidelibus quovis modo active assistere seu partem habere in sacris acatholicorum.

§ 2. Tolerari potest praesentia passiva seu materialis, civilis officii vel honoris causa, ob gravem rationem ab Episcopo in casu dubii probandam, in acatholicorum funeribus, nuptiis similibusque sollemniis, dummodo perversionis et scandali periculum absit.

It is unlawful for Catholics to assist actively in any way at, or to take part in, the religious services of non-Catholics. A passive or merely material presence may be tolerated, for reasons of civil duty or honor, at funerals, weddings, and similar celebrations, provided no danger of perversion or scandal arises from this assistance. In doubtful cases the reason for assisting must be grave, and recognized as such by the bishop.

15 S. Rit. C., April 26, 1834; March 11, 1871 (nn. 2716, 3241).

16 S. Rit. C., Sept. 12, 1857, ad XVI (n. 3059) — which proves the necessity of uniformity; the Sisters changed Ps. 19: *Exaudiat te Dominus in die professionis,"* instead of *tribulationis;* in the *Libera* they sang: *"Tremens facta sum."*

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This is the so-called *communicatio in sacris activa cum acatholicis.* The reason why the Church has always forbidden such participation in the religious services of non-Catholics is the intimate conviction that she herself is the only true Church of Christ. Secondary reasons for this prohibition are: the *quasi-approbation* of *non-Catholic* worship which lies in a Catholic's participation therein and which at the same time is an external profession of faith. The other reason is *scandal,* which may be given to Catholics who see the mixture of worship and the deference paid to non-Catholic ministers and functions. Finally there is the *danger of perversion,* or of gradually increasing religious indifference when the faithful freely and indiscriminately participate in heretical religious services. Even the simulation of false religion is incompatible with the purity of the Catholic faith.[17] Hence:

(a) The Sacrament of *Baptism* can never be lawfully received from a non-Catholic minister; nor is it allowed to offer a child for baptism to such a minister, even if the child was first baptized by a Catholic minister and the heretical ceremony is admitted in order to avoid a fine.[18] Neither are Catholics allowed to assist as sponsors, either personally or by proxy, at a baptism conferred by a non-Catholic minister.[19]

(b) *Confirmation* may not be administered to such as are compelled by a non-Catholic parent to assist at heretical services.[20]

(c) The *Holy Eucharist* may not be received at the hands or in the temples of non-Catholics, nor are Catholics allowed to assist at the Mass of schismatics; if they

17 S. O., Aug. 28, 1780; S. C. P. F., 1729 (*Coll.*, nn. 546, 311).

18 S. O., Sept. 26, 1668; Nov. 29, 1672 (*ibid.*, nn. 169, 205).

19 S. O., May 10, 1770; Jan. 3, 1871 (nn. 478, 1362).

20 S. O., Aug. 28, 1780 (*ibid.*, n. 546).

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have no church of their own, they are not bound to hear Mass on the days prescribed.[21] Concerning the visiting of churches of non-Catholics, the Holy Office has decided as follows: Catholics may enter non-Catholic temples merely from curiosity, without participating in the services and provided they have no evil intention. An evil intention would exist if a Catholic would visit a Protestant church for the purpose of assisting at a religious function, or of participating *in sacris,* or if the government had commanded such visits as a sign of religious indifference, or if the public would regard such a visit as a sign of an interior conviction that there is no distinction between Catholics and non-Catholics.[22] To the point is another decision of the same Holy Office regarding former conditions in schismatical Russia, where officials compelled pupils to assist at schismatical functions. Their assistance was declared an unlawful *participatio in sacris,* which teachers of religion cannot tolerate in silence. Therefore they must warn the children and parents of the wrong, and only in case of their being in good faith may they omit a second warning, and grant them absolution, provided always that there is no scandal.[23]

(d) *Confession* may be made to a heretical or schismatic minister only when there is danger of death, provided that no scandal be given, that no other priest be present, that there be no danger of perversion, and that the non-Catholic administer the sacrament in valid form, *i. e., secundum ritus Ecclesiae.*[24]

(e) Under no conditions is it permitted to receive *holy orders* from a non-Catholic minister.[25]

21 S. O., Dec. 5, 1668 (n. 171).

22 S. O., Jan. 13, 1818 (*ib.*, n. 727, ad 2).

23 S. O., April 26, 1894 (*ib.*, n. 1868).

24 S. O., July 7, 1864, ad 6 (n. 1257).

25 S. O., Nov. 21, 1709 (n. 278): "*Alias sunt irregulares et suspensi*"; suspension is stated in can.

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(f) Concerning *marriage* enough has been said under can. 1063.

(g) An *oath* imposed by the government may be administered by a non-Catholic minister and be taken by Catholics if said minister acts merely as an official and wears no stole or insignia of his creed.[26]

(h) Here an instruction[27] of practical value, not so much in our country, as in countries where the government compels officials and also bishops to assist at religious ceremonies conducted by non-Catholics, or to hold services in Catholic churches. It is never allowed for any bishop to go to a schismatical church to take part in the sacred functions or to chant the doxology. Government officials are not to be disturbed if they go to these churches, provided no Mass is said, and they take no part in the doxology. Catholic bishops if invited by the governor to have a celebration in the Catholic churches shall content themselves with singing the "*Te Deum*" and holding benediction of the Blessed Sacrament. This may be done with the intention of praying for the spiritual and temporal welfare of people and ruler. But the bishops shall abstain from Pontificals or singing Mass, lest the non-Catholic civil authorities should assist and incense and the "pax" should have to be offered them, which is by no means allowed.

§ 2 permits a *passive or merely material assist-*

2372, and irregularity follows suspension if can. 985, n. 7 is verified.

26 S. O., April 1, 1857 (n. 1133). In the province of Quebec (Canada) *Protestant bibles* were used in administering oaths; only the clergy were permitted to give oath by holding the hand to the breast. The Holy Office declared that the faithful should not be disturbed; Feb. 23, 1820. On another occasion (for British India) the S. C. P. F. asked that the ecclesiastical authorities should demand freedom to swear on the Catholic Bible, but as long as this could not be obtained, they should keep silent; Sept. 8, 1869 (*Coll.*, nn. 739, 1346); somewhat different Sabetti-Barrett, *Theol. Moral.*, ed. 27a, pp. 226 f.

27 S. O., May 12, 1841 (n. 921).

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ance at funerals, weddings and similar festivals. What does that assistance involve or admit? Concerning *funerals* the decisions are quite distinct. No religious act or ritual participation is permitted. Hence Catholics are not supposed to recite public prayers or carry torches or candles, etc., for the souls of deceased non-Catholics.[28] At *weddings* there is hardly more than a mere passive assistance, even for witnesses.[29] In Japan and other pagan countries, where at funerals the pagan priests are first called in to perform their rites, the faithful must abstain from any participation in these ceremonies, but may bury their dead according to their own ritual.[30]

Civilis officii vel honoris causa means civil duty or respect due to the dead or to the person who is the object of the ceremony at a wedding or similar festivity, for instance, the birthday of a ruler's son or a thanksgiving celebration. When a non-Catholic ruler dies, the clergy may assist in a body, outside the church, at the funeral procession, but without sacred vestments, *i. e.*, without stole and surplice, although in cassock, when no scandal is given or when it may be removed.[31] At the coronation of King Edward VII his Catholic subjects were allowed to enter Westminster Abbey because of the personal presence of the King, but in India Catholics were not permitted to enter the temples of non-Catholics because the King was not present. Besides, Catholics were permitted to sing the *Te Deum,* but not the solemn Mass,[32] in their own churches. If a non-Catholic relative or a good friend of a Catholic pastor dies, is the latter allowed to assist at the funeral? He may do so, but is not allowed

28 S. O., Jan. 13, 1818; June 30, July 7, 1864 (*Coll. P. F.*, nn. 727; 1257 ad 1).

29 S. O., June 22, 1859 (n. 1176).

30 S. O., March 11, 1868 (n. 1328).

31 S. O., Aug. 1, 1900 (n. 2089).

32 S. C. P. F., April 25, 1902 (n. 2136).

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to wear the insignia, *i. e.*, surplice and stole, and must take no active part in the ceremonies of the non-Catholic rite.[33]

Difficulties may arise concerning coöperation in the divine services of Catholics who are employed by non-Catholics as *singers or organists*. Although we could find no specific decision with regard to Catholic singers at non-Catholic services, it is evident that the Church cannot tolerate such a formal coöperation, for to that it would certainly amount. Besides, if it is forbidden for a Catholic to play the organ at non-Catholic services — which has been formally decided[34] — it naturally follows that Catholics may not sing at such functions. The Church has been more lenient lately with regard to admitting non-Catholics as singers and organists at Catholic services. Thus, in 1889, the Holy Office wished the abuse to be eliminated as soon as possible, in 1906 it made a concession for Bulgaria, in favor of sisterhoods whose non-Catholic pupils were admitted to sing in their chapels.[35]

The present canon only forbids active assistance at, or participation in, the religious services of non-Catholics. Therefore those who contribute to the building of non-Catholic churches or help to erect them as architects, contractors, or workingmen are not concerned here. The Holy Office[36] has indeed declared that no such contributions are allowed, but at the same time urged that those who build synagogues and heretical temples are not to be

33 S. O., May 8, 1889 (n. 1705).

34 S. C. P. F., July 8, 1889 (n. 1713): "*Cum ibi falsum cultum exercent.*" Exception might be made for school exercises or purely civil celebrations held in non-Catholic churches, provided they have no religious feature attached; for in that case there would be no "exercise of false worship."

35 S. O., May 1, 1889; Jan. 24, 1906 (*Coll. P. F.*, n. 1703, 2227).

36 S. O., June 30, July 7, 1864, ad 8–10 (*ib.*, n. 1257). Stricter is the instruction of the *Card. Vic. Urbis*, of July 12, 1878; but this concerns Rome only and cannot be generalized, because conditions are different elsewhere.

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disquieted, provided such edifices are not erected to spite or provoke Catholics. But, as stated, even contributions are not excluded by our canon. Besides it would be almost impossible, in our country at least, to carry such a prohibition into effect. Business men especially cannot be expected to ignore or offend their non-Catholic patrons.

APPROBATION OF DEVOTIONS AND LITANIES

CAN. 1259

§ 1. Orationes et pietatis exercitia ne permittantur in ecclesiis vel oratoriis sine revisione et expressa Ordinarii loci licentia, qui in casibus difficilioribus rem totam Sedi Apostolicae subiiciat.

§ 2. Loci Ordinarius nequit novas litanias approbare publice recitandas.

Prayers and devotions are not to be permitted in churches and oratories without previous revision by, and express permission of, the local Ordinary, who shall report more difficult cases to the Apostolic See. The local Ordinaries cannot approve new litanies which are to be publicly recited. A bishop must and may revise all kinds of devotions, and if there is doubt whether the prayers or invocations comply with the dogmatic and traditional requirements, he shall refer the matter to the Holy Office,[37] which, if merely ritual doubts exist, shall report to the S. Congregation of Rites. Concerning litanies, first and above all, *no new ones are allowed*. Only those may be recited publicly which are contained in the Breviary or in the new edition of the Roman Ritual, approved by the Holy See.[38]

37 The veneration of the Holy Face of our Saviour is given to the traditional representation, and no special pictures are preferred; S. O., May 4, 1892 (n. 1792).

38 S. Rit. C., March 6, 1894 (*Dec.*

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To these approved litanies *no additions* can lawfully be made. Thus neither new "Saints," even though they be titular or patron saints, nor versicles or other prayers not contained in said additions are to be added.[39] Religious are allowed to add the name of the founder or patriarch, but the name of no other Saint of their order or congregation.[40] Nor is the addition of special invocations allowed in the litany of the Blessed Virgin.[41] Neither is the name of any saint or invocation, as contained in the approved editions to be omitted in the recitation.[42] Even quasi-invocations recited in the form of a Litany are forbidden.[43]

§ 2 of our canon says: *publice recitandas,* to be recited publicly. This term was, especially after the decree of March 6, 1894, made the object of doubts, which were dispersed by the S. Congregation. Thus it would be a public recitation if several of the faithful would gather in a church or public oratory to recite together a litany, although the minister of the Church would assist only as a private person, not as a minister. Thus to recite a non-approved litany is, therefore, forbidden.[44] Neither are Sisters or nuns allowed to recite such litanies in common in their choir, even though this be separated from the church by a grate.[45] Single religious may recite or chant

Auth., n. 3820); no litany of St. Anthony, or of the Holy Family, or of La Salette has so far been approved; S. Rit. C., Jan. 29, 1656; Feb. 11, 1898; May 12, 1877 (*ibid.*, nn. 995, 3980, 3419).

39 S. Rit. C., March 8, 1631; May 31, 1821, ad 7 (nn. 562, 2613).

40 S. Rit. C., June 16, 1674; Feb. 11, 1702; Aug. 2, 1631 (nn. 1518, 2093, 576).

41 S. Rit. C., Aug. 2, 1631 (n. 576); additions approved are: *auxilium christianorum* (S. Rit. C., Sept. 15, 1815); *Regina SSmi Rosarii* (Dec. 10, 1883, nn. 2566, 3598); *Regina pacis* (May 5, 1917).

42 S. Rit. C., Sept. 11, 1847 n. 1 (n. 2956).

43 S. Rit. C., Aug. 24, 1880 (n. 3523).

44 S. Rit. C., June 1, 1896 (n. 3916).

45 S. Rit. C., June 20, 1896 (n. 3917).

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such litanies for their private devotion, but not in common.[46]

The *approved litanies are:* the Litany of All Saints, according to the general tenor and the formula for the Forty Hours' Devotion; the Litany of the Holy Name of Jesus[47]; the Litany of the Sacred Heart, approved April 2, 1899; the Litany of the Blessed Virgin Mary, known as that of Loreto; the Litany of St. Joseph, and the Litany for the Dying (*in ordine commendationis animae*).

INDEPENDENCE FROM SECULAR INTERFERENCE

CAN. 1260

Ecclesiae ministri in cultu exercendo unice a Superioribus ecclesiasticis dependere debent.

This canon is a well deserved rebuke of the arrogant bearing of the regalists, as well as of the modern oppressors of ecclesiastical liberty in matters of divine worship. Benedict XIV, although prone to make concessions, admonished the hierarchy of his time never to allow the lay power to command public prayers to be said for them, either as a thanksgiving or in case of necessity. And he exhorted the bishops to speak like Hosius of Corduba to the emperor Constantius: "Do not interfere in things ecclesiastical, nor command in that kind; but rather learn from us. God gave you the reins of government, but to us He has entrusted what pertains to the Church."[48] The government may ask, but not command. Neither are pastors allowed simply to comply with the

46 S. Rit. C., Feb. 11, 1898 (n. 3981).

47 With the addition: "*Per SSmae Eucharistiae institutionem tuam libera nos, Jesu,*" after "*Per ascensionem tuam*"; S. Rit. C., Feb. 8, 1905 (n. 4153).

48 "*Quemadmodum,*" March 23, 1743.

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arrogant edicts of an ignorant board of health, or city council, or mayor, or governor, or even president. Everything must be done through the proper channels. The hierarchy shall comply with the reasonable wishes of the public or civil authorities. Authority to decide whether and what kind of prayers are to be said, belongs to those who are ordained in the things that appertain to God, to offer gifts and sacrifices.[49] Pius X had to complain of Portugal, the so-called republic, which severed the tie that connected it with the Church. How iniquitous was the law concerning the "associations of cult" is evident, for it entrusted the whole care of divine worship to associations of laymen, from which clergymen were rigidly excluded.[50] There are two societies, the spiritual and the temporal, with entirely different spheres, rights, and claims. What is purely spiritual, as divine worship, appertains solely to the society set up for religious purposes.

DUTY OF THE ORDINARY

CAN. 1261

§ 1. Locorum Ordinarii advigilent ut sacrorum canonum praescripta de divino cultu sedulo observentur, et praesertim ne in cultum divinum sive publicum sive privatum aut in quotidianam fidelium vitam superstitiosa ulla praxis inducatur, aut quidquam admittatur a fide alienum vel ab ecclesiastica traditione absonum vel turpis quaestus speciem praeseferens.

§ 2. Si loci Ordinarius leges pro suo territorio hac in re tulerit, etiam religiosi omnes, exempti quoque, obligatione tenentur easdem servandi; et Ordinarius pot-

49 Heb. 5, 1.
50 "*Iamdudum*," May 24, 1911 (*A. Ap. S.*, III, 219).

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est eorundem ecclesias vel publica oratoria in hunc finem visitare.

The local Ordinaries should carefully see to it (1) that the regulations laid down in the *sacred canons* on divine worship are properly *observed;* especially (2) that no *superstitious practices* be introduced into the public or private divine worship or into the daily life of the faithful; (3) that nothing be admitted which is contrary to *faith or ecclesiastical tradition,* or which savors of shameful money-making.

The remark concerning superstitious practices is intended especially for missionary countries, as is manifest from the fact that most of the papal Constitutions [51] as well as the decisions of the Roman Congregations adduced here have in view the aforesaid countries. "Superstition," says St. Thomas,[52] "is a vice opposed to religion by excess, not as if it would offer more worship to God, but because it offers worship to those to whom it is not due, or in an unlawful manner." This is the case with ancestor worship [53] in China and other superstitious practices mentioned in the Constitution of Benedict XIV, "*Omnium sollicitudinum,*" Sept. 12, 1744. There is always danger that missionaries will connive at such practices in order to swell the number of converts. The essence of all these practices is formal and willful coöperation in idolatry. The faithful may be present when the pagans perform their rites for the dead, provided they take no active part in them and protest as much as they can.[54] They may eat of the food prepared for idols if it is dished up with other foods, and the banquet takes place

51 Cfr. *Coll. P. F.*, nn. 347, 349.

52 *Summa Theol.*, II–II, q. 92, art. 1.

53 S. C. P. F., Jan. 14, 1753 (n. 386).

54 S. O., March 23, 1656 (*ibid.*, n. 126).

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far away from any pagan place of worship.[55] But they are not allowed to assist at the meals of gentiles prepared in commemoration of the dead.[56] Catholics may sell chickens, eggs, plots for cemeteries, etc., provided the sale is not strictly and knowingly made for superstitious purposes or with superstitious rites.[57] But they are not allowed to contribute to, or aid in, the building of pagan temples, even though they protest against compulsion and comply in order to avoid persecution.[58]

But pagan countries are not the only ones which are in danger of superstitious practices. There are so-called pious superstitions even in Christian communities. Thus it is irreverent, to say the least, and unbecoming, to throw relics of the true Cross, or other relics, even if included in a reliquary, into the river, or to moisten them, in order to obtain rain.[59] New and non-approved devotions are the cult of the heart of St. Joseph and the veneration of the B. V. Mary under the title of the Cross.[60]

Omitting other silly practices,[61] which abound among Southern people more than in the sober North, we must mention *Spiritism.* It would be disastrous to regard this serious menace as a joke. Newspapers, magazines, and books are now making a regular propaganda for the dangerous new sect. Hence the Holy Office has justly forbidden Catholics to assist at spiritistic séances, whether with or without a medium or the use of hypnotism, even though the sittings have an honest purpose or bear the semblance of piety, no matter whether the souls or spirits

55 S. O., Dec. 15, 1768 (n. 470).
56 S. C. P. F., Jan. 14, 1753 (n. 386).
57 S. C. P. F., Jan. 21, 1778; April 5, 1785 (nn. 526, 575).
58 S. O., Sept. 5, 1736 (n. 320).
59 S. Rit. C., Jan. 16, 1619; Sept. 12, 1769 (*Dec. Auth.*, nn. 369, 2486).
60 S. Rit. C., June 14, 1873; Feb. 23, 1894 (*ibid.*, nn. 3304, 3818).
61 S. O., Aug. 3, 1903 (*Coll. P. F.*, n. 2173): to dissolve paper pictures of the B. V. Mary in water or form them into pills to obtain health.

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of the dead are invoked or whether the answers are simply heard, or even if the parties simply look on and protest either tacitly or explicitly that they will have nothing to do with evil spirits.[62] Fortune telling and clairvoyance are also strictly forbidden.

§ 2 obliges *religious,* no matter how *exempt* they may be, to abide by the laws which the local Ordinary makes for his territory. The same Ordinary is entitled to visit their churches and public oratories for the purpose of this canon. We have here an old law, enforced by the Council of Trent,[63] and no appeal is permissible.[64]

SEPARATE SEATS FOR MEN AND WOMEN IN CHURCH

CAN. 1262

§ 1. Optandum ut, congruenter antiquae disciplinae, mulieres in ecclesia separatae sint a viris.

§ 2. Viri in ecclesia vel extra ecclesiam, dum sacris ritibus assistunt, nudo capite sint, nisi aliud ferant probati populorum mores aut peculiaria rerum adiuncta; mulieres autem, capite cooperto et modeste vestitae, maxime quum ad mensam Dominicam accedunt.

§ 1. Conformable to ancient discipline, it is desirable that the women should be separated from the men in church. The very division of the ancient basilica singled out the vestibule for the penitents; the catechumens were usually admitted to the rear of the nave; the faithful occupied the side aisles, the *men on the right side of the entrance, the women on the left.* Those who were held in

62 S. O., April 24, 1917 (*A. Ap. S.*, IX, 268); for further literature see Raupert, *The New Black Magic,* 1919; Liljencrants, *Spiritism and Religion,* 1918.

63 Sess. 21, c. 8 *de ref.*; sess. 22 *de observ. et evit.*

64 Benedict XIV, "*Ad militantis,*" March 30, 1742, § 6.

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special honor by the congregation, as widows and virgins, and those who, on account of age or social position, were entitled to peculiar regard, had their place in the forward end of the aisles or in the transept. The different orders of the clergy were in turn distinguished, the bishop had his seat in the middle of the apsidal circle, while the presbyters were seated on either side of him, but at a lower level, the deacons stood near the altar and the inferior clergy had their place with the choir in the nave.[65] In this country it will, we fear, be difficult to carry out this "desire" of the Church, on account of our custom of family pews.

§ 2. The *men* should assist at sacred functions, either in or outside of the church, with their *heads uncovered,* unless a reasonable national custom or special circumstances justify a departure from this rule. The *women,* on the other hand, should cover their heads and be dressed modestly, especially when they approach the Lord's table.

Those especially who, like our trustees, carry the canopy over the Blessed Sacrament, or reliquaries, or sacred statues, should walk bareheaded.[66]

In China the wearing of a cap or hat is a sign of respect and honor, and therefore the Church does not insist upon this disciplinary rule there.[67] An old-fashioned blizzard on the prairies may constitute a "special circumstance," justifying the wearing of a warm cap in church. The rule that women should cover their heads is doubtless taken from St. Paul's Epistle.[68] It applies whenever they attend sacred functions, even from a window which separates them from the place of worship.[69] Concerning

65 Lowrie, *Monuments of the Early Church,* 1901, p. 105 f.

66 S. Rit. C., Sept. 25, 1688; June 18, 1689; Sept. 2, 1690 (nn. 1800, 1810, 1841).

67 S. C. P. F., Oct. 18, 1883, nn. XV f. (*Coll.,* n. 1606).

68 1 Cor. 11, 4 ff.

69 S. Rit. C., July 7, 1876, ad IV.

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decency of dress nothing need be said, since the general rules of Christian modesty suffice.

DISTINGUISHED SEATS IN CHURCH

CAN. 1263

§ 1. Potest magistratibus, pro eorum dignitate et gradu, locus in ecclesia esse distinctus, ad normam legum liturgicarum.

§ 2. Sine expresso Ordinarii loci consensu nemo fidelis locum habeat in ecclesia sibi suisque reservatum; Ordinarius autem consensum ne praebeat, nisi ceterorum fidelium commoditati sit sufficienter consultum.

§ 3. Ea semper factis in concessionibus inest tacita conditio, ut Ordinarius possit, ex iusta causa, concessionem revocare, non obstante quolibet temporis decursu.

§ 1. A distinguished place or seat in the church may be reserved for the civil magistrates, according to their dignity and rank. However, the liturgical laws must never be disregarded. These laws are summed up in the *Cæremoniale Episcoporum.*[70] There we read that the seats reserved for nobles and illustrious laymen, magistrates and princes, no matter whether of the highest or the lowest rank, should be placed outside the sanctuary or presbytery. Some princes and governors were very arrogant in this matter, and some bishops too lenient. The S. Congregation of Rites has always referred to the *Cæremoniale*. Princes, magistrates, etc., may have a *predella* or kneeling bench and a special seat covered with a tapestry or upholstered, but always outside the choir or sanc-

70 Lib. 1, c. XIII, n. 13 (ed. Pustet, 1886, p. 58).

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tuary, and no canopy is allowed.[71] They may also, in their proper place, be given the "*pax cum instrumento*" and two swings of the censer, but these must not be offered by the minister of the Holy Sacrifice, but by a chaplain dressed in surplice.[72] If the magistrates wish to have a seat and kneeling bench in the choir, they must obtain a special papal indult.[73] A concordat not ratified by the Holy See can not confer this privilege.[74] It is an intolerable abuse for laymen to occupy the choir stalls of the canons during divine service.[75] All these laws must be observed also by *exempt religious,* and should they dare to violate them, the bishop may proceed against them by censures.[76]

§ 2. *No Catholic may,* without the express consent of the diocesan Ordinary, *have a seat reserved for himself and his family in church,* and the Ordinary shall not give his consent unless he is certain that the rest of the faithful can be conveniently seated. This, of course, does not mean that the renting of pews is forbidden. For the source whence this law is taken, speaks of a citizen who occupies two, or three, or more pews (*scamna*), while others have to stand. This decision gives the bishop the right to see to it that such unqualified disregard for the rights of others is prevented.[77] From this it is clear that pastors need not worry about the lawfulness of pew-rent, which is common in our country, but they should see to it that all the faithful are conveniently seated.

§ 3. All these concessions contain the tacit condition

71 S. Rit. C., May 23, 1639; Dec. 15, 1640 (*Dec. Auth.*, nn. 680, 726).

72 S. Rit. C., Jan. 15, 1661 (n. 1187).

73 S. Rit. C., July 8 and 18, 1654 (n. 959 f.).

74 S. Rit. C., March 12, 1689 (n. 1808).

75 S. Rit. C., Feb. 21, 1604 (n. 157).

76 S. Rit. C., March 13, 1688; April 22, 1690 (nn. 1792, 1831).

77 S. Rit. C., Dec. 11, 1604 (n. 174).

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that the Ordinary may revoke them for a just cause and that no prescription confers a permanent right. For laymen, even by paying pew-rent for a number of years, acquire no personal right to pews or seats.[78]

Conformable to this canon are most *statute laws* of this country. Pew rights are all "a matter of bargain, and entirely conventional between the trustees and those individuals who wish to become hearers or members of the society and to have seats in the church."[79] The pew-holder's rights are not absolute, but subordinate to, and limited by, the superior rights of the owner of the building, and may even be affected by by-laws passed after he has acquired his right. It follows that the civil courts cannot decide otherwise than according to the church law.

CHURCH MUSIC

CAN. 1264

§ 1. Musicae in quibus sive organo aliisve instrumentis sive cantu lascivum aut impurum aliquid misceatur, ab ecclesiis omnino arceantur; et leges liturgicae circa musicam sacram serventur.

§ 2. Religiosae mulieres, si eisdem liceat, ad normam suarum constitutionum vel legum liturgicarum ac de venia Ordinarii loci, in propria ecclesia aut oratorio publico canere, tali e loco canant, ubi a populo conspici nequeant.

§ 1. All kinds of lascivious or impure music, whether accompanied by the organ or other instruments, or rendered vocally, must be entirely eliminated from the

78 S. Rit. C., Nov. 22, 1642 (n. 816).

79 Cfr. Zollmann, *American Civil Church Law*, 1917, p. 414 ff.

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churches; and the liturgical laws concerning sacred music must be observed.

This is a repetition of an enactment of the Council of Trent [80] as well as of later papal constitutions. It is not within the sphere of a canonist to dwell upon the development of Church music, much less upon the finer "nuances" between the different kinds of music, Gregorian [81] or Plain Chant and polyphonic renderings. Suffice it to say that the Church has never condemned Polyphony, which began to come into being in the fourteenth century, when the Plain Chant commenced to decline.[82]

What is menat by *lascivious and impure music?* According to a decree of Alexander VII, of April 23, 1657, it signifies music which suggests the dance or profane rather than ecclesiastical ideas.[83] Benedict XIV complains that what is lawfully permitted to be sung is often treated theatrically and operatically, like a stage play.[84] The same Constitution permits the following musical instruments: violoncello and double bass, bassoon, viola and violins; but excludes drums, hunting horns, trumpets, oboes,[85] flutes and picolos, piano, mandolins and such like, which savor of the theatre. Instruments are allowed only to strengthen the voice parts, so as to lead the mind more forcibly to the contemplation of divine things and the love of God. Finally, the *sensuous* and *improper qualities* of church music are negatively described in the well known "*Motu proprio*" of Pius X, Nov. 22, 1903. There the

80 Sess. 22, *de observ. et evit.*

81 We leave the question open as to whether St. Gregory the Great may fully claim the title of "Father of the Plain Chant"; — *adhuc sub iudice lis est.*

82 Cfr. R. R. Terry, *Catholic Church Music,* London, 1907, p. 55.

83 Terry, *l. c.,* p. 21.

84 "*Annus qui,*" Feb. 19, 1749, § 2 ff.

85 However, oboes and clarinettes are moderately permitted; S. Rit. C., Nov. 13, 1908 (*Dec. Auth.,* n. 4226); not allowed are chimes or peals together with the organ for liturgical service; S. Rit. C., May 18, 1917 (*A. Ap. S.,* IX, 352).

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great restorer of Christian ideals says: "Nothing, therefore, should have place in the temple that is calculated to disturb, or even merely to diminish, the piety and devotion of the faithful; nothing that may give reasonable cause for disgust or scandal; nothing, above all, which directly offends the decorum and the sanctity of the sacred functions, and is thus unworthy of the House of Prayer and the Majesty of God." [86]

Church music must be *sacred* music, and therefore exclude all profanity, not only in itself, but in the manner in which it is presented.[87] The whole instruction is noteworthy. We cull from it one more sentence (n. 22): "It is not lawful to keep the priest at the altar waiting on account of the chant or the music for a length of time not allowed by the liturgy."

The *typical Vatican edition* of the *Graduale* was approved Aug. 7, 1907, and all editors have to conform to that edition.[88] This edition must be used in the churches exclusively, even to the exclusion of the Medicæa.[89] Various other decrees were issued to give weight to the Motu proprio of Pius X. The quintessence of these is that the Vatican edition of the *Graduale Romanum* is *the* typical one, with which all others must agree, since the rhythmic signs (*signa rythmica*) are fully contained in said edition.[90] Other editions which, though accurately presenting the melodies of the *Vaticana,* have special rhythmic signs appended by private authority, may be used as subsidiary aids by the singers, and for these the

86 *Dec. Auth.*, n. 4121; Terry, *l. c.*, p. 9.

87 Terry, *l. c.*, p. 12.

88 *Dec. Auth.*, n. 4203, see also nn. 4166, 4168, 4229.

89 S. Rit. C., April 8, 1908 (n. 4217).

90 S. Rit. C., Jan. 25, 1911 (n. 4259): the Vatican edition represents the signs, although not especially printed, by the distance of the neums, and thus indicates what is called the *mora vocis*.

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Ordinaries may give their *imprimatur,* provided the other rules laid down in the decrees referring to Plain Chant are complied with.[91] In 1912 was approved the *Antiphonale Diurnum Sacrosanctae Ecclesiae Romanae* and edited by the Vatican Press the same year. To this also the liturgical rules and decrees referring to the Gradual must be applied.[92]

§ 2. *Religious women,* if their Constitutions or the liturgical laws and the local Ordinary permit them to do so, may sing in their own church or public oratory, but only in a place where they cannot be seen by the public.

It is hardly probable that nuns will again sing together with canons and monks, as was the case at the time of Innocent II, who complained [93] of this abuse, but certain regulations have been made concerning women singers in church choirs, which must be applied with discretion. Thus congregational singing by all the people, who thus take, as it were, the place of the choir (*schola cantorum*), does not exclude women and girls, provided they occupy a place distinct from that of the men, as far as possible.[94] Sisters or nuns are not supposed to mix with the congregation, but if they sing with the children entrusted to their care, there can be no reasonable objection to the practice. However, since mixed choirs, *i. e.,* choirs composed of men and women, have not found favor with the S. Congregation,[95] it is perhaps not too much to say that Sisters should not take part in such choir singing.

Besides, according to the Instruction of Nov. 22, 1903,

91 S. Rit. C., April 11, 1911 (n. 4263); June 23, 1917 (*A. Ap. S.*, IX, 396 f.). These private editions are generally printed in modern notation.

92 S. Rit. C., Dec. 8, 1912 (*A. Ap. S.*, IV, 727).

93 Cfr. c. 25, § 1, C. 18, q. 2.

94 S. Rit. C., Jan. 17, 1908, ad II (n. 4216).

95 S. Rit. C., Dec. 18, 1908 (n. 4231). We notice that Card. Gasparri has not quoted the two decisions just mentioned. Is it perhaps because they are impossible of execution?

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n. 12–13, since the singers in church take the place of the ecclesiastical choir, women cannot be admitted to form part of the choir or of the musical chapel. Their place should be taken by boys, provided of course this regulation can be carried into effect. It takes time to train men and boys and to fill up the gaps caused by the dismissal of women. Some of our country churches would be as silent as a grave without the voices of women singers.

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TITLE XV

RESERVATION AND WORSHIP OF THE BLESSED SACRAMENT

CAN. 1265

§ 1. Sanctissima Eucharistia, dummodo adsit qui eius curam habeat et regulariter sacerdos semel saltem in hebdomada Missam in sacro loco celebret:

1.° Custodiri debet in ecclesia cathedrali, in ecclesia principe Abbatiae vel Praelaturae *nullius,* Vicariatus et Praefecturae Apostolicae, in qualibet ecclesia paroeciali vel quasi-paroeciali et in ecclesia adnexa domui religiosorum exemptorum sive virorum sive mulierum;

2.° Custodiri potest, de licentia Ordinarii loci, in ecclesia collegiata et in oratorio principali sive publico sive semi-publico tum domus piae aut religiosae, tum collegii ecclesiastici quod a clericis saecularibus vel a religiosis regatur.

§ 2. Ut in aliis ecclesiis seu oratoriis custodiri possit, necessarium est indultum apostolicum; loci Ordinarius hanc licentiam concedere potest tantummodo ecclesiae aut oratorio publico ex iusta causa et per modum actus.

§ 3. Nemini licet sanctissimam Eucharistiam apud se retinere aut secum in itinere deferre.

Provided there is a guard, and provided a priest says Mass regularly at least once a week in the sacred place:

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1.° The Holy Eucharist *must* be kept in the cathedral church, the main church of an abbatial or prelatical territory *nullius,* of a Vicariate and Prefecture apostolic, in every parish and quasi-parish church, and in the church adjoining the house of exempt religious, either male or female.

2.° The Holy Eucharist *may* be kept, with the permission of the local Ordinary, in collegiate churches, in the principal public or semi-public oratories of charitable or religious houses, as well as in those of ecclesiastical colleges, in charge of either the secular or religious clergy.

In the earliest centuries, as ancient documents testify, the Holy Eucharist was kept by private persons and in private houses. But this custom ceased when the churches were no longer exposed to persecution and communities of faithful gathered around the cathedral as well as parish churches. The foremost reason for keeping the Blessed Sacrament is the necessity of administering it as viaticum to the sick. But the living also are entitled, especially now-a-days, to the privilege of receiving the Holy Eucharist. Lastly, the Real Presence naturally implies adoration.[1] The present legislation mitigates the former rigid laws or at least decisions,[2] which required papal indults.

A distinction is made between obligation and permission. The first paragraph of § 1 says: *debet,* the second, *potest.* The reason for this distinction is clear from the purpose of reservation, as stated above. Among the churches which *must* keep the Blessed Eucharist are those of exempt religious of both sexes, because they are parish churches for the members. However, it should be noted that canonical erection is required before a church

1 Cfr. Gasparri, *De SSmo Euch.,* n. 972.

2 S. C. C., quoted by Gasparri, *l. c.* n. 980.

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is allowed to keep the Blessed Sacrament.[3] Note, also, that the *cathedral* church is mentioned in general terms. This means that every cathedral church, even though it is not a parish church, must keep the Blessed Sacrament. Hence it may no longer be looked upon as a privilege,[4] but as an obligation. This is, to say the least, becoming because the cathedral church is, as it were, *the* parish church of the whole diocese.

Among the churches in which the Blessed Sacrament *may* be kept without special papal indult, and with the sole consent, either written or oral, explicit or tacit, of the *local Ordinary,* are the *principal* oratories of religious and charitable institutions. In each religious institution or house, therefore, one chapel, *i. e.,* the main public or semi-public oratory, may keep the Holy Eucharist. Infirmary chapels or private oratories, even of prelates inferior to bishops, cannot preserve the Holy Eucharist without a special papal indult. Nor are religious allowed to keep the Blessed Sacrament in their rural chapels without an indult.[5]

Charitable institutions in whose principal chapels the Blessed Sacrament may be kept are, of course, those which are under ecclesiastical government.[6]

Observe the term *local Ordinary.* Hence the permission must be obtained, not from the prelate regular under whose jurisdiction or direction a sisterhood or brotherhood is placed, but from the diocesan Ordinary, by which name also the Vicar General may be understood.

The canon mentions *two preliminary conditions:* a guard and a priest who says Mass at least once a week, as a rule. It is not required that the one who keeps

3 Cfr. can. 496 f. and our Commentary, Vol. III, 82 ff.; S. Rit. C., April 16, 1644 (n. 860).

4 As formerly, see Gasparri, *l. c.*

5 S. C. C., Sept. 3, 1703; Gasparri, *l. c.*, n. 978.

6 Cfr. can. 1489.

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watch at the church or chapel be a priest. He may be a layman,[7] and in religious communities no special guards are required because the community itself is the guard. But it is always required that a priest say Mass once a week, unless he is prevented by an accident. This rule was made in order to provide for the renewal of the sacred species and to safeguard the observation of the rubrics. Where the church is not adapted for the reservation of the Blessed Sacrament, either for lack of doors or windows, or want of safety, the S. C. has decided that the Blessed Sacrament should, on account of the sick, be kept in the parish residence or in the house of another priest.[8]

§ 2. To keep the Holy Eucharist in any other church or oratory besides those mentioned requires a papal indult. The local Ordinary may grant this permission only for churches and public oratories, for a just cause, and *per modum actus.*

Petitions asking for this privilege must be sent to the S. C. of Sacraments. Religious may address the S. C. of Religious, though the grant is always made by the former Congregation.

Which are the "*other churches*" mentioned in the text? They are, negatively, all churches not of the classes mentioned in § 1, 1°, and the collegiate churches named in § 1, n. 2. The term therefore comprises the churches of confraternities which are not erected in parish churches or in churches of exempt religious orders or which do not serve a charitable purpose, *v. g.*, hospital or school work.[9]

The "*other oratories*" are all private oratories, with

7 S. Rit. C., Feb. 17, 1881 (n. 3517).

8 S. C. P. F., Aug. 23, 1852, ad 2 (*Coll.*, n. 1079).

9 S. Rit. C., Sept. 12, 1626; June 14, 1646; Jan. 12, 1704 n. 26 (nn. 420, 895, 2123).

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the exception of course of those located in the residences of cardinals or bishops, all semi-public oratories which do not serve as main chapel of a religious community or charitable institute, and all public oratories which belong to confraternities or sodalities; not, however, the oratories of pious associations, because these may reasonably claim the favor of § 1, n. 2.

The papal indult generally contains the clause: "provided that the chapel be decently furnished, that the Blessed Sacrament be safely kept, that a light be always kept burning before it, and that a priest says Mass there at least once a week.[10]

The *Ordinary* may grant this permission only to churches and public oratories, not to semi-public or private oratories. Besides he must demand a just reason, and can give the permission only *per modum actus* (see can. 1195). Such a reason for, and transient manner of, granting this permission would be repair work on the main church, or deficient seating capacity of the parish church, or some temporary physical impediment, like a flood, a fire, or an epidemic.

§ 3. No one is allowed to keep the Blessed Sacrament in his home or to carry it with him when travelling. If one would keep the Blessed Sacrament in his home for sinister purposes, such as magic, he would be open to the suspicion of heresy and liable to be denounced to the Holy Office.[11]

The custom of carrying the sacred host when travelling has long been given up, and the practice declared unlawful, even for missionaries.[12]

10 S. Rit. C., May 23, 1593 (n. 31) 1. Sometimes has been added the clause: "*absque parochi, intra cuius parochiae fines existit, praeiudicio.*" May 14, 1889 (n. 3706).

11 S. C. P. F., Feb. 25, 1859 (*Coll.*, n. 1171).

12 Gasparri, *l. c.*, n. 971.

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OPEN CHURCHES

CAN. 1266

Ecclesiae in quibus sanctissima Eucharistia asservatur, praesertim paroeciales, quotidie per aliquot saltem horas fidelibus pateant.

Churches in which the Blessed Sacrament is kept, especially parish churches, should be open a few hours daily to the faithful. For one purpose of reservation is adoration of the Eucharistic Christ.

CAN. 1267

Revocato quolibet contrario privilegio, in ipsa religiosa vel pia domo sanctissima Eucharistia custodiri nequit, nisi vel in ecclesia vel in principali oratorio; nec apud moniales intra chorum vel septa monasterii.

In religious houses or charitable institutions the Holy Eucharist may be kept only in the church or principal oratory, and nowhere else; nuns are not allowed to keep it within the choir or convent enclosure. Every privilege to the contrary is hereby revoked.

THE BLESSED SACRAMENT ALTAR

CAN. 1268

§ 1. Sanctissima Eucharistia continuo seu habitualiter custodiri nequit, nisi in uno tantum eiusdem ecclesiae altari.

§ 2. Custodiatur in praecellentissimo ac nobilissimo ecclesiae loco ac proinde regulariter in altari maiore, nisi aliud venerationi et cultui tanti sacramenti commodius et decentius videatur, servato praescripto le-

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gum liturgicarum quod ad ultimos dies hebdomadae maioris attinet.

§ 3. Sed in ecclesiis cathedralibus, collegiatis aut conventualibus in quibus ad altare maius chorales functiones persolvendae sunt, ne ecclesiasticis officiis impedimentum afferatur, opportunum est ut sanctissima Eucharistia regulariter non custodiatur in altari maiore, sed in alio sacello seu altari.

§ 4. Curent ecclesiarum rectores ut altare in quo sanctissimum Sacramentum asservatur sit prae omnibus aliis ornatum, ita ut suo ipso apparatu magis moveat fidelium pietatem ac devotionem.

§ 1. The Blessed Sacrament cannot be kept habitually on more than *one* altar of the same church.

This altar should be designated by the Ordinary,[13] and the rule laid down in this canon also binds regulars.[14] But an exception is made in favor of churches of *perpetual adoration,* which must have another tabernacle on another altar, where holy Communion may be distributed to the faithful.[15] Note the word *habitually.* During the Forty Hours' Devotion the Blessed Sacrament must also be kept on another, for instance, a side altar for the distribution of holy Communion. On this altar must be placed a movable tabernacle, and if no railing surrounds the altar, benches may be placed round about it to mark it off.[16] Of course, where there is no other altar, this expedient will not work, and the best thing to do is to have the other kind of Forty Hours' which permits of reposition every day, or else to construct a temporary altar with a movable tabernacle. The term habitually

13 S. Rit. C., July 21, 1696 (*Dec. Auth.*, n. 1946).

14 S. Rit. C., March 14, 1861 (n. 3104).

15 S. Rit. C., May 18, 1878 (n. 3449).

16 S. Rit. C., Nov. 23, 1880 (n. 3525).

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admits of another departure from the general rule. Thus it is permitted to transfer the Blessed Sacrament from the usual to another altar during a triduum or novena, and in the months of May and June, and, we suppose, also in October, for the distribution of Holy Communion and Benediction.[17]

§ 2. The Blessed Sacrament should be kept in the most *prominent place of honor,* and therefore generally on the main altar, unless there is one more conveniently located and better suited for the veneration and cult of this holy Sacrament. But the rules regarding the last three days of Holy Week must be observed. The Blessed Sacrament may not be kept continually on the altar in the choir (*altare chori*), but it may be kept on side altars or in side chapels.[18]

The *liturgical laws* referred to are the rubrics and certain decrees concerning the *triduum* of Holy Week. One of these says that no sacred particles may be placed in the repository together with the Host to be used for the *Missa Praesanctificatorum on Good Friday.*[19] For the rest we must refer the student to the general rubrics.

§ 3. In cathedral, collegiate, and conventual churches in which the choir functions are held at the main altar, the Blessed Sacrament may as a rule be kept in another chapel or on another than the high altar, in order not to interfere with the services. The text says "*opportunum,*" which *per se* does not imply a strict law. However, the S. Congregation, in one instance at least, refused to allow the Blessed Sacrament to be kept on the high altar of the cathedral church.[20] The *Cæremoniale Epis-*

17 S. Rit. C., June 2, 1883 (n. 3576).

18 S. Rit. C., April 26, 1901 (n. 4071).

19 S. Rit. C., Dec. 9, 1899, ad IV (n. 4049).

20 S. Rit. C., Feb. 6, 1875 (n. 3335).

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coporum prescribes removal of the Blessed Sacrament from the altar on which the bishop solemnly pontificates.[21]

§ 4. The rectors of churches shall take care that the altar on which the Blessed Sacrament is kept, be more elaborately decorated than the other altars, so that its very appearance may move the faithful to devotion.

We know of no special rules for the decoration of the sacramental altar, except that a light should burn before it[22] and the tabernacle be curtained. The *Cæremoniale Episcoporum* (l. I, c. 12, n. 8, 12) has in view pontifical functions. It certainly is becoming that the sacramental altar should be more elaborately decorated than the others. More candlesticks, more steps, flowers (when permitted), an antipendium, and similar ornaments permitted by the rubrics will help to draw the attention of the faithful to their Eucharistic Lord. The sacramental altar should be clearly distinguished from the altar of the Blessed Virgin, for the Hidden God must not stand back before even His noblest creature.

THE TABERNACLE

CAN. 1269

§ 1. Sanctissima Eucharistia servari debet in tabernaculo inamovibili in media parte altaris posito.

§ 2. Tabernaculum sit affabre exstructum, undequaque solide clausum, decenter ornatum ad normam legum liturgicarum, ab omni alia re vacuum, ac tam

21 Tit. 1, c. 12, n. 8. The reason for this rule lies in the ceremonies to be performed before the Pontiff. But if a cathedral church serves as parish church, it certainly is more convenient for the people that the Bl. Sacrament be kept on the main altar, neither is the law against this practice, because it is "opportune."

22 A canopy or curtain should be over the tabernacle; Rit. Rom., tit. IV, c. 1, n. 6. But it may frankly be stated that an artistic tabernacle often suffers from a cover.

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sedulo custodiatur ut periculum cuiusvis sacrilegae profanationis arceatur.

§ 3. Gravi aliqua suadente causa ab Ordinario loci probata, non est vetitum sanctissimam Eucharistiam nocturno tempore extra altare, super corporali tamen, in loco tutiore et decenti, asservari, servato praescripto can. 1271.

§ 4. Clavis tabernaculi, in quo sanctissimum Sacramentum asservatur, diligentissime custodiri debet, onerata graviter conscientia sacerdotis qui ecclesiae vel oratorii curam habet.

§ 1. The Blessed Sacrament must be kept in an immovable tabernacle in the middle of the altar.

§ 2. The tabernacle must be skilfully constructed and safely locked, appropriately decorated according to the liturgical rules, be empty, and so carefully guarded that there is no danger of sacrilegious profanation.

Concerning the material of which the tabernacle is to be made, there are no rigid rules.[23] But the more precious the metal or stone, the more becoming it will be. Inside the tabernacle may be draped with white cloth, or simply gilded. On the outside [24] it must be covered with a veil or curtain. No veil is required on the inside, though this custom may be tolerated.[25] The material of the outside cover or veil may be silk, cotton, wool, hemp, etc. The color of the veil (called *conopaeum,* because it is supposed to be thrown over the whole tabernacle) has not been determined. The S. Congregation has admitted two opinions: the one which holds that the color must always be white, the other (Gavante) that it must change

23 The Capuchins may have a wooden tabernacle without any special painting outside; S. Rit. C., Dec. 7, 1888, ad XIII (n. 3697).

24 S. Rit. C., Aug. 7, 1871; June 5, 1889 (nn. 3254, 3709).

25 S. Rit. C., April 28, 1866 (n. 3150).

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according to the office and the seasons. This latter opinion was favored by the S. Congregation,[26] but no strict rule can be deduced from its answer. Hence a white veil is certainly admissible. However, since at funeral masses, exequies and on All Souls' Day, the antipendium and the drapery are of black, the veil of the tabernacle should also be, not black, but purple.[27]

§ 3. For any weighty reason which the Ordinary deems sufficient, it is permitted to keep the Blessed Sacrament *at night* away from the altar, in a more secure and decent place, but always on a corporal and with due regard to can. 1271. This would undoubtedly be permitted in case of churches[28] used by Catholics and Protestants alternately, and also in case a missionary lives far away from the church, especially for administering the Viaticum.[29]

§ 4. The *key of the tabernacle,* in which the Blessed Sacrament is kept, must be *carefully guarded;* the responsibility for carrying out this law rests with the priest who has charge of the church or oratory.

In order to prevent sacrilegious theft or irreverence, the priest, *i. e.,* the pastor, or rector, or canon sacristan, should keep the key in his pocket or put it with other keys in a cupboard or drawer, so that strangers cannot discover and abuse it.[30] It is especially forbidden to hand the key of the sepulchre on Holy Thursday to a layman, or to a confraternity or sodality; and no custom to the contrary is tolerated.[31] How serious this obligation is may be

26 S. Rit. C., July 21, 1855 (n. 3035).

27 S. Rit. C., Dec. 1, 1882 (n. 3562).

28 S. C. P. F., March 7, 1805 (*Coll.*, n. 681): "*in aedibus parochi.*"

29 S. Rit., C., Feb. 10, 1871, ad V, 1 (n. 3234).

30 S. C. EE. et RR., Feb. 9, 1751 (Bizzarri, *l. c.*, p. 31 f.).

31 S. Rit. C., Dec. 6, 1631; Dec. 7, 1737; May 22, 1841 (nn. 579, 2335, 2833).

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judged from the penalties threatened in the decretals and in one letter of the S. Congregation: Imprisonment, privation of the active and passive vote, and suspension. The bishop together with the superior may proceed thus against exempt religious.[32]

THE PYX

CAN. 1270

Particulae consecratae, eo numero qui infirmorum et aliorum fidelium communioni satis esse possit, perpetuo conserventur in pyxide ex solida decentique materia, eaque munda et suo operculo bene clausa, cooperta albo velo serico et, quantum res feret, ornato.

A number of consecrated particles, sufficient for the communion of the sick and other faithful, must always be kept in a pyx or ciborium made of some solid and suitable material, kept neat and well closed, covered with a veil of silk, which may be artistically ornamented as far as the rubrics allow.

This text is taken almost verbally from the Roman Ritual, and is also intended for the Orientals, who should, like the Latins, preserve the particles in a pyx, not in a dried or unbecoming form, as if they were mere bread.[33] The pyx should be made of metal, not of glass or some similar substance, even though there be danger that it be stolen.[34] Copper is admissible,[35] if gilded.

The particles may never be kept on the corporal, even though there be danger of theft.[36] They must be pre-

32 S. C. EE. et RR., *l. c.*

33 *Rit. Rom.*, tit. IV, c. 1, n. 5; Bened. XIV, "*Praeclaris*," March 18, 1746 (*Coll. P. F.*, n. 356).

34 S. Rit. C., Jan. 30, 1880 (*Dec. Auth.*, n. 3511).

35 S. Rit. C., Aug. 31, 1867, ad VI (n. 3162).

36 S. Rit. C., Feb. 17, 1881 (n. 3527).

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served *perpetuo, i. e.,* always, even during the Corpus Christi procession.[37]

The veil or cover of the ciborium may be embroidered or bear some suitable emblems having reference to the Holy Eucharist; but it must not be overloaded or so heavy that it is difficult to open the lid.

The ciborium itself must be kept clean, especially from rust and verdigris.

THE TABERNACLE LIGHT

CAN. 1271

Coram tabernaculo, in quo sanctissimum Sacramentum asservatur, una saltem lampas diu noctuque continenter luceat, nutrienda oleo olivarum vel cera apum; ubi vero oleum olivarum haberi nequeat, Ordinarii loci prudentiae permittitur ut aliis oleis commutetur, quantum fieri potest, vegetabilibus.

At least one lamp must burn day and night before the tabernacle in which the Blessed Sacrament is kept. For this lamp olive oil or beeswax should be used; if no olive oil is available, other oils may be used, according to the prudent judgment of the Ordinary, but they should be vegetable oils, if possible.

This is a grave obligation, as may be seen from the constant insistence with which it was forced upon the rectors of churches. The sanctuary lamp must be reserved for the sole purpose for which it is prescribed, and not serve other purposes, for instance, illumining a dormitory.[38] The lamp may be attached to the side wall, like a bracket or cornucopia, provided that the light burns

37 S. Rit. C., Aug. 13, 1667, ad 2 (n. 1357).

38 S. Rit. C., Aug. 22, 1669 (n. 2033).

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towards and before the altar (*infra et ante altare*).[39]

Olive oil best serves the mystic significance of the sanctuary lamp, as expressed in the liturgy of Palm Sunday.[40] However, beeswax, the significance of which is pointed out on Candlemas Day, is also permitted. So, too, is a mixture of olive oil and beeswax.[41] Vegetable oils (linseed, sesame, etc.) may be used where olive oil is unavailable. Note well that the text does not admit the use of electric light for the sanctuary lamp, as a decree of the S. Rit. C. permitted about four years ago, "on account of war conditions."[42] On the other hand it is safe to say that this decree seems to pave the way for the use of electric or gaslight as an aid to reading and for ornamental purposes, even on the altar. Hence the former rigorous decisions[43] may be taken with a goodly dose of discretion.

ALTAR BREADS

CAN. 1272

Hostiae consecratae, sive propter fidelium communionem, sive propter expositionem sanctissimi Sacramenti, et recentes sint et frequenter renoventur, veteribus rite consumptis, ita ut nullum sit periculum corruptionis, sedulo servatis instructionibus quas Ordinarius loci hac de re dederit.

The consecrated hosts reserved for the communion of the faithful or for the exposition of the Blessed Sacrament must be fresh and should be frequently renewed, the

39 S. Rit. C., June 2, 1883 ad IV (n. 3578).

40 S. Rit. C., July 9, 1864 (n. 3121).

41 S. Rit. C., Nov. 8, 1907 (n. 4205).

42 S. Rit. C., Nov. 22, 1907 (n. 4206); Nov. 23, 1916 (*A. Ap. S.*, VIII, 72 f.).

43 S. Rit. C., Nov. 29, 1901; May 16, 1902; Nov. 22, 1907 (nn. 4086, 4097, 4206).

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old ones having been duly consumed, so that there is no danger of corruption. Upon this matter the instructions given by the local Ordinaries should be scrupulously observed. See can. 815. Attention may be drawn to the decisions of the S. Congregation of Rites, which insist upon weekly renewal of the sacred species according to the *Cæremoniale Episcoporum.*[44]

FREQUENT ASSISTANCE AT MASS AND VISITS TO THE BLESSED SACRAMENT

CAN. 1273

Qui in religiosam fidelium institutionem incumbunt, nihil omittant ut pietatem erga sanctissimam Eucharistiam in eorum animis excitent, eosque praesertim hortentur ut, non modo diebus dominicis et festis de praecepto, sed etiam diebus ferialibus intra hebdomadam, frequenter, quantum fieri potest, Missae sacrificio assistant et sanctissimum Sacramentum visitent.

Those who have charge of the religious instruction of the faithful, should endeavor to foster in their hearts devotion to the Holy Eucharist, and exhort them to assist at Mass not only on Sundays and holydays of obligation, but also as often as possible on weekdays, and to visit the Blessed Sacrament.

EXPOSITION OF THE BLESSED SACRAMENT

CAN. 1274

§ 1. In ecclesiis aut oratoriis quibus datum est asservare sanctissimam Eucharistiam, fieri potest expositio privata seu cum pyxide ex qualibet iusta causa sine Ordinarii licentia; expositio vero publica seu cum

44 Lib. I, c. VI, n. 2; S. Rit. C., Sept. 12, 1884, n. II (n. 3624).

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ostensorio die festo Corporis Christi et intra octavam fieri potest in omnibus ecclesiis inter Missarum sollemnia et ad Vesperas; aliis vero temporibus nonnisi ex iusta et gravi causa praesertim publica et de Ordinarii loci licentia, licet ecclesia ad religionem exemptam pertineat.

§ 2. Minister expositionis et repositionis sanctissimi Sacramenti est sacerdos vel diaconus; minister vero benedictionis Eucharisticae est solus sacerdos, nec eam impertire diaconus potest, nisi in casu quo, ad normam can. 845, § 2, Viaticum ad infirmum detulerit.

§ 1. *Private* exposition of the Blessed Sacrament, *i. e.*, with the ciborium, may be held for any reasonable cause without the permission of the Ordinary in churches and oratories in which the Blessed Sacrament is lawfully kept. This sounds partly like a definition and is no doubt intended as such, to distinguish private from public exposition, which is mentioned in the next clause. But the definition is not complete and should be supplemented by a decision of the S. Congregation of Rites.[45] Private exposition (*ex causa privata*) takes place if the Blessed Sacrament is not taken out of the tabernacle, but remains hidden, so that the Host cannot be seen. Hence the tabernacle is opened and the ciborium is placed near the opening.[46] Private exposition excludes placing the ciborium or pyx, as it is called in the decisions,[47] upon a throne or movable tabernacle. Benediction with the ciborium is not forbidden where there is a long-standing custom authorizing it.[48] In fact, says Cardinal Gasparri,[49] if this less

45 May 31, 1642 (n. 800).

46 Bened. XIV, *Instit.*, 30, n. XVI; Gasparri, *De SSmo Euch.*, n. 1022.

47 S. Rit. C., May 23, 1835; April 28, 1902 (nn. 2725, 4096).

48 S. Rit. C., Sept. 11, 1847; March 16, 1876 (nn. 2957, 3394).

49 *L. c.*, n. 1034; Bened. XIV, *Instit.*, 30, n. VI f., where the pros

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solemn benediction can be imparted *pro causa tum publica tum privata,* the Ordinary should not permit solemn and visible benediction with the ostensorium except for a *causa publica.* This appears to us a very reasonable rule. Thus during the month of October this private benediction, we believe, would be amply justified and sufficient on weekdays.

What is a *causa privata?* A case of sickness or the mere desire of pious persons or of a religious community would be a private cause sufficient to justify private exposition.[50]

The *mode* of holding this kind of exposition and imparting the benediction is as follows: The priest wears stole and surplice, also, if he wishes, a cope. At least six candles must be lighted, but the incensation is omitted, since this is not in keeping with the Roman practice.[51] Praying and singing are allowed, and the *Tantum ergo* with versicle and oration may be said or sung. After the blessing is given the tabernacle should again be closed.[52]

Such an exposition requires no permission from the Ordinary, and is permitted in all churches and oratories which are entitled, either by law or by an indult, to keep the Blessed Sacrament, according to can. 1265.

Public exposition, i. e., with the *ostensorium* or monstrance, may be held in all churches on the feast of Corpus Christi and every day within its octave, at Mass and Vespers, but not on other occasions except for a just and weighty reason, especially of a public character, *and* with the permission of the diocesan Ordinary, which is required also for churches which belong to exempt religious.

and cons of frequent exposition are set forth.

50 Bened. XIV, *l. c.,* n. XVI.

51 S. Rit. C., Sept. 11, 1847 (n. 2957).

52 Gasparri, *l. c.,* n. 1027.

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The difference between private and public exposition lies in the manner of exhibiting the Blessed Sacrament as well as in the reason for which it is permitted. The prescribed vessel here is the *ostensorium* with the *lunula*.[53] This is generally placed under a canopy on a throne, on which is spread a palla or corporal. It is becoming that twenty candles, or at least twelve,[54] be burning on the altar during the exposition. The color of the antipendium as well as of the canopy and the vestments worn by the ministers is white. However, if the exposition is connected with the office of the day, for instance, Pentecost, the antipendium and the vestments worn by the ministers must be of the color of the day, *i. e.*, red in the case supposed, whilst the canopy may be white. But this is required only if the priest does not leave the altar before the exposition. If he goes to the sacristy after Mass or Vespers are said, he may vest in white. White is also the color of the *velum* or *humerale* thrown over the shoulders.[55] Black is not allowed under any circumstance at the altar or in the chapel of exposition, even though the rest of the church still bears signs of mourning.[56] All relics must be removed from the altar of exposition.[57]

The Mass of exposition should as a rule be at least a *missa cantata* or *solemnis*, although the term *inter Missarum sollemnia* does not strictly require a sung Mass.[58] When the Blessed Sacrament is exposed after Communion

53 A so-called *custodia* is not necessary for the lunula. The material for the ostensorium and lunula is not determined by law, but should be the same as for the ciborium; Gasparri, *l. c.*, n. 1030 f.

54 S. Rit. C., Feb. 8, 1879 (n. 3480); in this case the churches were poor.

55 Gasparri, *l. c.*, n. 1040.

56 S. Rit. C., March 13, 1804 (n. 2558); not even if a ruler dies.

57 S. Rit. C., Sept. 2, 1741, ad 1 (n. 2365).

58 S. Rit. C., Sept. 25, 1882 (n. 3558) has permitted the custom of exposing the Bl. Sacr. with a low Mass early in the morning.

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at Mass, the ostensorium should not be covered with a velum.[59]

The genuflections are to be made by bending both knees at private as well as public expositions.[60]

Public exposition is permitted on the feast of Corpus Christi and within its Octave, but only in churches, which term includes public oratories. But what about semi-public oratories which, according to can. 1265, § 1, n. 2, are allowed to keep the Blessed Sacrament habitually? The text of our canon would seem to exclude them. Cardinal Gasparri simply says: It is evident that exposition can only be held in a church which is entitled to keep the Blessed Sacrament. This would apply also to semi-public oratories, and we believe that the term *in ecclesiis* here should not be taken too strictly, provided, of course, the functions can be carried out according to the rubrics. At any rate, it would only require a permission from the Ordinary to authorize public exposition in pious institutions.[61]

The last clause of § 1, can. 1274, mentions "*other times*" at which public exposition may be held for a just and reasonable, especially a *public cause*. What is a *causa publica?* It is one that concerns the whole commonwealth, or municipality, or parish, or diocese, or country. But it may also be a reason of less extent, according to approved authors.[62] Such a reason would be the eradication of vice and fostering of virtue, public peace and tranquillity, impending disasters, etc., or any other reason which in one way or another, according to the judgment of the Ordinary, affects a community, or at least the larger part thereof. *Other times* are all those days which do not fall within the Octave of Corpus Christi. On no other

59 Gasparri, *l. c.*, n. 1036.
60 *Ibid.*, n. 1023.
61 Gasparri, *l. c.*, n. 1038.
62 *Ibid.*, n. 1034.

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day of the year, except, of course, the last three days of Holy Week, is public exposition forbidden, although Benedict XIV refused to permit it on the feastdays of Saints, when these are celebrated with more or less worldly pomp.[63] But custom may admit also those days.[64] Note that a weighty and public reason is required and, besides, the *express permission of the Ordinary* must be obtained. From this rule the S. Congregation would dispense neither in favor of exempt religious, no matter how many privileges they may claim, nor in favor of confraternities.[65] The latter may have an exposition, provided episcopal permission was given, without asking or notifying the pastor.[66] Hence the faculty of keeping the Blessed Sacrament does not include that of having an exposition of it outside the feast and octave of Corpus Christi.[67]

§ 2. The *minister* of exposition is the priest or deacon; but a priest may give the benediction, whereas a deacon may only impart the blessing according to can. 845, § 2, *viz.*, when administering the viaticum.

Note that no mechanism is allowed for exposing the Blessed Sacrament, but the minister must expose it with his hands.[68] The rather quaint manner of exposition mentioned in one decision, where the ostensorium was placed on the right arm of the statue of a Saint, was forbidden.[69]

63 *Instit.*, 30, n. XIV.

64 S. Rit. C., Sept. 27, 1864, ad 5 (n. 3124).

65 This is the tenor of all the decisions quoted by Card. Gasparri in his edition; cfr. Bened. XIV, *Inst.*, 30, n. IX f.

66 S. Rit. C., March 18, 1679 (n. 1622).

67 S. Rit. C., Jan. 12, 1704 ad 27 (n. 2123).

68 S. Rit. C., April 3, 1873 (Gasparri, *l. c.*, n. 1041); not contained in *Dec. Auth.*

69 S. Rit. C., Aug. 2, 1884 (n. 3615).

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THE FORTY HOURS' DEVOTION

CAN. 1275

Supplicatio Quadraginta Horarum in omnibus ecclesiis paroecialibus aliisque, in quibus sanctissimum Sacramentum habitualiter asservatur, statutis de consensu Ordinarii loci diebus, maiore qua fieri potest sollemnitate quotannis habeatur; et sicubi ob peculiaria rerum adiuncta nequeat sine gravi incommodo et cum reverentia tanto sacramento debita fieri, curet loci Ordinarius ut saltem per aliquot continuas horas, statis diebus, sanctissimum Sacramentum sollemniore ritu exponatur.

The Forty Hours' Devotion should be held every year, on the days established, with the consent of the local Ordinary, in all parochial and other churches in which the Blessed Sacrament is habitually kept, and with the greatest possible solemnity. When special circumstances permit the exposition of the Blessed Sacrament only with great inconvenience or danger of irreverence, the local Ordinary shall see to it that it be exposed solemnly at least for a number of consecutive hours on stated days.

The consent of the Ordinary may be given once for all, especially when definite churches are assigned for holding the devotion on certain days. This consent is required also for churches of regulars and confraternities,[70] nor may the pastor or first dignitary of the cathedral church prescribe the devotion without the permission of the bishop.[71] During Holy Week, *i. e.*, from the morning of Holy

70 S. Rit. C., Sept. 12, 1642 (n. 814).

71 S. Rit. C., June 4, 1644 (n. 869).

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Thursday until early on Holy Saturday, the devotion must be stopped.[72]

The Forty Hours' Devotion began in the sixteenth century. It was at first held on the days preceding Lent, which custom was approved by the Roman Pontiffs.[73] Clement VIII ordered the Forty Hours' Devotion as we know it. Clement XI not only approved it, but prescribed perpetual exposition on the same occasion and issued the so-called *Clementina*. The privileges and favors granted by this document are attached only to perpetual exposition, unless a special indult is obtained.[74]

72 S. Rit. C., March 12, 1661 (n. 1190).

73 Bened. XIV, Jan. 1, 1748.

74 *Instructio*, 21, 1705; S. Rit. C., May 27, 1911, ad III (n. 4268).

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TITLE XVI

WORSHIP OF THE SAINTS, SACRED IMAGES, AND RELICS

CAN. 1276

Bonum atque utile est Dei Servos, una cum Christo regnantes, suppliciter invocare eorumque reliquias atque imagines venerari; sed prae ceteris filiali devotione Beatissimam Virginem Mariam fideles universi prosequantur.

This canon, taken substantially from the dogmatic canons of the Council of Trent,[1] embodies the time-honored practice of the Catholic Church and voices a rebuke against ancient and modern image-breakers. It lays it down as a good and useful practice to invoke the intercession of the servants of God who reign with Christ, above all the Blessed Virgin Mary, and to venerate their relics and images. The *hyperdulia* paid to the Mother of God is not in vain,[2] although she is a creature. Nor is it imposture, as the so-called reformers maintained, to say Mass in honor of the Saints and to obtain their intercession with God.[3] It would be rash and pernicious to reprove the faithful for showing particular veneration and attributing special titles of honor to miraculous images of the Saints, especially those of the Blessed Virgin Mary.[4]

1 Sess. 25, *de invoc.*

2 *Prop. 26 damn. a S. O.*, Dec. 7, 1690 (Denzinger, n. 1183).

3 *Trid.*, Sess. 22, can. 5, *de Sacrif. Missae.*

4 *Propp. 70, 71 damn. per "Auc-*

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There is not the slightest danger that, in venerating the Saints and their images, we shall fail to adore God in spirit and in truth, or that the memory of the Saints will dislodge God from the hearts of the faithful.[5] For the rest, the reasonableness of the veneration of the Saints is a matter for theologians.

PUBLIC WORSHIP OF THE SAINTS

CAN. 1277

§ 1. Cultu publico eos tantum Dei Servos venerari licet, qui auctoritate Ecclesiae inter Sanctos vel Beatos relati sint.

§ 2. In album Sanctorum canonice relatis cultus duliae debetur; Sancti coli possunt ubique et quovis actu eius generis cultus; Beati vero non possunt, nisi loco et modo quo Romanus Pontifex concesserit.

§ 1. Only those servants of God may be publicly worshiped who are counted among the Saints and Blessed by the authority of the Church.

The history of beatification and canonization may be studied in the classic work of Benedict XIV.[6] Since the XIIth century this function is reserved to the Holy See as a *causa maior*. (See P. II, Book IV.)

Urban VIII, in his Constitution "*Caelestis Hierusalem,*" of July 25, 1634, ruled that no images or votive tablets should be permitted in churches and oratories of persons who had not yet been declared Saints or Blessed by the Apostolic See, except such as had been venerated

torem fidei," Aug. 28, 1794 (Denzinger, n. 1433 f.).

[5] *Propp. 18, 35, 36 damn. Nov. 20, 1687* (*ibid.*, nn. 1105, 1122 f.).

[6] *De Servorum Dei Beatificatione et Canonizatione*, ed. Prati, 1839, Vols. 7. We may also refer to Part II, Book IV of this Commentary.

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either "by common consent of the Church, or by immemorable custom or in the writings of the Holy Fathers and holy men." From this ruling it was but natural to conclude that there was a *casus exceptus* from the general rule of beatification and canonization, *viz.*, the cult attributed to a distinguished servant of God and proved by means described in the Constitution of Urban VIII, quoted above.

Pending the *Causa,* or after the Commission for the trial has been assigned, it is strictly forbidden to call a servant of God "Venerable" and to hold any service of thanksgiving for the *introductio causae* or to deliver any panegyrics.

A person may be called "Venerable" only after a formal decree to this effect has been published.[7] Besides it must be understood that, although Saints or Blessed were venerated publicly with Office and Mass, it is required that their worship be approved and ratified by the Church before a Mass or a proper office in their honor is permitted. For the general rule is that such *propria* and Mass are accorded only to such Saints and Blessed who are mentioned in the Roman Martyrology or have enjoyed a public cult which has been either formally decreed or ratified by the Holy See.[8] Sometimes Saints and Blessed are inserted in diocesan calendars (ordo) who are neither found in the Martyrology nor endowed with a decree of the Holy See. This insertion in diocesan calendars or *propria* of a diocese or order can never produce the effect or create the presumption of a formal or *aequipollens* beatification, but leaves both title and cult in *statu quo ante*.[9]

7 S. Rit. C., Aug. 26, 1913 (*A. Ap. S.*, V, 436 ff.).

8 S. Rit. C., July 13, 1896 (n. 3926).

9 S. Rit. C., April 28, 1914 (*A. Ap.* S., VI, 235 f.).

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Above a *prohibition of exhibiting the images or statues of Saints or Blessed not approved as such by the Holy See,* was mentioned. This prohibition includes any public veneration either outside or inside of the church or altar.[10] But it is not forbidden to paint the pictures and events from the life of pious servants of God upon the walls of a church, or on the stained windows, provided these representations contain no *nimbus* or halo that would indicate canonization, beatification or a cult.[11]

§ 2. To those who have been canonically inserted in the catalogue of Saints is due the worship called *dulia. Saints* may be worshipped everywhere and by any act of *dulia,* but the *Blessed* may be worshipped only in the places and manner expressly granted by the Roman Pontiff.

A *canonical* insertion is made either by a formal or by an equivalent (*aequipollens*) decree issued by the Church, ratifying the cult offered to a Saint or Blessed person either by a long-standing tradition, or the common consent of the Church, or the writings of Holy Fathers and saintly men. These Saints, then, may receive the worship of *dulia,* as explained in can. 1255.

There is a difference between *Saints* in the strict sense and *Blessed,* although the distinction of cult is hardly perceptible. Benedict XIV [12] states three characteristics which distinguish Saints from Blessed:

(1) Beatification *permits,* canonization *prescribes* worship; at least this is the rule, though the Pontiff admits exceptions.

(2) The worship of a Blessed is confined to a certain

10 S. Rit. C., Sept. 28, 1658 (n. 1097).

11 S. Rit. C., Aug. 27, 1894 (n. 3835).

12 *De Servorum Dei Beat. etc.,* l. I, c. 39, nn. 12 ff.

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province, diocese, city, or religious institute, whereas the Saints may, though they need not, be worshipped everywhere throughout the whole Church.

(3) Canonization is the definitive and ultimate sentence of the Sovereign Pontiff, by which the worship of a Saint is prescribed for the whole Church, whilst beatification is a less definitive pronouncement.[13] This latter feature, according to Benedict XIV, marks the real difference between Saints and Blessed.

The general rules which must be observed concerning the *worship* of the *Blessed* are the following:

1. *Mass* and *Office* must be especially granted by the Roman Pontiff in honor of the Blessed. This indult is not included in the grant of erecting an altar in honor of the Blessed, nor is the public recitation of the Office permitted by the act which permits worship. Devotions, however, or *festa devotionis,* may be celebrated in honor of the Blessed, but not regular holydays with Mass and office, unless there be a special indult to this effect.[14]

If a Mass and office have been granted by special indult, the priests who celebrate Mass in chapels or churches for which the indult was given may and must conform to the rubrics, *i. e.,* they should say the Mass of the Blessed, if prescribed according to the approved calendar.[15]

2. As to *images,* votive tablets, statues, and pictures of the Blessed, these may be publicly exhibited for veneration in churches and oratories *if* the indult for Mass and office has been given, because this indult includes permission to exhibit said objects. Otherwise the images,

13 Hence theologians are unanimous in stating the infallibility of the Pope with regard to canonization, whilst they are more or less divided concerning beatification; cfr. Mazzella, *De Rel. & Eccl.* n. 813.

14 S. Rit. C., Sept. 27, 1659; April 17, 1660; July 24, 1915 (*Dec. Auth.,* nn. 1136, 1156; *A. Ap. S.,* VII, 389).

15 See the decree of Dec. 9, 1895 of the S. Rit. C.

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etc., may only be placed on the walls of the church or chapel, but never on the altar; and the local Ordinary is entitled to have them removed.

3. The *names* of the Blessed may not be inserted in the general calendar, but only in the one used for the particular place or institute; nor may it be recited in the *suffragium Sanctorum,* or in other prayers, except those approved by the Holy See.

4. If the worship of a Blessed has been granted for a *certain place,* it cannot be extended to another without a papal indult.

5. These rules must also be observed by *exempt religious,* no matter what their name or privileges may be or have been.

PATRON SAINTS

CAN. 1278

Laudabiliter quoque, servatis servandis, Sancti nationum, dioecesium, provinciarum, confraternitatum, familiarum religiosarum aliorumque locorum et moralium personarum eliguntur et, accedente confirmatione Sedis Apostolicae, constituuntur Patroni; Beati non item, sine peculiari eiusdem Sedis Apostolicae indulto.

It is praiseworthy that nations, dioceses, provinces, confraternities, religious institutes, places and corporations should choose patron *saints* with the approval of the Apostolic See. But the *Blessed* can be chosen patrons only with a special indult of the same Holy See.

The approval of the Apostolic See is also required when a new patron Saint is chosen instead of an old one.[16] Thus it may happen that a revolution sweeps away religious communities and the new occupants of a church

[16] S. Rit. C., March 23, 1630 (n. 526).

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choose another patron saint. Such a change may be made with the consent of the S. Rit. C.[17] The patron-saint of a place or community may differ from the one in whose name a church is dedicated. In a large city, for instance, there may be many patron or titular saints of different churches, but only one patron of the city, or diocese, or province.[18]

PICTURES OF SAINTS

CAN. 1279

§ 1. Nemini liceat in ecclesiis, etiam exemptis, aliisve locis sacris ullam insolitam ponere vel ponendam curare imaginem, nisi ab Ordinario loci sit approbata.

§ 2. Ordinarius autem sacras imagines publice ad fidelium venerationem exponendas ne approbet, quae cum probato Ecclesiae usu non congruant.

§ 3. Nunquam sinat Ordinarius in ecclesiis aliisve locis sacris exhiberi falsi dogmatis imagines vel quae debitam decentiam et honestatem non praeseferant, aut rudibus periculosi erroris occasionem praebeant.

§ 4. Si imagines, publicae venerationi expositae, sollemniter benedicantur, haec benedictio Ordinario reservatur, qui tamen potest eam cuilibet sacerdoti committere.

§ 1 repeats almost verbally the strict prohibition of the Council of Trent[19] against exhibiting *unusual images,* in churches or sacred places, even of exempt religious, unless the approval of the local Ordinary has first been obtained.

§ 2. The Ordinaries shall never allow any sacred im-

17 S. Rit. C., June 1, 1876, ad VI (n. 3400).

18 S. Rit. C., May 1, 1857 (n. 3048).

19 Sess. 25, *de invocat.*

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ages to be publicly exhibited to the veneration of the faithful, unless these images are in keeping with the approved usage of the Church.

From this paragraph may be negatively deduced what an unusual image (*insolita imago*) is, namely, an image that represents persons or events in a manner which has no justification in either Holy Scripture or tradition. Thus to represent the Holy Ghost in the form of a young man has never been sanctioned, but rather reprobated, by the Church. The Blessed Trinity may not be represented in the shape of a man with three heads, or of one man with two heads with a dove between them.[20] A statue or painting similarly representing the Sorrowful Mother dressed in black and holding a crucifix in the left hand would be an unusual picture.[21] Pictures of the Sacred Heart of Jesus representing the Heart alone, without the rest of the body, are not allowed to be exhibited publicly on altars, but may be used for private devotion.[22] The title "*Cor Jesu Eucharisticum*" is neither canonical nor liturgical, and hence no pictures of it may be exhibited to the veneration of the faithful.[23] Chinese Christians sometimes depict our Saviour with a Chinese beard and shoes. This custom is not strictly forbidden, but should be discouraged.

Note that the term *images* comprises all kinds of representations: statues, pictures, medals, etc.

§ 3. The Ordinary shall never permit the exhibition, in churches or sacred places, of images which offend against dogma or lack decency and propriety, or are apt to lead

20 Bened. XIV, "*Sollicitudini*," Oct. 1, 1745, §§ 10 ff.

21 S. Rit. C., Feb. 23, 1894 (n. 3818).

22 S. O., Aug. 26, 1891 (*Coll. P. F.*, n. 1767). The S. Heart of Mary is to be represented according to the decree of April 26, 1875; Nov. 29, 1878 (n. 3470).

23 S. Rit. C., March 28, July 15, 1914 (*A. Ap. S.*, VI, 146, 382 f.).

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the ignorant into error. Undogmatic are the above-mentioned representations of the Holy Ghost and the Blessed Trinity. Decency is also required in the garb or dress given to statues, which only too often offend against good taste.[24] Danger might arise from the veneration of images if ignorant persons would be permitted to worship one who has never been declared or acknowledged as a saint,[25] or if fetichism were attached to their devotion.

§ 4. The *solemn* blessing of images which are to be exhibited for public veneration is *reserved to the Ordinary,* who may, however, delegate this function to any priest. There is no rule or law prescribing the blessing of images.

RESTORATION OF STATUES AND PAINTINGS

CAN. 1280

Imagines pretiosae, idest vetustate, arte, aut cultu praestantes, in ecclesiis vel oratoriis publicis fidelium venerationi expositae, si quando reparatione indigeant, nunquam restaurentur sine dato scriptis consensu ab Ordinario; qui, antequam licentiam concedat, prudentes ac peritos viros consulat.

Images which possess great value by reason of their antiquity, artistic finish or the veneration given to them, and which have been exhibited to the worship of the faithful in churches and public oratories, if in need of repairs, must not be restored without the written consent of the Ordinary, who shall seek advice from wise and experienced men before he grants such a permission. This is a very timely law which should have been enforced in the seventeenth and eighteenth centuries when ecclesiastical

24 S. Rit. C., March 15, 1888 (n. 3690).

25 S. Rit. C., Aug. 31, 1889 (n. 3715).

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dignitaries often "restored" fine romanesque churches of Gothic or Moorish architecture and converted them into whitewashed Barocco edifices.[26]

We may also be permitted to add that some modern statues savor very much of the "salon." Take, for example, a good many representations of St. Francis of Assisi and St. Antony, which are anything but dignified in their fancy costumes. Ecclesiastical statuaries should be inspected before they are ecclesiastically approved.

ALIENATION OF RELICS AND IMAGES

CAN. 1281

§ 1. Insignes reliquiae aut imagines pretiosae itemque aliae reliquiae aut imagines quae in aliqua ecclesia magna populi veneratione honorentur, nequeunt valide alienari neque in aliam ecclesiam perpetuo transferri sine Apostolicae Sedis permissu.

§ 2. Insignes Sanctorum vel Beatorum reliquiae sunt corpus, caput, brachium, antibrachium, cor, lingua, manus, crus aut illa pars corporis in qua passus est martyr, dummodo sit integra et non parva.

§ 1 prohibits the alienation of important relics or images of great value, as well as of such relics and images as are held in great honor by the people in some church. To alienate such without an apostolic indul is void of effect in the ecclesiastical external forum as well as in the court of conscience. Nor may such relics or images be permanently transferred to another church without permission from Rome.

In the eighth and ninth centuries, after many relics had

[26] Example: the cathedral of Amalfi in Italy.

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been transferred from the catacombs to the churches of Rome, a regular traffic in relics began which soon became a public scandal. A synod of Mayence, in 813, forbade the transfer of bodies of saints without the permission of the secular ruler, or bishop, or synod.[27] The fourth Lateran Council prohibited the exhibition of relics for sale as detrimental to religion and also commanded that all ancient relics should be enclosed in reliquaries and neither exposed nor sold without authority from the Sovereign Pontiff. Minor prelates in whose churches relics were venerated, were urged not to permit fraud by exhibiting false documents to allure the faithful — as, adds the council, had happened in several places, for the sake of gain.[28] Transfer from one altar to another of the same church may be permitted by the bishop.[29]

Temporary transfer is permissible because the Code uses the term *perpetuo*. Hence if repairs or other reasons would render a temporary transfer necessary, no recourse to the Holy See would be required, provided, of course, the relics or images are replaced.

§ 2 defines what an important relic (*insignis reliquia*) is. It is the entire body, head, arm, forearm, heart, tongue, hand, leg of a saint or blessed person, or that part of his body in which the martyr suffered death, provided it be entire and not a small part. This paragraph is verbally taken from a decree of the S. C. of Rites, which however, added: "duly approved by the Ordinary."[30] This clause is omitted in our text, probably on account of the following canon. There is a special reason for mentioning the different parts, namely, because on the

27 Can. 51, c. 37, Dist. 1 *de cons.*; Hefele, *Concil-Gesch.*, III, 711.

28 C. 2, X, III, 45.

29 S. C. Indulg., Nov. 17, 1676 (Prinzivalli, *l. c.*, n. 13).

30 S. Rit. C., April 8, 1628 (n. 460).

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Feast of Relics the *Credo* is to be recited in churches where an important relic is preserved.

After the publication or the decree of 1628 doubts arose as to what parts of the body of a Saint were meant. Most of the answers given in reply to questions were negative. Thus, the *tibia* or shinbone, or *femoris ossa* or thighbone, or smaller parts of the same, or the foot with some toes on it, were not acknowledged to be an *insignis reliquia,* nor even part of the head.[31] On the other hand, the forearm and the upper arm, from the elbow to the shoulder, were acknowledged as *insignia.*[32]

Integra or entire is that part of the body in which the martyr suffered, provided it be unmutilated; if it *is* mutilated, for instance, the cranium crushed, it could be gathered up and the parts reassembled so as to make one whole.[33] Besides, it must be a considerable part, not a mere splinter (*non parva*).

CAN. 1282

§ 1. Insignes Sanctorum vel Beatorum reliquiae nequeunt in aedibus vel oratoriis privatis asservari, sine expressa Ordinarii loci licentia.

§ 2. Reliquiae non insignes debito cum honore etiam in domibus privatis servari pieque a fidelibus gestari possunt.

Important relics of saints and blessed persons may not be preserved in *private homes and oratories* without the express permission of the local Ordinary. *Minor relics,* on the other hand, may be kept in private houses and rev-

31 S. Rit. C., Dec. 20, 1628; June 3, 1662 ad 2; Dec. 7, 1844 (nn. 490, 1234, 2883); S. C. Indulg., June 12, 1822 (Prinzivalli, n. 430).

32 S. Rit. C., June 27, 1899, ad II (n. 4041).

33 S. Rit. C., Dec. 3, 1672 (n. 1460).

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erently carried about by the faithful. The first paragraph is undoubtedly prompted by the desire that all the faithful should be benefitted by the presence of such sacred objects, and that important sacred remains should receive a greater reverence than they ordinarily receive if in private possession.

AUTHENTICATION OF RELICS

CAN. 1283

§ 1. Publico cultu eae reliquiae in ecclesiis, quanquam exemptis, honorari possunt, quas genuinas esse constet authentico documento alicuius S. R. E. Cardinalis, vel Ordinarii loci, vel alius viri ecclesiastici cui facultas *authenticandi* indulto apostolico sit concessa.

§ 2. Vicarius Generalis nequit, sine mandato speciali, reliquias authenticas edicere.

CAN. 1284

Locorum Ordinarii reliquiam, quam certo non esse authenticam norint, a fidelium cultu prudenter amoveant.

CAN. 1285

§ 1. Sacrae reliquiae, quarum authenticitatis documenta ob civiles perturbationes vel ob alium quemlibet casum interierint, publicae venerationi ne exponantur, nisi praecedat iudicium Ordinarii loci, non autem Vicarii Generalis sine mandato speciali.

§ 2. Reliquiae tamen antiquae in ea veneratione qua hactenus fuerunt, sunt retinendae, nisi in aliquo peculiari casu certis argumentis constet eas falsas vel suppositicias esse.

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CAN. 1286

Locorum Ordinarii ne sinant, maxime in sacris concionibus, libris, ephemeridibus vel commentariis fovendae pietati destinatis, ex meris coniecturis, ex solis probabilibus argumentis vel praeiudicatis opinionibus, praesertim verbis ludibrium aut despectum sapientibus, quaestiones agitari de sacrarum reliquiarum authenticitate.

Only genuine relics may be exhibited for public veneration in churches, even those of exempt religious. The genuineness of a relic is ascertained by an authentic document, issued either by a cardinal, or by the local Ordinary, or by a clergyman who has obtained an apostolic indult authorizing him to authenticate relics.

The Vicar General needs a special mandate to issue such a document.

The authentification of ancient relics is a delicate and difficult task, which requires a great deal of archaeological and palæographical knowledge. Hence the Cardinal Vicar of Rome supports a special department, called *lipsanotheca,* for the purpose of authenticating relics. This means was especially employed after 1870, when many churches and convents were suppressed, shrines and reliquaries scattered and sold without the knowledge of the proper authorities and imitations were not infrequently sold by unscrupulous persons for filthy lucre's sake. Hence the Vicariate of Rome warned bishops against being too credulous concerning bodies which purported to have been taken from the catacombs, even though they were "authenticated" by an Italian bishop, for these nefarious traders did not shrink from forging documents.[34]

34 Vicariatus Urbis litt. encycl., Jan. 17, 1881 (*Coll. P. F.*, n. 1546).

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Absolute certainty in regard to the genuineness of relics, especially such as date back to a remote age, is next to impossible. It would, however, be wrong for that reason to reject all ancient relics. Many documents attesting the transfer or translation of relics have been preserved, and, besides, the immemorable custom of veneration must be admitted as a living proof which amounts at least to moral certainty. It may also be assumed that Divine Providence watches over these sacred objects with special care.[35] Finally, even if there be fraud or erroneous belief, the act of venerating a relic is always a religious act addressed ultimately to God, and hence can never be entirely void of effectiveness.

The ecclesiastical authority who has to authenticate relics must, if possible, investigate their origin or source, and therefore demand a document. This document must contain the signature and seal of the one who enclosed the relics in its container. The latter (capse) must be sealed with the same seal which is impressed on the document of authentification. Generally also the make of the capse, its artistic decoration and the material from which it is made are indications of authenticity. If the signature, seal and capse (or shrine) all point to some degree of certainty, the document may be accepted as genuine.[36] In the same way the bishop must proceed when relics are transferred from one church or country to another, provided, in the latter case, the Apostolic indult was obtained. If no authentic document or no immemorable custom can be shown, no document should be issued.[37]

Can. 1284 obliges the local Ordinaries to withdraw from public veneration all relics of which he knows for

35 See Ps. 33, 2.
36 S. C. Indulg., Dec. 16, 1749 (Prinzivalli, n. 187).
37 S. Rit. C., July 21, 1696, ad 4 (n. 1946).

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certain that they are *not* genuine. As stated, the signature and seal on the document and capse may be considered sufficient authentication. However, the signature must be by hand, and not with a stamp (*colla stampiglia*), unless the prelate is notoriously prevented from writing by paralysis or other bodily infirmity.

Titular bishops are not empowered to authenticate relics.[38] This privilege is expressly reserved to cardinals and ordinaries in the strict sense of the term, though Vicars Capitular or Administrators are not excluded. Relics which are certainly spurious,[39] the Ordinaries would do well to withdraw and destroy.

However it may happen, as is evident from can. 1285, that the authenticating documents are lost. This has happened under the Huguenots' terror in Toulouse, during the French Revolution,[40] and in Italy after 1870. Such relics may be exposed to public veneration only if the local Ordinary deems it proper. The Vicar General is not competent to grant this permission without being specially commissioned to do so. If the faithful are deeply attached to certain, especially ancient, relics and have a special veneration for them, they may be retained and venerated, provided their spuriousness cannot be proved by solid arguments.[41]

The *public discussion of the authenticity of relics* should be avoided and may be forbidden by the local Ordinaries if the argument rests on mere conjectures, probabilities or prejudices, and if the methods employed are apt to cast ridicule and contempt on sacred relics or their

38 S. C. Indulg., Sept. 23, 1783 (Prinzivalli, n. 378).

39 For instance, relios of the Highpriest Melchisedek; S. Rit. C., Aug. 3, 1687 (n. 1977).

40 S. C. Indulg., Feb. 22, 1847 (Prinzivalli, n. 582); S. Rit. C., June 23, 1892 (n. 3779).

41 S. C. Indulg., Jan. 20, 1896; Pius X, "*Sacrorum Antistitum*," Sept. 1, 1910, n. VI (*A. Ap. S.*, II, 664 f.).

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veneration. Such discussions should not be conducted in sermons, or in books, magazines, and pamphlets intended to foster devotion rather than critical research. This well directed and carefully worded admonition, which is partly taken from the Motu proprio "*Sacrorum Antistitum,*" of Sept. 1, 1910, warns writers against setting up merely probable statements for absolute truth, but it does not forbid sober and respectful criticism based upon scientific research. For the rule laid down in our canon applies to devotional books or periodical publications only, — not to critical disquisitions and scientific reviews. Besides, whilst it warns against the propagation of purely probable and subjective views, it leaves a large margin for solid arguments.[42] The language employed by critics should, of course, always be moderate and respectful.

EXPOSITION OF RELICS

CAN. 1287

§ 1. Reliquiae, cum exponuntur, in thecis seu capsis clausae et obsignatae sint oportet.

§ 2. Reliquiae sanctissimae Crucis nunquam in eadem theca cum reliquiis Sanctorum publicae venerationi exhibeantur, sed propriam thecam separatam habeant.

§ 3. Beatorum reliquiae, sine peculiari indulto, in processionibus ne circumferantur, neve in ecclesiis exponantur, nisi ubi eorum officium et Missa celebretur ex Sedis Apostolicae concessione.

When relics are exposed, they should be *enclosed* in a shrine, case or capsule, and *sealed* with the seal of the authenticating prelate or official.

42 The Bollandists cannot be seriously accused of making exaggerated or unfounded statements.

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Relics of the true Cross should never be exhibited to public veneration together with relics of Saints, *i. e.*, enclosed in the same chest or shrine, but in a separate case.[43]

Relics of the true Cross and of other instruments of Christ's Passion may be carried about in procession under a canopy; but no other relics of Saints or Blessed may on such occasions be carried in procession under the canopy at the same time.[44]

Relics of *Blessed* persons may not be carried about in procession without a special indult, nor may they be publicly exposed in churches except where the Mass and office is permitted by the Apostolic See.

RELICS IN THE BISHOP'S PECTORAL CROSS

CAN. 1288

Sanctissimae Crucis reliquiae, quas in cruce pectorali Episcopus forte defert, ecclesiae cathedrali, ipso defuncto, cedunt, Episcopo successori transmittendae; et si defunctus pluribus praefuerit dioecesibus, ecclesiae cathedrali dioecesis, in cuius territorio supremum diem obiit aut, si extra dioecesim mortuus est, ex qua ultimo discessit.

Relics of the true Cross which may be enclosed in the pectoral cross of a bishop, after his death belong to his cathedral church, which shall hand them to the bishop's successor. If the deceased bishop ruled several dioceses, the relics pass to the cathedral church of the one in which he died; if he dies outside the diocese, the relics belong to the cathedral church of the diocese in which he passed away. The reason for this enactment is to be sought

43 S. C. Indulg., Feb. 22, 1847 (Prinzivalli, n. 589).

44 S. Rit. C., May 27, 1826 (n. 2647) and *pluries*.

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in the scarcity of these relics which bishops should carry about their person as a token of their dignity. But the law only touches the relic, not the pectoral cross, or the *theca* or capsule in which the relic is contained. The *theca* may, after the sacred relic has been withdrawn, be disposed of or sold, with due precaution, of course, against profanation.[45]

PRECAUTIONS AGAINST THE SALE AND PROFANATION OF RELICS

CAN. 1289

§ 1. Sacras reliquias vendere nefas est; adeoque Ordinarii locorum, vicarii foranei, parochi aliive curam animarum habentes, sedulo caveant ne sacrae reliquiae, praesertim sanctissimae Crucis, occasione maxime hereditatum aut alienationis acervi bonorum, veneant, neve in acatholicorum manus transeant.

§ 2. Rectores ecclesiarum, ceterique ad quos spectat, sedulo invigilent ne sacrae reliquiae ullo modo profanentur, neve hominum incuria pereant, vel minus decenter custodiantur.

It is forbidden to sell relics, and hence the local ordinaries, rural deans, pastors, and all those who have charge of souls shall take proper precautions lest sacred relics, especially of the Holy Cross, be sold on the occasion of hereditary transfer or public auction, and see to it that they do not pass into the hands of non-Catholics.

The rectors of churches, and others whom it concerns, (*e. g.*, the *custos sacrae supellectilis*) should also take great care lest sacred relics be exposed to profanation,

[45] Vic. Urbis lit. encycl., March 25, 1889 (*Coll. P. F.*, n. 1699).

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or lost through carelessness, or preserved in an unbecoming manner.

As mentioned above, the impious custom of selling relics was practiced at times for gain. Often also well-meaning Catholics bought relics from traders in order to save them from profanation. But even this is forbidden because of the danger of simony and of aiding this impious traffic. All the faithful are in duty bound to denounce to the Ordinary any place where relics are exhibited for sale. He will then take such steps as he deems proper.[46]

[46] S. C. Indulg., Dec. 21, 1878 (*Coll. P. F.*, n. 1505).

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TITLE XVII

SACRED PROCESSIONS

DEFINITION AND DIVISION

CAN. 1290

§ 1. Nomine sacrarum processionum significantur sollemnes supplicationes quae a populo fideli, duce clero, fiunt eundo ordinatim de loco sacro ad locum sacrum, ad excitandam fidelium pietatem, ad commemoranda Dei beneficia eique gratias agendas, ad divinum auxilium implorandum.

§ 2. *Ordinariae* sunt quae statis diebus per annum fiunt ad normam librorum liturgicorum vel consuetudinum ecclesiarum; *extraordinariae,* quae aliis publicis de causis in alios dies indicuntur.

Sacred processions are solemn invocations made by the faithful people marching in an orderly manner, under the leadership of the clergy, from one sacred place to another, for the purpose of arousing devotion, praising God's benefits, thanking Him, and imploring His help.

Ordinary processions are those held on stated days throughout the year, according to the sacred liturgy or the custom of the churches; *extraordinary* processions are those held for some other public cause on other days.

Processions are a popular element in almost every form of religious worship.[1] The Roman Ritual specifies as *or-*

1 Cfr. *Cath. Encycl.*, XII, 446 ff. *s. v.* "Procession."

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dinary processions those held on Candlemas Day (Feb. 2), on Palm Sunday, the so-called greater Litanies of April 25, and the Rogation Days preceding the feast of the Ascension. Besides these, we may designate as ordinary the procession on Maundy Thursday, the return on Good Friday, and the procession for the holy fire on Holy Saturday. Funeral processions may also be called ordinary. Moreover, as the text also mentions as ordinary the processions introduced by ecclesiastical custom, it is evident that so-called *field processions,* as still in vogue in Switzerland, and *processions* from one church to another in honor of a special *patron,* must likewise be reckoned among the ordinary ones.

Extraordinary processions, according to the Roman Ritual, are all those held for the purpose of obtaining rain, or fair weather, of driving away storms, the three assigned for times of famine, plague, and war, one for the occasion of any calamity, one for thanksgiving, and one for the translation of relics.

The *essential* feature of a sacred procession certainly is that it is held under the leadership of the clergy. Hence a mere parade held for any purpose, even for the translation of sacred images from house to house, in which the clergy are mere participants without sacred vestments, cannot be called a procession in the liturgical sense.[2] Besides, even a religious procession if arranged and led by laymen, cannot be styled a sacred procession.

A sacred procession must be conducted in an *orderly* manner. This rule has a double meaning, of which one is described in can. 1295, and has reference to due reverence and becoming conduct, while the other is that the order of the participants be according to the rules of precedence, regarding which see can. 1295.

2 S. Rit. C., Aug. 20, 1870 (*Dec. Auth.*, n. 3217).

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CORPUS CHRISTI PROCESSIONS

CAN. 1291

§ 1. Nisi aliter ferat immemorabilis consuetudo, vel locorum circumstantiae, prudenti Episcopi iudicio, aliud exigant, die festo Corporis Christi unica tantum sollemnisque per publicas vias processio in uno eodemque loco fieri debet ab ecclesia digniore, eique clerici omnes religiosaeque virorum familiae, etiam exemptae, et laicorum confraternitates interesse debent, regularibus exceptis qui in strictiore clausura perpetuo vivant, aut a civitate ultra tria millia passuum distent.

§ 2. Ceterae paroeciae et ecclesiae etiam regulares possunt, intra octavam, proprias processiones extra ecclesiae ambitum agere; sed ubi plures sunt ecclesiae, Ordinarii loci est dies, horas ac vias praestituere quibus suam quaeque processionem agant.

§ 1. Unless there be an immemorial custom to the contrary, or unless local circumstances in the prudent judgment of the bishop demand a deviation from the rule here laid down, only *one solemn procession is permitted* in the same place through the public streets *on the feast* of *Corpus Christi.* This procession is to be arranged and led by the more prominent church of the respective city or town, and all the clergy and male religious orders, including the exempt, as well as the confraternities of laymen, must attend it. Only those regulars who live perpetually in strict enclosure, or dwell three thousand paces from the city, are excused from participation.

The solemn *Corpus Christi procession* is to be held on the following Sunday, if the feast is transferred to

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that day,[3] as is the case in our country. Therefore, even taking into consideration § 2 of our canon, it would clearly be against the intention of the Church to hold the principal procession on Corpus Christi Thursday and a less pompous one on Sunday.

There must be only one *public procession* in the same town or city, unless an immemorial custom or special circumstances should induce the bishop to permit more. There is not much danger in our country, especially in the large cities, of having too many processions.

The *dignior ecclesia,* i. e., the more distinguished church, should lead the procession. *Dignior* undoubtedly is the cathedral church, which follows the collegiate church, provided it is also a parochial church.[4] It appears but just that a parochial church should be preferred to a collegiate church if the latter is not a parish church. Among the parish churches the more ancient one takes the lead over those established later, according to the rule: *Prior in tempore prior in iure.*

In this public procession the entire *secular* and *regular clergy,* as well as all confraternities, of men as well as women, are bound to participate. Religious congregations and orders of women need not attend, though Sisters who do not live in enclosure *may* do so if they wish; — at least the text does not exclude them because it only mentions those who are obliged to assist (*interesse debent*). As to the *regulars,* whether exempt or not, the Council of Trent[5] had already made it obligatory for them to attend, with one exception, to be explained further down (see next paragraph). The Council employs the phrase, "*vocati accedant,*" which presupposes some

3 S. Rit. C., June 24, 1911 ad VI (n. 4273).

4 S. Rit. C., Jan. 11, 1681 (n. 1657).

5 Sess. 25, c. 13, *de reg.*

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kind of invitation. The Code discards this clause, and hence no invitation is required, though the leading church may reasonably be expected to indicate or announce the hour of holding the procession and the place where it is to start.

The *exception* for regulars is based upon enclosure and distance. The *enclosure,* of course, is to be understood of the so-called papal enclosure, as stated under can. 597. This was already enacted by the Council of Trent and confirmed by later interpretations, the substance of which is that all regulars, no matter how exempt they may be, must attend the Corpus Christi procession, unless they live under strict perpetual enclosure or can show a privilege granted after the Council of Trent, and directly, *i. e.,* not obtained by way of communication.[6] Such privileges were granted to the Society of Jesus, to the Discalced Carmelites, the Theatines and the Scolapii.[7] The Code does not annul these privileges by any contrary clause. The great Mendicant Orders of St. Francis and St. Dominic are obliged to attend the Corpus Christi procession,[8] as are also the Augustinians, *Calceati* as well *Discalceati,* and the Celestinians.[9] As to the Benedictines there are two decisions worthy of note: the Cassinese monks need not take part in any procession except that of Corpus Christi, which they *must* attend, even though there be but six monks living in the monastery.[10] Note that no communication of privileges avails in this case. But what about enclosure? The Benedictines have a papal

6 Urban VIII, "*Nuper,*" Nov. 17, 1638, § 1 f.; S. Rit. C., Sept. 28, 1658 (n. 1096).

7 Piatus M., *Praelectiones Juris Regul.,* II, p. 41.

8 S. Rit. C., May 10, 1594; May 9, 1693 (nn. 48, 1895).

9 S. Rit. C., Dec. 9, 1638; Sept. 2, 1602; Aug. 4, 1674 ad 1 (nn. 661, 1244, 1716).

10 S. Rit. C., June 10, 1602; Oct. 2, 1683 (nn. 99, 1716).

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enclosure, but no strict enclosure in the sense of the text, like the Carthusians and the Camaldolese Hermits. The decision concerning the Cassinese Benedictines mentions custom, but the Corpus Christi procession is expressly excepted. The same is true of the Celestinians and may safely be applied to other monastic bodies of regulars; because if the enclosure means something, it certainly must be applied to that case also, the Corpus Christi procession, as a special token of belief in that mystery and a public profession of the same against heresy.

The next reason for exception is *distance.* The general decree of Urban VIII, as restated by the S. Congregation, mentions *" Ultra medium milliare a civitate," i. e.,* over half a mile from the city. Our text has 300 *passus.* A passus, according to Roman reckoning, is 485 English or American feet, so that 3000 passus would be about 14,550 feet, or 1,290 feet less than three English statute miles.[11] In round figures, therefore, we may say, three English (not geographical) miles, especially since the text says, *ultra,* above.

The point from which the distance must be reckoned is simply stated as " the city." But in a large city there may be a considerable difference between the different points from which distance may be measured. If the city limits are taken as the starting point, the three miles would be entirely outside the boundaries. This, we believe, is the meaning of the text, for it obliges the entire clergy of a city or town to attend the procession, and one decision says that all the Friars Preachers and Friars Minor *intra septa moenium civitatis* must be present.[12] Therefore not the church from which the procession

11 Cfr. Ramsay-Lanciani, *Roman Antiquities,* 1901, p. 462 f.

12 S. Rit. C., May 10, 1594 (n. 48).

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starts, but the city limits, is the point from which the distance is to be calculated. The direction, of course, is intended in the direct or air line, *i. e.,* within a radius of three miles outside the city limits.

It may be added that the obligation of assisting at the Corpus Christi procession binds the secular and regular clergy only if the procession is held in the open air, *per publicas vias,* and the term *regular* must be taken in the strict sense, to the exclusion of such religious as are exempt by a special indult.

§ 2. The other parishes and churches, including those which are in charge of regulars, may have their own processions outside the church during the Octave of Corpus Christi; but the local Ordinary should assign the day, the hour and the route for each parish. This rule was established in order to avoid unpleasant encounters. In some cases even the side of the wall or street had to be determined [13] and pastors were ordered not to invade the boundaries of other parishes.[14]

OTHER PROCESSIONS

CAN. 1292

Ordinarius loci, audito Capitulo cathedrali, potest ex publica causa extraordinarias processiones indicere; quibus, sicut et ordinariis ac consuetis, ii omnes interesse debent de quibus in can. 1291, § 1.

The local Ordinary, after having heard the advice of his cathedral chapter, may for a public cause order extraordinary processions, which, like the customary and ordinary ones, must be attended by those mentioned in can. 1291, § 1.

13 S. Rit. C., June 11, 1594 (n. 49).

14 S. Rit. C., Jan. 11, 1681 (n. 1657).

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If the Ordinary is obliged to hear the advice of the chapter and cannot lawfully order a procession without it, this is *a fortiori* true of the Vicar Capitular or administrator. Should a procession be ordered without their advice, the canons cannot be compelled to attend it.[15] This rule must also be followed in our country, where the consultors should be asked *collegialiter*. This does not, however, mean that the bishop cannot order a customary or extraordinary procession without first hearing the advice of the consultors. He may order a procession to be held in any parish; but he cannot oblige the whole clergy, secular and regular, to attend it if he has not previously asked the chapter or the consultors. However, it is sufficient to ask their advice; their consent is not required.[16] Besides the bishop no one else in the diocese is entitled to order a procession, but in the absence of the bishop the Vicar General may do so, provided he has asked the advice of the chapter.[17]

The *extraordinary* processions which the local Ordinary may order must be for a public cause, or, as is sometimes stated, [18] *pro bono publico et publico honore*. This means that the public interest or the welfare of the community must be at stake, as is evident from the enumeration of these extraordinary processions in the Ritual. They cannot be ordered for mere display. If a procession is customary on the occasion of the entrance of a new bishop, this may be ordered for all, including the regulars, though without threatening censures.[19] An extraordinary procession may also be ordered on the

15 S. C. EE. et RR., May 11, 1663 (Bizzarri, *l. c.*, p. 261).

16 S. Rit. C., March 28, 1626 (n. 394).

17 S. Rit. C., Jan. 14, 1617, ad 1; Sept. 28, 1630 (nn. 346, 545).

18 S. Rit. C., July 27, 1609 (n. 272).

19 S. C. C., July 11, 1750 (Richter, *Trid.*, p. 416, n. 9).

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occasion of a Eucharistic Congress, or a Congress in honor of the Sacred Heart of Jesus, or an important meeting of Catholics.

Those obliged to participate in these extraordinary processions are the same as mentioned in can. 1291; hence, first of all, the whole *secular clergy,* provided the Ordinary has duly intimated his intention to that effect. *Indicere,* to order, certainly implies a lawful summons. The *regular clergy,* too, must be present, under the same conditions as stated above. We will add that the monks, unless they can prove a legitimate contrary custom, must also be present. Thus it has been decided concerning the monks of St. Basil and St. Benedict in a case from the diocese of Paderborn.[20] The time or hour for the procession must be announced by the Ordinary, who may suit himself about it.[21] The lay *confraternities* also must attend these processions if they have been summoned by the Ordinary.[22]

RELIGIOUS NOT ALLOWED TO HOLD PUBLIC PROCESSIONS WITHOUT THE PERMISSION OF THE ORDINARY

CAN. 1293

Religiosi etiam exempti nequeunt extra suas ecclesias et claustra processiones ducere sine Ordinarii loci licentia, salvo praescripto can. 1291, § 2.

With the exception of the Octave of Corpus Christi, religious, even though exempt, are not allowed to hold processions outside their churches and cloisters without the permission of the local Ordinary, who may grant this

20 S. Rit. C., June 23, 1670; Dec. 22, 1770, ad 2 (nn. 2116, 2490).

21 S. Rit. C., June 17, 1606 (n. 217).

22 S. Rit. C., Sept. 23, 1820 (n. 2608).

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permission without asking the consent or advice of his chapter or consultors, nay, even against the will of the pastor or collegiate chapter,[23] and once for all. He may also prescribe or change the route the procession has to take.[24] If the religious have obtained a special papal indult, or can prove a legal custom, they do not need the permission of the Ordinary.[25] Also, if they have obtained a direct privilege, or can prove that the custom existed after the year 1628, no permission is required.[26] But if they have neither the Ordinary's permission, nor a privilege, nor an indult, nor a legitimate custom in their favor, they are allowed to hold processions only *within their church or cloister,* always excepting the Octave of Corpus Christi. However, a general decree of 1658, Sept. 28, states that if they have no cloister they may lead a procession even outside the church, provided they keep to the walls of the church and re-enter through the same or another door of the same (*non extra ambitum ecclesiae*).

PASTORS AND THE CLERGY IN RELATION TO PROCESSIONS

CAN. 1294

§ 1. Parochus vel quivis alius nequit processiones novas inducere aut consuetas transferre vel abolere sine Ordinarii loci licentia.

§ 2. Processionibus alicuius ecclesiae propriis interesse debent omnes clerici eidem ecclesiae adscripti.

§ 1. Neither the pastor nor anyone else can introduce new, or transfer or abolish the customary processions without the permission of the local Ordinary.

23 S. Rit. C., March 11, 1690; June 13, 1673; Aug. 31, 1697; (nn. 1824, 1573, 1980).

24 S. Rit. C., Nov. 24, 1691 (n. 1859).

25 S. Rit. C., Nov. 14, 1676; April 8, 1702 (n. 1581, 2099).

26 S. Rit. C., Sept. 28, 1658; Dec. 19, 1671, ad 1 (nn. 1096, 1440).

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The term *quivis alius* includes cathedral and collegiate chapters, as well as confraternities, so that the prohibition also applies to them.[27] If the Ordinary wishes to transfer a procession, for instance, on account of rain, the chapter would have to be asked.[28] Our canon is silent about the advice of the chapter, we believe with good reason. It goes without saying that also pastors or religious orders or congregations must abide by this law concerning processions.[29]

§ 2. At processions which are peculiar to any church, all the clergy belonging to the respective church must be present. The term *adscripti* means ascribed or assigned, and, in canonical parlance, includes all the *beneficiaries* of a church. All who hold a benefice in a church, unless they are *iubilati,* must attend the processions of that church.[30] In our country all the clergy assigned to a church are under the same obligation. However, the bishop may exempt such as are employed in other occupations, for instance, in mission work, teaching, etc. One who has been granted a vacation need not trouble his conscience concerning this obligation.

ORDER OF PROCESSIONS

CAN. 1295

Curent Ordinarii ut sacrae processiones, exstirpatis, si qui sint, malis usibus, ordinate procedant eaque modestia ac reverentia ab omnibus perficiantur, quae piis ac religiosis huiusmodi actibus maxime convenit.

27 S. Rit. C., Nov. 22, 1681, ad 2, 8; Jan. 12, 1704, ad 22 (nn. 1684, 2123).

28 S. Rit. C., Sept. 3, 1695; July 21, 1696 (nn. 1932, 1947).

29 S. C. EE. et RR., March 14, 1879 (*A. S. S.*, XI, 595 ff.).

30 S. C. C., Feb. 27, 1677; Bened. XIV, *De Syn. Dioec.*, III, 8, 9 f.

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The Ordinaries shall take care that any abuses that may have crept in are eliminated and that the processions proceed in an orderly manner, with the modesty and reverence suited to such pious and religious acts.

An *orderly* procession presupposes an orderly arrangement according to rules.[31] The participants must walk two by two, with the Cross leading the procession. After the cross-bearer follow the girls and boys, then the women and men, then the confraternities according to rank, then the religious according to the rules of precedence set forth in can. 491, then the secular clergy, and finally the officiating minister, prelate or priest. Here may be supplied what has been omitted under canons 106 and 491. The cathedral chapter precedes, or rather, strictly speaking, follows the collegiate chapter, and the chapter or body of regulars with their abbot or prelate must walk among the religious.[32] Among the secular clergy priority of ordination decides the order of precedence, to which also the "doctors" must defer.[33] Each of the religious orders or congregations must march separately under its own cross, if it carries one, and not promiscuously with other religious or the secular clergy. This rule also binds *magistri*[34] (*i. e.*, doctors of divinity) in the order of Preachers.

There should be no dancing or fighting, no eating or drinking, and no unseemly noise.[35] For this reason processions should not last too long or cover a distance of more than six miles, especially if the roads are bad or walking is difficult.[36]

31 Cfr. *Pont. Rom.*, l. II, c. 32, n. 2; *Rit. Rom.*, tit. IX, c. 1.

32 S. Rit. C., Dec. 22, 1770 (n. 2490 ad 2).

33 S. Rit. C., April 4, 1626 (n. 397).

34 S. Rit. C., July 6, 1593; May 10, 1594; July 10, 1638 (nn. 33, 48, 647).

35 S. Rit. C., Jan. 21, 1690 n. 5 (n. 1821); *Rit. Rom., l. c.*, n. 6.

36 S. Rit. C., March 7, 1703 (n. 2109).

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TITLE XVIII

SACRED VESSELS, UTENSILS, VESTMENTS ETC. (SACRA SUPELLEX)

The Latin term *sacra supellex* includes all sacred vessels, utensils, vestments, linens, and ornaments which are used for sacred functions, especially for the celebration of the Mass. The reader should not expect a canonist to go into details with regard to these objects, as they strictly belong to the domain of liturgical writers, who, however, curious to say, seem to evade a definition of the term *sacra supellex*.[1]

CARE AND MAINTENANCE

CAN. 1296

§ 1. Sacra supellex, praesertim quae, ad normam legum liturgicarum, benedicta aut consecrata esse debet quaeque publico in cultu adhibetur, caute custodiatur in ecclesiae sacrario aliove tuto ac decenti loco, nec ad usus profanos adhibeatur.

§ 2. Ad normam can. 1522 universae sacrae supellectilis inventarium fiat et accurate servetur.

§ 3. Circa materiam et formam sacrae supellectilis, serventur praescripta liturgica, ecclesiastica traditio et, meliore quo fieri potest modo, etiam artis sacrae leges.

1 We consulted De Herdt, Van der Stappen, Martinucci, Wapelhorst, and several books written in the vernacular.

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CAN. 1297

Nisi aliter sit provisum, qui officio tenentur reparandae ecclesiae ad normam can. 1186, debent quoque ei providere de sacra supellectili ad cultum necessaria.

Articles of *sacra supellex,* especially when blessed or consecrated as required by the liturgical rules, and used for public worship must be *carefully guarded* in the sacristy of the church or in some other safe and decent place, and may not be used for profane purposes.

An inventory should be made of the whole stock and diligently preserved.

As to the material and form of the *sacra supellex,* the liturgical laws, ecclesiastical tradition, and, as far as possible, the rules of sacred art should be observed.

Chalice and paten must be *consecrated* by the bishop, or whoever is authorized to perform this function.

The following articles must be *blessed:* the ciborium[2] (and most probably also the *lunula,*[3] because it comes into immediate contact with the Blessed Sacrament); the *vestments* used by the priest at sacred functions, particularly in saying Mass, to wit: amice, alb, cincture, maniple, chasuble, palla, corporal and altar linens.

The following objects *may* be blessed, though it is not prescribed by the rubrics: the ostensorium, the *custodia* or pyx for the *lunula;* dalmatics, cope, and surplice.

Not to be blessed are the purificators,[4] the chalice veil,

2 The formula is either that of the *Pontif. Rom.,* tit. *De Bened. Tabernaculi sive Vasculi pro SS. Euch. Conservanda,* or that of the *Rit. Rom.,* tit. VIII, c. 23 (ed. Pustet, 1913, p. 76*).

3 Gasparri, *De SSma Euch.,* n. 1031; S. Rit. C., Feb. 4, 1871 (n. 3234, ad IV) forbids the use of *lunulae* which so enclose the S. Host that the glass directly touches the sacred species. Yet, says Gasparri (*l. c.,* n. 1029), the custom is widespread in France; we may add, also in the U. S.

4 S. Rit. C., Sept. 7, 1816 ad 12 (n. 2572).

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the burse, the antipendium, candlesticks, cruets, censers, etc.

Concerning the consecration of the chalice and paten it may be noted that the formula requires *three signs of the cross,* one at the word *consecrare,* the other at the word *sanctificare,* the third at the *benedictionem.* If the last were omitted, there might be a doubt as to the validity of the consecration, although the S. Congregation would not answer the question directly.[5] It is more probable that the consecration would be valid, for the act of consecration proper is completed by the two anointings with holy chrism, made with the twofold sign of the cross, and the same S. Congregation has declared that chalice and paten are validly consecrated even though but one sign of the cross was made on them with holy chrism, either at the *consecrare* or *sanctificare*.[6] From this it appears lawful to conclude that, even though the last or third sign of the cross were omitted, the consecration would be valid. If the cup (*cuppa*) of the chalice be very deep, so that the consecrator cannot reach the bottom, which he should do when anointing from one rim through the center or bottom to the other rim, with the thumb, he may reach as far as possible with the thumb, rather than use the middle finger, and thus observe the rubric.[7]

The *sacerdotal vestments* require a *special blessing.* Therefore, if a priest should, in good faith, wear unblessed vestments, they would not become blessed by the mere act of wearing them at Mass.[8] *Priests* who are allowed to bless sacred vestments and linens must

5 S. Rit. C., June 14, 1873 (n. 3305): "*servetur rubrica Pont. Romani.*"

6 S. Rit. C., Dec. 2, 1882 (n. 3560).

7 S. Rit. C., Sept. 12, 1884 (n. 3620).

8 S. Rit. C., Aug. 31, 1867, ad VII (n. 3162).

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use the formula given in the Roman Ritual, and are not allowed to use the *Pontificale* for single pieces.[9] Thus a palla and corporal should be blessed together, and if only one of them is to be blessed, the formula prescribed in the Roman Ritual should be used.[10]

For the rest we refer to the rubrics in the liturgical books and to the authors who have written on the subject.

Can. 1297 applies the rules concerning the obligation of repairing churches as laid down in can. 1186 also to the support of the *sacra supellex,* which is necessary for divine worship. Hence, unless other provisions have been made, the same persons are bound to provide for the upkeep and repair of the sacred vessels, utensils, and vestments. There is a good rule stated in one decision, viz., if the parishioners cannot afford to contribute money, they should contribute their labor.[11] This is often done by the women, especially where there is an Altar Society which busies itself with embellishing the house of God. If other means fail, the beneficiaries of the church are obliged to share the burden *pro rata.*[12] Finally, Catholic storekeepers and pawnbrokers are admonished not to buy or sell any sacred utensils, especially if there is reason to suspect theft.[13]

CARDINALITIAL, EPISCOPAL, AND CLERICAL SUPELLEX

In order to understand these canons it will be well to take a historical note from the Constitution of Benedict XIV, which directly refers to our subject.[14] Whilst at Avignon, the Popes erected a magnificent chapel in their

9 S. Rit. C., March 16, 1876; Dec. 2, 1881, ad 1 (nn. 3392, 3533).

10 S. Rit. C., Sept. 4, 1880 (n. 3524); *Rit. Rom.*, tit. VIII, c. 22.

11 S. C. EE. et RR., Dec. 10, 1841 (Bizzarri, *l. c.*, p. 477 f.).

12 S. C. C., March 13, 1657; Bened. XIV, *Instit.*, 100, n. 13.

13 Bened. XIV, *Instit.*, 69, n. 3.

14 "*Inter arduas,*" April 22, 1749.

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palace, and after their return to Rome, they retained this custom in the Vatican palace, often performing solemn functions there which were formerly held in the basilicas, assisted by the Cardinals and the whole papal chapel. The Cardinals, too, held pontifical ceremonies requiring a more than common *sacra supellex*, which was partly purchased by the prelates, partly by the papal treasurer. The former were from time immemorial accustomed either to leave or bequeathe their vestments, etc., to the papal chapel,[15] and thus established a precedent which might be called a juridical prescription. Urban VIII formulated the written law[16] which, in substance, has entered our Code.

CAN. 1298

§ 1. Defuncti S. R. E. Cardinalis, qui in Urbe domicilium habebat, quamvis Episcopus suburbicarius aut Abbas *nullius* esset, quaelibet sacra supellex, exceptis annulis et crucibus pectoralibus etiam cum sacris reliquiis, aliaeque res omnes stabiliter divino cultui destinatae, nulla habita ratione qualitatis et naturae redituum quibus comparatae sint, cedunt pontificio sacrario, nisi Cardinalis eas donaverit aut testamento reliquerit alicui ecclesiae vel oratorio publico vel loco pio vel alicui personae ecclesiasticae seu religiosae.

§ 2. Optandum ut Cardinalis, qui huiusmodi facultate uti velit, saltem ex parte praeferat illas ecclesias, quas in titulum, administrationem seu commendam obtinuerit.

This law commands: (1) that the entire *sacra supellex* and everything that was permanently destined for divine

15 Julius III, "*Cum sicut nobis*," June 26, 1550.

16 Urban VIII, "*Aequum est*," July 19, 1642.

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worship, found in the possession of a cardinal at the time of his death, if that cardinal had his domicile in Rome, even though he was a suburbicarian bishop or an abbot *nullius,* belongs to the *papal sacristy.* Urban VIII excepted some things, viz., one tunicella for each cardinal deacon, one chasuble for each cardinal priest, one cope for each cardinal bishop, candlesticks, ewer, and basin. But none of these things are excepted by the new Code, and consequently all may be claimed by the papal sacristan. (2) Rings and pectoral crosses, together with the sacred relics enclosed therein, must not, but may be ceded to the pontifical sacristy.[17] (3) The entire *sacra supellex,* with the exceptions mentioned, belongs to the papal sacristy, *without any regard as to the quality and nature of the pecuniary means* from which said *sacra supellex* was acquired, *i. e.,* it matters not whether the cardinal bought it from church revenues, or from his patrimonial income, or obtained it by donation or bequest. (4) But the Code permits cardinals *de curia* to donate or bequeathe their *sacra supellex* to a *church, or a public oratory, or a pious institution, or any ecclesiastical or religious person.* This was the point which gave occasion to the aforesaid constitution of Benedict XIV.

§ 2 expresses the wish that, when such a donation or bequest is made, *preference* be given to the church which the Cardinal held as titular possessor, administrator, or commendatory abbot.

Sacra supellex here comprises the following articles: mitres, chasubles, copes, tunics, dalmatics, sandals, gloves, sacerdotal vestments, chalices, patens, sacred vessels of every kind (pyx, ostensorium, thimble) especially those

17 Cfr. Pius IX, "*Quum illud,*" June 1, 1847 (*A. S. S.,* III, 281).

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consecrated or blessed, also oilstocks, ewer and basin, cruets, procession cross, candlesticks, crozier, faldstool; also the Missal, Pontifical, Canon, and Gradual.[18]

CAN. 1299

§ 1. Defuncti Episcopi residentialis, etiamsi cardinalitia dignitate fulserit, sacra supellex cedit ecclesiae cathedrali, exceptis annulis et crucibus pectoralibus etiam cum sacris reliquiis, salvo praescripto can. 1288, et iis omnibus utensilibus cuiusvis generis quae legitime probetur ab Episcopo defuncto comparata fuisse bonis ad ipsam ecclesiam non pertinentibus neque constet in ecclesiae proprietatem transiisse.

§ 2. Si quando Episcopus duas vel plures dioeceses successive rexerit aut simul praefuerit duabus vel pluribus dioecesibus unitis aut in perpetuam administrationem concessis, cathedralem ecclesiam habentibus propriam et distinctam, quae sacra utensilia constiterit reditibus unius tantum dioecesis fuisse comparata, ea eiusdem cathedrali ecclesiae cedunt; secus dividi debent, aequis partibus, inter singulas ecclesias cathedrales, dummodo dioecesium reditus ne sint divisi, sed unam episcopalem mensam perpetuo constituant; si vero reditus divisi sint ac separati, divisio fiat inter singulas ecclesias cathedrales pro ratione fructuum quos in singulis dioecesibus Episcopus perceperit ac temporis quo eisdem praefuerit.

§ 3. Episcopus obligatione tenetur inventarii sacrorum utensilium authentica forma conficiendi, in quo pro rei veritate quando acquisita sint, exprimat, distincteque describat si qua non ex ecclesiae reditibus ac proventibus, sed ex propriis bonis vel ex donatione

18 Pius IX, "*Quum illud*," 3, III.

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sibi facta comparaverit; secus omnia reditibus ecclesiae comparata praesumuntur.

Can. 1299 lays down a rule concerning the *sacra supellex* left by a *residental bishop,* even though he may have been a cardinal. It excepts the rings and pectoral crosses, but as to the relics contained therein, it refers to can. 1288, which concerns a relic of the Holy Cross. Otherwise all articles of a bishop's *sacra supellex* belongs by law to the deceased prelate's *cathedral church,* with the exception, however, of such sacred appurtenances (*omnibus utensilibus*) which were bought by the deceased bishop with his own money and such utensils as have not passed into the possession of the church. However, for each of these two kinds of *sacra supellex* there must be legal proof that the money was not church money and that the ownership was acquired by the church. How is that proof to be furnished?

§ 3, following a letter of Pius IX, "*Quum aliud,*" says that bishops are strictly obliged to draw up an inventory faithfully describing their sacred utensils, both as to the time when they were bought — because according to can. 1511, § 2, thirty years' possession suffices to acquire such objects — and also as to the nature of the revenues with which they were bought. If this is done conscientiously and accurately, there should be little difficulty to carry out the present law, which, be it said by the way, involves a strict obligation. If no inventory is found, the presumption (*praesumptio iuris*) is that the entire *sacra supellex* was purchased with church money.

§ 2 describes what is to be done in the case of a bishop who ruled *several dioceses,* either as titular bishop or perpetual administrator. The supposition is, of course, that each of these dioceses has its own cathedral church.

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If the bishop has made the required inventory, it will be easy to decide which of the cathedral churches furnished the money for the *sacra supellex*. If only one of them furnished the money, it has an exclusive claim to the articles in question. If two or three dioceses contributed to the purchase, there are two possibilities: If no separate accounts are kept but all revenues go to constitute the income of the bishop (*mensa episcopalis*), then the *sacra supellex* accrues to the different cathedral churches in equal shares.[19] But if the different dioceses keep separate and distinct accounts of their revenues, then the *sacra supellex* is to be divided and apportioned according to the salary, cathedraticum, etc., the bishop received from each diocese, and according to the length of time he governed each diocese. Of course, unless books and records are carefully kept, there may be difficulties in making the division.

CAN. 1300

Quae in can. 1299 praescripta sunt, applicentur quoque clerico qui in aliqua ecclesia beneficium saeculare vel religiosum obtinuerit.

This canon applies the enactment of can. 1299 to *clergymen* who held either a secular or a religious benefice in any church during their lifetimes. It is a timely reminder to the clergy of their legal status with regard to the *sacra supellex*, which received attention from the earliest times and is frequently mentioned in the Decretals.[20] Thus Alexander III sanctioned a previous law which provided that all the goods appertaining to and acquired by a church must and may be claimed by said church. Pius V

19 We suppose this holds also with regard to pro-cathedrals.

20 Cf. *Can. Apost.*, 40; c. 12, X, III, 26.

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reiterated this regulation and explained to the papal collectors that they had no right to claim these goods for the *camera spoliorum,* but should leave them to the church whose beneficiary died.[21] The same rule applied to the canons and beneficiaries of St. Peter's basilica, no matter whether they still held their offices at the time of their death or not.[22]

This canon is, strictly speaking, applicable only to clergymen who held a church *benefice,* either secular or religious, but we venture to say that the mind of the legislator also includes those who, though not beneficiaries in the strictly canonical sense, have been employed either as pastors or curates (assistants), or otherwise. In other words, the law is applicable also to most clergymen of our country. The reasons are almost the same: the *sacra supellex* should not pass into profane hands and the churches should not be deprived of the necessary furniture. Besides, there is no doubt that many, perhaps most sacred vessels, utensils, vestments, etc., are bought with money contributed by the congregation or the members of the altar society, and such *supellex,* therefore, strictly belongs to the church. On the other hand, we would not deny that sometimes gifts are made for merely personal motives, for instance, by parents, relatives, friends. These could not in justice be claimed by the church. Care must always be taken, however, to avoid profanation.

21 S. Pius V, "*Romani Pontificis,*" Aug. 30, 1567, § 11.

22 Benedict XIV, "*Ad honorandum,*" March 27, 1752, § 27.

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DUTY OF MAKING A VALID TESTAMENT

CAN. 1301

§ 1. S. R. E. Cardinalis, Episcopus residentialis aliique clerici beneficiarii obligatione tenentur curandi testamento vel alio instrumento in forma iuris civilis valido ut canonica praescripta, de quibus in can. 1298–1300, debitum effectum etiam in foro civili sortiantur.

§ 2. Quamobrem tempestive ac forma iure civili valida personam integrae famae designent ad normam can. 380, quae, adveniente ipsorum morte, non solum sacram supellectilem, sed etiam libros, documenta aliaque quae ad ecclesiam pertinent et in eorum domo reperiuntur, occupet et cui debentur, remittat.

Cardinals, residential bishops, and all other clerical beneficiaries are in duty bound to draw up a last will or other instrument in a form acknowledged as valid by civil law, in order that the regulations laid down in can. 1298–1300 may be made effective also in the civil courts. For this purpose they shall in due time and legal form appoint some person of good character who, at the approach of their death, shall take temporary possession not only of their *sacra supellex,* but also of books, documents, and other objects belonging to the church and found in their residence, and deliver them to the lawful claimants.

Since the decree of the S. C. of the Propaganda, Dec. 15, 1840,[23] substantial changes have been introduced in the laws of our country which render said decree largely superfluous. Church property is no longer held in fee simple, but other forms of tenure have developed, which

23 *Coll. P. F.*, n. 916.

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render the conveyance of church property more simple. There is no doubt that the "corporation sole" effectively serves the necessities of churches whose form of government is monarchical.[24] For the rest, the statute laws in the different States of the Union differ widely. In many States bishops are authorized to become corporations sole by complying with certain conditions, which are usually extremely simple, consisting merely of the filing of some statement, certificate, or affidavit with a certain officer of the law. Then there is the system of quasi-corporations, which are by statute declared corporations for the purpose of taking over property.[25]

24 Cfr. K. Zollmann, *American Civil Church Law*, 1917, p. 63.

25 *Ibid.*, p. 46. Here it may be well to allege the following passage from the same distinguished author's work, p. 354 f.:

"The Roman Catholic church in this country has been until recently on a missionary basis. With the exception of some parishes in the territory acquired by the Louisiana Purchase, there are therefore few Catholic parishes in the United States. The theory was that the mission was conducted from abroad. It followed that the property necessary for the purposes of the church must be subject to the control of the church in general, rather than to that of any individual congregation or congregations. To achieve this condition of affairs the aim has been to place all the property of all the churches in the name of the bishop or archbishop of the diocese to which the particular church belongs. Consequently the property of Catholic churches is universally vested in some church dignitary either in his personal capacity or as a corporation sole. The question then arises as to the nature of this title. Is it legal or equitable or both? There can be no question that the bishop or archbishop is the holder of the legal title. The property ordinarily stands absolutely in his name. It is customary, and in fact required by church regulation in at least some of the dioceses, to eliminate from deeds to bishops all words of trust and all words indicating the official character of the grantee. Where the bishop is not a corporation sole he is required to make a will by which he devises such property to certain persons with a direction to convey it to the person appointed as his successor. The devisee, under such circumstances, is not held responsible for any negligence of the devisor. . . . It follows that money raised for the special purpose of building a local church and placed in the hands of the bishop does not pass absolutely to him, but is a trust fund which the congregation can reclaim at any time by action. It further follows that

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CUSTODY OF THE SACRA SUPELLEX

CAN. 1302

Rectores ecclesiarum aliique quibus credita sit cura sacrae supellectilis, sedulo debent eiusdem conservationi et decori prospicere.

Rectors of churches and others entrusted with the care of the articles known as *sacra supellex,* shall diligently preserve them and keep them clean and neat.

Chapter churches generally have a *custos* among their members.[26] Of course the Ordinary cannot be dispensed from the duty of vigilance, and this applies also to the churches of the Oriental Rite.[27] Everything connected with divine service should be clean, whole and decent.[28] The pastors are responsible in a particular manner for the condition of the *sacra supellex,* which must not be left exclusively in the hands of laymen or even Sisters. The pastor may, of course, entrust his curate or assistant with this duty.[29] Care must be bestowed not only on pontifical vestments and utensils, but also on the things that are worn or used by *simplices sacerdotes,* for the law draws no distinction between the two, and the sacred minister, when he celebrates the sacred mysteries, is not inferior to the pontiff, except by accident, because the

a voluntary assignment by a bishop for the benefit of creditors does not cover such property and that a deed or mortgage given to a purchaser who has notice of the facts (and who could purchase church property without such notice) passes no beneficial title. It further follows that on the death of the bishop the court may appoint a trustee in his stead." Parish corporations are recommended and corporations sole permitted, by the S. C. C., July 29, 1911 (*Eccl. Review,* Vol. 45, p. 585 f.).

26 C. 1, X, 27.

27 S. C. P. F., April 13, 1807, III (n. 692); S. C. EE. et. RR., Feb. 9, 1751 (Bizzarri, *l. c.,* p. 31 ff.).

28 S. C. EE. et RR., *l. c.; Rit. Rom.,* tit. I, c. un., n. 9.

29 *Rit. Rom., l. c.,* n. 3.

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vestments he wears refer chiefly to the sacred action, and not to the person who performs it.

FURTHER DIRECTIONS REGARDING THE SACRA SUPELLEX

CAN. 1303

§ 1. Ecclesia cathedralis debet sacram supellectilem aliaque quae ad Missae sacrificium vel ad alias pontificales functiones necessaria sint, gratis Episcopo subministrare etiam privatim celebranti non solum in ecclesia cathedrali, sed in aliis quoque civitatis vel suburbii ecclesiis.

§ 2. Si qua ecclesia paupertate laboret, potest Ordinarius permittere ut a sacerdotibus qui in proprium commodum inibi celebrant, propter utensilia ceteraque ad Missae sacrificium necessaria, moderata stipes exigatur.

§ 3. Episcopi, non autem Vicarii Capitularis aut Vicarii Generalis sine speciali mandato, est eandem stipem definire, et nemini, etiam religiosis etsi exemptis, licet ea maiorem exigere.

§ 4. Episcopus pro tota dioecesi eiusmodi stipem in dioecesana Synodo, si fieri possit, definiat, aut extra Synodum, audito Capitulo.

§ 1. The *cathedral church* must furnish free of charge the *sacra supellex* and everything else that may be required for the celebration of Mass and other pontifical functions, no matter whether the bishop celebrates privately or solemnly, in the cathedral church or in any other church of the episcopal city or its suburbs. Hence if the bishop celebrates within the city limits or its suburbs he may take the pontifical vestments along with him,

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and the cathedral church cannot object.[30] But this holds only for the episcopal city, not for the whole diocese.

§ 2. If a church is very poor, the Ordinary may permit that a moderate fee is paid by the priests who say Mass there for their own convenience, to defray the expense of the sacred utensils and other things required for the celebration of Mass. The S. Congregation has decided that beneficiaries who are compelled to say Mass in a church not their own should contribute something for the candles, bread, and wine, and for the use of the vestments.[31]

§ 3. The *bishop,* but not the Vicar Capitular nor the Vicar General without a special mandate, may fix the amount of said offering, and no one, not even exempt religious, may charge more.

§ 4. The bishop should fix this fee for the whole diocese at the diocesan synod, or else with the advice of the chapter or diocesan consultors.

BLESSING OF THE SACRA SUPELLEX

CAN. 1304

Benedictionem illius sacrae supellectilis quae ad normam legum liturgicarum benedici debet antequam ad usum sibi proprium adhibeatur, impertire possunt:

1.° S. R. E. Cardinales et Episcopi omnes;

2.° Locorum Ordinarii, charactere episcopali carentes, pro ecclesiis et oratoriis proprii territorii;

3.° Parochus pro ecclesiis et oratoriis in territorio suae paroeciae positis, et rectores ecclesiarum pro suis ecclesiis;

30 S. Rit. C., March 14, 1643, ad 4, 5 (n. 831).

31 S. C. C., May 14, 1729 (Richter, *Trid.*, p. 137, n. 62).

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4.° Sacerdotes a loci Ordinario delegati, intra fines delegationis et iurisdictionis delegantis;

5.° Superiores religiosi et sacerdotes eiusdem religionis ab ipsis delegati, pro propriis ecclesiis et oratoriis ac pro ecclesiis monialium sibi subiectarum.

The *sacra supellex* should be blessed before use, and it may be blessed by the following:

1.° By the cardinals and all bishops (hence also by titular bishops);

2.° By local Ordinaries not endowed with the episcopal character for the churches and oratories of their respective territory;

3.° By the pastors for the churches and oratories situated within their parishes, and the rectors of churches for their own churches;

4.° By priests delegated by the local Ordinary, within the limits of their delegation and the jurisdiction of the *delegans;*

5.° By religious superiors and by priests of the same institute delegated by the superior for their own churches and oratories and those of the nuns subject to them.

Notice that only *blessings in which no sacred anointing is required* are here understood. The consecration of chalices and patens is not included. The S. Congregation has clearly stated this in more than one decision, as may be seen from the references in the footnotes. What is said in no. 4, concerning delegation, may be deduced from the general rules on delegation.

The *finis delegationis* or purpose of delegation must be ascertained from the wording of the faculties. If the general term *sacra supellex* is used, it includes everything comprised under that name, also the *vasa*

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sacra, which only need to be blessed.[32] But if the faculty reads, "*benedicto sacerdotalium indumentorum,*" it excludes the blessing of altar linens, corporals, palls, and sacred vessels, which are all separate and distinct blessings given by means of special formulas.

Concerning *religious superiors* the text establishes nothing new, except perhaps that they require no privilege for blessing these things. Their power is, as it always was, restricted to their own *churches.* Thus abbots, priors (convenual not cloistral priors), guardians, rectors of the Society of Jesus, and all others who enjoy the privilege of blessing sacred vestments, cannot make use of this privilege except for the benefit of their convents and churches,— provided always that no sacred anointing is required.[33] When the S. C. was asked whether this faculty could be used also for blessing things pertaining to other churches than their own, in view of a standing custom (*stante eorum allegata consuetudine*), it replied: *non posse,* they cannot.[34] Hence the "awful" decree of Sept. 1659, decided nothing else but what was Roman jurisprudence.[35] The Cassinese abbots were also included in this decision.[36] If it is asked, which churches are meant by the term *propriae ecclesiae,* the answer is clearly contained in a decision[37] of the S. Rit. C., of May 16, 1744. They are the *pleno iure subiectae,* i, e., those churches which have been forever incorporated with the monasteries or religious organizations both as to temporal and spiritual matters by the Holy See. For the rest there is no need of stretching this power.

32 S. Rit. C., Dec. 2, 1881, ad II (n. 3533).

33 S. Rit. C., March 13, 1632 (n. 587).

34 S. Rit. C., Aug. 18, 1629 (n. 513).

35 S. Rit. C., n. 1131.

36 S. Rit. C., July 30, 1689, ad II (n. 1815).

37 S. Rit. C., May 16, 1744, ad II (n. 2377).

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If every pastor and every rector has the right to bless these articles, why should the religious superior trouble himself? An occasion for this assumption, and a reasonable one at that, would be if a religious community would distribute vestments to poor churches gratis. But not even in that case would the religious superior be authorized to bless the vestments to be distributed to churches outside of his jurisdiction.[38]

The *churches of nuns who are subject to religious,* are of course, those of such nuns as are subject to the prelates regular; therefore they are styled *moniales, i. e.,* Sisters with solemn vows. Tertiaries are not included. If these *moniales* (like the Sisters of the Visitation) are subject to the bishop, the *sacra supellex* of their churches must be blessed either by the Ordinary or the chaplain, provided the latter has received due delegation from the bishop. The same rule holds concerning the *sacra supellex* of ordinary sisterhoods. The chaplains should not imagine that they are rectors of the chapels or oratories of the religious whom they attend, for can. 479 gives a precise definition of a rector, in which they are not included.

LOSS OF BLESSING OR CONSECRATION

CAN. 1305

§ 1. Sacra supellex benedicta aut consecrata benedictionem aut consecrationem amittit:

1.° Si tales laesiones vel mutationes subierit ut pristinam amiserit formam, et iam ad suos usus non habeatur idonea;

2.° Si ad usus indecores adhibita vel publicae venditioni exposita fuerit.

38 S. Rit. C., Aug. 31, 1867, ad XI (n. 3157).

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§ 2. Calix et patena non amittunt consecrationem ob consumptionem vel renovationem auraturae, salva tamen, priore in casu, gravi obligatione rursum ea inaurandi.

§ 1. An article of *sacra supellex* that has been blessed or consecrated, loses its blessing or consecration:

1.° If it is so badly damaged or changed that its form is lost and it becomes unfit for its proper purpose;

2.° If it has been used for unsuitable purposes or exhibited for public sale.

The first case would be verified if a *chalice* sustained a slight break or split in the cup near the bottom. Not so however, if the break be near the upper part, so that consecration can take place in it without fear of spilling the contents.[39] The same rule applies, *mutatis mutandis,* to the paten, if it had holes in it. Concerning *vestments* a serious damage or injury would occur if a vestment were entirely taken apart and a relatively large portion renewed. The form of a corporal, or palla, etc., would be changed if, according to common parlance, the vestment could no longer be recognized as such, which would be the case, *e. g.,* if only rags remained.

Concerning *indecorous use* there is a synodal decree of Auvergne (536) which prohibits the use of sacred vestments for bridal or wedding purposes. The same synod also forbade covering corpses with altar linens (*pallia et ministeria divina*).[40] Zitelli refers to a decision according to which the consecration of a chalice would be lost if the sacred vessel was used for drinking purposes

39 Cfr. Schulte, *Consecranda,* 1907, p. 272, who also says: If the cup can be detached from the stem by loosening the screw, consecration would not be lost.

40 Can. 43, Dist. 1, *de cons.* Hefele, *Conc.-Gesch.,* II, 739: *ministeria divina* here means sacred vestments.

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by heretics.[41] There is no doubt that any profanation of a sinful character entails the loss of consecration. Exhibition for public sale or public auction also effects loss of consecration, no matter whether it is done by Catholics or non-Catholics.

§ 2 changes the former discipline or practice of the Roman congregations[42] when it states that *chalice and paten do not lose their consecration by the wearing away of the gilding, or by the process of regilding.* But if the gold plating wears away, there is a grave obligation to have the vessel replated. This new law undoubtedly presupposes, not only that the whole chalice is consecrated, but also that the consecration does not attach to the mere surface or gilding.

HANDLING SACRED VESSELS

Can. 1306

§ 1. Curandum ne calix cum patena et ante lotionem purificatoria, pallae et corporalia, quae adhibita fuere in sacrificio Missae, tangantur, nisi a celericis vel ab iis qui eorum custodiam habent.

§ 2. Purificatoria, pallae et corporalia, in Missae sacrificio adhibita, ne tradantur lavanda laicis, etiam religiosis, nisi prius abluta fuerint a clerico in maioribus ordinibus constituto; aqua autem primae lotionis mittatur in sacrarium vel, si hoc desit, in ignem.

§ 1. Care must be taken that the chalice with the paten, as well as the purificators palls, and corporals, before being washed, after having been used in the Sacrifice of the Mass are touched only by clerics or by those who have charge of these things.

41 *Apparatus Iuris Eccl.*, 1886, p. 433; Lib. II, c. III, art. 1, § 5.

42 S. Rit. C., June 14, 1845 (n. 2889).

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Pseudo-Soter says nuns and consecrated virgins were not allowed to touch the sacred vessels and palls.[43] Another canon says subdeacons and acolythes are allowed to touch sacred utensils — *sacra ministeria,* as they were then called.[44] The janitors (*ostiarii*) were *not* allowed to wash or handle them, but had to watch that no one touched them.[45] The general name for all who were allowed to touch such objects was *sacrati Dominoque dedicati homines.*[46] That the old Testament played a part in this prohibition is evident.[47] According to present-day practice only those who have received the *clerical tonsure* are allowed to touch the sacred objects mentioned. A cleric may touch the chalice and prepare it for the holy Sacrifice in the sacristy.[48] One who has received the clerical tonsure may *act as chaplain* to a prelate saying low Mass, or as *quasi-master of ceremonies* to a priest singing high Mass without deacon and subdeacon. But in the latter case he has to observe the following rules: (a) he shall not wipe the chalice before the offertory, nor bring it to the altar uncovered; (b) he shall not pour wine and water into the chalice; (c) he shall not pass the paten with the host, nor the chalice to the celebrant; (d) he must not touch the chalice after the canon has started, nor remove the pall from it; (e) after the ablution he shall not clean the chalice, but may cover it with the veil and burse, and carry it to the credential. If a cleric who has received only the tonsure[49]

43 C. 25, Dist. 1; — the manufacturer of this canon betrays himself as a forger, because *monachae* were unknown in Soter's time.

44 C. 32, Dist. 1.

45 C. 40, Dist. 1, *de cons.* (Pseudo-Clem.).

46 C. 41, Dist. 1, *de cons.* (Pseudo-Sixtus).

47 C. 42, Dist. 1, *de cons.*

48 S. Rit. C., Nov. 23, 1906, ad I (n. 4194).

49 A reasonable or plausible cause is required that one in minor orders or simply tonsured be admitted as subdeacon, but one who is no cleric should not be admitted; S. Rit. C., March 10, 1906, ad I (n.

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acts as *subdeacon,* dressed in amice, alb, cincture and tunic (without maniple), he has to observe these rules, but may carry the chalice to the altar. If an untonsured cleric is to assist a prelate at low Mass, the chalice must be placed on the altar before Mass, entirely covered and the cleric must act as if he were assisting a *simplex sacerdos.* He may, however, assist the prelate at the missal, turn the leaves, hold the candle, but he must not touch or wipe the chalice.[50]

§ 2. Purificators, palls, and corporals, which have been used in the Sacrifice of Mass, shall not be given to lay persons, even though they be religious, to be washed by them before they have been washed by a cleric in higher orders. The water of the first washing should be poured into the waste hole, called *sacrarium,* or if there is no *sacrarium,* into the fire.

Religious here means lay Brothers and Sisters. Even the Ordinary cannot grant these the permission here in question.[51] If, therefore, laymen, Sisters or Brothers, have to handle an object which they are forbidden by § 1 to touch, let them use a clean purificator.

Concerning the *ostensorium, ciborium,* and *custodia,* there is no prohibition of touching these objects, nor are laymen obliged to use a cloth in handling them.

4181); this is the general tenor of decisions.

50 S. Rit. C., March 10, 1906, ad II–VII (*l. c.*).

51 S. Rit. C., Sept. 12, 1857 (n. 3059). "*Vel ab aliis qui eorum custodiam habeant*" may cause a doubt, as if laymen or Sisters were allowed to touch said articles. Yet it appears from can. 1302 that these custodians are supposed to be of the clerical rank. This is confirmed by the last quoted decision of S. Rit. C. However, this seems to be understood of immediate touch; for a mediate touch, *i. e.,* by means of a cloth, can hardly be forbidden. Neither should Sisters have scruples if they touch the sacred vessels transiently or inadvertently.

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TITLE XIX

VOWS AND OATHS

CHAPTER I

VOWS, DEFINITION AND CAPACITY

CAN. 1307

§ 1. Votum, idest promissio deliberata ac libera Deo facta de bono possibili et meliore, ex virtute religionis impleri debet.

§ 2. Nisi iure prohibeantur, omnes congruenti rationis usu pollentes, sunt voti capaces.

§ 3. Votum metu gravi et iniusto emissum ipso iure nullum est.

§ 1. A vow is a deliberate and free promise made to God concerning something possible and better; it obliges by reason of the virtue of religion.

The promise[1] must be made to *God,* because He is the end of our actions, which ought indeed all to be directed to Him. A *promise* involves the obligation of keeping it, and hence differs from a mere resolution. A promise, to entail a lasting obligation, requires *full consent, freely given.* Every substantial error, therefore, in fact every error which is the cause of a vow, renders the latter

1 Cf. Suarez, *De Religione,* tract. VI, *De Voto* (ed. Paris., 1859, t. XIV, p. 750 ff.); S. Alphonsus, Lib. IV, tr. II c. 3, *De Voto* (ed. Paris, 1875, Vol. II, p. 120 ff.); Lehmkuhl, *Theol. Moralis,* I, n. 428 ff.; *Cath. Enc.,* Vol. XV, 511 f. (by Vermeersch, S. J.).

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null and void. This does not, however, imply that every circumstance or detail attending the vow must be known in advance.

Freedom excludes fear and compulsion, which may be brought to bear upon the will either from the outside or from within.

From the necessity of free and deliberate consent — because every vow is a human act — it naturally follows that the *material object* of the promise made must be something that lies in man's power, an object of which he is allowed to dispose and over which he has control. Hence it must be something *possible,* namely, attainable by his physical and moral faculties. Thus it would involve a physical impossibility to impose upon oneself a fast which were incompatible with the physical labor one has to do, or which would seriously impair one's health; and it would be morally impossible to avoid every sin.

The object of a vow must furthermore be a *bonum melius, i. e.,* something better than its omission, or something which does not impede or nullify a higher or better good. Hence no object which is sinful in itself (*ex parte rei votae*) can be made the object of a vow. Nor can anything useless or entirely indifferent be properly speaking intended in a vow. Thus a matter which would disturb the means of higher perfection or prevent the fulfillment of an ecclesiastical law, could not be made the object of a vow.

Lastly, the definition says that a vow obliges by reason of the *virtue of religion.* A vow is an act that refers to God as its immediate and proper end, and therefore is an act of that worship (*actus latriae*) which is due to God alone. If one "makes a vow to a saint," the meaning is that he makes the vow to God in honor of the

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saint, just as churches are dedicated. Such acts naturally spring from the virtue of religion, which regulates the relation between the Creator and His creature, the union between God and man.

§ 2. Unless prohibited by law, all who have the necessary use of reason, are capable of making a vow.

§ 3. A vow made under the influence of grave and unjust fear is null and void by law.

The general rule [2] is that everyone who has sufficient use of reason and free will may make a vow. However, as Suarez [3] says, for a vow to be valid before God there is required the necessary knowledge of God and of what the vow implies. If the latter knowledge were wanting, the subject would not enjoy that use of reason which is proportionate (*congruens*) to the object of the vow. On the other hand, although it may be said that the use of reason enlightened by faith is necessary, yet even a heretic who errs in certain doctrinal matters may pronounce a valid vow of chastity, provided he has the intention to make a vow and knows what it involves, at least substantially.[4] And substantial knowledge is generally supposed to exist in those who have sufficient use of reason to realize what a grievous sin is.

Some persons are *excluded* by law from making vows. Thus those who have not attained the required age, are forbidden to make a religious vow, and those who are subject to others in the matter of the vow are forbidden to do so. Bishops and clergymen should not take a vow to resign their offices or undertake a pilgrimage which would for a long time prevent them from fulfilling their duties.[5]

2 Cfr. S. Thom., *Summa Theol.*, 2^a 2^{ae} q. 88, art. 8 f.

3 *De Voto*, l. III, c. 2, n. 9 (*l. c.*, p. 895).

4 S. Poenit., Nov. 29, 1842 (*Coll. P. F.*, n. 959).

5 Cfr. Suarez, *l. c.* l. III, c. 4.

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Married women should not make vows incompatible with their state, religious should not, without the knowledge of their superiors, vow things which would clash with their ordinary duties.

Fear to render a vow invalid, must be *grave, i. e.*, such as is apt to influence a man of character and constancy. Such a fear would be that of torment or death.[6] It must also be *unjust, viz.*, threatened by such as have no authority or right to do so, or entirely out of proportion to the matter of the vow. The law which declares such a vow invalid is presumably the *ecclesiastical law,* for it would be difficult to prove that the natural law renders such a law invalid, since the *voluntarium* is not entirely wanting even under the pressure of grave fear.

KINDS OF VOWS

CAN. 1308

§ 1. Votum est *publicum,* si nomine Ecclesiae a legitimo Superiore ecclesiastico acceptetur; secus *privatum.*

§ 2. *Sollemne,* si ab Ecclesia uti tale fuerit agnitum; secus *simplex.*

§ 3. *Reservatum,* cuius dispensationem sola Sedes Apostolica concedere potest.

§ 4. *Personale,* quo actio voventis promittitur; *reale,* quo promittitur res aliqua; *mixtum,* quod personalis et realis naturam participat.

A vow is *public* when it is accepted by a lawful ecclesiastical superior in the name of the Church; all vows not so accepted are *private.*

Therefore, the intervention of the Church through her

[6] C. 6, X, 40; Suarez, *De Voto,* l. I, c. 8, n. 5, thought otherwise.

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lawful representatives is necessary to make a vow public.

The term *superior* supposes authority *in foro externo*, at least this is the usual acceptation. Hence neither the pastor, as such, nor a confessor, as such, can accept a public vow or render a vow public.

Private vows, of course, may be made into the hands of pastor or confessor, nay without any intervention on the part of the Church.

A vow is *solemn* if it is acknowledged as such by the Church; otherwise it is *simple*. This distinction has been explained in Vol. III of this Commentary. A vow is *reserved* if dispensation from it can be granted only by the Apostolic See.

A vow is *personal* if the object of the promise is an act of the vowing person, for instance, to love another; it is *real* if an object other than the act itself is promised; it is *mixed* if it combines the elements both of a personal and of a real vow. A vow to make a pilgrimage, *e. g.*, is a personal vow, but if it includes giving an alms, it is mixed.

RESERVED VOWS

CAN. 1309

Vota privata Sedi Apostolicae reservata sunt tantummodo votum perfectae ac perpetuae castitatis et votum ingrediendi in religionem votorum sollemnium, quae emissa fuerint absolute et post completum decimum aetatis annum.

The only private vows which are reserved to the Apostolic See are that of perfect and perpetual chastity and that of entering a religious order with solemn vows, provided they are made unconditionally and after the eighteenth year of age has been completed.

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St. Thomas knew two reserved vows: that of continence and that of a pilgrimage to the Holy Land. But the number was later increased, so that five were considered as reserved: to enter a religious order, to observe perpetual chastity, to make a pilgrimage to Jerusalem, St. James of Compostella (Spain), and to the tombs of St. Peter and Paul in Rome.[7] Now the three pilgrimages are taken away from the number of vows reserved to the Holy See, and only two are left. These two are explicitly defined, so that little doubt is left as to their extent.

The vow of perfect and perpetual chastity (*perfectae et perpetuale castitatis*) tends to an act that is perfect in itself and by reason of the matter intended. If the vow is taken from a motive lower than love of the virtue of chastity, it is imperfect. Such a lower motive may be vanity, physical imbecility, or even stubbornness. A vow of chastity would be imperfect on the part of the matter vowed, if only virginity, or integrity of the body, or not marrying, was contracted.[8]

A vow is perpetual if it is taken not for a limited time only, (for instance until a certain age), but forever.

The vow of "*entering a religious institute*" here refers to orders of regulars, *i. e.*, the religious state in which *solemn* vows are pronounced.

These private vows are not reserved to the Holy See unless made *unconditionally*. A condition would be, for instance, if I receive that favor, if I am restored to health; if the order is approved by the Holy See; if there is a convent of that order in such and such a country, etc.

Besides, the person who takes such a vow must have completed the *eighteenth year of age*. This is a higher

7 Bened. XIV, "*Inter praeteritos*," Dec. 3, 1749, § 42.

8 Cfr. Lehmkuhl, I, n. 477.

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limit than was set before, in fact until now there was no definite limit set to age in this connection.

PERSONAL OBLIGATION

CAN. 1310

§ 1. Votum non obligat, ratione sui, nisi emittentem.

§ 2. Voti realis obligatio transit ad heredes, item obligatio voti mixti pro parte qua reale est.

§ 1. A vow, as such, obliges no one but the person who makes it, for the reason that a vow involves a strictly personal obligation, which can neither be assumed nor fulfilled except by the one who has offered this promise to God.

In the city of Rome the fastday of Feb. 1 was long ago introduced by reason of a vow. After the promulgation of the Constitution of Urban VIII, "*Universa,*" of Sept. 13, 1642, doubts were proposed to the S. Congregation of Rites as to whether the feasts suppressed by that constitution also included the feasts which had been kept merely by reason of a vow. The answer was that the feasts observed by reason of a vow, but now suppressed, oblige only those who made the vow, not their successors.[9] Why, then, is the 1st of February still observed in Rome? Because there was a law, or statute, or precept attached to the vow. Therefore it is not the vow as such (*ratione sui*), but the law attached to it, which obliges the successors of the one who made the original vow[10]; provided that law was accepted by the majority and was not abrogated by a later law or contrary custom.

§ 2. The obligation arising from a *real vow passes*

9 S. C. Rit., April 18, 1043; Nov. 19, 1650; June 23, 1703, ad 1 (nn. 834, 932, 2113).

10 Suarez, *De Voto*, l. IV, c. 9.

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to the heirs, that arising from a *mixed vow* only in so far as the *real* part is concerned.

A personal vow expires with the death of the person who made it, and hence, for instance, the obligation of making a pilgrimage does not pass to the heirs. But if one vowed not only a pilgrimage, but also a certain sum of money to the sanctuary, the *real* part of the vow, respecting the donation, must be fulfilled by those who succeeded the deceased in the possession of his property. Why? Because an heir is, in virtue of justice and by reason of an at least implied or tacit contract, obliged to pay the debts of the one whose property he obtains either by last will and testament or by succession *ab intestato.* There is no reason why religious debts should not be paid, even though the civil law does not compel the heirs to pay them.[11] It is not necessary to recur to the religious aspect of the question, because, as Suarez truly says,[12] religious loyalty does not strictly oblige to restitution. Of course, if the vow was originally restricted to the lifetime of the *vovens,* or made conditional upon its acceptance by the heirs, it does not oblige the latter unless they accept the inheritance. It is evident that the heir must know of such a vow, one way or the other; if he does not, the inheritance must be considered free of encumbrance. A legacy or bequest left by vow must therefore, in virtue of justice, be delivered to the persons or pious institutes for whom it was intended by the *vovens.*

11 Cfr. l. 2, Dig. 50, 12: "*voti enim obligationem ad heredem transire constat.*"

12 *De Voto,* l. IV, c. 11, n. 8 f. The older English law left it with the Ordinaries to dispose of goods left *ab intestato* for pious purposes. Cfr. Blackstone-Cooley, II, § 494.

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CESSATION OF OBLIGATION

CAN. 1311

Cessat votum lapsu temporis ad finiendam obligationem appositi, mutatione substantiali materiae promissae, deficiente conditione a qua votum pendet aut eiusdem causa finali, irritatione, dispensatione, commutatione.

A vow ceases to oblige:

(a) After the time conditionally set for its fulfillment has expired; (b) If there is a substantial change in the thing promised; (c) if some condition on which the vow was made to depend, is not fulfilled; (d) if the cause or object for which the vow was made ceases to exist; (e) by nullification, dispensation, or commutation.

Before explaining these points we must premise that the time when an obligation commences (*terminus a quo*), differs according to the character of the vow, whether it is negative (a promise to omit something) or positive (a promise to perform a good work). If a vow is *negative* (for instance, not to play cards, not to gamble), it obliges immediately (*statius ac pro statim*), unless it was limited by the *vovens*. An affirmative vow, on the other hand, *e. g.*, to enter a religious order, though it also begins to oblige from the time it was made, may reasonably be postponed until a time which is more convenient according to one's own prudent judgment.[13]

Now as to *cessation:*

Ad 1. The lapse of time is here considered as *ad finiendam* which signifies that a precise term was set, beyond which the *vovens* had no intention to oblige himself. For instance, if one would take the "pledge" (to abstain from

13 See Suarez, *De Voto*, l. IV, c. 12.

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intoxicating drinks) in the form of a vow (in itself the pledge implies no vow, but a mere resolution) for one year, the obligation would cease after 365 days have elapsed, even in a leap year. This rule holds good for personal as well as real and mixed vows. If a vow was made for a certain time, but the time limit was only a secondary or accessory consideration, and not a condition proper, it is generally presumed that the vow, if personal (for instance, of fasting), ceases after the lapse of that period. Whereas if it is real, it does not cease to oblige even after that time and must therefore be complied with even if the time limit has expired.[14] This, of course, holds also of mixed vows, as to their material object.

Ad 2. A *substantial change* of the thing promised also renders a vow null and void. Such a change would occur, *e. g.,* if one had vowed to give substantial alms for a good purpose, and later became poor; he would then be free of his vow and need not beg to get the money.[15] The same rule applies to a personal vow (for instance, of undertaking a pilgrimage or of fasting) if one's health becomes so gravely impaired that one cannot comply with one's promise. This holds even if the change has been brought about by one's own fault.[16]

Ad. 3. A vow ceases to oblige, thirdly, if the *condition* attached to it by the *vovens* is not fulfilled, for instance, if one made a vow in order to obtain good health, and this favor has not been restored; or if one vowed to enter religion, provided such and such a convent would receive him or her. In the latter case he would not be obliged to ask for admission to another convent.[17]

14 S. Alph., lib. IV, tr. II, c. 3, *De Voto,* n. 220 (*ed. cit.,* p. 132 f.).

15 *Ibid.,* n. 225, 3 ff.

16 *Ibid.*

17 Cfr. Suarez, *De Voto,* l. IV, c. 17.

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Ad 4. By final cause (*causa finalis*) must be understood the main and primary reason that moves or prompts one to make a vow; for instance, if the poverty of a church caused one to vow a legacy to it, or if the sickness of a friend prompted one to vow a pilgrimage for his recovery. Besides this final cause, there may be impulsive reasons, which aided in impelling one to make the vow, but only accidentally or secondarily; these do *not* constitute the end or object for which the vow was made.[18] Now, if the final cause or purpose of a vow ceases to exist, as in the case of a poor institution becoming wealthy, the obligation ceases. But if the poverty of the institution was only a secondary or impelling cause ("*ad facilius donandum*") the vow obliges even after the institution ceases to be poor. It is, therefore, somewhat similar to a condition.

Ad. 5. The nullification or irritation of vows as well as dispensation and commutation are treated in the following canons.

IRRITATION OF VOWS

CAN. 1312

§1. Qui potestatem dominativam in voluntatem voventis legitime exercet, potest eius vota valide et, ex iusta causa, etiam licite irrita reddere, ita ut nullo in casu obligatio postea reviviscat.

§ 2. Qui potestatem non quidem in voluntatem voventis, sed in voti materiam habet, potest voti obligationem tandiu suspendere, quandiu voti adimplementum sibi praeiudicium afferat.

§ 1. Whoever lawfully exercises controlling power over the will of the *vovens* may validly and, for a reasonable

18 Suarez, *De Voto*, lib. IV, c. 18, n. 8.

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cause, also licitly nullify his vow, so that the obligation ceases, never to revive.

This is what is called irritation, and may be defined as an act by which either the object of the vow, or the act of the vowing person itself, ceases to oblige. When the matter of the vow (for instance, a pilgrimage) is immediately concerned, irritation is called *indirect* (see § 2). When the will, or, rather, the act of the *vovens,* is affected, irritation is called *direct,* because by it the act is revoked and, as it were, cancelled.[19] This power may be exercised only by persons to whom the will of the *vovens* is subject by reason of governing or domestic power, as distinguished from the power of jurisdiction. The *dominative* or *domestic power,* like the paternal power, is radically based upon the natural law, but has its formal sanction in ecclesiastical law.

The *domestic authorities* here concerned are:

(1) The pope and religious superiors (and *superioresses*) with regard to vows made by their subjects after their religious profession. As to the pope, the question is solved in can. 499, § 1; as to the superiors, there can be no doubt, since all superiors, even the female, enjoy domestic power over their subjects by virtue of the vow of obedience. This certainly is true with respect to all those who rule and live in a community to which the name "religious" may be applied in the canonical sense. Hence the superiors, higher and local, of all orders and congregations, papal as well as diocesan, have the power of irritating vows made by their subjects after the simple profession, for it is by this profession that the members are really placed under domestic power.

The answer is different for religious societies which

19 Suarez, *De Voto,* l. VI, c. 1, n. 4.

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pronounce no vows, or only the one or other. For the mere act of constituting a body or society does not yet give rise to the dominative power in its full sense. However, if the members are obliged to obey superiors who, in the constitutions, are said to enjoy dominative power,[20] there can be no doubt that their private vows can be nullified by these superiors. Vows of novices cannot be nullified by the religious superior in virtue of *direct* irritation.[21] Neither can the superiors, *per se,* irritate vows made before profession. Yet in virtue of the higher perfection attached to the religious state, and by reason of the ecclesiastical law, these private vows remain suspended, as will be seen under can. 1315.

(2) *Parents* and *tutors* or *guardians* may by direct irritation nullify the vows taken by boys who have not yet completed the fourteenth or by girls who have not yet completed the twelfth year of age.[22] Some authors[23] have extended this right to grandparents, which may be accepted as a benign interpretation, although can. 89 hardly warrants the extension.

(3) The *husband,* being the head of the wife according to divine and ecclesiastical law, *may nullify the vows of his helpmate made in the married state.* This rule most probably applies to all kinds of vows made by the wife, not only to such as are directly opposed to conjugal life.[24] The wife, on the other hand, cannot directly irritate any vow of her husband. What if the wife has taken a vow with the consent and approval of her husband? Even in

20 Thus the Constit. of the *Precious Blood Fathers, pro Praxi Americana* reads (art. 1): "*Sacerdotes Provinciae Americanae subiiciuntur vicario, qui auctoritate dominativa pollet, cui proinde obedientiam praestare tenentur.*" See can. 675, 501.

21 Cfr. Lehmkuhl, *l. c.* I, n. 460.

22 Can. 88, § 2.

23 S. Alph., *l. c.,* n. 229; Lehmkuhl, *l. c.,* n. 458.

24 S. Alph., *De Voto,* n. 234.

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this case he may nullify the vow, because his power has not been curtailed by his former consent.[25] This rule is extended by some authors also to the mutual vow of chastity,[26] holding that the husband may irritate the vow, and consequently also his own.

§ 2. Those who have power over the object of the vow, but not over the will of the vowing person, may *suspend* the obligation accruing from the vow if its fulfillment would be prejudicial to them. This, as stated above, is called *indirect irritation*. It is based on the principle that no one can promise anything that would violate the rights of another. Under this heading may be enumerated the following cases:

(1) *Ecclesiastical superiors*, the pope, bishops, religious superiors, also in virtue of jurisdiction, may suspend the obligation of vows that are detrimental to the welfare of the church, either universal or particular, or of their subjects. This holds good also of vows made before the vowing person became dependent on the respective superior.

(2) *Parents* and *guardians* may suspend the obligation of vows made by their dependants until these are of age.

(3) A *wife* may suspend certain vows of her husband, for instance, one which would cause long absence, one of keeping severe abstinence or of not asking the *debitum coniugale*.[27]

(4) Authors add that masters may suspend the vows of their servants. This applies to the ancient relation between master and servant (*herus et servus*), but is hardly applicable to modern conditions.

Direct irritation requires no reason for its validity, but

25 *Ibid.*; n. 239.

26 *Ibid.*; cfr. Lehmkuhl, *l. c.*, I, n. 463, who, however, advises provisional dispensation.

27 St. Alph., *l. c.* n. 235, n. 242.

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only for licitness. If the *vovens* demands the irritation of a vow from his or her superior, the reason must be sincerely stated, otherwise the superior would act invalidly, because he is not supposed to make use of this power without a reason.[28] Of his own accord, however, the superior may irritate a vow of his subject without a reason, though he may grievously sin by doing so, if the vow is important.

Indirect irritation requires no reason except the fact that a vow is detrimental to the welfare of the Church, or to authority, or to the salvation of the *vovens*. Of this the superior is the judge.

DISPENSATION FROM VOWS

CAN. 1313

Vota non reservata possunt iusta de causa dispensare, dummodo dispensatio ne laedat ius aliis quaesitum:

1.° Loci Ordinarius quod attinet ad omnes suos subditos atque etiam peregrinos;

2.° Superior religionis clericalis exemptae quod attinet ad personas quae can. 514, § 1, enumerantur;

3.° Ii quibus ab Apostolica Sede delegata fuerit dispensandi potestas.

Vows that are not reserved may be dispensed from, for a just reason, provided the dispensation does not trench on the right acquired by a third person. Such dispensations may be granted:

1.° By the *local Ordinary* to his own subjects as well as to *peregrini;*

2.° By *religious superiors* of *exempt clerical institutes*

28 Lehmkuhl, *l. c.*, n. 465.

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to all those persons that are mentioned in can. 514, § 1;

3.° By those to whom the power of dispensing has been granted by the *Apostolic See*.

Dispensation here means a relaxation of the rigor of the law in a particular case. More particularly it involves a remission of an obligation *contracted before God*[29]; for a vow is made to God only. A vow may justly be considered a law, because it is based upon the divine law, although made by individual persons, since vows in general have always been sanctioned in Holy Writ. That the divinely instituted Church possesses the power of condoning vows is evident from the universal jurisdiction granted her by Christ. As vows, as well as the power of dispensing from them, are rooted in divine law, it follows that not even the *Sovereign Pontiff can validly dispense from them without a proportionate reason.* Much less, then, may those validly dispense without a cause, who enjoy only a limited and dependent power.

Notice the clause: *dummodo ne laedat ius aliis quaesitum.* A vow may be made in favor of a third person, say a poor girl, for the purpose of endowing her, or of a pious or charitable institution, or it may be a religious vow which affects a community. To dispense from a vow made in favor of a third person, if the latter has freely and fully accepted the same, *per se* exceeds even the power of the Pope. Yet it must be and is admitted by most canonists[30] that the Pope, in virtue of his supreme power and government of the Church, may dispense from vows which affect either physical persons or ecclesiastical communities for the reason that this is necessary for the common welfare. Of course, there must be a solid reason.

29 Lehmkuhl, *l. c.*, n. 470.

30 Cfr. S. Alph., n. 256, where the negative opinion is said to have been held by some; St. Alphonsus himself defends the statement made in the text.

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This power cannot, however, be vindicated to inferior prelates, and is therefore excluded in our text.

What are "*vota non reservata*"? Reservation must be interpreted strictly, according to can. 1309. Hence only those private vows are reserved which are enumerated and comply with the conditions laid down in that canon. Thus the vow of entering a religious congregation or embracing a stricter order is *not* reserved.

However, some difficulty arises from the comparison of our canon with can. 1309, because the latter mentions *private* reserved vows, whilst our canon (1313) simply says: "*vota non reservata,*" without making a distinction between private and public vows. *Public* vows are those taken in a religious institute approved by the Church,[31] more especially the three that make up the religious state, no matter whether these vows be temporary or perpetual, simple or solemn. Are these religious vows included in the power of dispensation granted by law to those mentioned in can. 1313? It is certain that these vows must be considered as reserved to the Holy See, at least on account of the *ius tertii.*[32] Hence the general rule certainly forbids superiors, even though otherwise empowered, to dispense from them. Yet our bishops formerly could dispense from *temporary vows* of poverty and obedience in favor of non-enclosured members of diocesan institutes; also from the vow of chastity if not taken forever and absolutely.[33] The question therefore arises, whether bishops and exempt prelates may

31 Can. 488, 1.

32 S. C. P. F., Aug. 24, 1885 (*Coll. P. F.*, n. 1642).

33 *Ibid.* and S. O., Aug. 2, 1876 (*Coll. cit.*, n. 1461): "*Quoad vota non reservata paupertatis et obedientiae, posse Episcopum in utroque casu dispensare, dummodo ius ex contractu oneroso acquisitum tertii, ipso rationabiliter invito, non laedatur. Quoad votum non reservatum castitatis, ex potestate ordinaria Episcopi, negative, nisi constet votum non fuisse perpetuum et absolutum.*"

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still make use of this power? The answer is yes, because canonists generally hold, and the Code (can. 1309) does not deny, that vows not lasting or perfect in themselves, are not reserved. Hence, *per se loquendo,* the superiors mentioned might still use their power in favor of members with temporary vows, did not the Code, following a decision of the Holy Office, add the provision: *provided no right arising from the onerous contract and acquired by a third person be violated.*[34] Here, then, is the practical rule that should guide superiors: Follow can. 647, which determines the dismissal of religious with temporary vows only. This certainly is the canonically correct way, because it safeguards the rights of the third person, *viz.,* the religious institute.

Here we may supply from St. Alphonsus [35] the information that *no vow is reserved* (a) if it is made with the intention of obliging oneself only *sub levi,* (b) if it is made under the influence of fear, (c) if it is not complete as to the object promised, *e. g.,* the vow of virginity intended only to preserve the integrity of the body; (d) if it is made conditionally, even though the condition was fulfilled.

Concerning the persons mentioned in our text as being endowed with the power of dispensation, we must draw attention to the *peregrini.* For the purpose of this law a *peregrinus* is any one (*hic et nunc*) sojourning in the diocese of the dispensing Ordinary, and no inquiry is necessary as to his future intentions.[36] It goes without saying that by the local Ordinary is understood also the Vicar General and the administrator.

Those who have received *delegated power* to dispense from non-reserved vows from the Apostolic See are,

34 *Ibid.*

35 *De Voto,* n. 258; Lehmkuhl, I, n. 477.

36 Thus St. Alph., n. 262.

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among others, the *regular confessors, i. e.,* confessors belonging to a regular order, for, according to the common doctrine of the school, these can dispense all the faithful from non-reserved vows, either in or outside the confessional. This power, based upon privilege, is granted by papal delegation.[37] How far it may be extended to *papal delegates,* depends on their credentials.

Since none of those named in our canon can dispense without a reason, it may be well to state *some valid reasons* as given by St. Alphonsus:[38]

(1) *Periculum transgressionis ac indispositionis particularis vel communis hominum fragilitas;*

(2) *Magna difficultas in executione, sive praevisa fuit sive non praevisa;*

(3) *Si vovens vexetur magnis scrupulis;*

(4) *Si votum fuit emissum ex perturbata mente vel absque perfecta deliberatione, e. g., ex tristitia, ira, metu, etc.*

COMMUTATION OF VOWS

CAN. 1314

Opus voto non reservato promissum potest in melius vel in aequale bonum ab ipso vovente commutari; in minus vero bonum ab illo cui potestas est dispensandi ad normam can. 1313.

Any good work promised in a non-reserved vow may be changed by the *vovens* into one better or equally good; but only those who may dispense according to canon 1313, can change it into a lesser work.

Commutation is the substitution of a promised good work for another, according to the rules of (at least)

37 S. Alph., *l. c.,* n. 257; Lehmkuhl, I, 472.

38 *De Voto,* n. 252 f.

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geometrical proportion. The quality of a good work is measured by the spiritual profit of the *vovens* and the degree of divine pleasure and glory involved. This, of course, cannot be determined mathematically. The safest commutation always is a change into greater frequentation of the Sacraments.[39] The confessor, who is supposed to know the condition of his penitent, is the best judge in this matter.

Note that for a private change *no reason is required,* provided the promised good work is commuted into one that is obviously better. To commute the promised work into one less good, the authority that is empowered to dispense, must intervene. Therefore all those mentioned in can. 1313 may commute a non-reserved vow for a *just reason,* though it may be held with probability that the commutation would be valid even if there was no just reason because a commutation is not a complete liberation from a vow. It is also probable that even a vow made under oath may be commuted.[40]

Can. 1315

Vota ante professionem religiosam emissa suspenduntur, donec vovens in religione permanserit.

Vows made before religious profession are suspended as long the *vovens* remains in the religious institute which he has joined. This includes the vow of entering a stricter, say the Carthusian, order, for this vow is not reserved.[41] But what if this vow has been accepted by the stricter order, or if it was made under oath? Since

39 S. Alph., n. 243.

40 S. Alph. *l. c., De Voto,* n. 245; n. 190; Lehmkuhl, I, n. 479.

41 C. 5, 6°, III, 14, but the Pontiff dictates a penance for the vow not fulfilled, although the subject may remain in the more mitigated order.

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the text draws no distinction, the vow would be suspended even in that case; in fact the stricter order could not formally accept it until the religious had made his profession there. But this is not intended here because it would be a case of transfer, which is reserved.[42] After dismissal, the vows revive.

42 Can. 632.

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CHAPTER II

OATHS

DEFINITION

CAN. 1316

§ 1. Iusiurandum, idest invocatio Nominis divini in testem veritatis, praestari nequit, nisi in veritate, in iudicio et in iustitia.

§ 2. Iusiurandum quod canones exigunt vel admittunt, per procuratorem praestari valide nequit.

§ 1. An oath, that is, the invocation of the Divine Name in witness of the truth, cannot be taken except with truth, judgment, and justice.

§ 2. Oaths demanded or admitted by Canon Law cannot validly be taken by proxy.

There were heretics who rejected oaths as illicit, or minimized their value, or depreciated their gravity, or made little of perjury.[1] The golden mean always held by the Church is that oaths are permitted if made under the conditions[2] laid down in this canon, to wit:

(1) They must be made *in truth,* for what a man solemnly affirms, should be in conformity with the truth,

1 Cfr. *Professio Fidei Waldensibus proposita* (Denzinger, n. 371); *Errores Wicl. et Hus.* (Denzinger, nn. 519, 556–558); *propp. damn.*, 24–28, March 4, 1679 (*ibid.*, nn. 1041 ff.); *prop. 101, Quesnellii damn.*, Sept. 8, 1713 (*ibid.*, 1316); *prop. 75 Syn. Pisotoriens. damn.*, Aug. 28, 1794 (*ibid.*, n. 1438).

2 Cfr. the Commentators on tit. 24, lib. II, *de Iureiurando;* S. Thom., II–II, q. 89; q. 98; S. Alph., l. IV, tr. II, c. 2; Suarez, *De Relig.*, tr. V, *de Iuramento,* t. XIV, 438 ff.

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and when he makes a promise, he should have the intention of keeping it.

(2) They must be made *with judgment, i. e.,* with due and reverent consideration of the usefulness or necessity of an oath.

(3) They must be made *in justice,* because no unjust obligation is binding.

Of the various distinctions made by canonists we will consider only the two especially referred to in our Code — the *assertory or affirmative oath,* by which God is called upon to witness an assertion of a past or present fact; and the *promissory oath,* by which God is called upon to witness the execution of a resolution, vow or agreement. In both, the Deity must be invoked as witness and the intention must correspond with the words used in the invocation.

In judging the intention, which is always a difficult matter, the formula or terms of the promise must be taken according to the customary interpretation.

It is strictly forbidden to use a name for the Deity which is commonly considered to mean an evil spirit.[3] It is not necessary to couple the name of God with a verb in the imperative, or subjunctive, or optative form, for the indicative may have the same meaning, as in the formula: "God liveth, God knoweth, before God I speak, I tell the truth." But if these expressions were used as mere enunciations, the intention of swearing would, of course, be wanting.[4]

3 Thus *deocce,* with the Gallas, indicates an evil spirit; S. O., June 20, 1866, ad 37 (n. 1293).

4 S. Alph., *l. c.,* n. 134.

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THE OBLIGATION ARISING FROM AN OATH

CAN. 1317

§ 1. Qui libere iurat se aliquid facturum, peculiari religionis obligatione tenetur implendi quod iureiurando firmaverit.

§ 2. Iusiurandum per vim aut metum gravem extortum valet, sed a Superiore ecclesiastico relaxari potest.

§ 3. Iusiurandum nec vi nec dolo praestitum quo quis privato bono aut favori renuntiat lege ipsi concesso, servandum est quoties non vergit in dispendium salutis aeternae.

§ 1. One who freely takes an oath, promising to perform something, is under a special obligation, arising from the virtue of religion, to keep what he has promised. The reason is that in a promissory oath God is called upon as solemn witness of our intention to keep what we promise, and as a guarantee and pledge of executing our intention, and hence failure to do so is a slur and an injury to His honor and truthfulness, and involves a sin, either mortal or venial according to the gravity of the matter, against religion.[5]

§ 2. An oath extorted by violence or grave fear is valid, but may be rescinded by one's ecclesiastical superior.

This "great question," as St. Alphonsus [6] calls it, is here solved according to the doctrine laid down in the decretals,[7] *viz.*, that an oath taken under the influence of compulsion or grave fear is valid because man is obliged to keep what he promises under oath, lest God be found a

5 Cfr. Suarez, *l. c.*, l. I, c. 9; l. III, c. 16; cfr. c. 1, C. 22, q. 2; cc. 8, 9, 17, 28, X, II, 24; Pius IX, Syllabus, n. 64.

6 *L. c.*, II, n. 174; S. Thom., II-II, q. 89, art. 7, ad 2.

7 Cc. 8, 15, X, II, 24.

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false witness. However, the unjust extortioner has no just claim to the thing thus promised, and therefore the ecclesiastical authorities have absolved even sacred ministers who abjured their ministry under compulsion, from the obligation of the oath. Besides, all agree that no obligation of justice arises from an unjustly exacted oath, and that if the object (money, etc.) was already delivered, it could be claimed in court or regained by occult compensation.

§ 3. An oath taken without compulsion or fraud, by which one renounces some private good or favor granted him by law, must be kept, if it does not imply the loss of eternal salvation. The case is taken from the decretals.[8] Women had promised by oath to have their dowries sold. The pope told the judges to observe the canon law, which permitted such alienation, and to instruct the women to keep their oath, as long as no injury was done to others and there was no danger to their salvation.

NATURE OF OBLIGATION

CAN. 1318

§ 1. Iusiurandum promissorium sequitur naturam et conditiones actus cui adiicitur.

§ 2. Si actui directe vergenti in damnum aliorum aut in praeiudicium boni publici vel salutis aeternae iusiurandum adiiciatur, nullam exinde actus consequitur firmitatem.

§ 1. A promissory oath follows the nature and conditions of the act to which it is attached.

8 C. 15, 28, X, II, 24. Thus also an oath made to a *meretrix*, if no sin is involved, would hold; S. Alph., n. 177; even an oath to pay a usurer interest would bind, but the money may be reclaimed; c. 6, X, II, 24.

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§ 2. If the oath is attached to an act which implies damage to others, or prejudice to the common welfare or to eternal salvation, the act receives no strength from the oath.

§ 1 explains the meaning of a promissory oath. It is attached to a contract, stipulation, or agreement, and lends higher sanction to the same, but the obligation of the oath cannot be extended farther than the contract or natural promise itself. Hence (a) a sworn promise, in order to be valid, must be *accepted* before it obliges; (b) it cannot be condoned, abated, or forgiven. Besides there may be other mutual or implied conditions, as is the case in every contract; *e. g.*, if I am able, if my superior permits, etc.[9]

§ 2 declares that an oath has no binding force if attached to an act that (a) implies injury to a third person, for this would be evil,[10] or (b) injury to the public welfare, as if a judge would swear not to prosecute criminals, or a clergyman would take a civil oath forbidden by higher authority[11]; or (c) endangers eternal salvation. The underlying principle is that an oath cannot be a chain of iniquity.

CESSATION OF OBLIGATION

CAN. 1319

Obligatio iureiurando promissorio inducta desinit:

1.° Si remittatur ab eo in cuius commodum iusiurandum emissum fuerat;

2.° Si res iurata substantialiter mutetur, aut, mutatis adiunctis, fiat sive mala sive omnino indifferens, aut denique maius bonum impediat;

9 Cfr. c. 25, X, II, 24; Lehmkuhl, *l. c.*, I, n. 419.

10 C. 12, X, II, 14; not to speak to parents or relatives.

11 Cfr. c. 21, X, II, 14; c. 12, X, II, 2; Engel, l. II, tit. 24, n. 8.

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3.° Deficiente causa finali aut conditione sub qua forte iusiurandum datum sit;

4.° Irritatione, dispensatione, commutatione, ad normam can. 1320.

The obligation contracted by a promissory oath ceases:

1.° If condoned by the one in whose favor it was taken;

2.° If the thing promised is substantially changed, or if, by reason of a change in the circumstances, the oath becomes sinful, or entirely indifferent, or an obstacle to attaining a higher good;

3.° If the final cause or condition under which the oath was taken, have ceased to exist or failed;

4.° By irritation, dispensation, or commutation, according to can. 1320.

The first reason has been explained above.

The second reason is a *substantial change* in the thing promised. Thus, one is not obliged to marry a girl to whom he promised marriage under oath, if the girl has undergone a substantial change as to her health, social condition, virginal state, etc., etc.,[12] or if the change affect the *vovens* so that he may incur danger of death, or infamy, or risk the loss of a great good. No one is supposed to have had the intention of obliging himself under oath to something that will gravely [13] embarrass him. If the thing becomes evil or entirely useless, for instance, if one had sworn to punish a child and the child has amended its conduct. Lastly, if one had taken an oath that would deter him from entering the religious or clerical state, it would not be binding, unless the public welfare were at stake.

12 S. Alph., n. 180.

13 *Ibid.*, n. 187; for instance, the oath of keeping a secret.

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DISPENSATION FROM OATHS

CAN. 1320

Qui irritare, dispensare, commutare possunt votum, eandem potestatem eademque ratione habent circa iusiurandum promissorium; sed si iurisiurandi dispensatio vergat in praeiudicium aliorum qui obligationem remittere recusent, una Apostolica Sedes potest iusiurandum dispensare propter necessitatem aut utilitatem Ecclesiae.

Those who are empowered to annul, dispense from, or commute vows, have the same power with regard to promissory oaths; but in case the dispensation involves a prejudice to a third person, who refuses to condone the obligation, the Holy See alone can dispense on account of the utility or necessity of the Church.

This power is included in the supreme power of the Church and required for the tranquillity and peace of individuals and society. Thus it would certainly be in favor of the public welfare to dispense a child under age from the oath of marrying a certain person, even though the parents should be unwilling to have the oath annulled.[14]

INTERPRETATION

CAN. 1321

Iusiurandum stricte est interpretandum secundum ius et secundum intentionem iurantis, aut, si hic dolo agat, secundum intentionem illius cui iuratur.

An oath must be interpreted strictly according to law and the intention of the *vovens,* or if the latter swears de-

14 C. 19, C. 22, q. 4; c. 15; C. 22, q. 5.

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ceitfully, according to the intention of the person to whom the oath is made.

Thus one who swears to keep the statutes of a certain society or congregation is obliged to observe only those which were issued when the oath was taken, not those published later.[15] Nor can the obligation of an oath be extended beyond the intention of the *vovens,* because this intention is the measure of the obligation. But if the person swears deceitfully, he has only himself to blame if his intention is not accepted and that of the person receiving the oath substituted therefor.[16]

15 C. 35, X, II, 24.

16 Cfr. the peculiar case stated in c. 25, X, II, 24.

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PART IV

THE TEACHING OFFICE OF THE CHURCH

Although the authority of teaching and preaching the Word of God belongs to the Church by virtue of her divine constitution, and is therefore an inherent attribute of ecclesiastical persons, the manner of exercising this office constitutes part of the administrative rights of the Church. And although the *depositum fidei* can receive no substantial increase, yet its unfolding and explicit declaration are evidenced through the centuries. The material increase of the faithful and the administration of the Word of God have necessitated methods and means which were not so imperative in former times. Hence a certain change is noticeable also in the spread and exposition of the Word of God.

In Part IV the Code sets forth in a preamble the *authority of the Church* with regard to teaching the Word of God, and what is opposed to faith as understood by the Church. Then the text lays down rules for *preaching* (can. 1327–1351); sets up regulations for the *institutions* which hand down the Church's teaching, *viz.*, seminaries and other schools (can. 1352–1383); the warding off of errors as exercised through the *censorship of books* (can. 1384–1405); and, lastly, the obligations connected with the *profession of faith* (can. 1406–1408).

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RIGHT OF THE CHURCH TO TEACH

CAN. 1322

§ 1. Christus Dominus fidei depositum Ecclesiae concredidit, ut ipsa, Spiritu Sancto iugiter assistente, doctrinam revelatam sancte custodiret et fideliter exponeret.

§ 2. Ecclesiae, independenter a qualibet civili potestate, ius est et officium gentes omnes evangelicam doctrinam docendi: hanc vero rite ediscere veramque Dei Ecclesiam amplecti omnes divina lege tenentur.

§ 1. Christ, our Lord has entrusted to the Church the deposit of faith, in order that, by the continual assistance of the Holy Ghost, she might preserve the revealed doctrine and expound it faithfully.

The term "*depositum fidei*" (an allusion to I Tim. 6, 20), may be taken in a twofold sense. In the *strict sense* the deposit of the faith comprises all the truths which are either implicitly or explicitly contained in the written word of God or in tradition, and must be believed as revealed with divine faith. In a *wider sense* the deposit of faith comprises also those truths which, though not revealed, bear such an intimate relation to revealed truths that, without them, the latter could not be, at least easily and fully, preserved, expounded, and defended.[1] Both kinds of truth are in the lawful possession of the Church, who is entitled to make the deposit of faith in the wider sense an object of her infallible teaching, precisely in order to *preserve the faith holy, i. e.,* unchanged, unsoiled, and unadulterated. The duty of preservation is in itself positive and affirmative and the Church complies with it by *interpretation* or exposition; but it sometimes also re-

1 Cfr. Mazzella, *De Religione et Ecclesia,* 1892, p. 615.

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quires *reprobation* or rejection. Hence the Church has always claimed (a) the right of defining what belongs to the deposit of faith, *i. e.*, faith and morals, or the extent of divine faith; (b) the right of proposing the true meaning of revealed truth in its professions of faith; (c) the right of rejecting or condemning whatever is contrary to the teaching of faith and morals, either by rejecting false interpretations of revealed truth, or reprobating false conclusions of reason, censuring and proscribing erroneous propositions, etc.; (d) the right of infallibly judging dogmatic facts connected with certain doctrines, as in the case of Jansenius.

This office of an infallible teacher belongs to the Catholic Church not merely in virtue of her divine origin, but by reason of the continual assistance of the *Holy Ghost promised to her by Christ,* and which implies no new revelation, but a special providence keeping her free from error in the function of preserving and expounding the deposit of faith.[2]

§ 2. The Church, independently of the civil authority, possesses the *right* of teaching all nations the truth. Correlative to this right is the *duty* of teaching men, and on their part the duty of obtaining a knowledge of the truth and embracing the true Church of God. This obligation, incumbent on all, is derived from the divine law. Our Saviour not merely advised, but commanded, His Apostles to teach all nations and to preach the Gospel to every creature.[3] This command, intended also for their successors, itself forms part and parcel of the deposit of faith. It is attached to the universal mission of the Church, whose real object is nothing else but the union of men

2 Cfr. Matt. 28, 19 f.; John 14, 26; Mazzella, *l. c.*, n. 789, p. 603. The divine assistance presupposes human coöperation and investigation.

3 Cfr. Matth. 28, 19 f.; Mark 16, 15 f.

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with God, or the salvation of all mankind through intimate union with the Creator. This mission is incumbent on the Church to the end of time and is fulfilled first of all by preaching the word of God, because faith is the *conditio sine qua non* of salvation.[4] Faith, of course, must here be taken as including the works of faith, or, in the usual formula, faith and morals. The law of prescription adds weight to the divine law which dictates that everything directly related to the spiritual end or purpose for which the Church was founded, is her proper and exclusive domain, in which she is supreme, having no higher authority than God Himself. The Church, then, is not at liberty to abdicate this right or to shirk this duty, for if she did so, she would cease to exist or give up her divine mission.

On the other hand, as salvation is the individual concern of every rational creature destined to the ultimate end for which he is created, and since salvation begins with faith, it follows that every person endowed with the necessary faculties must coöperate in the attainment of that end by adopting the means without which it cannot be achieved — *necessitate medii*. Each and everyone must hear and believe those who preach the word of God by the authority of the Church. Every preacher must have a divine call, this is communicated to him through the organization founded by Christ. This is the Church in which all those who wish to be saved must be enrolled: "Unless one believeth, he shall be condemned" (Mark 16, 16). Such is, if we mistake not, the meaning of § 1 of our canon. The term *omnes* certainly includes all men who have sufficient use of reason to realize what a grievous sin is, when they are capable of merit and demerit, reward and

[4] Rom. 10, 10 ff.

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punishment. *Omnes,* furthermore, includes every individual without regard to ancestral or paternal prejudice and authority. For the ultimate end of man is not bound up with either national or family traditions, nor is paternal or maternal authority stronger than the divine command. Salvation, as we have said, is a strictly individual concern which involves a serious obligation from the time that reason dawns upon the child. From this viewpoint also is to be understood the phrase: "*independenter a qualibet civili potestate.*" For if the duty of acquiring the necessary knowledge of the Gospel and embracing the Church of God is individual, it necessarily follows that the State cannot be allowed to interfere in a matter which transcends its purpose — which lies entirely within the sphere of man's temporal welfare, whereas the object of the Church is spiritual and supernatural, reaching into eternity. Those two ends cannot, *per se,* clash, for although the two societies are supreme each in its own domain, their ends are different and only touch each other at some points. This could not be otherwise, as the author of both societies is one and the same God, who created both the natural and the supernatural world.[5]

THE MATERIAL OBJECT OF FAITH

CAN. 1323

§ 1. Fide divina et catholica ea omnia credenda sunt quae verbo Dei scripto vel tradito continentur et ab Ecclesia sive sollemni iudicio sive ordinario et universali magisterio tamquam divinitus revelata credenda proponuntur.

5 Cfr. Leo XIII, "*Immortale Dei,*" Nov. 1, 1885; Cavagnis, *Institutiones Iuris Publici Ecclesiastici,* 1883, p. 6 ff.; Lib. IV, c. 1; Bachofen, *Summa Iuris Eccl. Pub.,* 1910, p. 110 ff.

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§ 2. Sollemne huiusmodi iudicium pronuntiare proprium est tum Oecumenici Concilii tum Romani Pontificis ex cathedra loquentis.

§ 3. Declarata seu definita dogmatice res nulla intelligitur, nisi id manifeste constiterit.

§ 1. All those truths which are contained in the written word of God, or in tradition, and proposed to our belief as divinely revealed either by a solemn proclamation or by the ordinary and universal magisterium of the Church must be believed by Divine and Catholic faith.

§ 2. To pronounce a solemn judgment of this kind appertains either to a general Council or to the Roman Pontiff speaking *ex cathedra*.

§ 3. Nothing is to be taken as dogmatically declared or defined, unless it is manifestly known to be such.

The material object of faith (*objectum materiale fidei*), or that which is to be believed, is contained either in Holy Writ, as accepted by the Church, or in tradition, as preserved by the Church. However, as Holy Writ itself, without the acceptance of the Church, would be merely a material or indifferent book — though perhaps sacred on account of its venerable age and contents — so tradition would lack sacred character and obligation but for the *infallible judgment* of the Church. This infallible judgment is embodied in the teaching office of the Church, and constitutes a special prerogative granted to the Church by Christ, in virtue of which she cannot deceive nor be deceived in matters of faith and morals.[6]

Our text distinguishes a solemn *ex cathedra* judgment and the ordinary *magisterium* of the Church. But there is no intrinsic difference between the two, as they derive from the same source, *viz.*, the divine promise and provi-

[6] Mazzella, *l. c.*, n. 782, p. 599.

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dence, and have the same object and purpose. The object is faith and morals; the purpose, to protect the faithful from error.

The *ordinary and universal teaching body* of the Church consists of the pastors together with their head, the Roman Pontiff, no matter where the former are found, whether scattered over the globe, or sitting united in St. Peter's Dome. This is called the active subject of the infallible magisterium (*subiectum activae infallibilitatis*). To this teaching body corresponds the believing body of the faithful, which latter, however, being the *subiectum passivae infallibilitatis,* cannot be separated from the teaching body or be opposed to it. For the teaching office or authority is the cause of the infallibility of the Church, and both bodies are one in the same faith.

There is, however, a distinction, though not quite adequate, between the *teaching office of the Sovereign Pontiff alone,* and the body of teachers or the teaching Church united to its head, *i. e.,* the Pontiff. Without the latter, or, worse still, in opposition to the latter, there can be no teaching body, whilst the authority of infallible teacher is embodied in the Roman Pontiff alone. Both the Pontiff sole and the body of teachers united with him, enjoy the power of teaching infallibly.

The "*universal*[7] *and ordinary magisterium*" consists of the entire *episcopate,* according to the constitution and order defined by Christ, *i. e.,* all the bishops of the universal Church,— dependently on the Roman Pontiff.[8] Priests and deacons do not, *iure divino,* belong to the hierarchy of jurisdiction, and therefore, are not, prop-

7 The word "*universal*" was added in order to distinguish it from the official attribute of infallibility inherent in the Pontiff. See *Coll. Lac.,* t. VII, 176.

8 Cfr. Pius IX, "*Tuas libenter,*" Dec. 21, 1863.

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erly speaking, judges in matters of faith and morals, nor can they be, *iure ordinario,* bearers of infallible teaching. However, they exercise a certain teaching authority by divine right, inasmuch, namely, as they are helpers and co-workers of the bishops, from whom they receive delegated mission, and preach and testify to the faith preached and expounded by the episcopate. They, too, in a wider sense partake of the assistance of the Holy Ghost.

This teaching authority, then, proposes what must be believed by *divine and Catholic faith.* It is indeed true that what God has revealed may and must be believed with *divine faith,*[9] and that what the Church proposes as part of divine Revelation, may and must be believed with *divine* and *Catholic* faith, or, shortly, with *Catholic* faith. But the material object of divine faith comprises more than the object of Catholic faith, and besides there is something in Catholic faith which is not so clearly expressed or conspicuous in divine faith. For the former is offered by the living word of the Church with a precision and determination that leaves no doubt as to the supernatural origin and medium through which it is conveyed. This Catholic faith then commands our assent and obedience to the full extent of a childlike belief, but from the motive of divine veracity and truth.[10]

The term *proposed* means not merely an official or authentic formulation of a given object or article, but an authoritative promulgation of a law or rule contained in revelation, commanding our full interior and exterior assent.[11]

§ 2 defines, according to Vatican Council,[12] the *solemn*

9 The Blessed Virgin Mary certainly believed the Angel with divine faith, but of Catholic faith there can be no question.

10 Cfr. Scheeben, *Dogmatik,* 1873, I, p. 324; *Coll. Lac.,* t. VII, 72 ff., 159 f.

11 Scheeben, *l. c.,* p. 179 f.

12 *Conc. Vat.,* Sess. VII, c. II, *De Revelatione;* c. III, *De Fide;* c.

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judgment of the Church in contradistinction to her ordinary and universal magisterium, not as if the office of the Supreme Pontiff were extraordinary, in the strict sense, but because this means of proposing an infallible truth is uncommon. Such a solemn pronunciamento or proclamation may be made either by a *general council* or by the Pope. That a council cannot be ecumenical without the head, is evident, as explained in our Vol. II, where the other requisites are also discussed.[13]

The *Pope* alone, after having been duly elected and having accepted the election, is the lawful head of the Church, and, in virtue of his primacy of jurisdiction, is the supreme pastor and teacher of the whole Church, as the Vatican Council has defined.[14] As such he may define, or issue decrees on, points of faith and morals, binding the whole Church. His decisions do not receive their obligatory force from the consent of the Church, as the Gallicans asserted,[15] but embrace the whole extent of the object of the infallibility inherent in the teaching Church. The term *ex cathedra* means: (a) that the Pope proclaims a dogma as the supreme teacher and pastor of the Church; (b) that it be a matter of faith and morals, not of history or politics disconnected with the former; (c) that he pronounce an authoritative and final sentence with the manifest intention of obliging (d) the entire Church, *i. e.,* all individuals as well as the whole body of the faithful.[16]

However, as § 3 intimates, there may be doubt as to

IV, *De Fide et Ratione; De Revelatione,* can. 4; *De Fide,* can. 6; *De Fide et Ratione,* can. 3; Sess. IV, c. IV, *De Romani Pontificis Infallibili Magisterio.*

13 See can. 222 ff.; p. 217 f.

14 Sess. IV, *De Eccl.,* c. 4 (Denz., n. 1682).

15 Art. 2, *Decl. Cleri Gall. dam. ab Innoc. XI,* April 11, 1682; *ab Alex. VIII,* "*Inter multiplices,*" Aug. 4, 1690 (Denz., 1189).

16 Mazzella, *l. c.,* n. 1051, p. 821.

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what is *declared or defined* either by the universal teaching Church or by means of papal *ex cathedra definitions.* Therefore the theologians have laid down certain *rules,* which we will briefly restate.

a) What has been *solemnly defined,* either by a general council or by the Supreme Pontiff, is certainly *de fide;* but not all the historical or theological assertions which accompany a papal decision (for instance, the Bull "*Ineffabilis*") are *de fide.*

b) What is clearly and undoubtedly contained in *Holy Scripture and Tradition* as a matter of faith or morals, must be believed, although individual errors are not entirely excluded;

c) What the universal and approved practice and discipline proposes as connected with faith and morals must also be believed ("*Lex orandi, lex credendi*").

d) What the *Holy Fathers* and the *theologians* hold unanimously as a matter of faith and morals,[17] is also *de fide.*

There may be some doubt as to the form of infallible decisions. A test for genuine ex cathedra definitions has been found in the following formulas: (1) if those who assert the contrary are declared heretics; (2) if the terms "*si quis*" is used with "*anathema*" following; (3) if it is declared that the doctrine in question must be firmly believed by all the faithful as a dogma.[18]

If after the application of these rules a solid doubt remains, the utterance is not infallibly binding, as is evident from our text.

17 Cfr. Simar, *Dogmatik,* 1893, p. 41 ff., § 11.

18 For instance, Christ is true man; hence he must have a human body and a soul.

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DANGERS TO FAITH

CAN. 1324

Satis non est haereticam pravitatem devitare, sed oportet illos quoque errores diligenter fugere, qui ad illam plus minusve accedunt; quare omnes debent etiam constitutiones et decreta servare quibus pravae huiusmodi opiniones a Sancta Sede proscriptae et prohibitae sunt.

It is not enough to eschew heretical depravity, but those errors also must be carefully avoided which more or less closely approach heresy; and for this reason all must observe also those constitutions and decrees by which the Holy See proscribes and forbids such perverse opinions.

This text is very cautiously worded, no doubt in order to avoid theological controversy. The question here evidently turns about certain *conclusions,* commonly called theological, for there is no doubt that truths either immediately and expressly, or immediately but obscurely contained in Revelation must be believed *fide divinâ,* and, if properly proposed, also fide *catholicâ et divinâ.* But there *is* a controversy as to truths which are not directly and explicitly contained in Revelation, but only virtually (*virtualiter*) deducted therefrom by logical reasoning. Besides there are natural truths, not revealed in the proper sense, which have such an intimate connection with the revealed truths of faith and morals, that the purity and integrity of faith and morals cannot be safely maintained and defended without them. Concerning these some writers have asserted that they must be believed *fide divinâ,* whereas others (*e. g.,* De Lugo) main-

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tain that they must be believed *fide ecclesiasticâ* only.[19] Our Code does not decide this controversy. One thing is certain, *viz.*, that the *assent* which every Catholic must give to the judgment of the Church when she pronounces on certain errors, must be *internal,* and that the condemnations issued by the S. Congregations may not be treated as if they had no weight.[20] For even the so-called *fides ecclesiastica* requires not a mere servile silence, but a real assent, elicited by the will, although the formal reason, the *auctoritas Dei loquentis,* may not be implied.

PROFESSION OF FAITH

CAN. 1325

§ 1. Fideles Christi fidem aperte profiteri tenentur quoties eorum silentium, tergiversatio aut ratio agendi secumferrent implicitam fidei negationem, contemptum religionis, iniuriam Dei vel scandalum proximi.

§ 2. Post receptum baptismum si quis, nomen retinens christianum, pertinaciter aliquam ex veritatibus fide divina et catholica credendis denegat aut de ea dubitat, haereticus; si a fide christiana totaliter recedit, apostata; si denique subesse renuit Summo Pontifici aut cum membris Ecclesiae ei subiectis communicare recusat, schismaticus est.

§ 3. Caveant catholici ne disputationes vel collationes, publicas praesertim, cum acatholicis habeant, sine venia Sanctae Sedis aut, si casus urgeat, loci Ordinarii.

§ 1. The faithful are obliged to openly profess their

19 De Lugo, *De Virtute Fidei,* disp. 20, sect. 13, n. 109; Simar, *l. c.*, p. 49 f., p. 640 ff.

20 "*Lamentabili,*" July 4, 1907, propp. VII and VIII.

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Christian faith, as often as silence, evasion, or mode of acting would involve an implicit denial of the faith, contempt of religion, dishonor to God, or scandal to their neighbors.

The Apostle says: "With the heart we believe unto justice; but with the mouth confession is made unto salvation."[21] This and the declaration of Christ: "He that shall be ashamed of me and my words, of him the Son of man shall be ashamed,"[22] clearly indicate a double duty, namely, (1) to profess the Christian religion, and (2) not to deny it. But as a prohibitive or negative law obliges always, whereas an affirmative or a positive law does not oblige at every moment or on every occasion, so in our case the text states the negative side of the obligation, namely *not to omit the profession* of faith when it is called for. Faith may be concealed by mere *silence,* which, however, is sometimes permissible, for, as stated, we need not profess the faith all the time. Nay, it may even be necessary to hide it, namely, when great damage, such as persecution or vexation,[23] threatens a whole community. On the other hand it is certain that whenever the public and lawful authority demands a profession of one's faith, it is never permitted to refuse it.[24] Besides, in no case is it allowed to conceal the faith entirely and to be a hidden Christian, even though there were danger of life or loss of temporal goods.[25] Such as wish to remain occult Christians always cannot be admitted to baptism.[26]

Faith may also be concealed by *subterfuge,* and various devices have been adopted for this purpose, some of them

21 Rom. 10, 10.
22 Luke 9, 26; Matth. 10, 32.
23 Lehmkuhl, I, n. 291.
24 S. C. P. F., Feb. 7, 1791 (*Coll.,* n. 604).
25 S. C. P. F., Nov. 24, 1628 (n. 44).
26 S. C. P. F., May 28, 1635 (n. 84).

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despicable. Thus the custom of Christians assuming pagan or Mohammedan names was branded as deceitful and hypocritical and strictly forbidden by papal constitution.[27] While there is little or nothing in a name as such, if it becomes a shibboleth of heresy or apostasy and is so regarded by the magistrate and populace, it is no longer as sounding brass, even if the bearer interiorly desires to retain the faith. Therefore circumstances must be considered.

A curious kind of subterfuge was devised by certain Christians who wished to graduate or take the doctor's degree in China, a ceremony accompanied by religious rites, such as the offering of flowers, meat, or incense to an idol, etc. This is never permitted. It is also forbidden to bribe the magistrate or to "play sick" on the day of the ceremony, because this would amount to a lie.[28] A somewhat similar artifice was employed in good faith by some missionaries. The mandarins, in order not to lose their office, made an investigation as to the conduct of these missionaries and, in a report to the "Celestial Son," assured him that the missionaries were not priests, had not preached the faith and left no following. This report, together with the sentence of exile (instead of capital punishment), had to be signed by the missionaries themselves, so that they, as it were, condemned themselves in order to be treated more leniently. The S. Congregation decided that the missionaries were not allowed to sign the sentence thus worded. On the other hand, however, they were not bound to protest publicly against the magistrates, if these published the sentence without the signature of the missionaries.[29]

27 Bened. XIV, "*Inter omnigenas*," Feb. 2, 1744, § 3–6; "*Quod provinciale*," Aug. 1, 1754; S. O., Nov. 29, 1729 (*Coll. P. F.*, n. 373).

28 S. C. P. F., Jan. 4, 1798 (n. 644).

29 S. C. P. F., Dec. 9, 1822 (n. 776).

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For in that case the malice of the act was imputable entirely to the mandarins.

It may be added that no denial of the faith is involved in the act of hiding one's special or peculiar state (for instance, the priesthood) nor would such an act *per se* amount to a mortal sin.[30]

Lastly, one's conduct, or *ratio agendi,* may imply a denial of the faith. To this class belong certain acts which are indifferent in themselves, but become wrong by the end for which they are performed, or by their object or accompanying circumstances.[31] Thus *eating meat* is in itself an indifferent act, but may become sinful through either or all of three concomitant adjuncts. Thus to eat or prepare meat in *odium fidei,* in contempt of religion, is a grievous sin because the end is sacrilegious, and may amount to a denial of the faith, if the meat is taken as a *signum protestativum of apostasy.* If the act is performed merely for economy's sake, without any religious motive, no denial is involved. Christians in the Orient were permitted to build, or help build, a Mohammedan mosque because compelled to do so by the Turks; at least the S. Congregation decided that they were not to be disquieted.[32] A different answer was given by the Holy Office in reply to the question whether Christians were allowed to build, or coöperate in building, a pagan temple because they feared for their life or were in danger of being exiled. This was declared forbidden.[33] There is an

30 Lehmkuhl, I, n. 292, according to De Lugo, Suarez, etc.

31 S. O., April 19, 1635; May 27, 1671, n. 1; June 20, 1866, n. 38 (*Coll. P. F.,* nn. 83, 195, 1293); S. C. P. F., June 26, 1820 (n. 747). The end is also perceptible in the following case: Christians may contribute to public funds or public demonstrations, if these may be interpreted as signs of public joy, even though idolatrous customs may be connected with them, but the intention of contributing to idolatry is never permissible. S. C. P. F., Sept. 12, 1645, n. 114.

32 S. C. P. F., Sept. 26, 1840, n. 14 (*Coll.,* n. 914).

33 S. O., Jan. 8, 1851, ad 1 (*Coll.,* n. 1055).

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essential difference between a mosque and a pagan temple, because the latter involves idol worship, whereas the former does not. Besides, the cases are somewhat different in this that the latter implies voluntary coöperation, whereas the former contains an element of violence.

That *circumstances,* too, may change the nature of an act is evident from the example of certain Christians who were made to trample on the cross. To walk over or to step on an object, is in itself a merely material and indifferent act, but intentionally to trample on the cross, if seen and perceived, is sacrilegious. The case was as follows: The pagans placed crosses across the road and in narrow gates, where Christians had to pass. The decision was: (a) if the Christians were not warned, they should walk as if nothing had happened; but (b) if they were warned, they should take care not to step on the crosses; (c) if they were warned, but could not pass by without stepping on them, they should protest to the bystanders and pass over them as reverently as they could.[34]

Idol worship in whatever form, for instance, in the shape of tablets dedicated to the "seat of such and such a soul," is incompatible with the Christian faith. Therefore such tablets must be destroyed, if they are in the exclusive possession of Christians, or, if pagan families have a share in them, may be restored to these.[35] A convert from the Anglican Church may not hide his faith so as to retain a Protestant minister in his home and assist at the prayer meetings, even though the convert recites the Catholic prayers; nor is he allowed to leave his children in the care of heretical tutors.[36]

Concerning *schismatic* priests the following decisions may be noted: Assistance at schismatic services is not

34 S. O., *Inst.*, 1863 (*Coll. P. F.*, n. 1235).

35 S. O., Aug. 20, 1778 (n. 530).

36 S. O., July 29, 1699 (n. 246).

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allowed. An Armenian priest of the Catholic faith is not allowed to pour water secretly into the chalice in the sacristy.[37] Catholic Nestorian priests are not allowed to hear the confessions of their schismatic coreligionists, even though by their refusal they risk losing their support; nor are they permitted to recite the names of Dioscurus or Nestorius at Mass, even though they merely intend to honor the patron saints of these two heresiarchs.[38]

As to *clothes,* the answer is always the same: if they are distinctive and notorious signs or proofs of infidelity, heresy or apostasy, a Catholic is never allowed to wear them.[39]

For the rest, the rules on material and formal cooperation should be consulted.

§ 2 *defines* three classes of Catholics who have suffered "shipwreck of the faith."[40] The first class is that of *heretics* who, having been baptized, retain the name of Christians, but obstinately deny or doubt some of the truths that must be believed by divine or Catholic faith. The second class is that of *apostates,* who have given up the Christian faith entirely and fallen away from it. The third class is that of *schismatics,* who refuse to obey the Sovereign Pontiff or to live in union with those who submit to him.

Heresy, therefore, supposes the valid reception of Baptism, which is the means of Christian initiation. But there is a difference in the attitude of different heretics. Some have been validly baptized and raised in a sect the truthfulness of which they have never doubted.

37 S. O., Aug. 7, 1704 (n. 267). They do it to hide their faith, because the Monophyites abhor a mixture of wine with water.

38 S. O., Aug. 28, 1669 (*Coll.,* n. 185).

39 Cfr. Lehmkuhl, *l. c.,* n. 294.

40 I Tim. 1, 19.

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Such are called *material heretics,* who may, nay should remain where they are, as long as no doubt arises in their mind concerning the truth of their sect. Others have doubts, but make no effort to disperse them, and are not ready to accept the truth, even though convinced of it. Such are *formal* heretics. To this we may also reckon those so-called Catholics who interiorly reject or doubt any revealed truth, provided the rejection as well as the doubt be obstinate (*pertinax*), because this characteristic constitutes malice. Obstinacy may be assumed when a revealed truth has been proposed with sufficient clearness and force to convince a reasonable man. Of course, the character of each individual must be taken into consideration.

Apostasy differs from heresy only as to the extent of the material object of faith denied; the specific malice, *viz.,* the denial of God's truthfulness, or of the divine authority, is the same in both.[41] An apostate, therefore, is one who rejects the whole deposit of faith and becomes an unbeliever, whilst a heretic is one who wilfully rejects or doubts only the one or other truth revealed and proposed by the Catholic Church.

Pure schism involves mere stubbornness or disobedience to the Roman Pontiff, or to a bishop, as the case may be; but in reality it hardly ever occurs without heresy. The Puseyites endeavored to convince the Apostolic See of the contrary; but the Holy Office very properly decided that separation from the See of Peter meant a split in the unity and apostolicity of the Church and setting up another Church in place of the one founded by Christ.[42]

§ 3 *warns Catholics against disputations and conferences* with non-Catholics. To hold such a disputation

41 Cf. Lehmkuhl, *l. c.,* I, n. 299.

42 S. O., Sept. 16, 1864 (*Coll. P. F.,* n. 1262).

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or conference, especially in public, requires the special permission of the Holy See, or, in urgent cases, of the local Ordinary. This has been the attitude of Apostolic See ever since the beginning of the seventeenth century, though public disputations and conferences — including the so-called congresses or parliaments of religion — are not absolutely forbidden, but may be tolerated, under the condition mentioned, when there is hope of a greater good.[43] The S. Congregation has often expressly forbidden them on the ground that they do more harm than good, since false eloquence may cause error seemingly to triumph over truth.[44] Religious superiors are urged to forbid such public disputations and conferences to their missionaries.[45] This rule in our opinion also affects public disputations with Socialists, because their tenets often contain heresies.[46]

When such disputations are expressly permitted, care should be taken that only capable and prudent speakers be employed to defend the Catholic side.[47]

BISHOPS AS JUDGES IN MATTERS OF FAITH

CAN. 1326

Episcopi quoque, licet singuli vel etiam in Conciliis particularibus congregati infallibilitate docendi non polleant, fidelium tamen suis curis commissorum, sub auctoritate Romani Pontificis, veri doctores seu magistri sunt.

What is said in this canon has been partly explained under can. 1323, where it was said that the bishops,

43 S. C. P. F., Feb. 7, 1645 (n. 112).
44 S. C. P. F., Feb. 7, 1625 (n. 8).
45 S. C. P. F., Dec. 18, 1862 (n. 148).
46 S. C. pro Neg. Eccl. Extr., Jan. 27, 1902; n. VIII (*Anal. Eccl.*, X, 74).
47 S. C. P. F., Dec. 18, 1662 (n. 148).

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dependently upon the Roman Pontiff, are true teachers of the flock confided to them. But neither singly nor in councils do they share the infallibility which is their prerogative when acting as the ordinary teaching body of the Church under the leadership of the Sovereign Pontiff, or when united under the same at a general council. One case in particular illustrates the second clause of our text, *viz.*, that the bishops must be regarded as true teachers of their flocks, as long as they obey the ordinances and laws issued by the Roman Pontiff. It is the question of *interest taking* which has repeatedly agitated the minds of confessors and bishops.[48] To take interest on money loaned seemed to be prohibited, especially since Pius VIII (*"Vix pervenit"*) had forbidden the practice to a certain extent. But his words seemed ambiguous and did not cover various cases. Therefore it was left to the bishops to decide in individual cases, whether it was allowed to accept and retain interest, provided they followed the principles laid down in the papal constitution; and the confessors had to abide by their decisions. This may be applied to disciplinary cases in general and also to rubrics. But in case of doubt recourse may be had to the S. Congregations.[49]

48 Cfr. S. O., Aug. 18, 1830, Aug. 31, 1831; Jan. 17, 1838 (Denz., nn. 1470 ff.).

49 S. O. May 9, 1821, ad 2 (*Coll. P. F.*, n. 759, Kentucky).

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TITLE XX

PREACHING THE WORD OF GOD

CAN. 1327

§ 1. Munus fidei catholicae praedicandae commissum praecipue est Romano Pontifici pro universa Ecclesia, Episcopis pro suis dioecesibus.

§ 2. Episcopi tenentur officio praedicandi per se ipsi Evangelium, nisi legitimo prohibeantur impedimento; et insuper, praeter parochos, debent alios quoque viros idoneos in auxilium assumere ad huiusmodi praedicationis munus salubriter exsequendum.

Preaching the word of God is a necessary means of spreading as well as preserving the deposit of the faith.[1] This *office* emanates from the power of jurisdiction, of which the *magisterium ecclesiasticum* is a part. The *Sovereign Pontiff* is the supreme teacher of the faithful and consequently has the duty, above all others, of preaching the Catholic faith to the whole Church. This, of course, means that there is no Catholic church on the whole earth in which he is not allowed to preach without interference from any, either ecclesiastical or civil, authority. But it also implies that his *pastoral letters* and other instructions need no approbation or permission from the civil government. St. Peter asked neither Nero (54–68) nor the Jewish synagogue for permission to

1 Bened. XV, "*Humani generis*," June 15, 1917 (*A. Ap. S.*, IX, 305 ff.).

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address the faithful of Pontus, Galatia, Cappadocia, Asia, and Bithynia, nor do we read of any such permission being asked for by Clement I. Up to the eleventh century there is barely a trace of what later on came to be called *placetum regium*. On the contrary, Pope Paschal II (1099–1118) complained against Henry I of England that letters sent by the Apostolic See were subjected to the *placet* of his royal majesty.[2] The quarrel between Philip IV, the Fair, and Boniface VIII is too well known to need repetition. Other *regalistically tainted governments* followed the perverse example of Henry and Philip up to even the "enlightened" nineteenth and twentieth centuries. Government supervision was, and in some countries[3] is still, applied to the pastoral letters of bishops. That such a course of action is against the divine law needs no proof. Obedience is due to God rather than to men.[4] Nor is there any seditious inference contained in this assertion. For a law is a law in the proper sense only if it conforms to the eternal or natural law, which requires conformity with the Divine Mind, the source of every right and incapable of self-contradiction. Hence no human authority, no matter on what pretext, can lawfully command what runs counter to a divine command. A human law, therefore, forbidding the free and unhampered preaching of the divine law cannot be acknowledged as binding the conscience.[5] This is also evident from the nature and constitution of the Church as a perfect, legal, and necessary society, independent in the choice of the means conducive

2 Cf. Friedberg, *Grenzen zwischen Staat und Kirche*, 1872, p. 729; Bachofen, *Summa Iuris Eccl. Publici*, 1910, p. 57.

3 Thus in the Canton of St. Gall, Switzerland, the pastoral and even the Lenten letters are still subject to the approval of the cantonal government!!

4 Act. 5, 29.

5 Cfr. Leo XIII, "*Sapientiae*," Jan. 10, 1890.

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to its spiritual and supernatural end. Finally, if the Vicar of Christ on earth is bound to teach the faithful, it is his inherent right to do so, and in the exercise of this right no human power may hinder him. This right is inalienable because inherent in the primacy of jurisdiction that spans the universal Church.

The *bishops,* in virtue of their jurisdiction, are obliged to preach the Catholic faith each within his own district or diocese. This duty, as § 2 states, they must perform personally, unless they are lawfully prevented. For as they are, as a rule, chosen for their personal qualities (*de industria personae*), they are in conscience bound to break the spiritual bread for their flocks.

Some of the *lawful reasons* which may prevent an Ordinary from fulfilling this duty, are mentioned in a papal decretal.[6] They are: manifold pastoral or episcopal occupations, such as the diocesan visitation, attendance at councils or synods, bodily infirmity, hostile invasions, etc. The decretal adds within brackets: "*ne dicamus defectum scientiae, quod in eis reprobandum est omnino, nec de caetero tolerandum.*"

If a bishop is legitimately prevented from preaching, he should entrust this duty to another,[7] as Bishop Valerian did when, on account of defective speech, he commissioned St. Augustine to preach in his place.

Our text continues that bishops should also employ, not only *pastors, but also others who are fit or capable* (men not women) as co-workers in preaching the word of God. The pastor's duty is evident, and it is also clear that the bishop is responsible for the pastors under his jurisdiction. The S. Congregation once recommended to an archbishop (of Antivari) to explain the catechism

[6] C. 15, X, I, 31.

[7] Reg. Iuris 68, 72 in 6°.

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on Sundays and holydays if the pastor failed to do so.[8] The reason is that the bishop is *par excellence* the pastor of the diocese, and the divinely constituted judge in matters of faith and morals, as successor of the Apostles.[9] If the bishop is pre-occupied by other pastoral work, the pastor of the cathedral church is obliged to preach for him.[10]

The text says that the bishop should choose *idoneos viros,* fit or capable men, to assist him in preaching. This means clergymen who possess the qualities necessary for sacred preachers and ministers of God, to wit, a sufficient familiarity with sacred science and the moral virtues that impress the people. Besides, natural gifts are necessary, lest they appear to tempt God.[11] Preachers who possess these qualifications will preach with salutary effect (*salubriter praedicabunt*) because they will not preach for the sake of showing off their eloquence or of gaining applause.[12]

It goes without saying that the bishop may call upon any member of his diocesan clergy (secular or non-exempt religious) to fulfill this duty.

Concerning exempt religious see can. 608, § 1.

MISSIO CANONICA

CAN. 1328

Nemini ministerium praedicationis licet exercere, nisi a legitimo Superiore missionem receperit, facultate peculiariter data, vel officio collato, cui ex sacris canonibus praedicandi munus inhaereat.

8 S. C. P. F., Nov. 28, 1785 (*Coll.*, n. 581).

9 Bened. XV, "*Humani generis*," June 15, 1917 (*A. Ap. S.*, IX, 307); *Trid.*, Sess. 5, c. 2, *de ref.*

10 S. C. C., Sept. 14, 1748 (Richter, *Trid.*, p. 22, n. 5).

11 Bened. XV., "*Humani generis*" (*A. Ap. S.*, IX, 309).

12 *Ibid.*, (*l. c.*, p. 308).

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No one is allowed to preach the word of God unless he has received the *missio canonica* from his legitimate superior. This is a requirement of the divine [13] as well as of human law, for the latter clearly supposes that preaching is an attribute of jurisdiction which must be obtained from the lawful authority.

The *missio canonica* may be given either by means of a special faculty, or by virtue of an office to which the right of preaching is attached by ecclesiastical law.

As to the special faculties required, consult Ch. II of this Title. Here we will only state that the *offices* to which the right and duty of preaching are attached by law, are those of the Sovereign Pontiff, bishops, and pastors. Thus a cathedral prior or collegiate provost, to whom the care of souls is entrusted, is obliged to preach.[14]

13 Rom. 10, 15; "*Humani generis*" (*A. Ap. S.*, IX, 307).

14 S. C. C., July 30, 1591; May 26, 1639 (Richter, *Trid.*, p. 22, nn. 3 f. *et pluries*).

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CHAPTER I

THE PASTOR'S DUTY

CATECHETICAL INSTRUCTION

CAN. 1329

Proprium ac gravissimum officium, pastorum praesertim animarum, est catecheticam populi christiani institutionem curare.

It is the proper and a most weighty duty, especially of pastors of souls, to provide for the catechetical instruction of the people.

The term "catechetical instruction," as is well known,[1] means oral instruction in the elements of religion, especially as a preparation for initiation into the Church. It is now usually, though not exclusively, conducted by means of questions and answers. We need not dwell upon the importance of this instruction, as Pius X has brought its necessity home to all concerned in his encyclical letter "*Acerbo nimis*," of April 15, 1905.

CAN. 1330

Debet parochus:

1.° Statis temporibus, continenti per plures dies institutione, pueros ad sacramenta poenitentiae et confirmationis rite suscipienda singulis annis praeparare;

2.° Peculiari omnino studio, praesertim, si nihil ob-

1 *Cath. Encycl.*, Vol. V, 75 ff., *s. v.*, "Doctrine, Christian."

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sit, Quadragesimae tempore, pueros sic instituere ut sancte Sancta primum de altari libent.

CAN. 1331

Praeter puerorum institutionem de qua in can. 1330, parochus non omittat pueros, qui primam communionem recenter receperint, uberius ac perfectius catechismo excolere.

CAN. 1332

Diebus dominicis aliisque festis de praecepto, ea hora quae suo iudicio magis apta sit ad populi frequentiam, debet insuper parochus catechismum fidelibus adultis, sermone ad eorum captum accommodato, explicare.

The pastor is obliged:

1.° To prepare the children for receiving the Sacraments of Penance and Confirmation each year by a continuous course of instructions held at stated times;

2.° To instruct the children with special care, if nothing prevents him, especially, during Lent, in order that they may worthily receive First Holy Communion.

Besides the instruction of children mentioned in the preceding canon, the pastor shall not neglect to instruct the boys and girls who have already received their First Communion more fully in Christian doctrine.

On Sundays and other holydays of obligation he shall, at an hour convenient for the people, teach catechism also to his adult parishioners, in a manner adapted to their capacity.

We notice some mitigation in the wording of our text, as compared with the injunctions of Pius X. For instance, no mention is made in can. 1330, n. 2 of instruc-

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tions to be given every day in Lent; in can. 1332 the "full" hour is omitted as well as the addition that no Sunday shall be excepted, etc. These are wise moderations for a Code binding the universal Church. But even the rulings of the Code need some modification in missionary countries, including our U. S., as we know from experience. Take, for example, a pastor who has to attend two missions, twelve or more miles apart. He has perhaps to start a fire in both churches, then to hear confessions, sing high Mass at least in one church, and preach in both, perhaps in different languages. Then he ought to teach catechism for another hour before making his train — and all this with an empty stomach. These are not fanciful, but real conditions, which cannot be compared to those existing around Treviso, Mantua, or Venice. Hence it must be left to the diocesan Ordinaries to determine how far the prescriptions of the code can be carried out. Meanwhile every pastor ought to impress upon his mind what Pius X says concerning catechetical instruction: — that it is the milk which St. Peter wished the faithful to yearn for in all simplicity like new-born babes; that the labor of the pulpiteer presupposes that of the catechist; that ornate and flowery sermons often tickle the ears, but utterly fail to touch the heart,[2] etc.

The best opportunity for effective catechetical instruction is offered by the schools, which, we are happy to say, flourish in our country as nowhere else. Where such a school exists, the pastor can easily find convenient hours for extensive catechetical work.

2 "*Acerbo nimis*"; see *Amer. Eccl. Rev.*, 1905, Vol. XXXII, p. 606.

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CATECHISTS

CAN. 1333

§ 1. Parochus in religiosa puerorum institutione potest, imo, si legitime sit impeditus, debet operam adhibere clericorum, in paroeciae territorio degentium, aut etiam, si necesse sit, piorum laicorum, potissimum illorum qui in pium sodalitium *doctrinae christianae* aliudve simile in paroecia erectum adscripti sint.

§ 2. Presbyteri aliique clerici, nullo legitimo impedimento detenti, proprio parocho in hoc sanctissimo opere adiutores sunto, etiam sub poenis ab Ordinario infligendis.

§ 1. If the pastor is lawfully prevented, he may, nay should employ the help of clerics living in his district, for the religious instruction of the children. He may also, if need be, call upon pious laymen, especially such as belong to the Sodality of Christian Doctrine or a similar organization represented in the parish.

This is an expedient for overburdened pastors and missionaries who can visit their parishes only at intervals. It might be good practice for seminarians of the last year to spend a few hours in the school room, not as hearers, but as teachers, provided the professor of pastoral theology or homiletics has taught some method.

The *Confraternity of Christian Doctrine* was founded in 1560 in Rome and approved by Pius V, in 1571. Of late it has spread all over Italy and other countries.

Laymen, in the text, includes members of the female sex, provided, of course, they enjoy the necessary qualifications of knowledge, virtue, and strength. School-teachers may be supposed to be peculiarly adapted to this task.

Male and female *catechists* are frequently employed in

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missionary countries. They should be chosen by the missionaries with care and only such should be called to this important office as are at least twenty-five years of age and possess the necessary moral and mental qualities.[3]

§ 2. Priests and other clerics, who are not lawfully prevented, must assist their pastor in this most holy work, and may be punished by the Ordinary if they fail to do so.

It has been the general practice, also of the Roman Court,[4] not to oblige any cleric to work not prescribed in the law or the foundation document. This rule was upheld in principle by Benedict XIV, though the great Pontiff strongly insisted on the necessity of proper instruction in Christian doctrine.[5] He found a means of compelling all priests and clerics, even those not charged with the care of souls, to assist in that holy work. The bishop should not promote clerics who are remiss in this duty to higher orders or better positions if they refuse to obey his commands. This is the punishment adverted to in our canon. It is a powerful weapon in the hands of the bishop, who may lawfully wield it under the law, though no censure can be inflicted for refusal, because neither the old nor the new law mentions such a penalty *sub poenis* or *censuris infligendis*.

OBLIGATION OF RELIGIOUS

CAN. 1334

Si, Ordinarii loci iudicio, religiosorum auxilium ad catecheticam populi institutionem sit necessarium, Superiores, etiam exempti, ab eodem Ordinario requisiti,

3 S. C. P. F., Feb. 29, 1836 (n. 846).

4 S. C. C., July 15, 1882, ad 10 (*A. S. S.*, XV, 324 f.).

5 "*Etsi minime*," Feb. 7, 1742, § 6.

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tenentur per se vel per suos subditos religiosos, sine tamen regularis disciplinae detrimento, illam populo tradere, praesertim in propriis ecclesiis.

If the local Ordinary is convinced that the help of religious is required for the catechetical instruction of the people, he may call upon the religious superiors, including those of exempt orders, and they are obliged to comply with his orders, either personally or through their subjects, especially in their own churches, provided the regular discipline does not suffer. Religious, therefore, should give catechetical instructions, especially in their own churches. We may repeat here what Benedict XIV said concerning regulars, to wit, that they should not interfere by their celebrations with instruction in Christian doctrine, nor by their solemnities,[6] draw the people away from their parish churches while instructions are given.

Although no penalty is attached to this law, it imposes a moral obligation, the extent of which must be gauged by the need of the people, as well as the scarcity and physical inability of the secular clergy.

We wish to draw attention to the clause: "*sine tamen regularis disciplinae detrimento,*" which also occurs in can. 608, § 1. This means, first and above all, that if the Rule or Constitution approved by the Holy See excludes such work, the religious are not bound by this canon, and therefore the bishop has no right to call on them. It means, secondly, that, if the Constitutions permit such work, the discipline must be safeguarded. Thus at least the ordinary choir service, the school work, either in the seminary, college or school, must not suffer any serious detriment. And, lastly, regular discipline also means community life. Consequently, if by frequent calls

[6] "*Etsi minime,*" § 15.

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the religious should sustain a serious setback in their religious or common life, the religious superior would be entitled to modify the bishop's command. It may also be permitted to state that if the bishop and clergy wish to be aided by the religious of the diocese, they are reasonably expected to aid and support the diocesan institutions conducted by such religious. This is not only a dictate of natural law, but is also insinuated by can. 608, § 2.

DUTIES OF PARENTS

CAN. 1335

Non solum parentes aliique qui parentum locum tenent, sed heri quoque ac patrini obligatione adstringuntur curandi ut omnes sibi subiecti vel commendati catechetica institutione erudiantur.

Not only parents, but also those who take the parents' place, as well as masters and sponsors, are obliged to see to it that their subjects and protegés receive catechetical instruction.

This obligation rests on the natural as well as on a positive law, which latter is here briefly formulated according to Benedict XIV, who urged bishops and pastors to remind all those above mentioned of their grave obligation to instruct their subjects in the catechism.[7] The natural obligation arises from the fact that the ultimate end of all men is God, who must be known in order to be served and loved. It also follows from the superiority of the soul to the body. Hence at least as much care should be bestowed upon acquiring the knowledge of salvation, as upon the acquisition of natural science.[8]

7 "*Cum religiosi*," June 26, 1754, § 4.

8 Cfr. Leo XIII, "*Humanum genus*," April 20, 1884.

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DIOCESAN REGULATIONS

CAN. 1336

Ordinarii loci est omnia in sua dioecesi edicere quae ad populum in christiana doctrina instituendum spectent; et etiam religiosi exempti, quoties non exemptos docent, eadem servare tenentur.

This canon corroborates what was said above about the authority of the *local Ordinary* to regulate instruction in Christian doctrine. He is entitled to issue decrees with reference to the instruction of the people in Christian doctrine, and these regulations must be obeyed also by exempt religious, whenever they impart religious instructions to anyone not possessed of the privilege of exemption. It follows that all those persons mentioned in can. 514, § 1, to wit, servants, pupils, guests, and the sick, must, as far as their condition permits, attend the catechetical instructions given by the pastor or his assistants. For these persons are not properly exempt.

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CHAPTER II

SERMONS

FACULTY REQUIRED FOR PREACHING

CAN. 1337

Tum clericis e clero saeculari, tum religiosis non exemptis facultatem concionandi pro suo territorio solus concedit loci Ordinarius.

The secular clergy as well as non-exempt religious receive the faculty of preaching only from the local Ordinary for his respective diocese.

According to a medieval decretal, some clerics usurped the office of preaching under the cloak of piety without being authorized either by the Apostolic See or a bishop.[1] There is in this decretal a hint that members of the rising religious orders were at times carried too far by their zeal. It is therefore not surprising that the same papal constitutions [2] which regulated the matter of hearing confessions, also settled the question of preaching. The law was challenged by Wiclif and his followers, who maintained that any deacon or priest may preach the word of God without authority from the Apostolic See or from a Catholic bishop.[3] Therefore the Council of Trent again insisted upon previous examination for all who assume the office of preaching.[4]

1 C. 13, § 6, X, V, 7, *de haereticis.*

2 Greg. XV, "*Inscrutabili,*" Feb. 5, 1622, § 3, 6; Clement X, "*Superna,*" June 4, 1670, § 1, 3.

3 *Prop. 14 dam.* (cf. Denzinger, n. 490).

4 Sess. 5, c. 2, *De Ref.;* S. C. EE. and RR., July 31, 1894 (*Coll. P. F.*, n. 1878).

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Note the word: *solus loci Ordinarius.* The Ordinary alone is competent to grant the faculty of preaching. Hence no municipality or university may grant it, although they may select the preacher, for instance for Lent, as happened in certain Italian communes.[5] It also means that the faculty given by the bishop is sufficient, and consequently no pastor or rector can lawfully reject one so approved.[6]

RELIGIOUS PREACHERS

CAN. 1338

§ 1. Si concio habenda sit tantum ad religiosos exemptos aliosve de quibus in can. 514, § 1, facultatem concionandi in religione clericali dat eorum Superior secundum constitutiones; qui in casu potest eam concedere etiam iis qui de clero saeculari vel de alia religione sunt, dummodo a proprio Ordinario vel Superiore fuerint idonei iudicati.

§ 2. Si concio habenda sit ad alios, vel etiam ad moniales regularibus subiectas, facultatem religiosis quoque exemptis impertit Ordinarius loci in quo concio fiet; concionator autem, verba facturus monialibus exemptis, licentia Superioris regularis praeterea indiget.

§ 3. Facultatem vero concionandi apud sodales religionis laicalis, quamvis exemptae, dat loci Ordinarius; sed concionator nequit facultate uti sine Superioris religiosi assensu.

Formerly[7] a distinction was drawn between churches

5 S. C. C., April 21, Aug. 11, 1742; Aug. 3, 1743 (Richter, *Trid.*, p. 22, nn. 7 f.).

6 S. C. C., June 27, 1744 (*ibid.*, n. 15).

7 *Trid.*, Sess. 5, c. 2, *De Ref.*; Greg. XV, "*Inscrutabili*"; Clement X, "*Superna.*"

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that belonged to regulars and such as did not belong to them, or to another religious order. Our text distinguishes between the persons preached, or the hearers.

§ 1 rules that *religious* of a clerical order obtain the faculty of preaching from their own superiors, according to their constitutions, in case they preach to exempt religious of their own order or to such who are mentioned in can. 514, § 1. For these the respective superior may also grant the faculty to the secular clergy, or to members of another religious institute, provided, however, that the secular cleric has been previously approved or found fit by his Ordinary and the religious by his superior.

This law has been widened, as is apparent from a comparison with former regulations on the same subject. For what was formerly considered a privilege of the regulars in the strict sense, is here applied to *all religious clerical institutes,* whether exempt or not, and the distinctive character is attached to the hearers only, who must be exempt or share exemption *de facto,* as is the case with the persons mentioned in can. 514, § 1, *i. e.,* servants, guests, students, and sick persons, besides the professed members and novices. However, like the Tridentine Council and various papal decrees,[8] our text requires fitness in the preacher, as defined in can. 1340.

The text mentions only *religiosos exemptos aliosve,* in the masculine gender, thereby evidently excluding the female sex, as is patent also from the following section.

§ 2. If the sermon is to be delivered before others, including nuns subject to regular prelates, the faculty of preaching must be granted by the Ordinary in whose diocese the sermon is to be delivered; and the preacher who addresses exempt nuns must also have the permission

[8] Sess. 5, c. 2; Sess. 24, c. 4, *De Ref.,* and the constitutions quoted.

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of the regular superior to whom they are subject.[9] Preaching to nuns (*moniales* with solemn vows) is done at the grate, so that the preacher is not obliged or permitted to enter the enclosure, which is here understood to be the papal one.

The others (*alios*) are all non-exempt religious, as well as laymen and clerics who do not share the exemption mentioned in can. 514, § 1.

§ 3. To preach for members of a religious lay institute, for instance, the Christian Brothers, even though they may enjoy exemption, a priest must obtain faculties from the local Ordinary, in whose diocese the religious house is located. However, he cannot make use of his faculty unless the *religious superior of the institute gives his consent.* This ruling is partly taken from the Constitution of Leo XIII, "*Conditae,*" A. D. 1900, but has an added clause requiring the consent of the religious superior. The superior and his religious are here understood of institutes of men, not of women, § 2 having sufficiently provided for the latter. Moreover, it would not be proper for religious women to refuse to accept a preacher appointed by the bishop. The consent of the religious superior is required for reasons of discipline and to maintain his authority.[10]

RELIGIOUS VS. ORDINARIES

CAN. 1339

§ 1. Ordinarii locorum religiosis qui a proprio Superiore exhibeantur, facultatem concionandi, sine gravi causa, ne denegent, concessamque ne revocent, prae-

9 Clement X, "*Superna,*" § 3.

10 Preachers were sometimes imposed on such institutes, who lacked even a knowledge of the essentials of the religious life, not to mention other defects.

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sertim una simul universis domus religiosae sacerdotibus, firmo tamen praescripto can. 1340.

§ 2. Concionatoribus religiosis, ut facultate recepta uti liceat, opus est praeterea sui Superioris licentia.

§ 1 closely resembles can. 880, which concerns the faculty of hearing confessions. It commands the local Ordinaries not to refuse the faculty of preaching to such religious as are presented by their superiors, nor to withdraw it from them without weighty reasons. They should refrain especially from refusing or withdrawing the faculty from all religious of one house at the same time, provided, of course, at least the one or the other was found fit.

Religious formerly had reasons to complain against some Ordinaries, who either had not read the decrees of the Tridentine Council [11] or interpreted them arbitrarily and withdrew the faculty of preaching without any reason. The S. Congregations sustained the complaints and ordered the nuncio (in Spain) to stop such arbitrary proceedings, which prejudiced the Friars. There must be for such action, says the decree in question, a lawful cause proved by documents (*in actis* [12]). Mere caprice or dislike cannot be styled a lawful reason, and a *legitima causa* is one which concerns preaching.[13] However, if a moral defect or want of knowledge render a particular preacher undesirable, and his incapacity can be proved, the bishop may withdraw or refuse the faculty. But it is hardly imaginable that such defects could be imputed to a whole community.

§ 2. *Religious,* in order to make lawful use of the faculty granted by the Ordinary, must in addition obtain

11 Sess. 5, c. 2; Sess. 24, c. 4, *De Ref.;* Clement X, "*Superna,*" § 3.

12 S. C. EE. et RR., Jan. 13, 1610 (Bizzarri, 243).

13 S. C. EE. et RR., Dec. 14,

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permission from their respective superiors. This is required in virtue of the vow of obedience. Those who take the vow of stability, like the Benedictines, have still another reason for asking permission, namely, because the office of preaching may call them away from their habitual residence.

It may not be amiss to draw attention to former regulations which are now out of date. Formerly the religious, before they were allowed to preach in churches not belonging to their own institute, had to obtain a written permission from the bishop, and also to ask his blessing. This was particularly required for the famous Lenten preachers employed by municipalities.[14] These formalities are no longer required, nor need the faculty of the bishop or the permission of the religious superior be given in writing, though the bishop would not exceed his power if he were to demand a written statement of the religious superior as to the ability and moral standing of the religious who wishes to preach in his diocese.

Examination

Can. 1340

§ 1. Graviter onerata eorum conscientia, loci Ordinarius vel Superior religiosus facultatem vel licentiam concionandi cuiquam ne concedant, nisi prius constet de eius bonis moribus et de sufficienti doctrina per examen ad normam can. 877, § 1.

§ 2. Si, concessa facultate vel licentia, compererint necessarias dotes in concionatore desiderari, debent eam revocare; in dubio de doctrina, debent certis argu-

1674; S. C. C., Feb. 28, 1654 (Bizz., *l. c.*, p. 273).

14 Clement X, "*Superna*," § 1, S. C. C., *apud* Richter, *Trid.*, p. 22, nn. 7 ff.

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mentis dubitationem executere, novo etiam examine, si opus fuerit.

§ 3. Ob revocatam concionandi facultatem vel licentiam, datur recursus, sed non in suspensivo.

§ 1. Local Ordinaries as well as religious superiors are seriously charged to grant the faculty or permission to preach only to such as have passed an examination with regard to their moral standing and sufficiency of knowledge, according to the rule laid down in can. 877, § 1.

This section of our canon must therefore be compared to can. 877, § 1, which prescribes an examination, but excepts those whose theological knowledge is otherwise known and tried.

The examination is held to establish the moral standing of the preacher and his knowledge. It was prescribed by the Council of Trent [15] and elaborated in an Instruction of the S. Congregation of Bishops and Regulars [16] of 1894.

As to moral standing, it is evident that lack of a good name would hardly recommend a preacher to the people. Hence, neither the bishop nor the religious superior are allowed to give faculties to one who has been rejected or disvowed by another bishop.[17] This rule, of course, applies especially to such clerics or religious as are tainted with Modernism.[18] But mere rumor and defamation should be carefully sifted from true and proved statements.

With regard to *knowledge, sacred eloquence* requires not only piety but also familiarity with the sacred armory

15 Sess. 5, c. 2; sess. 24, c. 4, de ref.

16 July 31, 1894 (*Coll. P. F.*, n. 1878).

17 S. C. Consist., Sept. 25, 1910, ad X, XI (*A. Ap. S.*, II, 741).

18 Pius X, "*Sacrorum Antistitum*," Sept. 1, 1910 (*ib.*, II, 653 ff.).

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of Holy Writ, with dogmatic and moral theology and with ecclesiastical history, as well as a delivery worthy of the subjects treated. St. Thomas says: "In order that a preacher may really be the light of the world, he must possess three things; firmness or stability, in order that he may not deviate from the path of truth; clearness, in order that he may not teach with confusion and obscurity; the right intention, in order that he may seek not his own, but God's honor and glory."[19] Therefore he must avoid vainglory and the motive of material gain.[20] As to these points, therefore, the candidate should be examined when passing through the seminary, or when he presents himself for the faculty to preach. If however, as can. 877, § 1 states, his moral standing and knowledge are sufficiently known to either the bishop or the religious superior, the examination may be waived.

§ 2. If a preacher shows that he lacks the necessary requisites after the faculty or permission to preach has been granted to him, the Ordinary and the superior must withdraw it. If a doubt arises as to his knowledge, they should endeavor to disperse it by gathering the necessary information or proofs, and may also subject him to a new examination. The prudent enforcement of this law requires vigilance, so much recommended with regard to the sacred office of preaching by our Holy Father, who warns the bishops against human respect in this regard and requires a strict examination as to the two requisites.[21]

19 *Comment. in Matth.*, V; S. C. EE. et RR., *l. c.*, n. 5.

20 Bened. XV, "*Humani generis*," June 15, 1917 (*A. Ap. S.*, X, 309 ff.).

21 *Ibid.*

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EXTRADIOCESAN PREACHERS

CAN. 1341

§ 1. Sacerdotes extradioecesani sive saeculares sive religiosi ad concionandum ne invitentur, nisi prius licentia ab Ordinario loci in quo concio habenda sit, obtenta fuerit; hic autem, nisi eorum idoneitatem aliunde compertam habeat, licentiam ne concedat, nisi prius bonum testimonium super concionatoris doctrina, pietate, moribus a proprio eiusdem Ordinario habuerit; qui, graviter onerata conscientia, secundum veritatem respondere tenetur.

§ 2. Licentiam tempestive petere debet parochus, si agatur de paroeciali ecclesia aliave eidem subiecta; rector ecclesiae, si de ecclesia parochi auctoritati non obnoxia; prima dignitas, de Capituli consensu, si de ecclesia capitulari; moderator seu cappellanus confraternitatis, si de ecclesia eiusdem confraternitatis propria.

§ 3. Si ecclesia paroecialis sit simul capitularis aut confraternitatis propria, ille licentiam petat, qui sacras functiones iure peragit.

The general rule is, as stated in can. 1337, that the Ordinary in whose diocese a priest wishes to preach, grants the faculty. This rule also binds exempt religious who wish to preach to persons not belonging to their own institute.

Now § 1 supposes that *priests from another diocese* are invited to preach. Whether these be seculars or religious, exempt or non-exempt, does not matter, provided only that the hearers are not exempt religious. Such priests need *the faculty of the Ordinary in whose diocese*

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they are invited to preach. If, *e.g.*, a Jesuit from St. Louis University wishes to preach in the cathedral of St. Joseph, or in the Abbey Church of Conception, to the parishioners, he requires a faculty from the Bishop of St. Joseph, which the latter should not grant unless he has satisfied himself as to the preacher's knowledge, piety, and moral standing by means of a statement from the latter's Ordinary. Therefore, in the case mentioned, the Archbishop of St. Louis has to furnish the Bishop of St. Joseph with a testimonial as to the qualifications of said preacher, and he is bound in conscience to state the truth. This shows how serious the sacred office of preacher is regarded by the Church.

Yet, in order to avoid red tape, and also, we suppose, mistrust, the Code adds the wise clause: "*nisi eorum idoneitatem aliunde compertam habeat.*" If the Ordinary who has to give the faculty knows the preacher, and is convinced that he possesses the necessary qualities, he may dispense with the formality of demanding testimonials from the other Ordinary. Of course, the bishop who has to impart the faculty *may*, though he is not bound to, abide by the statement of the pastor who has invited the strange priest. The superiors general are specially cautioned against sending out their subjects to preach, unless they are certain that these subjects are duly qualified, and against permitting their religious to preach without the knowledge of the bishop.[22] This warning applies also to secular priests, who should not invite an outsider to preach without informing the bishop.

§ 2. *Pastors* must, therefore, ask for the permission in good time, if the preaching is to be done in their own church, or in one subject to them, as may be the case

22 S. C. EE. et RR., July 31, 1894, n. 7 (*l. c.*).

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when a pastor governs two parishes, or one with several missions. The same obligation is encumbent on *rectors* with regard to churches not subject to the pastor, and on the first dignitary (provost or dean), who has to ask the consent of the chapter before applying to the bishop for a faculty; also on chaplains or directors of confraternities if the preaching is to be done in their own church.

§ 3. If the parish church is at the same time a chapter or confraternity church the obligation of asking for permission for a strange priest to preach devolves on the one who has the right to perform the sacred functions.

In a parish church which at the same time serves as a cathedral or collegiate chapter church the sacred functions by right belong to the pastor,[23] who must ask the consent of the chapter before he "invites a preacher," as required by § 2. It is the pastor, therefore, and not the first dignitary, who must ask for permission. Does this rule apply also to *monastic chapters?* The text simply says: *ecclesia capitularis,* a chapter church, which term may be applied to an abbey church, which serves at the same time as parish church, as is insinuated in can. 609, § 1.

With regard to confraternities, the general decree of the S. Congregation of Rites may be consulted. It states that confraternities lawfully erected in parish churches *depend on the pastor* for the exercise of all, even non-parochial, functions.[24] From this it follows that the pastor must demand permission for the preacher.

The term *tempestive* (*in good time*) has been officially declared[25] to mean two months before the preaching

23 Can. 415, §2.

24 S. Rit. C., Jan. 12, 1704, ad 1 (n. 2123).

25 S. C. C., April 30, 1729 (Richter, *Trid.*, p. 22, n. 9).

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commences. However, as communication is swifter nowadays, the time must be left to the prudent judgment of the petitioner, provided the matter is not delayed purposely so that the bishop cannot obtain the necessary information.

WHO MAY PREACH

CAN. 1342

§ 1. Concionandi facultas solis sacerdotibus vel diaconis fiat, non vero ceteris clericis, nisi rationabili de causa, iudicio Ordinarii et in casibus singularibus.

§ 2. Concionari in ecclesia vetantur laici omnes, etsi religiosi.

Only priests and deacons should be given the faculty of preaching, and no other clerics should be allowed to preach, except in particular cases and for a cause which the Ordinary deems reasonable.

Laymen, even though they may be religious, are *forbidden* to preach in church.

It is well known that some Oriental lay monks played a rather conspicuous part in the religious controversies of the fifth century. We need not wonder, therefore, that they were forbidden to preach, because this office demands a canonical mission.[26] There is a remarkable decretal of Innocent III, which shows the ingenuity of some abbesses who, besides hearing confession, also delivered public homilies.[27] This appeared as a novelty to the pope, who stopped the practice. Laymen, too, at times went so far as to hold secret conventicles and to despise the word of God when preached by priests.[28] Wiclif and Huss were not the first to demand permission to preach to men and women alike.[29] This prohibitive

26 See c. 19, C. 16, q. 1 (Leo I).
27 C. 10, X, III, 38.
28 C. 12, 14, X, V, 7.
29 Art. 37 (Denz., 581).

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law is based on the requisite of jurisdiction, of which the faculty of preaching is a part.

CAN. 1343

§ 1. Ordinarii locorum ius habent concionandi in qualibet sui territorii ecclesia, quamvis exempta.

§ 2. Nisi agatur de magnis civitatibus, potest quoque Episcopus prohibere ne in aliis eiusdem loci ecclesiis verba fiant ad fideles, quo tempore vel concionem ipse habet vel coram se, ex causa publica atque extraordinaria, convocatis fidelibus, habendam curat.

§ 1 vindicates to the local Ordinaries the right of preaching in every church of their diocese, including the churches of exempt religious.

§ 2 recalls the ancient quarrel between bishops and regulars. The latter maintained that no bishop could forbid them to preach in their own churches and places where the bishop could not himself preach, but engage a preacher to deliver a sermon in his presence. The S. Congregation decided [30] substantially as our text reads, namely, that with the exception of large cities, to which the law does not apply, the bishop may forbid sermons to be delivered to the faithful in other churches of a place in which he or another by his command is preaching at the same time. However, this prohibition binds only when the preaching is done for a special and public cause and the faithful have been properly invited to attend. Such a "special event," as it is called in one decision, would be a Catholic congress or solemn gathering to which the clergy and the faithful have been invited. Large cities are excepted. The size of a city

30 S. C. C., April 26, 1607; March 10, 1646 (Richter, *Trid.*, p. 23, n. 17); Bened. XIV, *De Synod. Dioec.*, IX, 17, 7.

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must here be gauged, not by the total number of its inhabitants, but by the number of Catholics and Catholic congregations it contains. New York, Chicago, and St. Louis are undoubtedly large cities in the sense of this canon.

THE PASTOR'S DUTY TO PREACH

CAN. 1344

§ 1. Diebus dominicis ceterisque per annum festis de praecepto proprium cuiusque parochi officium est, consueta homilia, praesertim intra Missam in qua maior soleat esse populi frequentia, verbum Dei populo nuntiare.

§ 2. Parochus huic obligationi nequit per alium habitualiter satisfacere, nisi ob iustam causam ab Ordinario probatam.

§ 3. Potest Ordinarius permittere ut sollemnioribus quibusdam festis aut etiam, ex iusta causa, aliquibus diebus dominicis concio omittatur.

Pastors are in duty bound to preach the word of God in the customary manner on all Sundays and holy days of obligation, especially during the Mass that is most largely attended.

This obligation is personal and cannot be habitually committed to another, except for reasons recognized as sufficient by the Ordinary.

The Ordinary may allow the sermon to be omitted on solemn feast-days, and, for good reasons, also on the one or other Sunday.

That preaching is a *personal* duty of the pastor is evident from the fact that he is generally appointed for his personal qualities, and as pastor is bound by divine law to break bread to the hungry and to feed his flock

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with spiritual food.[31] Therefore the custom of not preaching must be styled unreasonable, and has been so styled by the Roman Pontiffs.[32] Nor can the pastor be dispensed from this sacred obligation during Lent or Advent, when other preachers take the pulpit, or other churches in the same city have such preachers.[33]

On the other hand every obligation, no matter how personal, has its equity, which mitigates the rigor of the law. Hence § 2 sets certain bounds to this otherwise strict duty of preaching. The law merely wishes to prevent *habitual* shirking of the obligation, even though the motive be natural shyness, timidity, or lack of confidence. If the *bishop sanctions* the reason for which the pastor shifts the burden to others, the habit or custom may become lawful. Where there is a natural impediment, for instance, throat trouble, failing memory, or other obstacles, the Ordinary may certainly permit a pastor to let others preach for him habitually. Where it is customary for pastors and curates or assistants to take turns at preaching, and the custom has been ratified by the bishop, no breach of the law occurs.

The last section gives the Ordinary the power of dispensing[34] pastors from the duty of preaching on the more solemn feasts of the year, and even on the one or other Sunday. If the bishop pontificates in a parish church, *e. g.*, he may tell the pastor not to preach. A just reason would be the necessity of hearing many confessions, or the reading of a lengthy financial statement of the parish. The text *does not require an express per-*

31 *Trid.*, Sess. 5, c. 2; Sess. 22, c. 8, *De Sac. Missae;* Sess. 23, c. 1; Sess. 24, c. 4, *De Ref.*

32 Innoc. XIII, "*Apostolici ministerii,*" May 23, 1723; Bened. XIII, "*In supremo,*" Sept. 23, 1724; cfr. Bened. XIV, *Instit.*, X, n. 3.

33 S. C. C., Aug. 30, 1817 *et pluries* (*A. S. S.*, IX 465 ff.).

34 This is the term used by S. C. C., April 1, 1876 (*A. S. S.*, IX, p. 468).

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mission, nor that it be given separately for each occasion, and consequently the bishop may do so in the synod, or through a circular letter, or by a general statement, either written or oral; provided always that no abuses creep in and no contrary custom develops.

INSTRUCTION IN CHRISTIAN DOCTRINE IN OTHER THAN PARISH CHURCHES

CAN. 1345

Optandum ut in Missis quae, fidelibus adstantibus, diebus festis de praecepto in omnibus ecclesiis vel oratoriis publicis celebrantur, brevis Evangelii aut alicuius partis doctrinae christianae explanatio fiat; quod si loci Ordinarius id praeceperit, opportunis datis instructionibus, hac lege tenentur non solum sacerdotes e clero saeculari, sed religiosi, exempti quoque, in suis ipsorum ecclesiis.

What our text prescribes in a mildly optative form was laid own by Benedict XIV, not as a general rule, but as a guiding principle for Ordinaries.[35] The Church desires that in *all churches and public oratories,* even though they are not parish churches, the Gospel or some part of Christian Doctrine should be expounded during the Masses that are attended by the faithful on holy days of obligation. Our text continues: If the Ordinary issues instructions to that effect, all priests, secular as well as religious, including those who are exempt, are bound to obey this law in their respective churches.

The Roman Pontiff will side with Ordinaries even against exempt religious.[36]

35 "*Etsi minime,*" Feb. 7, 1742, § 15.

36 *Ibid.*

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LENTEN AND ADVENT SERMONS

CAN. 1346

§ 1. Curent locorum Ordinarii ut tempore quadragesimae, itemque, si id expedire visum fuerit, tempore Adventus, in ecclesiis cathedralibus et paroecialibus sacrae conciones frequentius ad fideles habeantur.

§ 2. Canonici aliique de Capitulo huic concioni, si in propria ecclesia continuo post chorum habeatur, interesse tenentur, nisi iusto impedimento detineantur; et illos Ordinarius, poenis quoque adhibitis, ad id adigere potest.

§ 1. The Ordinaries should see to it that during Lent, and if expedient also during Advent, sermons are delivered more frequently in cathedral and parish churches.

Pius X ordained that the young who are preparing for first Communion, should be given daily instructions during Lent.[37] Our text speaks of " sermons to the faithful," but leaves the details (arrangement, frequency, etc.) to the judgment of the Ordinaries.

§ 2. Canons and other members of a Chapter are obliged to attend these sermons, if held immediately after choir service, unless they are lawfully prevented; and the Ordinary may compel them to attend under penalties.

All the canons, except of course the *Canonicus theologus* and the *Pœnitentiarius,* and those employed in other offices with the permission and sanction of the bishop, must be present; also the prebendaries and beneficiaries (*mansionarii*). They must wear the choir dress (*habitus choralis*) and occupy their seats, as usual. This obligation binds even in case the sermon is held in another

[37] "*Acerbo nimis,*" April 25, 1905, n. III,

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church which (for instance, on account of repairs) temporarily serves as cathedral or collegiate church. The collegiate canons, too, are included.[38]

The penalties depend on the judgment of the Ordinary and may consist of fines.[39]

SUBJECTS OF SERMONS

CAN. 1347

§ 1. In sacris concionibus exponenda in primis sunt quae fideles credere et facere ad salutem oportet.

§ 2. Divini verbi praecones abstineant profanis aut abstrusis argumentis communem audientium captum excedentibus; et evangelicum ministerium non in persuasibilibus humanae sapientiae verbis, non in profano inanis et ambitiosae eloquentiae apparatu et lenocinio, sed in ostensione spiritus et virtutis exerceant, non semetipsos, sed Christum crucifixum praedicantes.

§ 3. Si, quod absit, concionator errores aut scandala disseminet, servetur praescriptum can. 2317; si haereses, in eum praeterea, ad normam iuris, agatur.

§ 1. Sermons should be devoted above all to what is necessary for the faithful to believe and do for salvation.

§ 2. Therefore the preachers shall abstain from profane and abstruse arguments which exceed the capacity of their hearers, and perform their evangelical ministry (as the Apostle warns [40]) not in persuasive words of human wisdom, or for the display of vain and ambitious eloquence, but in showing of the Spirit and power; preaching not themselves, but Christ crucified.

38 S. Rit. C., March 22, 1653; Oct. 1, 1661; March 31, 1703; Dec. 10, 1718, ad 4 (nn. 944, 1217, 2108, 2258).

39 *Ibid.*, nn. 1217, 2258.

40 I Cor. II, 4.

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They should not play the rôle of philanthropists, limiting their arguments to this life and disregarding the next. They may speak of the beauty and the blessings arising from religion, but should also mention man's duties to God, the eternal judge.[41]

§ 3. If (what God may avert!) a preacher should disseminate errors and scandals, he should be deprived of the faculty of preaching and removed from the teaching office, and may also be subjected to such penalties as the Ordinary may deem necessary to repair the scandal.[42] Should he preach heresies, the Ordinary must proceed against him according to the law. The first step in the latter case would be to forbid him to preach, followed by a canonical summons, or, where the Holy Office still exercises its jurisdiction, denunciation to the same. But the Council of Trent warns bishops to be careful lest innocent priests be injured by calumny.[43]

DUTY OF THE PEOPLE

CAN. 1348

Monendi et adhortandi diligenter fideles sunt ut sacris concionibus frequenter intersint.

The faithful should be diligently admonished and exhorted to hear sermons frequently. They may also be told that, even when they have no opportunity to hear Mass on Sundays and holy days of obligation, the duty of keeping holy these days by hearing the word of God does not cease. But the exhortation or admonition must not be so worded as if it were an ecclesiastical precept obliging under sin to attend sermons.[44]

41 S. C. EE. et RR., July 31, 1894, n. 6 (*Coll. P. F.*, n. 1878).
42 Can. 2317.
43 Sess. 5, c. 2, *De Ref.*
44 S. C. P. F., Jan. 4, 1798 (*Coll.*, n. 642).

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CHAPTER III

MISSIONS

CAN. 1349

§ 1. Ordinarii advigilent ut, saltem decimo quoque anno, sacram, quam vocant, missionem, ad gregem sibi commissum habendam parochi curent.

§ 2. Parochus, etiam religiosus, in his missionibus instituendis mandatis Ordinarii loci stare debet.

§ 1. Ordinaries shall see to it that the pastors arrange a holy mission — as it is called — for their flocks at least every ten years.

§ 2. Pastors, including religious, must abide by the regulations of the local Ordinaries in this matter.

Thus, if the local Ordinary orders a mission to be held in a parish church which is in charge of exempt religious and governed by them, they have no right to hinder it or vex the missionary sent by the bishop.[1]

MISSIONS TO NON-CATHOLICS

CAN. 1350

§ 1. Ordinarii locorum et parochi acatholicos, in suis dioecesibus et paroeciis degentes, commendatos sibi in Domino habeant.

§ 2. In aliis territoriis universa missionum cura apud acatholicos Sedi Apostolicae unice reservatur.

1 S. C. EE. et R.R., July 23, 1694 (Bizzarri, *l. c.*, p. 281).

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§ 1. The non-Catholics living in a diocese or parish are recommended to the benevolent attention of the bishop and the pastors, who should ponder effective means and ways of bringing them back to the one true fold of Christ. This may be accomplished by spreading apologetic tracts,[2] etc. Of course, the social and intellectual conditions of the non-Catholic population must be duly taken into account. Prayers for their conversion should be offered.[3]

§ 2. In all other territories the care of non-Catholics is reserved exclusively to the Holy See. Therefore all foreign missions, the superiors general of missionary societies and their subjects, are under the special supervision of the S. C. de Propaganda Fide, without the consent of which no new mission may be founded or missionary work started. This law binds all religious, exempt and non-exempt, of whatever denomination, under threat of ecclesiastical penalties.[4]

CAN. 1351

Ad amplexandam fidem catholicam nemo invitus cogatur.

No one should be compelled to embrace the Catholic faith against his will.

This golden rule of the great bishop of Hippo[5] was followed in the treatment of the Donatists until they caused troubles which led the civil rulers to interfere. If it has been lost sight of in course of time, this was

2 S. C. P. F., Sept. 8, 1869 (*Coll.*, n. 1346). *The Faith of Our Fathers*, by Cardinal Gibbons; Fr. Conway's Question Box, the pamphlets of the Catholic Truth Societies, "The Antidote," and similar literature may be recommended for this purpose.

3 S. C. P. F., *Instructio* of 1879 (*ibid.*, n. 1507).

4 S. C. P. F., Dec. 5, 1640; Jan. 11, 1656 (*Coll.*, nn. 101, 125).

5 Cfr. cc. 3, 5, Dist. 45.

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due to the mixture of ecclesiastical with political affairs. But it remains as true as it was in St. Augustine's day that faith is a free gift of God, though, of course, men may be instrumental in procuring it. The early Christians were allowed to buy and retain pagan slaves who voluntarily fled to them in order to be more leniently treated; they could use exhortations and persuasive words, but were not allowed to exercise any compulsion.[6]

[6] S. O., Sept. 12, 1776 (*Col. P. F.*, n. 515).

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TITLE XXI

SEMINARIES

From the second century onward, *i. e.*, as soon as the Church was free to spread, *schools* were instituted which, though called catechetical, offered more than a catechetical training to such as wished to enter the clerical state or to hold some other responsible position. The schools of Alexandria and Antioch resembled theological academies where philosophy was not neglected, though it would be hazardous to identify them with seminaries.[1] More closely resembling our modern seminaries were the cloistral and cathedral schools of the Middle Ages, where clerics and laymen, especially of the nobility, received their education. These nurseries of learning and piety, fashioned after the domestic school of St. Augustine, may be called forerunners of the modern colleges and seminaries established upon the initiative of the Council of Trent.[2] The twenty-third session of that council, held in July, 1563, contains a long chapter on this important subject, in which the colleges for the training of clerics are for the first time called *seminaries*. The council ordained that youths of at least twelve years, especially from among the poorer classes should be received into these schools for the necessary scientific, moral, and practical training qualifying them for the priesthood. A peculiar feature was that the pupils should receive the tonsure when they entered the seminary. The

1 Cfr. *Cath. Encycl.*, XIII, 694 ff., *s. v.* "Seminary."

2 Sess. 23, c. 18, *De Ref.*

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council prescribed two school boards, to be chosen by the bishop, one for the spiritual, the other for the temporal administration. Such a seminary was to be established in every diocese large enough to maintain one. The smaller dioceses were allowed to combine. Thus the terms diocesan, interdiocesan, provincial, and pontifical seminaries were introduced.

A *seminary* may be broadly defined as a school destined either remotely or proximately for the preparation of candidates for the sacred ministry, especially the priesthood.[3]

A *diocesan* seminary is one under the control of the local Ordinary, an *interdiocesan* is one under the control, generally *in solidum,* of all the bishops who send their students there, although interdiocesan may only mean that the control is entrusted to the local Ordinary, whilst other bishops are merely entitled to send their candidates; a *provincial* seminary is one under all the bishops of an ecclesiastical province with the metropolitan as head; a *pontifical* seminary is one under the immediate control and supervision of the Holy See, who generally exercises this right by means of the papal delegate.

RIGHT OF THE CHURCH TO EDUCATE THE CLERGY

CAN. 1352

Ecclesiae est ius proprium et exclusivum eos instituendi qui ecclesiasticis ministeriis sese devovere cupiunt.

[3] A promiscuous college with business, scientific, and classical courses, even though erected by the bishop and conducted by the diocesan clergy, *cannot* be styled a seminary, as is apparent from the Council of Trent as well as from our Code. One consequence is that the *seminaristicum* cannot be collected for such colleges, but at most a *subsidium caritatis,* if no other college of the same nature exists in the diocese.

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It might seem superfluous to make a law saying that *"the Church enjoys the native and exclusive right to train those who wish to devote themselves to the sacred ministry."* Yet the legislator, taught by experience, has thought it well to emphasize this right. He calls it a *ius proprium,* or inherent right. This is evident from the office of the Church as the divinely constituted teacher of faith and morals. This office demands that those who shall be the bearers of light be imbued with those mental and moral qualities which render the exercise of the teaching office effective and conformable to the principles of faith and virtue. It is a native right of the Church to select those who are in a more particular manner the elect of the Lord, from among the multitude of men and place them in the shadow of the sanctuary, where they are protected against dangerous maxims and practices. In doing this the Church does not violate the rights of the State or of any individual. The *State* has no right to dictate any one's vocation. If God, who is the author of civil authority, calls one to the priesthood or religious state, no human power can hold him back. Individuals are free to choose the clerical state because in doing so they obey their Maker. There is now no longer any danger, as there was in the fifth and sixth centuries, that a wholesale flight from public office and municipal obligations would endanger the existence of an empire. Those were abnormal times suffering from a corrupt system of administration and taxation.

The text says further that the right of training clerics belongs *exclusively* to the Church. The Gallican, Febronian, and Josephinist schools claimed the right of prescribing the programme of studies for the clergy of the State.[4]

4 *Syllabus Pii* IX, n. 46 (Denzinger, *l. c.,* n. 1594); Pius IX, *"Nunquam fore,"* Dec., 1856.

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This claim is based on a false notion of ecclesiastical authority. If the Church, as an autonomous and independent society, is entitled to attain her purpose by the choice of appropriate means, she certainly has the right to train those who are to be the living and successive bearers of her divine mission,— the sacred ministers. From this it naturally follows that the right of choosing the means best adapted for the training of the clergy belongs to the Church exclusively. Her sphere of interests differs essentially from that of the State, though there is no contradiction between the two. The State may monopolize salt and tobacco, but for it to monopolize education, and clerical education in particular, would be usurpation.[5] There is no danger that the clerical training might prove detrimental to the State. For the very fact that loyalty and morality are the principal objects of that training guarantees the foundations of civil society.

THE DUTY OF PASTORS WITH REGARD TO CLERICAL VOCATIONS

CAN. 1353

Dent operam sacerdotes, praesertim parochi, ut pueros, qui indicia praebeant ecclesiasticae vocationis, peculiaribus curis, a saeculi contagiis arceant, ad pietatem informent, primis litterarum studiis imbuant divinaeque in eis vocationis germen foveant.

Priests, and especially pastors, should interest themselves in such boys as show signs of an ecclesiastical vocation, keep them away, as much as possible, from worldly contagion, instruct them in piety and the elements of sci-

[5] Leo XIII, "*Iampridem*," Jan. 6, 1886; "*Officio sanctissimo*," Dec. 22, 1887 (to Prussia and Bavaria after the "Kulturkampf").

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ence, and foster in them the germ of their vocation. For it is evident that by such means an ordinary or general vocation may develop into a special or extraordinary one. Suitable surroundings and a favorable atmosphere develop the seeds of a supernatural calling.[6]

DIOCESAN SEMINARIES

CAN. 1354

§ 1. Unaquaeque dioecesis in loco convenienti ab Episcopo electo Seminarium seu collegium habeat in quo, pro modo facultatum et dioecesis amplitudine, certus adolescentium numerus ad statum clericalem instituatur.

§ 2. Curandum ut in maioribus praesertim dioecesibus bina constituantur Seminaria: minus, scilicet, pro pueris litterarum scientia imbuendis, maius pro alumnis philosophiae ac theologiae vacantibus.

§ 3. Si constitui Seminarium dioecesanum nequeat, aut in constituto Seminario conveniens institutio, praesertim in philosophicis ac theologicis disciplinis, desideretur, Episcopus alumnos in alienum Seminarium mittat, nisi Seminarium interdioecesanum vel regionale, auctoritate apostolica, constitutum fuerit.

§ 1. Every diocese should have a seminary or college in a convenient place selected by the bishop. There, according to the revenues and size of the diocese, a certain number of young men should be trained for the clerical state.

§ 2. In the larger dioceses there should be established *two seminaries:* one as a college or *petit seminaire,* the other for the students of philosophy and theology.

[6] Cavagnis, *Institutiones Iuris Publ.* Eccl., 1883, l. IV, n. 76; Vol. III, p. 45.

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§ 3. If a diocesan seminary cannot be erected, or the philosophical and theological courses cannot be properly given in one already existing, the bishop shall send his students to another seminary, unless there is an interdiocesan or provincial seminary erected by authority of the Apostolic See.

§ 1 prescribes that a preparatory college or *petit seminaire* be established in every diocese. But it wisely sets a limit to this obligation, making it dependent *upon the revenues and size* of the diocese. Where there is a college conducted by religious, the bishop may make use of it for his students.

§ 2 prescribes *two seminaries,* a college and a clerical seminary, for the larger dioceses. The size of a diocese is not determined by its area, but by the number of the faithful, for in extent some apostolic vicariates are large enough to comprise many Italian dioceses or even archdioceses, yet they were told to establish central or provincial seminaries.[7] The revenues, also, are a determining factor, as the same Instruction intimates. Besides it is evident that an efficient staff of teachers and an adequate number of students cannot be expected in a small diocese, not to speak of the expenses necessary for the building and maintenance of the required edifices and the cost of administration.

The two seminaries should, if possible, be separated and conducted as different establishments. This is desired mainly by reason of the different discipline required for younger and for more advanced students.[8]

§ 3 permits bishops to send their students to another seminary, *i. e.,* one existing in a different diocese, but only in case there is no interdiocesan or provincial seminary

7 S. C. P. F., Oct. 18, 1883 (*Coll.*, n. 1606).

8 S. C. Consist., July 16, 1912, n. 1 (*A. S. S.*, IV, 492 f.).

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erected by the Holy See. The latter may intervene either directly or indirectly in the establishment of an interdiocesan or provincial seminary. *Directly* by a formal decree issued by the S. Congregation of Seminaries and Universities,[9] declaring an institution to be an interdiocesan or provincial seminary; *indirectly* by the S. C. Conc. approving the acts of a provincial synod erecting or approving such an institution. The latter mode of approval is intended in certain Instructions of the S. Congregation of the Propaganda.[10] There may be a doubt whether the "*auctoritas apostolica*" is expressly required for both provincial and interdiocesan seminaries,— in other words whether our text intends to draw a real distinction between an interdiocesan and a provincial seminary. Though there is a distinction between the two, this distinction has no practical value in our case, as can. 1357, § 4 simply rules that the government and administration of "an interdiocesan or provincial seminary" are to be conducted according to the rules laid down by the Holy See. This undoubtedly means that interdiocesan and provincial seminaries must have their statutes, and thereby also their existence, approved by the S. Cong. of Seminaries and Universities.

Where such an interdiocesan or provincial seminary exists, therefore, a bishop who has no seminary of his own, in which philosophy and theology are taught, must send his students to that provincial seminary, but only for the strictly clerical, not for the classical, studies.

9 Cfr. can. 256.
10 Oct. 18, 1883, IV; Aug. 28, 1893 (*Coll.*, nn. 1606, 1848).

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THE SEMINARISTICUM

CAN. 1355

Pro constitutione Seminarii et alumnorum sustentatione, si proprii reditus deficiant, Episcopus potest:

1.° Parochos aliosve ecclesiarum etiam exemptarum rectores iubere ut statis temporibus in ecclesia ad hunc finem stipem exquirant;

2.° Tributum seu *taxam* in sua dioecesi imperare;

3.° Si haec non sufficiant, attribuere Seminario aliqua beneficia simplicia.

If there are no endowments for the support of a seminary and its students, the bishop may

1.° Command the pastors and other rectors of churches, even though they be exempt religious, to take up collections for that purpose at stated times;

2.° Impose a seminary tax in the diocese;

3.° If these resources do not prove sufficient, he may attach some simple benefices to the seminary.

The first means is modern. It imposes the obligation of taking up a collection, even in churches which are not parish churches, and in such as belong to exempt religious.

As to the incorporation of benefices, it should be observed that *only simple benefices* are intended, *i. e.,* such as require no permanent residence in the place of benefice,[11] and the duties of which may be performed by a substitute or vicar. Thus a *simplex canonicatus* or a chaplaincy may be united with a seminary; but a parochial benefice may not, without apostolic indult.

Incorporation is either *pleno iure* or *semipleno iure,* either as to the spiritual and temporal, or as to the tem-

11 Cfr. can. 1411.

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poral benefits only; the latter element is especially intended here, since incorporation is permited for the purpose of support. But the union cannot be made without the advice of the seminary board; that of the chapter or consultors is not sufficient.[12]

An incorporation of benefices made before the seminary is in existence, is invalid.[13]

Simple benefices of any kind may be united with a seminary, even if the appointment to these falls within so-called papal months, *i. e.,* those in which the right of appointment belongs to the Holy See. But in this case the incorporation must be made before the vacancy occurs.[14]

CAN. 1356

§ 1. Tributo pro Seminario obnoxia sunt, quavis appelatione remota, reprobata qualibet contraria consuetudine et abrogato quolibet contrario privilegio, mensa episcopalis, omnia beneficia etiam regularia aut iurispatronatus, paroeciae aut quasi-paroeciae, quamvis alios reditus, praeter fidelium oblationes, non habeant, domus hospitalis auctoritate ecclesiastica erecta, sodalitates canonice erectae et fabricae ecclesiarum, si suos reditus habeant, quaelibet religiosa domus, etsi exempta, nisi solis eleemosynis vivat aut in ea collegium discentium vel docentium ad commune Ecclesiae bonum promovendum actu habeatur.

§ 2. Hoc tributum debet esse generale eiusdemque proportionis pro omnibus, maius vel minus secundum Seminarii necessitatem, sed quinas quotannis centesi-

12 S. C. C., Feb. 14, 1594; March 3, 1594 (Richter, *Trid.*, p. 212, n. 87); Bened. XIV, *De Syn. Dioec.*, IX, 7.

13 S. C. C., June 8, 1595; March 3, 1597 (Richter, *Trid., l. c.*, n. 10 f.).

14 S. C. C., Aug. 1586; Aug. 31, 1600 (Richter, *l. c.*, n. 13).

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mas partes (5%) reditus vectigalis non excedens, minuendum prout reditus Seminarii augentur.

§ 3. Reditus tributo obnoxius is est qui, deductis oneribus et necessariis expensis, supersit in anno; nec in eo reditu computari debent distributiones quotidianae, vel, si omnes beneficii fructus distributionibus constent, tertia earundem pars; nec fidelium oblationes, nec, si omnes paroeciae reditus coalescant fidelium oblationibus, tertia earundem pars.

Can. 1356 more precisely determines those persons, either physical or corporate, who are obliged to pay the seminary tax (*taxa seminaristica*).

It starts with three clauses, the first of which is "*quavis appellatione remota.* The principal effect of this clause is that no appeal is admitted *in devolutivo,* though a recourse or *restitutio in integrum* is not prohibited. Another effect of this clause is that, even if the seminary tax would be only a side issue in another cause, it would affect the entire cause, at least as long as the secondary one remained unsettled.

The second clause is: "*reprobata qualibet contraria consuetudine.*" This clause abrogates any custom which already exists, or has existed, *i. e.,* whether present or past. As to this there is no controversy, but the question has been raised whether this clause intends to annul future customs.[15] This seems to us to be settled by can. 27, § 1, which says that every custom explicitly reprobated in the Code is unreasonable. Therefore even a future custom is made impossible with regard to the seminary tax, because it would lack the consent of the legislator.

The last clause reads: "*abrogato quolibet contrario*

15 Cfr. Barbosa, *Tractus Varii,* Clausulae, nn. IX, 87 (ed Lugd., 1660, p. 260 f., 450 f.).

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privilegio." Each and every privilege, therefore, whether obtained directly or indirectly (by way of communication), must be considered as abolished and void of effect because contraries cannot be comprised under the same subject.[16] Hence if exempt religious have obtained a privilege of not paying the *seminaristicum,* this privilege is now void.

The following are obliged to contribute to the seminary:

1.° The *mensa episcopalis,* which comprises the whole income or salary of the bishop and is administered by him.[17] Hither belong the *cathedraticum* and that part of the pew-rent of the cathedral church that is reserved for salary. In countries where there are endowments these too are included, with due regard, however, to § 3.

2.° *All benefices,* including those of regulars and such as are of lay or ecclesiastical advowson.[18]

3.° *All parishes and quasi-parishes,* even though they have no other income than the offerings of the faithful. Parishes not yet organized as such are probably exempt from paying the *seminaristicum* because rights and duties are correlative terms.

4.° *Hospitals* erected by ecclesiastical authority and provided with funds of their own, for instance, by endowment. Hospitals founded and governed by the civil authority or by private persons (Sisters, etc.), cannot be taxed. The term ecclesiastical authority comprises the Ordinary, the superior major of exempt religious, and the Holy See. Hospitals which subsist on the generosity of voluntary contributors or alms, are not taxable.[19]

16 Barbosa, *l. c.*, p. 38, n. 4.

17 *Idem, De Officio et Potestate Episc.*, P. III, alleg. 95, n. 67.

18 S. C. C., Dec. 17, 1836, ad II (Richter, *Trid.*, p. 213, n. 27).

19 S. C. C., July, 1588 (Richter, *Trid.*, p. 213, n. 22); "*loca pia non e bonis ecclesiasticis facta non tenere.*"

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5.° Canonically erected confraternities and ecclesiastical *fabricae,* provided they have their own income. The term *fabrica* comprises the administrators of a church building, or the counselors. Thus, for instance, the *Reverenda Fabrica S. Petri,* means the whole administration of St. Peter's Basilica. The underlying idea is that such a building is (by *fictio iuris*) an artificial person, or, rather, an ecclesiastical institution. This also applies to confraternities which possess corporate property of their own, either movable or immovable, such as the guilds or confraternities in some parts of Europe. In this country, as far as we are aware, this law does not apply to confraternities or sodalities, because the monthly fees of the members do not constitute *reditus* or income in the proper sense.

6.° *Every religious house, even though exempt.* This includes every religious community, whether *formata* or not, whether belonging to men or to women. *Exceptions* to this rule are: (a) the houses of mendicant orders and others who live from alms,[20] but not the parishes which are entrusted to the care of mendicants; (b) all religious who actually maintain a college of pupils or professors which promotes the common welfare of the church. The latter clause appears ambiguous, but its meaning can be determined from certain official decisions. Thus it has been declared that a monastery which supports a college for monks and professors, or maintains a seminary of its own, is not bound to pay the seminary tax.[21] This was the case in former times at the universities of

20 Among these are the orlers of St. Dominic, St. Francis (all three branches), the Hermits of St. Augustine, the Carmelites, the Servites, the Minimi, the Society of Jesus; Barbosa, *De Off. et Potest. Episc.,* P. III, alleg. 77, nn. 14 f. (Vol. II, p. 315).

21 S. C. C., Sept. 9, 1594 (Richter, *l. c.,* p. 213, n. 18).

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Paris and Bologna, where the relgious orders maintained their own colleges.

A doubt may perhaps arise as to colleges conducted by religious in their own name, which are not seminaries in the technical sense. However, our text does not say "seminary," but *collegium,* and the only condition is that such a *collegium* promotes the common welfare of the Church. This, we believe, is verified in any Catholic college worthy of the name, which is open to all Catholic youths without discrimination, for such institutions greatly promote the welfare of the Church at large. A different answer must be given if the college is intended only for members of the respective religious family, a so-called scholasticate, for such institutions are primarily destined for the benefit of the respective order or congregation, not of the Church at large. The fact that a scholasticate was educating boys without means would not free it from the seminary tax.[22] Nor would the circumstance that the school or scholasticate was instituted in the monastery with some grammar school for its members.[23] Lastly, although a monastery may have to contribute to a seminary of its own order or congregation, it is not exempt from the diocesan seminary tax.[24]

§ 2 rules that the seminary tax must be general, equal, and proportionate. It must be *general,* that is to say, no exception may be made in favor of anyone who is obliged to contribute. It must be *equal, i. e.,* all are to be taxed to the same extent, without subjective or personal consideration, according to the objective standard laid down in § 3. The tax must be *proportionate* to the needs of the seminary, *i. e.,* it must be diminished if the revenues of

22 S. C. C., Jan. 3, 1594 (*ibid.,* n. 20).

23 S. C. C., April 24, 1723 (Richter, *l. c.,* n. 19).

24 S. C. C., Sept. 7, 1714 (*ibid.,* n. 21).

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the seminary increase, and the maximum rate cannot exceed 5% of the net income or capital taxed.

§ 3. The seminary tax can be levied only on the *income which is left after all obligations and expenditures have been deducted.* This is a general principle, which must be applied to the various contributors mentioned in § 1.

(a) As to the *mensa episcopalis* or episcopal income, it must be observed that former decisions cannot be fully adapted to modern exigencies because they apply to real benefices with immovable property. Still these decisions afford at least a clue as to what may be included in deducting obligations and expenditures. An *obligation* may burden the *mensa* in the form of an ecclesiastical pension which the bishop has to pay, for instance, to a disabled priest. Yet a decision says that the bishop would be allowed to charge it to the pensioner.[25] However, this is a rather complicated case. The term *expenditures* covers the total expense of collecting the income, the wages of hired hands and all other employees occupied in harvesting the produce of estates.[26] Applying these rules to modern notions we may say, *salvo meliore iudicio,* that the *mensa episcopalis* is taxable on what is left after the obligations and expenditures accruing from pastoral visits and professional occupations have been duly deducted. Household expenses are not to be deducted.[27] For the rest it is left to the bishop's own conscience to tax himself in a fair amount. The idea of the law is that no one should exempt himself.

(b) The same rules, according to the decision quoted, apply to the holders of *ecclesiastical benefices.* Mass stipends are not taxable.

25 S. C. EE. et RR., *Eugubina,* March 1, 1805 (Bizzarri, *l. c.,* p. 405).

26 S. C. C., 1673 (Bizzarri, *ibid.*); Dec. 17, 1836, ad VII, XI (Richter, *l. c.,* p. 214, n. 27).

27 S. C. EE. et RR., *l. c.*

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(c) *Hospitals, confraternities,* and *fabricae* as well as *religious houses* are subject to the same rule. Hence, for instance, if the obligation of maintaining a number of patients or wards free of charge, or keeping sick or sickly clergymen free of charge, burden a hospital, this expense may be deducted, plus the interest to be paid on capital or mortgage. Thus also *confraternities* would be justified in deducting the expenses of Masses imposed by legacies and of alms imposed by their statutes.[28] *Religious houses* may subtract from the taxable sum the amount which they have to spend on their own seminaries or colleges.[29] In fact a religious house burdened with heavy debts and bound to meet its obligations, could claim either exemption or mitigation, for the terms are general in our text. This of course only in case they have no incorporated benefice or parishes.

(d) *Not taxable* are the *daily distributions* which the beneficiaries of cathedral and collegiate churches receive for actual and active assistance in choir, if they have an income besides these distributions. But if their income consists entirely of daily distributions, the *third part of these distributions* is liable to the tax.[30]

(e) Not taxable are the *offerings of the faithful* if the whole income of a parish consists of such offerings. This is the case in most of our parishes, since by offerings are understood not merely the plate collections, but also pew-rent, subscriptions, and house collections. Of these, then, only two-thirds are to be taxed. However, the general rule stated at the beginning of this section must also be applied to these two-thirds. Therefore the debts and the

28 S. C. C., June 23, 1640 (Richter, *l. c.*, p. 213, n. 23).

29 S. C. C., Sept. 2, 1714 (*ibid.*, n. 21).

30 S. C. C. EE. et RR., March 1, 1805 (Bizzarri, *l. c.*); S. C. C., June 23, 1640 (Richter, *l. c.*, n. 23).

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necessary current expenses for the priests' salary, the maintenance of buildings and persons (organist, janitor, housekeeper) may be deducted. There will remain very little to be taxed in a good many churches of our country, and no other means is left except what is first stated in can. 1355, *viz.*, the taking up of a collection.

It may be noted that our pastors and curates not being beneficiaries in the canonical sense of the word, are exempt from the seminary tax.

THE BISHOP'S DUTIES IN REGARD TO THE SEMINARY

CAN. 1357

§ 1. Episcopi est omnia et singula quae ad rectam Seminarii dioecesani administrationem, regimen, profectum necessaria et opportuna videantur, decernere, eaque ut fideliter observentur, curare, salvis praescriptionibus a Sancta Sede pro casibus peculiaribus latis.

§ 2. Potissimum studeat Episcopus frequenter Seminarium ipse per se visitare, in institutionem quae alumnis traditur sive litterariam et scientificam sive ecclesiasticam sedulo vigilare, et de alumnorum indole, pietate, vocatione ac profectu pleniorem sibi comparare notitiam, maxime occasione sacrarum ordinationum.

§ 3. Unumquodque Seminarium suas leges habeat ab Episcopo approbatas, in quibus quid agere, quid observare debeant, doceantur tum qui in eodem Seminario in spem Ecclesiae instituuntur, tum qui in horum institutionem operam suam impendunt.

§ 4. Seminarii interdioecesani vel regionalis regimen universum et administratio regitur normis a Sancta Sede statutis.

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§ 1. The bishop shall, with due respect to the particular regulations given by the Holy See, decide what is necessary and profitable for the proper administration, government, and progress of the seminary, and enforce his regulations.

§ 2. Above all the bishop shall try to visit the seminary frequently, watch over the mental and moral training of the students, and, especially on the occasion of sacred ordinations, acquaint himself more fully with the character, piety, vocation, and progress of the pupils.

§ 3. Each seminary must have its statutes, approved by the bishop, in which the rules for the conduct of students and teachers are laid down.

§ 4. Interdiocesan or provincial seminaries are entirely governed by the statutes issued by the Holy See.

For Italy special rules have been issued, which may serve as models for other interdiocesan seminaries.[81]

SEMINARY OFFICIALS

CAN. 1358

Curandum ut in quolibet Seminario adsint rector pro disciplina, magistri pro instructione, oeconomus pro curanda re familiari, a rectore distinctus, duo saltem confessarii ordinarii et director spiritus.

In every seminary there shall be a rector to maintain the discipline, professors to teach the students, a procurator to provide for the temporalities, who must be an official distinct from the rector, at least two ordinary confessors, and a spiritual director.

81 Cfr. Micheletti, *Constitutiones Seminariorum Clericalium*, 1919, p. XVIII.

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DIOCESAN SEMINARY BOARD

CAN. 1359

§ 1. Diocesanis Seminariis bini constituantur coetus deputatorum, alter pro disciplina, alter pro administratione bonorum temporalium.

§ 2. Utrumque deputatorum coetum constituunt bini sacerdotes, ab Episcopo, audito Capitulo, electi; sed excluduntur Vicarius Generalis, familiares Episcopi, rector Seminarii, oeconomus et confessarii ordinarii.

§ 3. Munus deputatorum per sexennium durat, nec electi sine gravi causa amoveantur; sed rursus eligi poterunt.

§4. Episcopus debet consilium deputatorum in negotiis maioris momenti petere.

§ 1. Every diocesan seminary must have two boards, one for discipline, the other for the administration of temporal affairs.

§ 2. Each board consists of two priests, appointed by the bishop with the advice of the chapter or diocesan consultors; excluded are the Vicar-general, members of the bishop's household, the rector of the seminary, the procurator, and the ordinary confessors.

§ 3. The term of each board member lasts for six years, during which he should not be removed from office without a serious reason; he may also be reappointed.

§ 4. The bishop is bound to ask the advice of these boards in important matters.

Such matters of importance are, *e. g.*, the drawing up of statutes, the admission of pupils, the appointment of the rector, confessors and teachers, etc., the selection of text-

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books, and the punishment and dismissal of unruly and incorrigible students.[32]

By *familiares episcopi* must here be understood his *commensales, i. e.,* those who partake of the episcopal table or household and live in the episcopal residence as dependants,[33] and since, according to § 2 only priests can be elected *deputati,* they will be the bishop's chaplains, secretaries, or chancellors, provided they live together with the bishop.

The reason for excluding these and the Vicar General, the rector of the seminary, etc., is their dependence; these officials should be as independent as possible.

It may not be superfluous to state that the bishop is in duty bound to have such a seminary board and that he is not allowed to substitute another, made up of other persons, for instance, the rector, or the professors, or other persons prohibited by law.[34]

QUALIFICATION OF THE CHIEF SEMINARY OFFICIALS

CAN. 1360

§ 1. Firmo praescripto can. 891, ad munus rectoris, directoris spiritus, confessariorum et magistrorum Seminarii eligantur sacerdotes non doctrina tantum, sed etiam virtutibus ac prudentia praestantes, qui verbo et exemplo alumnis prodesse possint.

§ 2. Rectori Seminarii in propriis muneribus implendis obtemperare omnes debent.

§ 1. For the positions of rector, spiritual director, confessors, and professors in the seminary, only such priests should be chosen as are distinguished not only by learn-

32 S. C. C., 1585; July, 1589; Jan. 19, 1595 (Richter, *l. c.,* p. 211, n. 1 ff.).

33 Barbosa, *De Off. et Potest. Episc.,* P. II, alleg. 5, n. 2 ff. (Vol. I, 212 f.).

34 S. C. C., Aug. 27, 1864 (*A. S. S.,* I, 657 ff.).

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ing, but also by virtues and prudence, so that they may serve as examples to the students in word and deed.

§ 2. All must obey the rector in the discharge of their duties.

As to the qualities of a rector, St. Charles Borromeo demanded that he be of advanced age (*aetate provectus*), of a serious disposition (*auctoritate gravis*), of tried integrity (*speciali probitate*).

With regard to his *external canonical status* the rector is (1) *exempt* from the parish organization, as per can. 1368. If a church is connected with the seminary, he is the canonical rector of the same (see can. 480, § 3). (2) He is obliged and entitled to attend the diocesan synod, as per can. 358, § 1, 3; (3) he is obliged to make the profession of faith according to can. 1406.

Concerning the internal affairs of the seminary; the rector (1) depends in everything and at all times on the Ordinary; (2) he is the supreme authority in the seminary, whom all others, of whatever degree, including the professors and the œconomus and other officials, must obey in matters that pertain to discipline, study, and ordinary administration; (3) he is not allowed habitually to hear the confessions of the students who live under the same roof with him, as per can. 891; (4) he may arrange and change things of minor importance according to his good judgment. (5) In urgent and extraordinary cases, (a) he may expel a student guilty of a grievous public transgression, but must inform the bishop immediately; (b) make changes of a serious nature after due deliberation with the Ordinary; (c) in serious cases which brook no delay he shall consult with the other officials, but not with the spiritual director or the confessors, act upon their advice, and afterwards report to the bishop.[35]

35 Micheletti, *l. c.*, p. 14 f.

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SEMINARY CONFESSORS

CAN. 1361

§ 1. Praeter confessarios ordinarios, alii confessarii designentur ad quos libere alumni accedere possint.

§ 2. Si ii confessarii extra Seminarium degant, et alumnus aliquem eorum acciri postulet, illum rector arcessat, nullo modo petitionis rationem inquirens neque se aegre id ferre demonstrans; si in Seminario habitent, ipsos alumnus libere adire potest, salva Seminarii disciplina.

§ 3. Quando agitur de alumno ad ordines admittendo vel e Seminario expellendo, nunquam confessariorum votum exquiratur.

§ 1. Besides the ordinary confessors, others should be appointed, whom the students may freely approach.

§ 2. If these extraordinary confessors live outside the seminary, and a student desires to approach one of them, the rector shall call him, without in any way asking the reason or showing signs of displeasure. If these extraordinary confessors live in the seminary, the students may freely approach them, with due regard, of course, to the discipline of the house.

§ 3. When a seminarian is to be promoted to sacred orders, or expelled, the opinion of the confessors must never be asked.

The rule for religious communities,[36] that they may have extraordinary confessors at least four times a year, may also be applied to seminaries.

A confessor may be offered *salva disciplina,* means that the granting of such a petition should not constitute a *custom* detrimental to good order, *e. g.,* withdrawing from

[36] See can. 566, § 2, 4.

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the lecture room, or study hall, or common exercises. In exceptional cases, of course, a relaxation may be justifiable.

SCHOLARSHIPS

CAN. 1362

Reditus legati pro clericis instituendis tribui possunt alumnis in Seminarium sive maius sive minus rite receptis, licet nondum clericali tonsura initiatis, nisi aliud in tabulis fundationis expresse caveatur.

Legacies or bequests left for the training of clerics may be applied to students of the clerical or little seminary, even though they have received tonsure, provided the foundation does not forbid it.

This ruling is substantially taken from a letter of Pius X to the Cardinal Vicar of Rome. There are some scholarships in the Roman Seminary (near the Lateran) reserved for aspirants of the diocese of Rome. Pius X ordered that these be reserved for students of theology, and only in case there be none such may they be given to students of the lyceum (or college). This also holds for such as are Romans not by birth, but by domicile.[37] Our text is somewhat broader, leaving the choice free between clerical and collegiate students, provided, of course, they have entered the college with the intention of becoming priests, and provided that the terms of the bequest do not ordain differently. It is, therefore, important that such documents be carefully kept. If a scholarship is intended only for students of a certain diocese or parish, it cannot be applied to those of another diocese or parish. If the bequest is for university students, the scholarship cannot be applied to college students. If it is

[37] Pius X, May 5, 1904, n. 2 (*Anal. Eccl.*, XII, 235).

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to be given to one student only, it cannot be divided or distributed among several. On the other hand, if the bequest is made in general terms "for a clerical student," without qualification, the president of the college or seminary may give the scholarship to any one attending the college, the petit seminaire, or the clerical seminary proper.

ADMISSION TO SEMINARIES

CAN. 1363

§ 1. In Seminarium ab Ordinario ne admittantur, nisi filii legitimi quorum indoles et voluntas spem afferant eos cum fructu ecclesiasticis ministeriis perpetuo inservituros.

§ 2. Antequam recipiantur, documenta exhibere debent de legitimitate natalium, de susceptis baptismate et confirmatione ac de vita et moribus.

§ 3. Dimissi ex aliis Seminariis vel ex aliqua religione ne admittantur, nisi prius Episcopus etiam secreto a Superioribus aliisve notitias requisierit de causa dimissionis ac de moribus, indole et ingenio dimissorum, et certo compererit nihil in eis esse quod sacerdotali statui minus conveniat; quas notitias, veritati conformes, eorum conscientia graviter onerata, suppeditare Superiores debent.

§ 1. The Ordinary shall admit into the seminary only boys of legitimate birth, whose character and inclination justify the hope that they will devote themselves forever to the ecclesiastical ministry.

§ 2. These, before they are received, must submit proofs of legitimate birth, certificates of Baptism and Confirmation, and testimonials of their life and conduct. These documents, to which a medical certificate might

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profitably be added, are to be presented to the rector, who shall submit them to the Ordinary. The latter, as stated above, must consult with the seminary board.[38]

§ 3. Such as have been *dismissed* from another seminary or from a religious institute can be admitted only under the following conditions:

(a) The bishop must ascertain, if necessary even by way of secret information from the superiors and other persons, the reasons why they were discharged;

(b) He must satisfy himself about their moral standing, character, and intellectual capacity, and

(c) He must be morally certain that there is nothing in them that would not be compatible with the sacerdotal state.

The superiors who are called upon for such information are bound in conscience to tell the truth as far as they are able. Untruthful recommendations have often done great damage.

PLAN OF STUDIES FOR LITTLE SEMINARIES

CAN. 1364

In inferioribus Seminarii scholis:

1.° Praecipuum locum obtineat religionis disciplina, quae, modo singulorum ingenio et aetati accommodato, diligentissime explicetur.

2.° Linguas praesertim latinam et patriam alumni accurate addiscant;

3.° Ea in ceteris disciplinis institutio tradatur quae conveniat communi omnium culturae et statui clericorum in regione ubi alumni sacrum ministerium exercere debent.

38 Micheletti, *l. c.*, p. 90 ff.

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1. The first place in the study plan of the *petit seminaire* belongs to *religious instruction,* which should be carefully given and adapted to the intellectual capacity and age of the hearers. Here it may not be amiss to state what is prescribed for the Italian schools. Each week, one period or hour for catechism and one for Bible History in the high school or academic grades; one hour for higher catechism and apologetical instruction in the college, at least in the higher grades.[39]

2. Especially the *Latin language* as well as the vernacular should be learned correctly. Nothing is prescribed as to the number of hours to be devoted to each; but it goes without saying that the language of the Church should be given such a prominent place that the pupils realize its importance as a main branch.

A difficulty may arise in regard to mixed schools, *i. e.,* such as are partly secular and partly ecclesiastical. In these, says Leo XIII as well as the above-quoted Circular of the Consistorial Congregation, the Ordinaries should see to it that the plan of studies be adapted as closely as possible to that prescribed by the civil government.[40] In other words, the colleges conducted by and for ecclesiastics should not fall below the standard prescribed by the State.

Should it be necessary to supplement the instruction in certain branches in keeping with ecclesiastical tradition, certain periods or hours may be added for those who follow the ecclesiastical course. This is a very wise ruling.[41]

3. As to the *other branches,* everything should be taught that is required by the intellectual standard of the country in which the students expect to exercise the sacred

39 S. C. Consist., *Litterae Circulares,* July 16, 1912, n. 8 (*A. Ap. S.,* IV, 495).

40 Leo XIII, "*Depuis le jour,*" Sept. 8, 1879; *Litt. Circ.,* n. 6 (*l. c.*).

41 *Litt. Circ., l. c.*

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ministry. This standard differs in different countries, but everywhere a priest is looked upon as a man of culture and the Catholic clergy in general as the "light of the world." To conform to this ideal students for the ministry must acquire the knowledge and learning expected of them and necessary to enable them to exercise a wholesome influence on their fellowmen. This can only be accomplished by a comprehensive and thorough training in those branches which society at present considers the *sine qua non* of culture. This is more efficaciously and palpably achieved by obtaining the usual academic degrees.[42] This does not mean that all clergymen are called upon or expected to excel in secular learning, but that some at least should be first-class all-around scholars. All, however, are obliged to acquire such a degree of even worldly science as is necessary to their state, in order that there may be no prejudice and unfounded accusations.[43]

PHILOSOPHY AND THEOLOGY

CAN. 1365

§ 1. In philosophiam rationalem cum affinibus disciplinis alumni per integrum saltem biennium incumbant.

§ 2. Cursus theologicus saltem integro quadriennio contineatur, et, praeter theologiam dogmaticam et moralem, complecti praesertim debet studium sacrae Scripturae, historiae ecclesiasticae, iuris canonici, liturgiae, sacrae eloquentiae et cantus ecclesiastici.

§ 3. Habeantur etiam lectiones de theologia pas-

42 Leo XIII, *"Officio sanctissimo,"* Dec. 22, 1887; *"Depuis le jour,"* Sept. 8, 1899.

43 *Ibid.*

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torali, additis practicis exercitationibus praesertim de ratione tradendi pueris aliisve catechismum, audiendi confessiones, visitandi infirmos, assistendi moribundis.

§ 1. The *philosophical course* must last at least two continuous years and comprise, besides philosophy proper, also the allied branches.

Philosophy is here understood in its proper sense, as the knowledge or science of things in their ultimate principles.[44] The *disciplinae affines* are officially described as follows: mathematics, natural or physical science, literature, Latin and Greek, history. The number of lessons to be devoted to each is stated as one hour per day. However, it must be observed that this plan was drawn up for the Italian lyceum, which has a three years' course. Counting five periods a week (they have one full holiday every week) this would be fifteen hours per week for three years. Distributing these lessons over two years, we have about 7 to 8 hours for each per week. To these must be added, according to the same Circular, one hour for review or repetition each week, and one hour for debate or disputation every two weeks.[45] Thus about 8 or 9 periods of philosophy proper are required to do justice to this important branch.

§ 2. The *theological course* should last at least *four full years* and comprise, besides dogmatic and moral theology, the study of Holy Scripture, Church history, Canon Law, liturgy, sacred eloquence, and ecclesiastical chant.

The *number* of hours to be devoted to dogmatic theology, according to the Circular,[46] is one a day, *i. e., five hours per week,* plus one hour for disputation and one

44 Cfr. Turner, *History of Philosophy*, 1903, p. 1.

45 *Litt. Circul. S. C. Consist.*, July 16, 1912, n. 9.

46 *Ibid.*, nn. 11 f. (*A. Ap. S.*, IV, 496 f.).

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for review, in all, seven hours a week for dogmatic theology.

For *moral* theology no definite number of hours is assigned, but it is added that lectures on sociology and the elements of Canon Law should be given as supplementary to moral theology.

For *Holy Scripture* four periods per week are assigned throughout the four years' course. The first two years are to be devoted to introduction and the last two to exegesis.

Church History has no definite number prescribed, neither have the secondary branches of Biblical Greek, Hebrew, sacred eloquence, patrology, liturgy, sacred archaeology, sacred art, and Gregorian Chant.

It may be noted that this programme, as outlined in the Circular, is to be taken as directive only, not as a law in the strict sense. Details may be left to the seminary board. Note that the same Circular[47] says that there should not be more than four, or at most four and one-half hours school a day, and these should not follow one another consecutively, but should be divided up. Too many lessons are incompatible with the discipline of the seminary, the necessary exercises of piety, and the physical well-being of the students.

§ 3 rules that *pastoral theology* should also be taught. Practical exercises should be added. These should consist in pedagogic instructions, in order that the candidates may learn how to teach catechism, to hear confessions, to visit the sick, and to assist the dying.

47 *Ibid.*, n. 7.

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QUALIFICATION OF SEMINARY PROFESSORS

CAN. 1366

§ 1. Ad magisterii munus in disciplinis philosophicis, theologicis et iuridicis, ii, ceteris paribus, iudicio Episcopi et deputatorum Seminarii, praeferantur, qui laurea doctorali potiti sint in Universitate studiorum vel Facultate a Sancta Sede recognitis, aut, si agatur de religiosis, qui simile testimonium a suis Superioribus maioribus habeant.

§ 2. Philosophiae rationalis ac theologiae studia et alumnorum in his disciplinis institutionem professores omnino pertractent ad Angelici Doctoris rationem, doctrinam et principia, eaque sancte teneant.

§ 3. Curandum ut saltem sacrae Scripturae, theologiae dogmaticae, theologiae moralis, et historiae ecclesiasticae, totidem habeantur distincti magistri.

§ 1. For the teaching of philosophy, theology, and canon law, other qualifications being equal, those should be preferred who have obtained the doctor's degree from a university or faculty recognized by the Holy See. The decision lies with the bishop and the seminary board. The phrase *ceteris paribus* is easily understood in the light of can. 1360, § 1, which demands not only learning, but also virtue and prudence, as necessary qualities of a professor. Teachers taken from the rank of *religious* should have testimonials from their superiors testifying to their doctor's degree or recognized capacity and scholarship.

§ 2. Mental philosophy and theology must be taught according to the method, teaching, and principles of the *Angelic Doctor,* to which the professors should religiously adhere.

The *method* here understood is the *scholastic form* in

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which the *Summa Theologica* of St. Thomas and, in fact, all the great *Summae* of the thirteenth century are composed.

The term *doctrina* in this connection is not so easily defined, but, taken as a whole, no doubt means the teaching of St. Thomas, more especially his metaphysics,[48] though not each and every sentence laid down in his works need be accepted.

The *principles* of the Angelic Doctor are the rules or theses around which his system clusters, and upon which it more or less hinges, especially in metaphysics.[49]

It was but natural that the *Summa Theologica* of St. Thomas should be prescribed as the *text-book for theological seminaries.* This does not mean that no other systematic text-book may be used for recitation purposes, but only that the *Summa* must be used and explained for the scholastic part, *i. e.*, in the treatment of purely speculative questions.[50] Of modern erudition there is but little in the *Summa,* and yet dogmatic theology now-a-days must be treated with the aid of history and Holy Writ.[51] That it will not be easy for a Scotist or a Molinist to feel at home in the Thomistic system goes without saying; but no other system is condemned by the preference given to St. Thomas.

§ 3. Care should be taken that at least Holy Scripture, dogmatic theology, moral theology, and Church history be taught by different professors.

48 Pius X, "*Doctoris Angelici*," June 29, 1914 (*A. Ap. S.*, VI, 338).

49 See the 24 theses proposed by S. C. Stud., July 27, 1914 (*A. Ap. S.*, VI, 383 ff.).

50 Cfr. the documents already quoted and S. C. Sem., March 7, 1916 (*A. Ap. S.*, VIII, 157).

51 *S. C. Consist., Lit. Circul.*, n. 11.

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THE RELIGIOUS TRAINING OF SEMINARISTS

CAN. 1367

Current Episcopi ut alumni Seminarii:

1.° Singulis diebus communiter matutinas et serotinas preces recitent, per aliquod tempus mentali orationi vacent, sacrificio Missae intersint;

2.° Semel saltem in hebdomada ad sacramentum poenitentiae accedant et frequenter, qua par est pietate, Eucharistico pane se reficiant;

3.° Dominicis et festis diebus, sacris Missarum et Vesperarum sollemnibus adsint, altari inserviant sacrasque caeremonias exerceant, praesertim in ecclesia cathedrali si id, iudicio Episcopi, sine disciplinae et studiorum detrimento fieri possit;

4.° Singulis annis per aliquot dies continuos exercitiis spiritualibus vacent;

5.° Semel saltem in hebdomada adsint instructioni de rebus spiritualibus quae pia exhortatione claudatur.

The bishops shall see to it that the students of the Seminary:

1.° Recite their morning and evening prayers in common, make a short meditation, and assist at Mass;

2.° Go to confession at least once a week and frequently receive holy Communion with proper devotion;

3.° Assist at solemn Mass and Vespers on Sundays and holy-days of obligation, serve at the altar, and perform the sacred ceremonies, especially in the cathedral church, provided the bishop thinks it can be done without disadvantange to discipline and study;

4.° Make a retreat once a year for several successive days;

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5.° At least once a week attend a spiritual lecture, which may be followed by a pious exhortation.

We hardly believe that this canon applies to "little seminaries" *in globo*. At most some of its prescriptions may serve as a directive norm for these, as far as circumstances permit. The practice or exercise of sacred ceremonies is certainly only intended for seminarians in the strict sense. Weekly confession for academic and collegiate students cannot be prescribed as a rule. Where there are day scholars, not even 1° can be enforced. Therefore we believe that this canon is primarily intended for clerical seminaries, but may, as stated, serve as a directive norm for high schools and colleges.

To superintend the pious exercises is the special duty of the *rector*,[52] who should see to it that genuine and solid piety be fostered in the candidates to the sacred ministry. Hence he must combat hypocrisy and watch over the freedom of conscience. This presupposes free choice of confessors, according to can. 1361. The rector should be cautious and circumspect in inquiring into the frequentation of the Sacraments, and use no compulsion or moral persuasion in this matter. He shall also inculcate this mode of acting in his officials.

The *spiritual director* conducts the daily, weekly, and monthly devotions of the seminarists, but under the supervision of the rector (can. 1360, § 2). He should be ready to hear confessions whenever asked by the students. But he, too, must leave the freedom of conscience intact, scrupulously abstain from restricting the choice of confessors, and be specially careful about the seal of confession.

It may be asked: If perfect liberty of conscience is

52 Micheletti, *l. c.*, p. 26 ff.

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guaranteed, how can the discipline, and especially the rule laid down in our canon, be observed? We answer as follows: The rector as well as the spiritual director should give warning in their conferences and spiritual lectures as to the obligation in general of observing this rule, a protracted violation of which can not long remain hidden from the eyes of a vigilant rector or spiritual director. The rector, then, when perceiving any case of palpable negligence, must correct the culprit, and, like a religious superior, is bound to correct even apparently slight faults if a serious relaxation of discipline is to be apprehended therefrom.[53] As to individuals, the matter must first be settled with the confessors who are the judges of conscience. It may be that in cases of scrupulosity the confessor would advise less frequent confession. Should a penitent say that he has nothing to confess, the rules of *materia sufficiens* and *necessaria* must be applied. Giving scandal by not going to confession would seem to form a *materia sufficiens*. At least the penitent should present himself to hear the confessor's advice and receive his blessing. Thus freedom can be safeguarded as well as discipline. What goes on between the confessor and the penitent is a matter entirely subtracted from public discipline.

Our canon says that the Ordinary must see to the enforcement of this rule. This can be done especially on the occasion of his visits, when the bishop may interpellate the rector as to its observance. The rector is bound to answer his questions truthfully. Of course, neither the spiritual director nor the confessors may reveal anything that they know from confession only. However, the spiritual director, who has every opportunity to watch

53 Cfr. Marc, *Institutiones Morales*, II, n. 2170, q. 3.

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the students, may express his judgment in general terms, without mentioning any individual, as to the general observance of our canon. The Ordinary may give weight to the rule by threatening injunctions or penalties, against which no appeal is admitted.[54]

EXEMPTION

CAN. 1368

Exemptum a iurisdictione paroeciali Seminarium esto; et pro omnibus qui in Seminario sunt, parochi officium, excepta materia matrimoniali et firmo praescripto can. 891, obeat Seminarii rector eiusve delegatus, nisi in quibusdam Seminariis aliter a Sede Apostolica constitutum.

The seminary is exempt from the jurisdiction of the pastor, whose place is taken by the rector or his delegate for all who live in the seminary in all things except marriage and matters concerning which the Holy See may have differently provided. But the rule laid down in can. 891, that the rector should not habitually hear the confessions of boarding pupils, must not be set aside.

This canon, though quite clear in itself, raises more than one doubt. First of all, there is the very term *seminary*. Does it comprise every seminary, the little as well as the clerical? In view of the definition given above, in the introduction to this title, we believe exemption may be claimed by any seminary which is such in the proper sense of the word. For as the bishop may exempt some religious families and charitable institutions from parish organization,[55] so does the Code exempt the seminaries

54 Bened. XIV, "*Ad militantis*," March 30, 1742, § 34.

55 Can. 464, § 2. But the definition of seminary cannot be *eo ipso* applied to colleges of a promiscuous character; the clerical character

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from the same. Besides, the general rule that, where the law makes no distinction, neither should the interpreter, may here be safely applied, as the law is favorable to the seminaries. But only such seminaries, either little or clerical, as are under the control of the local Ordinary, or interdiocesan and pontificial seminaries, must be understood. Hence seminaries governed by religious cannot claim this privilege, unless the Ordinary should see fit to apply can. 464, § 2, as mentioned above.

The next question is: Who are "*all those who are in the seminary*"? No doubt the officials as well as the professors and pupils who habitually live in the seminary, and as long as they live there, even during vacation, should they spend their vacation there. And we believe that this rule may also be applied to the so-called *villeggiatura,* or summer resort, which is a *desideratum* for all seminaries.[56] This privilege doubtless also applies to laymen working for, and living as boarders in, the seminary, for the text admits this extension. But concerning these laymen it must be understood that, if they want to get married, they must do so in the parish church, according to the law established in can. 1094 ff. All other sacraments, including baptism and confirmation, these laymen may receive in the seminary.

But what about the *Sisters* in the seminary? Their presence there is necessary for more than one reason, and is now tolerated by Roman practice. They are subject to the following rules:[57]

1. They may be called or dismissed by the local Ordinary according to his discretion.

must certainly be prevalent, otherwise any school might be called a seminary.

56 *S. C. Consist., Litt. Circul.,* July 16, 1912, n. 3 (*A. Ap. S.,* IV, 493).

57 Micheletti, *l. c.,* p. 40.

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2. The appointment of the superioress and the selection of sisters for service in the seminary is left to the superioress general, who, however, should comply with the wishes of the local Ordinary.

3. The interior government of the Sisters employed in the seminary must be left to the local superioress and neither the rector nor any other official should interfere therewith.

4. A private oratory should be assigned to the Sisters for their spiritual exercises.

5. Their habitation should be entirely separate from the other parts of the seminary, and no one, except the rector, vicerector, and procurator, shall be allowed to communicate with the Superioress or the Sisters.

6. As to confessions the common law, as stated in can. 520, must be applied.

From these observations the question with regard to the rector's rights is easily settled. The Sisters' chaplain must be assigned by the local Ordinary, according to can. 529. Their confessors must have the requisite faculties from the Ordinary; and for the rest, especially for their "peace of conscience," the Sisters may avail themselves of the favors granted in can. 522–523.

SEMINARY DISCIPLINE

CAN. 1369

§ 1. Seminarii rector et alii omnes moderatores sub eius auctoritate curent ut alumni statuta ab Episcopo probata studiorumque rationem adamussim servent ac spiritu vere ecclesiastico imbuantur.

§ 2. Saepius eis verae et christianae urbanitatis leges tradant, eosque exemplo suo ad illas colendas excitent; hortentur praeterea ut praecepta hygienica,

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vestium et corporis munditiam et quandam in conversando comitatem cum modestia et gravitate coniunctam, iugiter servent.

§ 3. Sedulo vigilent ut magistri suo munere rite fungantur.

§ 1. The rector and all other officials subject to his authority shall take care that the students closely *observe the statutes* approved by the bishop as well as the *plan of studies,* and that they be imbued with the true ecclesiastical spirit.

If the students are bound to follow the programme laid down for the various courses, it naturally follows that the professors too should follow it (§ 3). Therefore, says the oft-quoted Circular, the professors should not waste time in long discussions on some particular subject — perhaps a "hobby"— but finish their *pensum* within the period assigned for the same. Ordinaries are exhorted to see to it, that the lectures on dogmatic and moral theology, and, as far as possible, also those on philosophy, at least the general outlines, are given in Latin.[58] This, of course cannot mean that the vernacular is to be banished. For the positive parts of dogmatic theology and sociological questions are certainly more easily and profitably treated in the vernacular language. But the speculative parts should be treated in the accurate and precise Latin terminology handed down by tradition.

§ 2. The seminary officials should insist *upon the rules* of genuine Christian politeness and excite the students to imitation by their example. They should also exhort them to observe the rules of hygiene, be cleanly in dress and appearance, and practice courtesy joined with modesty and gravity.

58 *Lit. Circul.,* n. 13.

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STUDENTS OUTSIDE THE SEMINARY

CAN. 1370

Quoties alumni ob quamlibet causam extra Seminarium morentur, servetur praescriptum can. 972, § 2.

When students, for whatsoever reason, live outside the seminary, they should be placed under the care of pious and worthy persons, who shall watch over them and lead them on to piety, as stated under can. 972, § 2.

DISMISSAL OF STUDENTS

CAN. 1371

E Seminario dimittantur dyscoli, incorrigibiles, seditiosi, ii qui ob mores atque indolem ad statum ecclesiasticum idonei non videantur; itemque, qui in studiis adeo parum proficiant ut spes non affulgeat eos sufficientem doctrinam fore assecuturos; praesertim vero statim dimittantur qui forte contra bonos mores aut fidem deliquerint.

Disorderly, incorrigible, and rebellious students, such as appear unfit for the ecclesiastical state on account of their conduct and character, and those who make so little progress in their studies that there is no hope that they will acquire a sufficient knowledge, should be dismissed. Those who offend against faith and good morals — by which latter term the *praeceptum contra sextum* is chiefly meant — should be expelled at once.

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TITLE XXII

SCHOOLS

This title sounds more restricted than its contents bear out. Education comprises Christian training of every kind and degree, no matter in what place or form it is given, whereas the term *school* has, at least in common parlance, a narrower meaning, to wit, a place or building where education is imparted; or an institution of learning or training, especially when the latter is carried on in a systematic form. Education in general means mental and moral development of the faculties of man; school means a systematic education offered in a place or building assigned for that purpose. Thus we also speak of compulsory education and compulsory schooling, which terms differ widely, since the former does not necessarily include the latter, as shall be seen under can. 1375. The first of the following canons refers to *Christian education in general.*

THE DUTY OF CHRISTIAN EDUCATION

CAN. 1372

§ 1. Fideles omnes ita sunt a pueritia instituendi ut non solum nihil eis tradatur quod catholicae religioni morumque honestati adversetur, sed praecipuum institutio religiosa ac moralis locum obtineat.

§ 2. Non modo parentibus ad normam can. 1113, sed etiam omnibus qui eorum locum tenent, ius et

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gravissimum officium est curandi christianam liberorum educationem.

§ 1. All the faithful must from childhood be educated in such way that not only are they taught nothing that is contrary to faith and morals, but that religious and moral training takes the first place.

§ 2. Not only parents, but all those who take their place, have the right and the solemn duty to provide a Christian education for their children.

It seems superfluous to add anything to this pregnant text, which is the concrete embodiment of the many solemn documents which the Holy See issued against the liberalistic tendencies of the last century. One was directed especially to the bishops of the U. S. by the Holy Office.[1] It says that the tender age is most susceptible to the seeds of vice as well as virtue. Experienced teachers and priests could tell a thrilling story of the difference between children brought up in the atmosphere of faith and piety, and those who come from homes where religion has little or no influence.[2]

The right of parents and guardians under God is inalienable and inviolable because the child belongs primarily and before others to the parents. This natural right has its foundation in the very fact of procreation and involves the right of the parent to feed, clothe, and educate his children physically, intellectually, and morally.[3] These rights involve their corresponding duties, which parents may neither evade nor ignore.[4] For by doing so they would violate their natural duties towards their God-

1 S. O., Nov. 24, 1875 (*Coll. P. F.*, n. 1449).

2 Cfr. Becker, S. J., *Christian Education or The Duty of Parents;* 1899, p. 128 ff.

3 See can. 1113.

4 See the excellent paper of Cardinal O'Connell in *Catholic Educational Association Bulletin*, Aug. 1919; Cavagnis, *Instit. Iuris Pub. Eccl.*, 1882, Vol. IV, p. 14 f.

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given protegés, for whom they are responsible and accountable to the Creator.

From this follows that the parents are entitled and obliged to provide, either themselves or through others, the necessary moral and religious training and to keep their children away from everything and every person that would be dangerous to faith or morals.

RELIGIOUS INSTRUCTION IN SCHOOLS

CAN. 1373

§ 1. In qualibet elementaria schola, pueris pro eorum aetate tradenda est institutio religiosa.

§2. Iuventus, quae medias vel superiores scholas frequentat, pleniore religionis doctrina excolatur, et locorum Ordinarii curent ut id fiat per sacerdotes zelo et doctrina praestantes.

§ 1. In every elementary school religious instruction should be given the children according to their age.

These elementary, popular or grade schools are especially destined for the building up of good character, and since an education which guarantees public peace and tranquillity cannot be solid and lasting without the principles of Christian truth, moral as well as intellectual, it follows that no schooling without religious training is able to produce the desired effects. These words of Pius IX to the Archbishop of Freiburg (Baden) [5] need no further proof than a glance at the present social condition of the world. The programme of the so-called "Liberals," who propose to take the schools away from the influence of the Church, and to limit education to the pursuit of worldly happiness,[6] has never received a more ter-

[5] "*Quum non sine,*" July 14, 1864 (*Coll. P. F.*, n. 1260).

[6] Syllabus of Pius IX, prop. 48 (Denz., n. 1596).

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rible shock than in the late war. Unfortunately, the enemies of Christian education have eyes but see not. Rationalism and materialism clings to their bones and often has its principal nerve in the pocket.

§ 2. Youths who *frequent the secondary or higher schools* should be given fuller instruction in Christian doctrine, and the local Ordinaries should see to it that this instruction is given by zealous and learned priests.

Such fuller instructions are contained in the larger catechism as well as the so-called evidences of religion, which should be imparted so that they may be easily grasped and assimilated by the pupils.[7]

NON-CATHOLIC SCHOOLS

CAN. 1374

Pueri catholici scholas acatholicas, neutras, mixtas, quae nempe etiam acatholicis patent, ne frequentent. Solius autem Ordinarii loci est decernere, ad normam instructionum Sedis Apostolicae, in quibus rerum adiunctis et quibus adhibitis cautelis, ut periculum perversionis vitetur, tolerari possit ut eae scholae celebrentur.

Catholic children should not frequent non-Catholic, neutral, or mixed schools, *i. e.,* such as are open also to non-Catholics. It is for the local Ordinary to decide, according to the instructions of the Apostolic See, in what circumstances and with what precautions attendance at such schools may be tolerated, without danger of perversion to the pupils.

There is a term used in this canon which recalls the famous controversy waged about the *parochial schools* in

7 Pius IX, "*Acerbo nimis,*" April 15, 1905, n. V.

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this country a generation ago. It is "*tolerari possit,*" which was given only for particular cases and in view of special circumstances, and may be called an equitable arrangement departing from the letter of the law.[8] The *instructions of the Holy See* for *our country* were contained in a document issued by the Holy Office,[9] Nov. 24, 1875. Others of a similar tenor were given for Canada, Ireland, England and missionary countries.[10] All of them revolve around the question whether the influence of the Church is entirely excluded from the public schools and the Catholic pupils are exposed to danger to the faith; if so, the bishop shall provide for their instruction as far as lies within his power, and at the same time warn the faithful and announce to them that they cannot in conscience permit their children to frequent schools opposed to the Catholic Church.[11]

The *circumstances* in which attendance at non-Catholic schools may be permitted are expressed in the above-named Instruction to the bishops of the U. S. as follows: "Generally speaking, such cause will exist if there is no Catholic school in a place, or if the one that is there cannot be considered suitable to the conditions and circumstances of the pupils." This suitability must not be identified with mere fashionableness, for there is no proportion between the danger to faith and "stylishness." Hence said instruction continues: "Parents who neglect to give this necessary Christian training and instruction to their children, or who permit them to go to schools in

8 See the excellent work of Burns, C. S. C., *The Growth and Development of the Catholic School System in U. S.*, 1912, chs. XI f.

9 *Coll. P. F.*, n. 1449.

10 S. C. P. F., March 14, 1895; Sept. 18, 1819; Jan. 16, 1841; April 7, 1860; Aug. 6, 1867 (Oxford and Cambridge); 1659; July 19, 1838; March 20, 1865; April 25, 1868 (*Coll.*, nn. 1890; 738, 1190; 1312, 1329).

11 Pius IX, "*Quum non sine,*" July 14, 1864 (*Coll. P. F.*, n. 1260),

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which the ruin of their souls is inevitable, or, finally, who send them to the public schools without sufficient cause and without taking the necessary precautions to render the danger of perversion remote, and do so while there is a good and well-equipped Catholic school in the place, and while they have the means to send them elsewhere to be educated; — such parents, if obstinate, cannot be absolved, as is evident from the moral teaching of the Church." [12]

THE RIGHT OF THE CHURCH TO ESTABLISH SCHOOLS

CAN. 1375

Ecclesiae est ius scholas cuiusvis disciplinae non solum elementarias, sed etiam medias et superiores condendi.

The Church has the right to establish schools of every kind, not only elementary, but also secondary and higher schools. Note well, the Church does *not claim* the *exclusive right* to establish schools, as she does with regard to seminaries for the education of the clergy (can. 1352). Our canon claims for her the right of *establishing schools* of *every kind,* (*cuiusvis disciplinae*). By *disciplina* is generally understood what we call a branch or department of learning. Hence the term includes elementary, secondary, and higher schools, colleges and universities, even the special faculties of theology, philosophy, medicine, and law. Among the secondary schools figure training and professional schools and high schools for boys and girl (academies), whatever name they may go by in different countries, for the terminology varies.[13]

To *establish* a school means to furnish the means

12 *Coll. P. F.*, n. 1449.

13 See *Cath. Encycl.*, Vol. XIII *s. v.* "Schools."

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wherewith to commence and continue it. Such an act does not exclude the coöperation of other persons, either public or private, who may participate in the administration or regulation of a school.

A school is a building or other place where education is given in a more or less systematic manner. Now-a-days education is concentrated in schools; hence the "fight for the schools" waged in nearly every civilized country. Yet it cannot be denied that there is not a purely mental or abstract, but a real and well-founded distinction between *education* and *school*. For education comprises the development of the moral and mental faculties in the whole range of science and moral principles. Schools on the other hand are differentiated by the higher and lower degrees of studies, these being divided into various grades, as the appellations elementary, secondary, etc., clearly indicate. Besides, schools are localized and attached to state and municipal machinery, whilst education may and should be the common good of all.

The Code, then, by claiming the right of establishing schools for the Church, leaves aside the question of education in general. Whence this claim to establish schools? Whatever has reference to the purpose or end for which the Church was founded, belongs to her domain. Now schools, as the universal and ordinary means of conveying a Christian education, undoubtedly have a natural connection with the end of the Church. Consequently the Church has the right of establishing and conducting schools.[14] The major premiss follows from the fact that the Church is an autonomous, an independent, and a perfect society endowed with the right of procuring the means necessary to attain its end. It will not do to say

14 Cfr. Cavagnis, *Institut. Iuris Eccl. Pub.*, Vol. III, p. 69 f., l. IV, n. 117 ff.

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that the State offers to the Church these means, because one sovereign society cannot be at the mercy of another,—the Church subject to the State. As to the *minor*, viz., that schools are closely connected with the end of the Church, the following observation may suffice. In itself a school may have a merely temporal purpose, and thus be referred to the State, the end of which is to procure temporal prosperity and order, but a systematic separation between scientific training and moral development results in a one-sided education which can bear no solid and lasting fruits, because the unity of man requires an even evolution of all his faculties, intellectual as well as moral. And since true morality cannot exist without religious principles, it naturally follows that the whole business of education is closely bound up with religion. To provide a religious and moral training for her subjects certainly appertains to the Church, whose proper end is spiritual, religious, binding man's temporal to his eternal destiny. Neither is there any danger that religious schools will breed disloyalty or disturb the peace among citizens. The very fact that religion teaches submission and obedience to lawful authority and love of fellowmen should be sufficient to dispel any misgiving in that direction. This is acknowledged by honest non-Catholic politicians,[15] and the late war has amply proved that Catholics are as loyal as the members of any other denomination.

Here we may recall the law of *prescription*. The Church it was who in the turmoil of barbarous invasions held high the torch of civilization and preserved it against the assaults of savage hordes. To her most of the higher, cloistral and cathedral schools and universities, are indebted for their very existence and endowments. Many of those very chairs that have been made the catapults

15 Thus Treitschke, *Vorlesungen über Politik*, I, 350.

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from which poisonous missiles are hurled against the Catholic Church, owe their foundation to ecclesiastical benefices and persons.

This may suffice to illustrate can. 1375. It is not our task to outline what the State may justly claim. This would require an extensive investigation. Only one statement may be permitted. What is said in the heat of controversy cannot always be accepted as objective truth. Cavagnis[16] vindicates the following functions to the *State:* (1) It should establish schools when private citizens, or other agencies, neglect to do so; (2) It should see to it that the social and civic relations and good order are not disturbed or subverted in private schools; (3) It should repress and punish rebellious disturbances and dangerous machinations. Similar views are expressed by many other Catholic authors,[17] viz., that compulsory education, but not compulsory schooling, may be vindicated to the State, which, as Cavagnis also admits, has the greatest interest in the adequate training of its citizens. It may be quite true that these ideas are imported from the Old World, as Cardinal Manning observed,[18] and that the conditions of the New York are different; but the underlying principles must be as true here as they are there.

UNIVERSITIES, FACULTIES, AND DEGREES

CAN. 1376

§ 1. Canonica constitutio catholicae studiorum Universitatis vel Facultatis Sedi Apostolicae reservatur.

§ 2. Universitas vel Facultas catholica, etiam religiosis familiis quibuslibet concredita, sua debet habere statuta a Sede Apostolica probata.

16 *Instit. Iuris Publ. Eccl.*, Vol. III, p. 64, l. IV, n. 107; for the rest we refer to Burns, *l. c.*, ch. IX.

17 Th. Meyer, S. J., *Institutiones Iuris Nat.*, 1900, Vol. II, 703 ff.

18 Burns, *l. c.*, p. 220.

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CAN. 1377

Gradus academicos qui effectus canonicos in Ecclesia habeant, nemo conferre potest, nisi ex facultate ab Apostolica Sede concessa.

The canonical establishment of Catholic universities and faculties is reserved to the Holy See.

These, even when entrusted to religious institutes, must have their statutes approved by the Apostolic See. No academic degree produces any canonical effect unless it has been conferred in virtue of the power granted by the Apostolic See.

The difference between a university and a faculty consists in this, that a university includes a so-called *studium generale,* or, in concrete words, the faculties of theology, philosophy, law, and medicine, while the term *faculty,* in its restricted and technical sense, means only one of these. If we say *studium generale* we are aware that this term was first used to signify a school which admitted students from all parts, and then was transferred to the corporate body of teachers and students. To-day a university in the full sense of the word means the total of the four faculties mentioned above.[19] The term "*faculty*" was originally used in the more general sense of science or knowledge; later it came to indicate some department of study, as the faculty of arts,[20] or theology, or Canon Law. In this sense it is used in our text. Universities and faculties, then, which enjoy the privilege and power of conferring degrees and are acknowledged as *Catholic* universities or faculties, can be established

19 See *Cath. Encyc.*, Vol. XV, 188, *s. v.* "Universities."

20 See *New International Encyc.*, 1904, Vol. XIX, *s. v.* "Universities," p. 738.

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only by the Holy See and must have their statutes approved by the S. C. of Seminaries and Universities.[21]

Can. 1377 is to be understood both of degrees conferred after examination and of so-called *honoris causa* degrees. It would seem that the mere acknowledgment and approval of an institution of learning by the Holy See does not convey the right of conferring academic degrees, but this right must be specially mentioned in the petition and the grant. If the Holy See grants the honorary title of doctor, this gives the recipient the same rights and privileges as the degrees conferred by a Catholic university after examination.[22]

RIGHTS ATTACHED TO THE DEGREE OF DOCTOR

CAN. 1378

Ius est doctoribus rite creatis deferendi, extra sacras functiones, annulum etiam cum gemma, et biretum doctorale, firmo praeterea praescripto sacrorum canonum, qui in collatione quorundam officiorum et beneficiorum ecclesiasticorum statuunt eos, ceteris paribus, iudicio Ordinarii, esse praeferendos, qui lauream vel licentiam obtinuerint.

Duly created doctors are entitled to wear, outside of ecclesiastical functions, a ring studded with a gem and the doctor's biretta, and the ruling of the sacred canons remains effective which says that all other things being equal, doctors and licentiates should be preferred in the appointment to ecclesiastical offices and benefices.

The doctor's ring may be worn on the same finger on which prelates wear theirs.[23] The biretta here intended is

21 Pius X, "*Sapienti Consilio*," June 29, 1908, § 1, n. 11.

22 S. C. Stud., Dec. 19, 1903.

23 S. Rit. C., May 23, 1846, ad 5 (*Dec. Auth.*, n. 2907).

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the four-cornered ecclesiastical headgear,[24] not the so-called doctor's hat. These paraphernalia may not be worn at ecclesiastical functions, especially not while saying or singing Mass.[25]

By the way it may be stated that our text grants the right to such distinctions to all duly created doctors, whether of the secular or religious clergy.

CATHOLIC SCHOOLS TO BE ESTABLISHED

CAN. 1379

§ 1. Si scholae catholicae ad normam can. 1373 sive elementariae sive mediae desint, curandum, praesertim a locorum Ordinariis, ut condantur.

§ 2. Itemque si publicae studiorum Universitates doctrina sensuque catholico imbutae non sint, optandum ut in natione vel regione Universitas catholica condatur.

§3. Fideles ne omittant adiutricem operam pro viribus conferre in catholicas scholas condendas et sustentandas.

§ 1. Where there are no *Catholic schools* in the sense of can. 1373, the church authorities, especially the local Ordinary, should take care to establish such.

§ 2. *Catholic universities* should also be founded in provinces or countries where the existing universities are not imbued with Catholic teaching and feeling.

§ 3. The *faithful should not omit to lend their aid, according to their ability,* in the establishment and support of Catholic schools.

This has been a maxim of the Church ever since univer-

24 S. Rit. C., Dec. 7, 1844, ad 1 (16 n. 2877).

25 S. Rit. C., *l. c.*, and June 30, 1883, ad VII (n. 3580).

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sities and schools have taken an unchristian turn, as especially the letters of the Holy See to the Irish hierarchy emphasize.[26]

CLERICS TO PURSUE HIGHER STUDIES

CAN. 1380

Optandum ut locorum Ordinarii, pro sua prudentia, clericos, pietate et ingenio praestantes, ad scholas mittant alicuius Universitatis aut Facultatis ab Ecclesia conditae vel approbatae, ut inibi studia praesertim philosophiae, theologiae ac iuris canonici perficiant et academicos gradus consequantur.

It is desirable that the local Ordinaries should, with prudent judgment, send clerical students who excel in piety and talent, to a university or faculty either founded or approved by the Church, that they may there complete their studies, especially in philosophy, theology, and Canon Law, and obtain the academic degrees.

Honorius III already advised prelates and chapters to send talented clerics to universities for at least five years, during which teachers as well as students should be supported from ecclesiastical funds, *i. e.*, benefices, by authority of the Apostolic See.

RELIGIOUS INSTRUCTION UNDER CHURCH AUTHORITY

CAN. 1381

§ 1. Religiosa iuventutis institutio in scholis quibuslibet auctoritati et inspectioni Ecclesiae subiicitur.

§ 2. Ordinariis locorum ius et officium est vigilandi ne in quibusvis scholis sui territorii quidquam contra fidem vel bonos mores tradatur aut fiat.

[26] Leo XIII, "*Officio sanctissimo*," Dec. 22, 1887 *et pluries.*

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§ 3. Eisdem similiter ius est approbandi religionis magistros et libros; itemque, religionis morumque causa, exigendi ut tum magistri tum libri removeantur.

§ 1. The *religious instruction* of the young in all schools is subject to the *authority and inspection of the Church.* This law, it would seem, should need no special stressing, yet it is a sad fact that the Apostolic See had more than once to complain of encroachments on its rights by the civil authorities. Pius IX in his Syllabus proscribed the proposition that the direction of the schools in which the Christian youth are educated, should be entirely withdrawn from the jurisdiction of ecclesiastical authority and given to the civil government. This is a confusion of the sphere of the two societies, Church and State, since religious instruction belongs without a shadow of doubt to the teaching office of the Church by divine right.[27]

§ 2 ascribes to the local Ordinaries the right and duty to watch that in the schools of their territory nothing contrary to faith and morals be taught or done.[28]

There may be a difficulty concerning national or government schools, such as existed in Ireland in the middle of the last century,[29] or as our American public schools, which are under municipal or State authority, entirely withdrawn from the influence of any religious denomination. Here much depends upon the local school board, the directors, and the superintendents, but also upon legislation. Catholic citizens have a powerful weapon in their hands in their vote. The ecclesiastical authorities should prudently draw attention to obnoxious teachers

27 *Syllabus Pii IX*, nn. 45, 47 (Denzinger, nn. 1593, 1595).

28 *Ibid.*, Pius IX, "*Quum non sine*," July 14, 1864; cfr. Math. 28, 19 f.

29 S. C. P. F., April 7, 1680 (*Coll.*, n. 1190).

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and books. The pastors may counteract the bad influence by alertness and the intensified teaching of religion. But all these remedies are insufficient and the necessity of having Catholic schools of our own is imperative.

Of general interest is an instruction of the Holy Office [30] given Aug. 22, 1900, to the bishop of Jassy in Roumenia. There, on account of peculiar circumstances, Catholic schools were permitted to receive schismatic pupils, but only on several conditions, namely: (a) that no danger to faith or morals arise from the practice to the Catholic and schismatic students; (b) that Catholic school boards shall not employ schismatic catechists, though they may permit the schismatics to maintain such at their own expense; (c) that neither Catholic nor schismatic catechists teach the "interdenominational" catechism, *i. e.*, a doctrine which is acceptable to both; (d) that non-Catholics must not be admitted as teachers of metaphysics, ethics, and allied branches; though they may be permitted to teach languages, mathematics, and natural sciences under the supervision of the Catholic schoolboard; (e) that no textbooks, even of profane sciences, written by non-Catholics may be used unless they are known to contain no error, or have been corrected. These rules, as stated, concern only schools governed by Catholic school boards; but they contain some hints which may be applied to our public schools.

§ 3. The local Ordinaries also have the right to *approve the teachers and text-books* of religion and to demand that teachers or books that offend against faith and morals, *be removed.*

The underlying principle is always the same: the teaching of religion belongs to the Church, and the State cannot usurp it without infringing upon a divine right.

30 *Coll. P. F.*, n. 2093.

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SCHOOL INSPECTION BY THE LOCAL ORDINARIES

CAN. 1382

Ordinarii locorum sive ipsi per se sive per alios possunt quoque scholas quaslibet, oratoria, recreatoria, patronatus, etc., in iis quae religiosam et moralem institutionem spectant, visitare; a qua visitatione quorumlibet religiosorum scholae exemptae non sunt, nisi agatur de scholis internis pro professis religionis exemptae.

The local Ordinaries are entitled, either personally or through a delegate, to inspect any school, oratory, asylum,[31] orphanage, etc., in all things concerning religious and moral education. This right of inspection includes the schools of religious with the sole exception of purely internal schools intended for the members of exempt religious institutes.

The Council of Trent vindicated to the bishops the right of visiting all hospitals, colleges, and religious or charitable institutions, except those placed under royal protection.[32] No appeal was or is allowed from this law,[33] but our text, because it concerns schools only, restricts this right of visitation to moral and religious instruction. Our canon covers all schools, elementary, secondary, academic and collegiate, all faculties and universities; none may claim exemption, for the text says: "*quaslibet scholas.*" The reason is because the bishops are the judges in all matters of faith and morals. Theirs is a doctrinal superintendence which they cannot divide with the civil government.

31 *Recreatoria,* from the Italian *ricreatori,* means asylums for the poor or the aged; also conservatories for boys and girls; *patronatus* is generally understood of orphanages, but it may also mean any institution of advowson.

32 Sess. 22, c. 8, *De Ref.*

33 Bened. XIV, "*Ad militantis,*" March 30, 1742, § 31.

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Universities which are under the immediate protection of the Holy See, cannot be canonically visited by bishops, but only by the Sovereign Pontiff or his legitimate representative.[34]

The domestic or internal schools of exempt religious, established for the sole use of professed members, are not subject to episcopal visitation; but all other schools, as well as orphanages,[35] colleges and faculties conducted by these religious, including the scholasticate, may be inspected by the local Ordinary in the points mentioned, and none other.[36]

CAN. 1383

In religiosa alumnorum alicuius collegii institutione servetur praescriptum can. 891.

In regard to the religious training of college students, can. 1383 recalls the rule laid down in can. 891, namely, that the rector should not habitually hear the confessions of the students.

34 S. C. C., Aug. 1, Sept. 1, 1888 (*A. S. S.*, XI, 674 ff.).

35 S. C. EE. et RR., May 14, 1872 (*Coll. P. F.*, n. 1386).

36 Leo XIII, "*Romanos Pontifices*," May 8, 1881.

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TITLE XXIII

THE CENSORSHIP AND PROHIBITION OF BOOKS

RIGHT OF THE CHURCH

CAN. 1384

§ 1. Ecclesiae est ius exigendi ne libros, quos ipsa iudicio suo antea non recognoverit, fideles edant, et a quibusvis editos ex iusta causa prohibendi.

§ 2. Quae sub hoc titulo de libris praescribuntur, publicationibus diariis, periodicis et aliis editis scriptis quibuslibet applicentur, nisi aliud constet.

The Church has the right to demand that the faithful shall not publish books which she has not previously approved by her judgment; she also has the right to forbid for a just reason books published by whomsoever.

The first refers to preventive censorship (*praevia librorum censura*) which touches Catholics only; whereas the second vindicates to the Church the right of prohibiting any and all books which she considers objectionable. The wording of the former clause is rather broad, for it would seem to include all kinds of books, even such on mathematics, agriculture, etc. However this law must be understood in the light of, and by comparison with, the canons of chapter 1, *infra*.

The text says that the Church has the right to censor and forbid books. As to previous censorship there can

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be no doubt, because the faithful, as well as the matter itself, are subject to the authority of the Church, to whom all Catholics owe obedience in whatever refers to their salvation. Nevertheless the censorship has often been made the target of violent attacks. These attacks are unfounded. Paternal as well as political authorities have the *natural right* to ward off anything that may endanger the moral and physical welfare of their subjects, and to protect them against bad surroundings, company, literature, etc., in fact anything that is apt to cause insubordination, anarchy, or moral decay. The Church, being an autonomous society, with subjects for whom she is responsible within her own sphere cannot be destitute of the authority and power which enables her to keep her children uncontaminated and to safeguard them against the danger of perversion. Of all the dangers that imperil man's salvation bad literature is perhaps the most destructive. Hence the right to control the reading of her children cannot be denied the Church even from the purely natural point of vantage. Historical facts amply confirm the necessity of preventive censorship in Church and State.[1]

The Church, by divine right, is the *guardian and teacher of faith and morals,* the shepherd who must lead his sheep upon wholesome pasture and point out the poisonous weeds that endanger their welfare. This office requires repressive and preventive remedies which the Church is certainly allowed to apply in teaching and preserving the deposit of faith. One of these remedies is the censorship of books.[2] This has been *always exercised by the Church,* not indeed to the same extent and in

1 Cfr. the classical work of J. Hilgers, S. J., *Der Index der verbotenen Bücher,* 1904.

2 Hilgers, *l. c.,* p. 15 ff.; see also *The Ave Maria,* Notre Dame, Ind., Jan. 31, 1920, pp. 148 ff.

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the same way, but in various ways and by different methods according to the exigencies of the times.[3] The Apostles frequently warned the faithful against the baneful influence of a too intimate intercourse with the enemies of Christianity either in word or writing.[4] The first express prohibition of a book is that of Arius' *Thalia*, which was forbidden by the Council of Nicaea (325). Then followed the lists, which look like incipient indices, of Popes Innocent I and Gelasius I, in which, besides the authentic books of the Old and New Testament, certain "apocryphal" books are enumerated.[5] Gregory the Great (590–604), Martin I (649–654), and Zachary (741–752) drew up new lists, and the practice was continued in the Middle Ages.

It goes without saying that the *invention of printing* called for more extensive and severer measures. Innocent VIII, Alexander VI, and Leo X commanded printers to submit all books to be printed to the ecclesiastical authorities for approval. An index of forbidden books in the modern sense of the word was that of Paul IV, published in 1559. It was followed by that of 1571, under the pontificate of St. Pius V, and others, which later were made superfluous by the more comprehensive index issued in 1758. This, together with the Constitution "*Sollicita ac provida*" of Benedict XIV (July 9, 1753) remained in force with scarcely any modification until Leo XIII issued his well-known Constitution "*Officiorum ac munerum*," Jan. 25, 1897.

3 Hilgers, pp. 3 ff.; Hurley, *A Commentary on the Present Index Legislation*, 1908, p. 23 ff.

4 I Tim. 6, 20; II Tim. 2, 16; Acts 19, 19.

5 Innocent I, Ep. 6, *ad Excep.*, c. 7 (Migne *P. L.*, 20, 501 f.); Gelasius' decree, see in c. 3, Dist. 16; the authenticity has given rise to doubts (Zahn, *Geschichte des Neutestam. Kanons*, 1890, II, i, 259 f.), which, however, are not borne out by solid critical research.

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This constitution, as such, is now superseded by the Code insofar as it does not agree with the latter. At the same time it is well to remember that the wording, and sometimes even the substance, of the old law will assist us in determining the nature and extension of the new rules.[6]

§ 2 extends the meaning of the term *books* so as to include newspapers and other periodical publications as well as all other published writings, unless the contrary is manifest.[7]

Strictly speaking a *book* is a volume[8] consisting of a number of sheets of paper, now-a-days generally printed, and either bound or stitched together, which treats of one subject in a more or less coherent and systematic manner. It is generally held that a book must have some bulk (*aliqua moles*), that is, it should have at least 160 pages. Our text as well as the Constitution of Leo XIII draw a distinction between books and leaflets, etc. The *unitas objecti* is an essential feature of a book. Magazines, as a rule, do not treat of only one subject and hence, even if they are bound, do not constitute a book in the technical sense. But if a treatise is published in loose numbers (*fasciculi*), so as to form one whole, the term "book" applies to it. As to the manner of publication it must be observed that now-a-days by *book* we generally mean a *printed* volume, when we use the term without any further attribute. But a book need not necessarily be printed to be a book, else the manuscript treatises published before 1600 could not have been prohibited as books. Our text quite consistently applies the general

6 Hurley, *l. c.*, p. 51.

7 This is a decidedly new regulation for which Card. Gasparri could give no quotation.

8 Noldin, *Theol. Moralis*, Vol. II, 1914, n. 701, p. 726 f.

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prohibition to all writings, no matter how published, so they be but *published, i. e.,* made accessible to all. As long as a manuscript or book remains the exclusive private property of the author, it cannot be called *editus.* A printer is not *eo ipso* a publisher (*editor*). An *author* may write a book for his own pleasure and have it printed; as long as he keeps it entirely to himself, it is not "published."

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CHAPTER I

PREVIOUS CENSORSHIP

Previous censorship consists in the submission of a book to the proper authority for inspection, examination, and approval (or rejection). The law binds the author as well as the publisher, placing both under the obligation of submitting an intended publication to the proper authority. If the *imprimatur,* or permission to have the book published, is given, this means not an approval of its contents, but only the judgment of the respective authority that the book may, under present circumstances, be read without detriment to faith or morals.[1]

CAN. 1385

§ 1. Nisi censura ecclesiastica praecesserit, ne edantur etiam a laicis:

1.° Libri sacrarum Scripturarum vel eorundem adnotationes et commentaria;

2.° Libri qui divinas Scripturas, sacram theologiam, historiam ecclesiasticam, ius canonicum, theologiam naturalem, ethicen aliasve huiusmodi religiosas ac morales disciplinas spectant; libri ac libelli precum, devotionis vel doctrinae institutionisque religiosae, moralis, asceticae, mysticae aliique huiusmodi, quamvis ad fovendam pietatem conducere videantur; ac generaliter scripta in quibus aliquid sit quod religionis ac morum honestatis peculiariter intersit;

1 Noldin, *l. c.,* n. 708, p. 734.

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3.° Imagines sacrae quovis modo imprimendae, sive preces adiunctas habeant, sive sine illis edantur.

§ 2. Licentiam edendi libros et imagines de quibus in § 1, dare potest vel loci Ordinarius proprius auctoris, vel Ordinarius loci in quo libri vel imagines publici iuris fiant, vel Ordinarius loci in quo imprimantur, ita tamen ut, si quis ex iis Ordinariis licentiam denegaverit, eam ab alio Ordinario petere auctor nequeat, nisi eundem certiorem fecerit de denegata ab alio licentia.

§ 3. Religiosi vero licentiam quoque sui Superioris maioris antea consequi debent.

This canon first lays down a general rule as to what books must be submitted to ecclesiastical censorship, and then designates the authority competent to grant the imprimatur.

§ 1. The following books, even though published by laymen, must be submitted to ecclesiastical censure:

1.° The *Books of Holy Writ* and annotations to and commentaries on the same.

Hence the *original text* of each and every one of the forty-five books of the Old Testament and the twenty-eight books of the New Testament must be submitted to ecclesiastical censorship. Also parts of the same (*pericopes*) and *translations* or versions, whether old or new. *Old versions* are the Latin Vulgate as well as the Itala, the Oriental versions of the Septuagint, the Syriac, Coptic, and Armenian. *New versions* are those made into modern languages. These translations must be submitted, even if only parts or *pericopes* are to be published, for instance, the Epistles and Gospels for Sundays and holy days. For the text simply says "*libri sacrarum Scripturarum,*" and can. 1384, § 2 finds its application here.

Adnotationes are short explanations or glosses, either

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continuous or partial, such as were made on single words between the lines or in the margin, and are now generally placed at the foot of the page (foot-notes). It does not matter whether these notes are printed separately from, or together with, the text, whether they are original or translated, as our canon simply says, *vel.* Nor are foot-notes on the pericopes exempt from this law.

Commentaries are treatises in the form of annotations or explanations of the books of the Old and New Testament, altogether or severally. What was said concerning annotations also holds with regard to commentaries.

2.° The second paragraph of § 1 mentions three classes of books as subject to ecclesiastical censorship, namely, scientific, devotional, and general, especially,

(a) Books treating of Holy Scripture, sacred theology, Church history, Canon Law, theodicy, ethics, and other religious and moral disciplines.

"Books on *Holy Scripture*" here means the treatises called *introductions,* not works of exegesis proper, for the latter, being in the nature of a commentary, falls under no. 1. Introduction includes hermeneutics and "higher criticism," so-called.[2]

"*Sacred theology*" embraces treatises on dogmatic as well as moral theology, either single tracts, or the whole, written in any language, and published in any form.

"*Church history,*" which is the scientific knowledge of the internal and external development of the Society founded by Jesus Christ, may be written as chronicles or in the form of general accounts, biographies, monographs, etc. It is true that the Church is distinct from the individuals that compose it,[3] but if any individual, for instance, St. Augustine,[4] is treated as the representative of a period

2 Pius X, "*Lamentabili,*" July 4, 1904, prop. 1.

3 Hurley, *l. c.*, p. 209.

4 See Von Hertling's *Augustinus*

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or school of thought, the biography becomes part and parcel of ecclesiastical history. Therefore such a book must be submitted to censorship. The law does not, however, apply to purely secular or political history. The scope, then, or purpose of a book marks the dividing line.

As to *Canon Law,* we all know that this is a distinctly ecclesiastical discipline.

Natural Theology, or Theodicy is that part of philosophy which treats of God and His relations to His creatures from the standpoint of reason unaided by Revelation.

Ethics or moral philosophy, has for its object the moral rectitude of human acts in accordance with the ultimate principles of reason. To this discipline belong books on sociology, unless they are written from the merely economical or political viewpoint.

It would be difficult to explain the phrase, "*other such religious or moral disciplines,*" since the sciences expressly mentioned seem to exhaust the subject. Treatises on Spiritism, hypnotism, astrology (formerly also alchemy) must find a place here because they usually touch religion and morals.

(b) Liable to censorship are furthermore: *large and small prayer-books and devotional, catechetical, moral, ascetical, mystical, and the like books and pamplets, even though* they seem to foster piety. To this class belong Bible histories, missals with vernacular translation, catechisms, lives of Saints, the Imitation of Christ, and similar books.[5] Of a mystic character are "The City of God"

("*Weltgeschichte in Karakterbildern*") Mainz, 1902, without episcopal imprimatur.

[5] S. C. P. F., Jan. 3, 1777 (*Coll.* n. 519); S. Rit. C., Aug. 4, 1877 (*Dec. Auth.*, n. 3427); also the translations of the *Officium Parvum B. M. V.*; S. Rit. C., April 24, 1896, ad 1 (n. 3827).

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by Mary of Agreda, the writings of Anne Catherine Emmerich, St. Catharine of Genoa, and others. Devotion is not always piety and devotional writings require particular vigilance. We may also place in this class all prophesies, private revelations, visions, etc., as well as new devotions of every kind.

(c) The law finally subjects to ecclesiastical censorship "*all writings which contain anything that particularly concerns religion and morals.*" No distinction is made between books, but all are comprised that deal in any way with religion or morality. The phrase "*peculiariter intersit*" must be referred to the manner in which the subject is treated. "*Peculiariter*" is opposed to "*obiter*" or "*perfunctorie.*" The manner of treatment must be measured by the length of the article or treatise. A long treatise would not savor peculiarly of religion or morality, if it contained only one or the other sentence bearing on those subjects.

A question has been raised regarding so-called *temperance leaflets.*[6] We will state our opinion fairly and squarely. If these leaflets advocate absolute prohibition, they should be forbidden, for prohibition is opposed to the natural law and clearly touches ethics. If they are merely intended to promote temperance, such leaflets come under the category of moral writings, because temperance is one of the four cardinal virtues which in the natural order belong to ethics, and in the supernatural order, to moral theology. From every viewpoint, therefore, these leaflets are subject to the censorship of the Church.

3.° *Sacred images,* no matter how printed, and whether with or without prayers, fall under ecclesiastical censor-

6 Cfr. Hurley, *l. c.*, p. 214 f.

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ship. It is evident that only stamped or printed images are intended here, because the text refers only to books or things published in the form of printed matter. But of these all kinds, new and old,[7] are included,— engravings, photographs, chromos, lithographs, etc., etc. Not included are oil or water-colors and statues. If an image belong to the class of printed matter, it is immaterial how customary or unusual it be; for here not the *insolita imago* of can. 1279 is intended, but the image as such, provided, of course, it be *sacred*. Sacred images are all representations of the Blessed Trinity, of our Lord Jesus Christ, of the Blessed Virgin, of the Angels, Saints, and Blessed. Also images which represent a religious mystery, or a sacred scene, or groups of biblical events, or emblems representative of mysteries. The text says it matters not whether such images are printed with or without prayers. If a prayer is added, either at the bottom or on the back, the picture also falls under no. 2 of our canon.

§ 2 and § 3. The permission to publish books and images mentioned in § 1 may be granted by the local Ordinary of the author, or by the local Ordinary of the place of publication, or, finally, by the local Ordinary of the place where the books, etc., are printed. However, if any one of these Ordinaries refuses the *imprimatur*, the author is not allowed to ask it of another, unless the latter has been informed of the refusal.

Religious must obtain the permission of their superiors before applying for the episcopal imprimatur.

7 The text does not contain the adjective "*novae*" found in the "*Officiorum ac munerum*," n. 15; hence Vermeersch's view that new designs only must be submitted (*Comm.*, n. 20), no longer holds. Not included are *medals*, because these are not printed, but struck; see Vermeersch, *l. c.*

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Our text is wider than that of the Leonine constitution [8] in admitting three Ordinaries as competent to give the imprimatur. It is also more liberal in regard to Bible editions, as will be seen under can. 1391. The local *Ordinary* of course is the bishop or the vicar-general, or whoever goes by that name. Since superiors of exempt religious are not local Ordinaries in the meaning of the Code, it would be evident, even if it were not mentioned in § 3, that such religious are not exempt from the obligation of asking the imprimatur of the diocesan bishop; but they may do so through their publisher or printer.

If the local Ordinary himself wishes to publish a book, he needs no imprimatur, even though the book were printed and published outside of his diocese.[9] The reason is that the author's Ordinary may give the *imprimatur,* who, in our case, is the author himself.

Which of the three Ordinaries mentioned should be asked to give the imprimatur is left to the judgment of the author. But in order to prevent deception and to uphold ecclesiastical authority, it is required that in case one of the three Ordinaries has refused the imprimatur, this fact must be stated to the other who is asked for the imprimatur. The latter will probably demand the reasons for the refusal either from the refusing Ordinary or from the author.

Religious, exempt as well as non-exempt, also need the permission of their superiors, who ought to subject every book that is to be published to an examination by competent scholars.[10]

8 "*Officiorum ac munerum,*" nn. 7, 35.

9 Formerly, as Noldin states (l. c., n. 710), an Ordinary needed the *imprimatur* of another Ordinary if his book was published outside his own diocese.

10 *Trid.*, Sess. 4, *De Editione et Usu SS. Librorum;* the superiors may abide by the verdict of the censors.

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Whether rule 37 of the "Officiorum ac munerum" still holds, may well be doubted. This rule prescribed that if an author residing in Rome wished to have a book printed elsewhere than in the City, he needed only the approval of the Cardinal Vicar and the Master of the Sacred Palace. This rule rather restricts liberty and is not in accord with § 2 of can. 1385. Therefore we hardly believe that one would be obliged to abide by it, unless a local custom or written particular law would be superadded to said § 2.

OBLIGATIONS OF CLERICS AND LAYMEN

CAN. 1386

§ 1. Vetantur clerici saeculares sine consensu suorum Ordinariorum, religiosi vero sine licentia sui Superioris maioris et Ordinarii loci, libros quoque, qui de rebus profanis tractent, edere, et in diariis, foliis vel libellis periodicis scribere vel eadem moderari.

§ 2. In diariis vero, foliis vel libellis periodicis qui religionem catholicam aut bonos mores impetere solent, nec laici catholici quidpiam conscribant, nisi iusta ac rationabili causa suadente, ab Ordinario loci probata.

§ 1. The secular clergy without the consent of their Ordinary, and religious without the permission of their higher superior and of the local Ordinary, are forbidden to publish books on secular subjects and to write for newspapers or other periodicals, publications, or to act as editors of such. The *consent* of the Ordinary is here clearly distinct from censorship proper, which requires a scientific examination, whereas the consent only means a judgment connected with the manifestation of an act

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of the will. However this does not take away from the bishop the right of demanding specimen copies of a publication or the title thereof; nor does it prevent the bishop from refusing his consent if he thinks the author or editor incapable of treating the subject correctly and creditably.

This consent is required even for literary products of a purely worldly or technical character, no science or topic being excepted.[11] The reason is given in the above-mentioned Constitution of Leo XIII, to wit, "to give an example of ready obedience." Prompt submission is also required in two other cases; viz.: when clerics wish to contribute to periodic publications or if they desire to act as managers or editors of such publications as *diaria, folia, libelli periodici. Diaria* are newspapers, daily, weekly, or biweekly. *Folia* are publications published more or less irregularly, of undetermined size or number of pages, be they leaflets or brochures. *Libelli periodici* are quarterly, monthly, fortnightly, weekly, etc., magazines or reviews.

To write for such publications, therefore, the secular clergy need the permission of the bishop to whom they are subject, regardless of where the paper or magazine is printed or published. For the text simply says, "*suorum,*" which refers to the clergy, not to the publication. If we say, "to *whom they are subject,*" we mean habitually or legally, by virtue of incardination. Therefore a clergyman on his vacation, who wishes to contribute to a periodical publication, must obtain permission from his own bishop, not from the Ordinary in whose diocese he is sojourning.[12]

11 S. C. pro Negot. Eccl. Extraord., June 27, 1902, n. 3 (*Anal. Eccl.*, X, 73).

12 The local Ordinary of religious is the bishop in whose diocese their house is located; but we believe that

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The question naturally arises whether clergymen and religious need the simple or double permission for *each and every article* they contribute to any periodic publication. From former legislation it would seem that regular correspondence or contributions are intended. Such at least is the tenor of the "*Sacrorum Antistitum,*" of Sept. 1, 1910, from which our text is evidently taken: "*Ad sacerdotes quod attinet, qui correspondentium vel collaboratorum nomine vulgo veniunt,* etc." We would not press the term "*scribere*" in our text, though this, too, would seem to involve habitual writing. Hence we hardly believe that a brief occasional article would need episcopal consent. To say that the publication of a notice of a church festival, or parish event, or funeral required the special consent of the Ordinary or religious superior, would render the law ridiculous. On the other hand, a treatise or an elaborate article on any important subject, especially if it touches faith and morals, or ecclesiastical discipline, no doubt falls under the law. Also any important manuscript which religious would like to publish. Nor may religious with either simple or solemn vows publish their writings anonymously or under an assumed name, even with the local Ordinary's permission, if their superior has refused to give his imprimatur.[13]

It may be added that *female religious,* too, must abide by this law.

"*Eadem moderari,*" to direct or manage periodical publications, also requires a double permission for religious, and the permission of the ordinary for secular clerics. This prohibition concerns the management or directorship of all newspapers, pamphlets, and periodicals without ex-

the local Ordinary of any diocese in which a religious lives for some time, may give the required permission, especially in the case of exempt religious.

13 Hurley, *l. c.*, p. 228.

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ception. The canon here is somewhat stricter, at least in its wording, than the old law, but more logical and consistent.

Are *college papers* included? The text does not make a distinction, and hence they, too, need the permission of the local Ordinary in whose diocese the board of managers live, and of the religious superior, if religious are on the board of directors. But if lay students constitute the board, they need no permission from the local Ordinary. Female religious, however, do, no matter how pious the title of their magazine may sound.

What *if the Ordinary refuses* to consent to the publication of a book treating of secular matters only? In that case the author would do well to abide by the bishop's decision, provided there is no reason to assume personal spite. He may, however, demand the reason of the refusal. For although the Holy Office does not need to state its reasons, this prerogative cannot be extended to the bishops, and the S. Congregation of the Index decided that bishops must give their reasons for refusing the imprimatur in case a book is susceptible to correction.[14]

The author has another expedient, namely that offered in can. 1385, § 2; which allows him to seek another publisher or printer. In doing so an author would only be claiming a natural right.

§ 2. Not even *Catholic laymen* — much less clergymen and religious — may write for newspapers, pamphlets or other periodical publications which are accustomed to at-

14 S. C. Ind., Sept. 3, 1898, quoted by Hurley, who, in a circuitous way, concludes that the bishop is not bound to state the reasons (*l. c.*, p. 200, 224 f.); if he is bound to give his reasons in matters of faith and morals, he is surely also obliged to state his reasons for refusing to permit the publication of books of a profane nature; the contrary opinion is frivolous and unworthy of the episcopal office.

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tack the Catholic faith or good morals. An exception to this rule may be made only for a just and valid reason, acknowledged to be such by the local Ordinary.

The publications to which even Catholic laymen should not contribute by way of correspondence or collaboration have been named above. Here a special class is singled out which is distinguished by its wicked purpose, *i. e.*, those which habitually attack the Catholic faith or good morals. Is our so-called *yellow press* included in this class of publications? It would be difficult to give a positive answer to this question. For we cannot say that they make it a practice to attack the Catholic faith, though, on the other hand, their scandalous reports on suicides, divorces, etc., are anything but favorable to good morals. Yet as these reports are not strictly attacks on morality, the solution depends on the general tendency of these publications. We think it must be admitted that regular contributions from Catholic pens might promote the sale of an objectionable paper and thereby further religious indifferentism. The law expressly permits extraordinary or occasional contributions for solid reasons. Thus, for instance, if a prelate or prominent priest is interviewed on an important public question, it might be permissible, nay even desirable, that he explain the Catholic position. Again a correction, or the defence of Catholic teaching against an attack might prove useful for the reason that it would reach parties which a Catholic paper could not reach.

VARIOUS EXCEPTIONS

CAN. 1387

Quae ad causas beatificationum et canonizationum Servorum Dei quoquo modo pertinent, sine licentia Sacrorum Rituum Congregationis edi nequeunt.

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CAN. 1388

§ 1. Indulgentiarum libri omnes, summaria, libelli, folia, etc., in quibus earum concessiones continentur, ne edantur sine licentia Ordinarii loci.

§ 2. Requiritur vero expressa licentia Sedis Apostolicae ut typis edere liceat, quovis idiomate, tum collectionem authenticam precum piorumque operum quibus Sedes Apostolica indulgentias annexuit, tum elenchum indulgentiarum apostolicarum, tum summarium indulgentiarum vel antea collectum, sed nunquam approbatum, vel nunc primum ex diversis concessionibus colligendum.

CAN. 1389

Collectiones decretorum Romanarum Congregationum rursus edi nequeunt, nisi impetrata prius licentia et servatis conditionibus a Moderatoribus uniuscuiusque Congregationis praescriptis.

CAN. 1390

In edendis libris liturgicis eorumque partibus, itemque litaniis a Sancta Sede approbatis, debet de concordantia cum editionibus approbatis constare ex attestatione Ordinarii loci in quo imprimuntur aut publici iuris fiunt.

Matters pertaining to the *canonization and beatification* of servants of God may not be published without the permission of the S. Congregation of Rites. Urban VIII already ordered that the lives, deeds, and miracles of the venerable servants of God should not be published without the approval of the Ordinary, who had to report each

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case to the Apostolic See, *i. e.,* the S. Congregation of Rites, in order that frauds, mistakes, and novelties might be avoided.[15]

Can. 1388 refers to books, summaries, booklets, leaflets, etc., containing *grants of indulgences.* These may not be published without the permission of the local Ordinary. The express permission of the *Holy See* is required for publishing, in any language, *authentic collections of prayers and good works* enriched with indulgences by the Apostolic See. The same express permission is required for publishing lists of papal indulgences, and summaries of indulgences, either already collected but not yet approved, or to be made from various grants. Concerning this we refer to can. 919, § 2.

Can. 1389 demands the permission of the respective officials for the republication of *collections of the various Roman Congregations.* If such permission is granted, the conditions laid down by the heads of the respective congregations must be faithfully complied with. What those conditions are is not explicitly stated. One of them is that the original text must be reproduced *ad literam.* Another one undoubtedly will be that a copy of the reprint shall be forwarded to the Cardinal Prefect or Secretary of the respective Congregation, provided permission for *republication* is given.

Notice the phrase, "*rursus edi*"; it supposes that a collection has already been made and published, as those of the S. Rit. C. and the Propaganda.

Can. 1390 concerns the *publication of liturgical books,* or parts thereof, and litanies approved by the Holy See. Reprints of these must agree with the approved text, and the Ordinary of the place where they are printed or pub-

15 "*Coelestis Hierusalem,*" July 5, 1634, § 1; S. Rit. C., July 31, 1821 (n. 2617).

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lished must testify to such conformity. Of this enough has been said under canons 1257, 1259, and 1264.

BIBLE VERSIONS

CAN. 1391

Versiones sacrarum Scripturarum in linguam vernaculam typis imprimi nequeunt, nisi sint a Sede Apostolica probatae, aut nisi edantur sub vigilantia Episcoporum et cum adnotationibus praecipue excerptis ex sanctis Ecclesiae Patribus atque ex doctis catholicisque scriptoribus.

Translations of Holy Scripture into the vernacular may not be printed, unless they are approved by the Apostolic See or published under the supervision of the bishops, and are provided with notes taken chiefly from the Holy Fathers and learned and orthodox writers.

By Holy Scripture here is understood the text of the Old and New Testament. The plural seems to indicate that parts of Holy Writ are also intended. Hence even a portion of the Old Testament, say the Law, the Prophets and Ketubim, separately taken, fall under this rule; also the Gospels and the Epistles of St. Paul, when translated into the *vernacular*. Old versions, like the Syriac and Latin, which cannot be called vernacular in the proper sense, are excluded. But Arabic, English, French, German, Indian, Italian, Spanish, and the modern Slavic languages, also Chinese and Japanese, are vernacular, and translations of the Bible or any part thereof into any of these languages fall under the present canon, no matter whether the translators are Catholics or non-Catholics.

The *approving authority* is twofold: the Apostolic See and the bishop, the latter under certain conditions only.

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(a) The *Holy See* may approve any versions with or without notes; it may even — which is, however, not likely to occur — approve translations made by non-Catholics;

(b) The bishop may approve any translation made under his supervision. "*Vigilantia episcoporum*" here has a special meaning, namely, that the translation must be carefully compared with the original text approved by the Church, or, at least, must substantially agree with a translation already approved.

Of course, a difficulty may arise from the fact that, with the exception of the Latin Vulgate, there is no approved original text,— the Greek text, and much more so the Hebrew-Massoretic text, being subject to many variants. The episcopal censor, therefore, had better keep to the Latin text, but he may make use of the original in doubtful cases. The translator as well as the censor must keep in mind the following canon, 1392.

But supervision is not enough; notes are also required. These notes should be taken from two sources, the writings of the Fathers and learned Catholic authors. The period of the "*Fathers,*" as is generally assumed, ends with the death of Isidore of Seville, A. D. 636. After that time we speak of Catholic writers. The prescribed annotations may be taken from the original works of the "Fathers" or from the current "Catenae," so they be but genuine. The Catholic authors here intended are not only those of the Scholastic period, but also of modern times, provided only they be really Catholic and learned. Purely mystic or devotional writings, where the allegorical sense of the text is unduly emphasized, should be entirely discarded, or at least used sparingly.

Our text employs a term which is not to be found in

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Pope Leo's Constitution; it is the word *praecipue*, signifying that the notes should be taken *chiefly* from Catholic authors. This seems to imply that non-Catholic writers need not be entirely neglected. The historical and archaeological explanations and the critical readings of non-Catholic scholars may therefore find a place in the translations approved by the bishops.

WHEN A NEW APPROBATION IS DEMANDED

CAN. 1392

§ 1. Approbatio textus originalis alicuius operis, neque eiusdem in aliam linguam translationibus neque aliis editionibus suffragatur; quare et translationes et novae editiones operis approbati nova approbatione communiri debent.

§ 2. Excerpta e periodicis capita seorsim edita novae editiones non censentur nec proinde nova approbatione indigent.

§ 1. The approbation of the original text of a work does not imply approbation of translations into other languages or of new editions; therefore translations as well as new editions of a work already approved need a new approbation. Thus, for instance, a translation of the Little Office of the B. M. V. into the vernacular needs a new approbation every time it is republished. The Ordinary may grant this approbation if the text agrees with that approved by the Church, which agreement is left to the conscientious judgment of the bishop[16] to determine. The same rule applies to translations of the Roman Missal.[17]

16 S. Rit. C., Sept. 4, 1875 (n. 3373).

17 S. Rit. C., Aug. 4, 1877 (n. 3427).

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One remark must, however, be added. Our text speaks of *editions* and translations. From this it must be concluded that mere *reprints,* either phototyped or lineotyped, accurately reproduced, require no new approbation. For it is evident that the purpose of the law is to prevent fraud or corruption of the original text.

§ 2. Extracts or *excerpts* from periodicals, published separately, are not new editions and therefore require no new approbation.[18] If these so-called reprints (in French *tirages à part*) cover a series of articles and develop into a book and are published in book form, do they require ecclesiastical approbation? We believe with Noldin[19] that they do, for the reason that the text mentions only *excerpta capita,* single extracts or chapters. Besides, there is always danger that such a reprinted book may contain substantial changes from the original text as published in the periodical.

Reprints of single articles, or, if the same subject was treated in two or three issues of a periodical, of several articles forming one chapter or treatise, need no new approbation.

DIOCESAN CENSORS

CAN. 1393

§ 1. In universis Curiis episcopalibus censores ex officio adsint, qui edenda cognoscant.

§ 2. Examinatores in suo obeundo officio, omni personarum acceptione deposita, tantummodo prae oculis habeant Ecclesiae dogmata et communem catholicorum doctrinam quae Conciliorum generalium decretis aut Sedis Apostolicae constitutionibus seu praescri-

18 S. C. Ind., May 23, 1898, ad 3 (*Coll. P. F.*, n. 2000).

19 *De Praeceptis,* 1914, ed. 11, n. 706, p. 732 f.

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ptionibus atque probatorum doctorum consensu continetur.

§ 3. Censores ex utroque clero eligantur aetate, eruditione, prudentia commendati, qui in doctrinis probandis improbandisque medio tutoque itinere eant.

§ 4. Censor sententiam scripto dare debet. Quae si faverit, Ordinarius potestatem edendi faciat, cui tamen praeponatur censoris iudicium, inscripto eius nomine. Extraordinariis tantum in adiunctis ac perquam raro, prudenti Ordinarii arbitrio, censoris mentio omitti poterit.

§ 5. Auctoribus censoris nomen pateat nunquam, antequam hic faventem sententiam ediderit.

These rules are chiefly taken from the Motu proprio of Pius X, "*Sacrorum Antistitum,*" of Sept. 1, 1910, which was directed against Modernism.[20] They are:

§ 1. *Every diocese must have officially appointed censors,* for the examination of writings that are to be published. *Ex officio* means that there should be a regular censor, not merely one chosen for an emergency. The diocesan censors should be mentioned in the Catholic Directory.

§ 2. The *examiners* in discharging their office, should set aside all human respect and guide themselves solely by the dogmatic teaching of the Church as contained in the decrees of the general councils, in papal constitutions and decisions, and in the consent of approved doctors. This does not mean, however, that any opinion or system tolerated by the Church is to be condemned if it does not fit in with the views of the censor.

20 Of course, these rules are not entirely new, having been to a great extent, embodied in former documents like that of Clement VIII on the Index, Benedict XIV, "*Sollicita ac provida,*" July 8, 1753, etc., see Hilgers, *l. c.*, p. 12, p. 59 f.; p. 535 ff.; *A. Ap. S.*, II, 661.

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§ 3. The censors should be taken from *both the secular and the regular clergy,* and be men of mature age, distinguished by learning and prudence, who can safely keep the golden mean in approving or rejecting doctrines.

§ 4. The censor must give his verdict in *writing.* If the verdict is favorable, the Ordinary shall give his permission to publish (*i. e.,* the *imprimatur*), which must be preceded by the censor's verdict (the "*Nihil obstat*") and his signature. Only in very rare cases and under extraordinary circumstances, if the Ordinary deems it prudent, may the name of the censor be omitted.

§ 5. The censor's name must not be made known to authors before he has given a favorable opinion. This rule clearly presupposes that more than one censor is appointed in each diocese, as § 1 insinuates by using the plural number (*censores*).

We may quote here a remark taken from the "*Sacrorum antistitum,*" namely, that the title of censor has no juridical or canonical value and contributes no weight to the private opinion of the official entrusted with this duty. Therefore if the censor makes a mistake the author has no guaranty in the "*Nihil obstat*" that his book will not be put on the index.

THE IMPRIMATUR MUST BE GIVEN IN WRITING

CAN. 1394

§ 1. Licentia, qua Ordinarius potestatem edendi facit, in scriptis concedatur, in principio aut in fine libri, folii vel imaginis imprimenda, expresso nomine concedentis itemque loco et tempore concessionis.

§ 2. Si vero licentia deneganda videatur, roganti auctori, nisi gravis causa aliud exigat, rationes indicentur.

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§ 1. The imprimatur should be given in writing and be placed either in the beginning or at the end of the book, leaflet or image, together with the name of the grantor, and the place and date of the grant. It is strongly advisable to print the year of publication on the title page,— a practice which is neglected by some, especially English, publishers.

§ 2. If the imprimatur is denied, the reasons should be given to the author upon demand, unless a weighty motive counsels the contrary. (See can. 1386.)

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CHAPTER II

THE PROHIBITION OF BOOKS

Whilst previous censorship chiefly affects authors, and the faithful at large only indirectly, this second chapter is directly intended to safeguard the faith and morals of all Christians. We purposely say *all Christians,* not merely Catholics, because morality is something universal and common to all who believe in Christ. Of course, the legislator does not concern himself with those outside the Church; but Christians of all denominations ought to be grateful for this directive norm, which, as law, binds all Catholics. The censorship with which we now deal is called *repressiva,* because it aims at suppressing bad literature.[1]

WHO HAS THE POWER TO FORBID BOOKS

CAN. 1395

§ 1. Ius et officium libros ex iusta causa prohibendi competit non solum supremae auctoritati ecclesiasticae pro universa Ecclesia, sed pro suis subditis Conciliis quoque particularibus et locorum Ordinariis.

§ 2. Ab hac prohibitione datur ad Sanctam Sedem recursus, non tamen in suspensivo.

3. Etiam Abbas monasterii sui iuris et supremus religionis clericalis exemptae Moderator, cum suo Capitulo vel Consilio, potest libros ex iusta causa suis

1 S. C. Ind., Aug. 24, 1864 (*Coll. P. F.*, n. 1264).

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subditis prohibere; idemque, si periculum sit in mora, possunt alii Superiores maiores cum proprio Consilio, ea tamen lege ut rem quantocius deferant ad supremum Moderatorem.

§ 1. The right and duty to forbid books for a just cause belongs to the supreme ecclesiastical authority for the whole Church, and to particular councils and local Ordinaries for their respective subjects.

§ 2. Recourse from this prohibition may be had to the Apostolic See, but only *in devolutivo*.

The act of forbidding books is an exercise of jurisdiction, part of which is the teaching office of the Church, which belongs to those who are judges in matters of faith and morals. The supreme authority of the Church exercises its influence over the entire Church, whilst the bishops exercise theirs only over those who are subject to them. Therefore the text properly says: "*pro suis subditis.*" From this we naturally conclude that *exempt religious* are not *juridically* bound to obey the episcopal injunction, that is to say, no penalty can be pronounced against them for not observing the Ordinary's edict. Morally they may be obliged to abide by the bishop's order because of scandal or the danger of weakening the episcopal authority, especially among laymen.[2]

If a *particular council* forbids a book, are the exempt religious living within its jurisdiction obliged to heed that prohibition? If the council is a diocesan synod, the exempt religious are not obliged to obey, since the sole legislator is the local Ordinary, to whom they are not subject. If, however, a provincial or plenary council is understood, its decrees, we believe, are binding on the whole territory,

2 Thus Vermeersch, *De Prohibitione et Censura Librorum*, n. 12 (ed. 1); Noldin, *De Praeceptis*, ed. 11, n. 704, p. 729.

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especially if they are approved by Rome, and therefore also oblige exempt religious.[3]

§ 2 admits *recourse,* not appeal, to the Holy See, but such recourse has no suspensive character. Therefore the prohibition remains in force until the Apostolic See decides otherwise.

§ 3. *Abbots of autonomous monasteries* and the *superiors general* of exempt clerical institutes also may, for just reasons, forbid books to their subjects; but they must proceed together with their chapter or consultors. There is a juridical difficulty in this clause, because, as said above, the act of forbidding books rests on jurisdiction. This text is entirely new, and seems strange, as these superiors are not ordinarily considered to be judges in matters of faith.[4] Yet it is only the logical consequence of § 1, because the local Ordinaries have no jurisdiction over exempt religious. Therefore the reason advanced by the S. C. of the Index for extending the authority to forbid books to local Ordinaries and delegates of the Apostolic See — which extension is now antiquated — may be here applied. The "*pravorum librorum colluvies,*" the flood of perverse literature which is daily increasing in volume, clearly made it imperative to act promptly and efficaciously for the protection of the faithful, and this could be accomplished only by instructing the domestic authorities to stop the danger at the very beginning and, as it were, on the spot.[5]

Whether the chapter or the counsellors have a decisive, or merely an advisory vote, is not explicitly stated in the

3 This seems to follow from can. 291, § 2, because such decrees would affect also religious, and we hardly believe that exemption could be claimed in this case, although we readily grant that can. 291, § 2 only mentions territorial, not personal, obligation.

4 Can. 501, § 2.

5 S. C. Ind., Aug. 24, 1864 (*Coll. P. F.*, n. 1261).

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text. This would seem to be a matter for the Constitutions to decide. To us it appears that a decisive vote is intended, to be given at the regular meeting, for the matter is of great importance. If there is a regular chapter, such as an independent monastery generally has, it is not enough that the abbot call the consultors; he must convene the chapter. *Capitulum* refers to the abbot of an autonomous monastery, *consilium* to the superior general.

The text continues: "If delay should be dangerous, the *other higher superiors* may, with the coöperation of their counsellors, also forbid books, but they are obliged to report the matter immediately to the superior general." The *alii superiores maiores* here intended are the provincials, etc., as explained under can. 488, n. 8. However, note the difference between the first and the second clause. The sentence of the abbots and superiors general is final and no further report is required, whereas that of inferior superiors is only provisional and requires the sanction of the superior general.

The reader may perhaps inquire whether the second clause applies to *female congregations*. No, because they lack a fundamental condition, *viz.*, jurisdiction. But we do not mean to say that a superioress would not be entitled to forbid a book to one of her religious, for this would be an exercise of domestic authority. But she could not forbid it to all as dangerous to faith and morals. Her prohibition would be a merely precautionary measure, and she would have to act according to can. 1397, § 1.

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BOOKS FORBIDDEN BY THE APOSTOLIC SEE

CAN. 1396

Libri ab Apostolica Sede damnati ubique locorum et in quodcunque vertantur idioma prohibiti censeantur.

Books condemned by the Apostolic See must be considered as forbidden everywhere and in whatsoever language they may be translated.

The term "*Apostolic See*" comprises the Sovereign Pontiff as well as the S. Congregations, especially those directly concerned with the proscription of books.

(a) The *Pope* himself may forbid a book either by an "Apostolic letter," or without such a letter. There are on record four examples of books forbidden by Apostolic letter and without the coöperation of any congregation.[6]

(b) The *Holy Office* has issued about 900 decrees forbidding books from 1600 to 1900.[7] To this congregation our Code (can. 247, § 4) has affiliated the famous Congregation of the Index, which has the special duty of examining and prohibiting books.

(c) Other Congregations whose decrees figure in the new Index are that of *S. Rites* and that of *Indulgences* (the latter now incorporated with the S. Poenitentiaria). Besides, all other S. Congregations may take cognizance of and condemn books having special reference to their respective departments.[8]

As to the authority of the decisions rendered in regard to books the following may safely be stated:

The decisions given either by the Pope himself, or by

6 Cfr. Hilgers, *l. c.*, p. 89; Genovesi, Langeois des Chatellier, De Potter, Siegwart Müller.

7 *Ibid.*, p. 88.

8 *Ibid.*, p. 89.

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a congregation of the Roman Court *do not, per se, contain a dogmatic or an ex cathedra definition, i. e.,* an infallible verdict as to the doctrine defended or proposed in the forbidden book. It goes without saying that the Pope *may* issue a decree condemning a book with infallible authority, but in that case his intention must be apparent from the wording of the decree. The Thursday sessions of the Holy Office, on account of the personal presence of the Sovereign Pontiff, are regarded as more weighty than the others; but even the decrees issued at these sessions cannot be called infallible or irreformable.[9]

It need not be added that these decisions must be received with the greatest respect and obedience and with internal as well as external submission.

Our canon says that the books condemned by the Apostolic See must be considered forbidden *everywhere.* The reason is because the Holy See is the supreme tribunal in matters of faith and morals. Books of purely local interest usually are left to the local Ordinaries. This also explains why *translations* of forbidden books are also forbidden, for the difference of language is merely accidental. The poison is the same, although the channel may differ.

THE OBLIGATION OF DENOUNCING BOOKS

CAN. 1397

§ 1. Omnium fidelium est, maxime clericorum et in dignitate ecclesiastica constitutorum eorumque qui doctrina praecellant, libros quos perniciosos iudicaverint, ad locorum Ordinarios aut ad Apostolicam Sedem deferre; id autem peculiari titulo pertinet ad Legatos

[9] *Ibid.,* p. 74 f.; p. 88.

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Sanctae Sedis, locorum Ordinarios, atque Rectores Universitatum catholicarum.

§ 2. Expedit ut in pravorum librorum denuntiatione non solum libri inscriptio indicetur, sed etiam, quantum fieri potest, causae exponantur cur liber prohibendus existimetur.

§ 3. Iis ad quos denuntiatio defertur, sanctum esto denuntiantium nomina secreta servare.

§ 4. Locorum Ordinarii per se aut, ubi opus fuerit, per sacerdotes idoneos vigilent in libros, qui in proprio territorio edantur aut venales prostent.

§ 5. Libros qui subtilius examen exigant vel de quibus ad salutarem effectum consequendum supremae auctoritatis sententia requiri videatur, ad Apostolicae Sedis iudicium Ordinarii deferant.

Denunciation savors of sycophancy, yet it may become an official duty. A prosecuting attorney, for instance, has to denounce crimes and criminals. Every society which cares for the observance of its laws must have custodians and guardians of the public welfare. Protestant sects promoted sycophancy by giving part of the fine imposed upon the guilty to their denouncers.[10] The Catholic Church does not hold out any material gain, but imposes a strict obligation on all concerned. However, there is a gradation of duty in regard to denouncing. Those who are bound *ex officio, i. e.,* the official guardians and judges in matters of faith and morals, are obliged *in justice* to denounce transgressors. The obligation is grave, as a rule, when the matter is serious, and the damage resulting from negligence would be great. Ordinary *Christians* on the other hand are as a rule bound to make

10 Cfr. Hilgers, *l. c.* pp. 70, 270 (in "free" Switzerland denunciation flourished), p. 304 (Hungary) and elsewhere, for inst., the Netherlands.

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denunciation only when the matter is very important, as when a book causes great injury to faith and morals, or if a positive law imposes denunciation. Besides, it is evident that less educated persons are as a rule exempt from the obligation of denouncing books, unless their conscience raises an irresistible scruple, in which case they may refer the matter to the confessor. But cultured Catholics who move in the higher circles of society most certainly are bound to perform this duty. It is a natural duty enforced by positive law.[11] Hence our canon rules:

1. That it is the duty of all the faithful, especially of *clergymen, ecclesiastical dignitaries* and persons distinguished by learning to denounce books which they deem pernicious, to the local Ordinaries or to the Apostolic See. More especially is this duty incumbent on *papal legates, local Ordinaries,* and the *rectors of Catholic universities.* The last named organizations in the Middle Ages always were conspicuous for their zeal in maintaining orthodoxy, as is proved by their statutes, which forbade the professors as well as librarians to publish or sell manuscripts that had not been corrected and examined by the faculty.[12] Now-a-days, too, on account of the number of students as well as by reason of extensive literary acquisitions and communications, the Catholic universities are favorably situated for watching scientific productions.

2. When denouncing a book it is expedient that *not only the title of the book* be indicated, but also the *objectionable passages be singled out* which call for a prohibition. Such coöperation facilitates the work of the consultors and censors, who are usually overburdened, and, besides, guarantees the acumen and sincerity of the denouncing person.

11 Cfr. "*Officiorum ac munerum,*" n. 27 ff.
12 Hilgers, *l. c.,* p. 404.

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3. Those who receive the denunciation, *i. e.*, usually the officials of either the Roman or the diocesan court, are strictly bound to keep the *name of the denouncer secret.* This is a grievous obligation, enhanced for the officials of the Sant' Uffizio by their sacred oath. The Secretary of the S. Congregation, however, is authorized to communicate to the author the objections made to his book, but he may not divulge the name of the denouncer or censor.[13]

4. The local Ordinaries, either personally, or, if necessary, through capable priests, should watch the books that are published and sold in their territory. This was the duty of the so-called *vigilance commissions* prescribed by Pius X against the Modernists.[14] Although the Code does not enforce this law, the Holy Office has decided that it remains in force until the Apostolic See orders differently.[15]

The members of the diocesan vigilance commission may perform their duty at regular sessions, to be held every other month, or by written communication.[16] It is clear that an effective control can be exercised only over *Catholic* firms, who may be deprived of their title of Catholic book-sellers if they refuse to obey episcopal orders. Even if a book has the *imprimatur,* but is proved to be infected with modernism, it must be withdrawn from sale or exhibition.[17] Priests, especially pastors and confessors, should watch over the reading of the faithful, particularly over circulating libraries and also public libraries. Much can be accomplished by prudent vigi-

13 Benedict XIV, "*Sollicita ac provida*," July 9, 1753, § 12.

14 "*Sacrorum Antistitum*," Sept. 1, 1910 (*A. Ap. S.*, II, 664).

15 S. O., March 22, 1918 (*A. Ap. S.*, X, 136).

16 S. C. Consist., Sept. 25, 1910, ad II, III (*A. Ap. S.*, II, 740 f.).

17 "*Sacrorum Antistitum*," n. III (*A. Ap. S.*, II, 660).

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lance in keeping these institutions free from objectionable books.

5. Books which require a more thorough examination or call for the judgment of the supreme tribunal, should be referred to the Holy See by the Ordinaries — by all Ordinaries, not only the diocesan bishops. Sometimes the matter at issue may not be delicate or difficult, but the author's name and reputation require an emphatic and more solemn sentence, to produce the desired effect.

THE EFFECTS OF PROHIBITION

CAN. 1398

§ 1. Prohibitio librorum id efficit ut liber sine debita licentia nec edi, nec legi, nec vendi, nec retineri, nec in aliam linguam verti, nec ullo modo cum aliis communicari possit.

§ 2. Liber quoquo modo prohibitus rursus in lucem edi nequit, nisi, factis correctionibus, licentiam is dederit qui librum prohibuerat eiusve Superior vel successor.

§ 1. The prohibition of books has this effect that a forbidden book may not be published, nor read, nor kept, nor sold, nor translated into another language, nor communicated to others in any way.

The term *edere* (to publish) concerns the author, the editor, and the printer: the *author* of the book is forbidden to have it printed and published; the *editor* may not sell it, and the *printer* may not print and bind it, either personally or through others. Accessory helpers and remote coöperators are hardly affected, as otherwise there would be an indefinite number of persons included.

Reading a book means the operation by which the

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contents of a book are conveyed to the mind through the senses of vision or hearing. If one would employ another to read a forbidden book to him, he would certainly read it himself and would incur the penalty of the law.[18]

To *keep a book* (*retinere*) means to possess it permanently as one's personal property or to have it in one's possession temporarily or transiently so as to be able to make free use of it. Librarians are not said to keep, but rather to guard the books entrusted to their care. The length of time is immaterial, but must amount to a somewhat protracted action, as the reduplicative particle *re* indicates.

Books may be *sold* in stores or at auction, at wholesale or retail, of which more under can. 1404.

What *translations* are is generally known. Here we will only observe that it does not matter whether the objectionable passages or parts of a forbidden book are omitted or explained in the translation; as long as the original text is forbidden, the translation is also forbidden, unless expressly approved.

Communicare aliis means to loan a book to others or to exchange it for another. It may also imply making the contents known to others. In this latter sense the reading of a forbidden book to others, for instance, by a teacher to his pupils, is forbidden.[19]

18 To read a book means to assimilate a considerable part thereof (Vermeersch, *l. c.*, n. 32, n. 11); the opinion of St. Alphonsus, referred to by Noldin (*l. c.*, n. 702, p. 728), and opposed to what we say in the text, is contrary to Reg. Iuris 72 in 6°. Of course, if one would hear some parts of a forbidden book read by mere chance, he would not fall under the law. Readers are also those who read the proofsheets of a book.

19 Under this heading as well as under that of "retaining" fall restaurants, hotels, boarding houses, etc., which keep objectionable papers and magazines and place them at the disposal of their guests. The owners of these places are certainly not allowed to keep literature which is manifestly contrary to faith and morals.

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Here may be added some explanations given by the Holy Office. A book may not be read, even if the contents are not understood or the errors are not accepted. This applies also to Protestant Bible translations: they may not be read even if the missionaries, for instance, have corrected the erroneous passages.[20] Neither may a forbidden book be read or retained for a good and holy purpose.[21]

Books which are forbidden with the clause, "*donec expurgentur,*" may not be retained until they have been corrected.[22]

§ 2. A book forbidden no matter how, *may not be republished* until after it has been corrected and the one who forbade it, or his superior or successor, has granted permission to republish it. Therefore, if the bishop has forbidden a book, and recourse was had to the Roman Congregation, who granted the imprimatur, the book may be published. Note also the term *quoquo modo,* in whatever manner forbidden. The Constitution of Leo XIII (n. 31) applied that rule to books prohibited by the Apostolic See. But our text says in a general way, no matter how and by whom forbidden, whether by general rules or special prohibition, whether by the Ordinaries or by the Apostolic See. The latter is always ready to accept corrections made by the author, provided he has duly submitted himself and his corrections are accepted by the examiners.

20 S. O., July 26, 1848 (*Coll. P. F.*, n. 1030).

21 S. O., June 29, 1817 (*ibid.*, n. 718).

22 *Prop. 45 damn.*, March 18, 1666 (Denzinger, n. 1016).

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LIST OF FORBIDDEN BOOKS

CAN. 1399

Ipso iure prohibentur:

1.° Editiones textus originalis et antiquarum versionum catholicarum sacrae Scripturae, etiam Ecclesiae Orientalis, ab acatholicis quibuslibet publicatae; itemque eiusdem versiones in quamvis linguam, ab eisdem confectae vel editae;

2.° Libri quorumvis scriptorum, haeresim vel schisma propugnantes, aut ipsa religionis fundamenta quoquo modo evertere nitentes;

3.° Libri qui religionem aut bonos mores, data opera, impetunt;

4.° Libri quorumvis acatholicorum, qui ex professo de religione tractant, nisi constet nihil in eis contra fidem catholicam contineri;

5.° Libri de quibus in can. 1385, § 1, n. 1 et can. 1391; itemque ex illis de quibus in cit. can. 1385, § 1, n. 2, libri ac libelli qui novas apparitiones, revelationes, visiones, prophetias, miracula enarrant, vel qui novas inducunt devotiones, etiam sub praetextu quod sint privatae, si editi fuerint non servatis canonum praescriptionibus;

6.° Libri qui quodlibet ex catholicis dogmatibus impugnant vel derident, qui errores ab Apostolica Sede proscriptos tuentur, qui cultui divino detrahunt, qui disciplinam ecclesiasticam evertere contendunt, et qui data opera ecclesiasticam hierarchiam, aut statum clericalem vel religiosum probris afficiunt;

7.° Libri qui cuiusvis generis superstitionem, sortilegia, divinationem, magiam, evocationem spirituum, aliaque id genus docent vel commendant;

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8.° Libri qui duellum vel suicidium, vel divortium licita statuunt, qui de sectis massonicis vel aliis eiusdem generis societatibus agentes, eas utiles et non perniciosas Ecclesiae et civili societati esse contendunt;

9.° Libri qui res lascivas seu obscenas ex professo tractant, narrant, aut docent;

10.° Editiones librorum liturgicorum a Sede Apostolica approbatorum, in quibus quidpiam immutatum fuerit, ita ut cum authenticis editionibus a Sancta Sede approbatis non congruant;

11.° Libri quibus divulgantur indulgentiae apocryphae vel a Sancta Sede proscriptae aut revocatae;

12.° Imagines quoquo modo impressae Domini Nostri Iesu Christi, Beatae Mariae Virginis, Angelorum atque Sanctorum vel aliorum Servorum Dei ab Ecclesiae sensu et decretis alienae.

By law (*i. e.,* common law) are forbidden:

1.° *Editions* of the original text and of ancient Catholic versions of *Holy Scripture,* also of the Oriental Church, which have been published by non-Catholics; also *translations* of the same into any language made or published by non-Catholics.

The *original text* of the O. T. is in Hebrew, except portions of the Book of Esdras and about half of Daniel, which are written in Chaldean. The Books of Judith, Tobias, Baruch, Ecclesiasticus, I Machabees and parts of Daniel were written either in Hebrew or in Chaldean, but are preserved only in translations, of which the Greek Septuagint is the oldest. The book of Wisdom, II Machabees and the whole of the N. T. were composed in *Greek,* and have come down to us in that language.

Ancient translations are several Greek and Chaldean translations of the O. T.; a Samaritan version of the

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Pentateuch, some Syriac versions (especially the Peshitto of the Ist century), several Arabic (mainly made in the Xth century by a Jewish rabbi), one Armenian (IVth century) one Coptic (IIIrd century) one Ethiopian (IVth century), one Slavonic, one Gothic (by Wulfilas, IVth century); and especially the Latin versions called Itala and Vulgate.[23] All these texts and versions, if published by non-Catholics, are forbidden, for the reason that there is danger of perversion and hypercriticism, which may lead to the elimination of genuine texts or wrong punctuation, etc. By issuing this prohibition, of course, the Church does not wish to slur well-deserving non-Catholic editors or their work. She merely desires to safeguard the text of S. Scripture and the faith of her children.

More liable to carelessness and perversion than the ancient versions are the *translations into modern languages,* of which the King James Bible furnishes an example. Most of them entirely omit the so-called deutero-canonical books and thus offer a mutilated Bible.

2.° The *books of writers defending or championing heresy and schism, or attempting in any way to undermine the very foundations of religion.*

The text omits the term "*apostates,*" found in the Leonine legislation, for the reason, apparently, that they are included either in this paragraph or the following two. *Propugnare* means an argumentative defence. Heresy and schism have been defined in can. 1325, § 2.

The foundations of religion are the fundamental truths of both the natural and the supernatural, i. e., revealed, order,— the existence of God, the immortality of the soul, the possibility and reality of miracles, etc., as generally set forth in handbooks of fundamental theology or

[23] Seisenberger, *Practical Handbook for the Study of the Bible,* (Engl. Transl.) 1911, p. 213; p. 235.

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apologetics.[24] The undermining, *evertere,* may be done by casting ridicule upon these fundamental truths; hence satirical, also sceptical writings would suffice.

3.° *Books which purposely attack religion or good morals. Data opera* appears to mean the same as *ex professo,* and is opposed to such expressions as *perfunctorie* and *obiter.* It may be, however, that *data opera* is intended to signify the intention. This would have to manifest itself in some way, whereas *ex professo* rather refers to the way and style of handling the arguments or subject. Practically the two phrases are hardly to be distinguished from each other.

What is understood by *religion* is not expressly determined, but there can be no doubt that the term here denotes first and above all the true religion of Christ, and secondarily natural religion, which governs the relations between God and His creatures.

"*Good morals*" comprise the principles laid down by ethics as well as moral theology, not only the system as a whole, but any part of it. Thus, for instance, a book defending "race suicide" or profiteering would no doubt be opposed to good morals.

Impetere means not only to make incoherent statements, as is done in newspapers, but to launch an elaborate or a systematic attack.

4.° *Books by non-Catholics which professedly treat of religion,* unless it is certain that they contain nothing contrary to the Catholic faith.[25]

The *author* must be a non-Catholic,—*i. e.,* a pagan, Jew,

[24] Thus Wernz, *Ius Decret.,* Vol. III, ed. 1, p. 119, n. 111. Vermeersch (*l. c.,* n. 13) excludes "*praecipua dogmata ipsius fidei*" and seems to insist too much on the distinction between scientific and religious foundations; it is not true that all these are included in heresy and schism, for not all heretics and schismatics attack them.

[25] Wernz, *l. c.;* Hurley, *l. c.,* p. 62.

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Moslem, heretic, schismatic, or an apostatized Catholic, for our Code always uses the term non-Catholic in this wide sense.

The phrase "*ab acatholicis quibuslibet*" in no. 1 of the present canon shows that, as in the Constitution of Leo XIII, so here also the term "non-Catholic" must be interpreted in the widest sense.[26]

The *subject* is religion, without any further determination, therefore natural as well as supernatural religion, for in the final analysis all religion affects the attributes of God.

The *mode* of treating religion must be *ex professo,* which, as stated before, signifies not a mere transient or cursory statement, but a formal and developed argument dealing with at least a notable and considerable part of the subject in question. Such, for instance, are sermons or discourses written by non-Catholics, histories of religion, etc.

The *restrictive clause* "*nisi constet . . .*" permits the reading of such books if it is morally certain that they contain nothing against the Catholic faith, either by way of assertion, innuendo, or induction. The word *nihil* is a wide term, as it marks a universal negation and generally admits of no restriction. Still stronger would be the expressions, "*nihil penitus,*" or "*nihil omnino,*" which absolutely exclude everything and anything.[27] But since the simple term "nothing" is used here, we may admit the adage "*parum pro nihilo putatur,*" and say that one or the other sentence of little importance against the Catholic faith might be overlooked, especially if there is a palpable absence of malicious intent.

It is said that one must be *morally certain* that the book

26 Wernz, *l. c.*, p. 119 f.

27 Barbosa, *Tractatus Varii,* Dictio 214 (ed. Lugdun., 1660, p. 725).

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contains nothing objectionable. This certainly may be obtained by reading the book, either privately or officially, on the part of persons who are capable of judging it and possess a conscientious disposition.

5.° *Bibles and Biblical annotations and commentaries,* modern translations of the Bible, *i. e.,* into the vernacular, and all books mentioned in can. 1385, § 1, n. 2, books and booklets which narrate new apparitions, revelations, visions, prophecies, miracles or aim to introduce new devotions, even though they pretend to be purely private, if published without regard to the rules prescribed, *i. e.,* without complying with the law of previous censorship (can. 1393).

Note the word *narrare,* which is historical rather than theological or scientific. However, a mere report in a newspaper or magazine could hardly be intended, because the term appears to require a longer treatise.[28] This rule also applies to " war prophesies," of which we heard so much of late. It does not matter whether the facts narrated are objectively true or not.

New devotions are such as have not yet been approved by ecclesiastical authority. In regard to new devotions, as well as to *apparitions,* for instance, of the Blessed Virgin Mary, observe that, if they were believed and tolerated for a long time, and never disapproved by the Holy See, they may continue to be tolerated by the local Ordinary, who may also approve them and thus render them permissible. In case of episcopal approbation, the Ordinary should add a declaration to the effect that the respective devotion is tolerated on account of immemorial custom.[29]

28 Thus also Vermeersch, *l. c.,* n. 14. This seems also evident from the opposition: books and booklets. Their chief purpose must be the narration of such things, no matter whether the narrator himself believes the story or not.

29 S. Rit. C., Feb. 6, 1875; May 12, 1877 (*Dec. Auth.,* nn. 3336, 3419).

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The previous *censorship,* therefore, is required for all these books, and without the Ordinary's imprimatur no one may read them, even for private devotion.

6.° This number contains several classes of books which are best kept separate, namely:

(a) *Books which attack or ridicule any dogma of the Catholic Church.* Dogma here means an article of divine or Catholic faith. The attack may be made by argument or in the form of a simple statement. Ridicule may be contained in one sentence.

(b) *Books which defend errors that have been proscribed by the Apostolic See, i. e.,* by the Pope himself, or by one of the S. Congregations.[30] This law refers principally to formally condemned errors of heretics, *e. g.,* Jansenius, Bajus, Molinos, etc., also to the propositions censured in the Syllabus of Pius IX and the so-called New Syllabus of Pius X.

(c) *Books which disparage divine worship. Cultus divinus* is here evidently to be taken in the same sense in which the Code uses the term in can. 1255 ff., *i. e.,* the worship paid to God and His Saints as well as the liturgical functions of the Church, which are nothing else but visible manifestations of internal worship.

Detrahere signifies a kind of slander of a person or disparagement of some object connected with that person. Thus the worship of relics and sacred images is disparaged by iconoclastic propositions.

(d) *Books which seek to undermine ecclesiastical discipline.* To this class belong writings directed against the Canon Law and the divine liturgy. Ecclesiastical discipline comprises all the measures taken by the Church to preserve and develop the society founded by Christ. The

30 It is not necessary that any specific qualification (*erronea, temeraria, scandalosa, piarum aurium offensiva,* etc.) be added.

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term includes the holy seasons, the sacred liturgy, the duties and privileges of clergy and laymen,[31] etc.

(e) *Books which of set purpose insult the ecclesiastical hierarchy or the clerical or religious state.* The term insult is liable to a more or less subjective interpretation. Essentially it means an undeserved affront or indignity offered to one's self-respect. The insult, to bring a book within the prohibited class, must strike at the hierarchy *as such,* not at single persons. The same is true of the clerical or *religious state.* Therefore an insult hurled against a clergyman, or several clergymen, or against a religious, or one house or congregation of religious, or even a whole order could not be called an affront against the religious state.[32]

7.° *Books which teach or approve any kind of superstition, fortune-telling, divination, magic, the evocation of spirits, and other similar practices.*[33]

Superstition seems to be here taken as a distinct and coordinate, not as a comprehensive term, and hence means a specific form of belief, which manifests ignorant or abnormal credulity, such as the belief in omens, charms, etc. The other terms include the whole broad field of occultism or Spiritism, witchcraft, sorcery, clairvoyancy, and so forth. Hypnotism and somnambulism, if superstitious, are also included. Books *teaching or approving* such practices are forbidden, not, of course, books written for the purpose of combatting them.

8.° *Books which defend the lawfulness of duelling or suicide or divorce; or which try to prove that Freemasonry*

31 However, this must be understood, not of single canons or rubrics, but of the law and liturgy as a whole, or at least some compact part thereof.

32 Thus the commentators generally; see Wernz, *l. c.,* p. 123.

33 Somewhat different appears to be the meaning in "*Officiorum ac munerum,*" art. 12.

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and other similar sects are useful and not detrimental to Church and State.

Statuere, in the first clause, means literally to establish, determine, pass judgment or demonstrate. To do this requires no *ex professo* treatise, but the tendency to make duelling, etc., appear lawful, must be manifest. Law books which admit divorce are excepted from this prohibition, because they are merely repositories of laws. But a pamphlet written to recommend a divorce bill would certainly be prohibited.

The second class treats of *Masonic and similar sects.* Masonic societies are those which have special rites, secret oaths, and advocate subversive principles. The last mentioned feature is now regarded as a characteristic feature,[34] and hence all anarchistic, Bolshevist, and extremely Socialistic societies are included.[35] However, such books or pamphlets, to fall under the prohibition of our canon, must *make a serious attempt* to prove the usefulness or harmlessness of these sects. This requires argumentation which is apt to convince the reader.

9.° *Books which of set purpose treat of, relate, or inculcate lascivious and obscene things.* Hither belongs the whole class of strictly so-called pornographic literature, as well as innumerable romances, novels, and poems. To treat of (*tractare*) implies a frivolous or alluring style. *Narrare* refers to a minute or detailed account of obscene facts, whilst *docere* may be taken as indicating that the reader deduces false conclusions from the description or narrative. From this it is evident that scientific treatises on medicine, surgery, pastoral medicine, and moral theology do not belong to the category of for-

34 Cfr. S. C. P. F., Sept. 24, 1867 (*Coll.*, n. 1320).

35 Vermeersch (*l. c.*, n. 13) doubts whether Socialists are included because they are, he maintains, neither a *factio* (*une partie*, a

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bidden books [36] unless they are written in a style which clearly betrays the purpose of the author to be other than scientific.

The term "books" here excludes images, pictures, drawings, engravings, photogravures, etc.

10.° Editions of *liturgical books* approved by the Apostolic See, which have been altered so as *no* longer to agree with the *authentic texts.*

11.° Books which spread apocryphal indulgences or indulgences that have been proscribed or recalled by the Holy See.

12.° Images, however printed, of our Lord Jesus Christ, the Blessed Virgin Mary, the Angels, the Saints, and other Servants of God, if not in keeping with the spirit or decrees of the Church.

These last three classes of publications have been sufficiently explained under canons 1257, 1279, 919.

EXCEPTION IN FAVOR OF THEOLOGICAL STUDENTS

CAN. 1400

Usus librorum de quibus in can. 1399, n. 1, ac librorum editorum contra praescriptum can. 1391, iis dumtaxat permittitur qui studiis theologicis vel biblicis quovis modo operam dant, dummodo iidem libri fideliter et integre editi sint neque impugnentur in eorum prolegomenis aut adnotationibus catholicae fidei dogmata.

Editions of the original text of Holy Scripture, of the ancient versions by non-Catholics, and translations into

party), nor a secret (*occulta*) sect. But the latter characteristic is not absolutely needed, according to the preceding note; and the attribute of faction or party can certainly not be denied to such Socialist bodies as the Spartacists in Germany.

[36] Wernz, *l. c.*, p. 122.

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the vernacular made and published either by non-Catholics or by Catholics without previous censorship, are allowed to such as are in any way engaged in theological or biblical studies, provided, however,

(1) that these editions are faithful and entire, and

(2) that neither the introduction nor the annotations contain attacks on Catholic dogmas.

There is, then, a privileged class of persons, who may make use of the aforesaid forbidden books, but not of others mentioned in the preceding canon, namely those engaged in *theological* or *biblical studies*. Theology comprises first and above all dogmatic theology, but may be taken as coextensive with the theological course of can. 1365, § 2, and therefore includes all branches usually taught with theology. This interpretation is not contradicted by the declaration of the S. C. of the Index, of June 21, 1898, which (*ad 2am partem*) excludes from this privilege those who simply read the Hebrew or Greek text of S. Scripture without reference to *theological studies*.[37] Hence one purpose of using these otherwise forbidden books is theological study. Another is the pursuit of *biblical studies, viz.*, introduction, hermeneutics, and exegesis. Now both these studies may be pursued not only by professional theologians and biblical scholars or professors, but also by students in seminaries, universities, etc. All these share in the privilege extended by can. 1400.[38]

Is the use of these editions allowed if one has to prepare a sermon or lecture? Our answer would be that for a usual Sunday or holyday sermon no special theological or biblical study is required, and therefore we could not

37 Cfr. Wernz, *l. c.*, p. 120; mistaken is Hurley's interpretation, *l. c.*, p. 69.

38 Cfr. S. C. Indic., May 23, 1898, ad 1 (*Coll. P. F.*, n. 2000).

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say that these preachers are engaged in (*operam dant*) such studies.[39] But if one would have to deliver an elaborate *lecture* on a theological subject, say for instance, on creation, on the Real Presence, or on Holy Orders, he would certainly have to study his subject, and therefore would be allowed to make use of these editions.[40]

PERSONS EXEMPT FROM THE PROHIBITION

CAN. 1401

S. R. E. Cardinales, Episcopi, etiam titulares, aliique Ordinarii, necessariis adhibitis cautelis, ecclesiastica librorum prohibitione non adstringuntur.

Cardinals, residential as well as titular bishops, and other Ordinaries, provided they employ the necessary precautions, are not bound by the law of forbidden books, (but must obey the law of previous censorship).

What precautions are to be taken is not determined by the Code. They may be described as follows:

(a) The natural as well as positive law requires that one should not expose his faith and morals unnecessarily to danger (cfr. can. 1405, § 1), for no one is immune from temptations.

(b) No one is allowed to read lascivious or obscene books unless bound to do so *ex officio,* to examine them;

(c) If the persons mentioned retain forbidden books, they must see to it that they do not fall into the hands of those not permitted to read them. This does not mean, however, that Ordinaries, etc., may not communicate

39 If one, by way of exception, should need a critical edition, or should have no other text at hand, he would be excused.

40 The best known editions by non-Catholic authors are those of Tischendorf, Tregelles, and Westcott and Hort.

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among themselves or converse with their censors about such books.

Here it may be useful to add a word about *librarians.* These, being custodians, not proprietors or retainers, of the books in their care, should see to it that forbidden books are kept separate, or if this is impossible or impracticable, that a warning sign be placed on the shelves containing forbidden or dangerous books.

The *prelates or superiors of exempt clerical institutes,* who, according to our canon and canon 198, are free from the restrictions of the law regarding forbidden books, should take care that their libraries are so managed as to preclude danger to their subjects.

This rule may also be applied to *parish libraries,* though these, as a rule, will hardly keep forbidden books, with the exception perhaps of non-Catholic editions of the Bible.

What we have said is nothing but a logical deduction from *can. 1403, § 2,* which strictly obliges those who have obtained faculties for reading or retaining forbidden books, to guard them carefully, so that they do not fall into the hands of others.

FACULTIES

CAN. 1402

§ 1. Ordinarii licentiam, ad libros quod attinet ipso iure vel decreto Sedis Apostolicae prohibitos, concedere suis subditis valent pro singulis tantum libris atque in casibus dumtaxat urgentibus.

§ 2. Quod si generalem a Sede Apostolica facultatem impetraverint suis subditis permittendi ut libros proscriptos retineant ac legant, eam nonnisi cum delectu et iusta ac rationabili causa concedant.

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CAN. 1403

§ 1. Qui facultatem apostolicam consecuti sunt legendi et retinendi libros prohibitos, nequeunt ideo legere et retinere libros quoslibet a suis Ordinariis proscriptos, nisi in apostolico indulto expressa iisdem facta fuerit potestas legendi et retinendi libros a quibuslibet damnatos.

§ 2. Insuper gravi praecepto tenentur libros prohibitos ita custodiendi, ut hi ad aliorum manus non perveniant.

Can. 1402 mentions two kinds of faculties, one granted by the law itself, the other by the Apostolic See.

1. *Ordinaries, i. e.,* all who go by that name [41] in virtue of can. 198, § 1, may grant permission to their subjects to read books forbidden either by law (*i. e.,* by the Code) or by a special decree of the Apostolic See, but they can impart this faculty only for individual books and in urgent cases. The term "*pro singulis tantum libris*" means that each book must be distinctly mentioned by title and no wholesale permission may be issued. The plural form, *singulis libris,* permits the faculty to be given for more than one book at a time, provided they are duly specified.

Urgent cases are such as arise suddenly and unexpectedly. Thus if a writer needs a certain book for immediate use, he may apply to his Ordinary, (either the local Ordinary, if he is subject to him, or the exempt religious superior, if he is an exempt religious) and obtain the permission needed.

It may have surprised the reader to find *libri lascivi vel*

41 Wernz, *l. c.,* p. 129 correctly held against Pennacchi that all ordinaries, hence also religious superiors who, according to can. 488, n. 8 and can. 501, § 1, have jurisdiction *in foro externo,* must here be understood.

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obscoeni mentioned under n. 9 without the restriction or mitigation found in rule 10 of the Constitution of Leo XIII, in favor of *classical writers*. Does the New Code abolish this mitigation? It does, though § 1 of can. 1402 permits teachers and others whose office necessitates such reading, to apply to their superiors for the faculty, if the case is urgent, as it generally is.

§ 2 mentions a general faculty granted by the Apostolic See (Holy Office).[42] If such a general faculty has been given to Ordinaries for the benefit of their subjects, it should be communicated to the latter with discretion and only for a just and reasonable cause.

The term "*cum delectu*" doubtless refers to the *persons* subject to the Ordinaries. These persons are described in the Clementine Instruction as men of learning and piety who labor for the public welfare and that of the Catholic Church. Being engaged in such work constitutes a reasonable and just cause for granting the permission.

Ordinaries who have this general (either triennial or quinquennial) faculty, before granting either perpetual or revocable permission to their subjects,[43] should carefully read the text of the grant, for it may be that some classes of books (*e. g., libri obscoeni* or books *ex professo* defending heresy and schism or undermining the foundations of religion) are excepted.

Can. 1403 rules that those who have obtained a papal faculty for reading and keeping forbidden books, are not thereby entitled to read and keep books proscribed by their Ordinaries unless the indult which they have ob-

42 Secular prelates have to petition the Holy Office if they are under the ordinary hierarchical jurisdiction; otherwise the S. C. de Propaganda Fide. Religious prelates must apply to the S. C. Relig.

43 Wernz, *l. c.*, p. 129.

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tained contains the express clause that they may read and keep books *no matter by whom condemned.*[44]

What was said under can. 1395, also applies here and should be compared with rule 26 of the Constitution of Leo XIII, which employs the term "local Ordinaries" (*Ordinariis locorum*), whereas our canon mentions Ordinaries in general. The consequence is that if the local Ordinary or bishop forbids a book, or magazine, or paper, exempt religious are not, juridically speaking, bound to heed the proscription, until their superior has approved it. On the other hand, the religious superior of an exempt clerical institute may forbid a book or pamphlet or magazine not forbidden by the local Ordinary. Therefore a religious who has obtained a papal indult to read and keep forbidden books is not allowed to read or retain a book forbidden by his (exempt) religious superior, unless the above-mentioned clause is found in the papal indult. This rule holds good even if the local Ordinary or religious superior should prohibit a book already proscribed either by common law or by a special decree of the Apostolic See; for there may be a special local or personal reason why this book should be doubly forbidden.

We may finally admit a certain *epikeia* when an adequate reason of utility or necessity exists for not observing the law, as far as its positive side is concerned, provided, of course, there be no danger to faith or morals.[45]

BOOKSELLERS

CAN. 1404

Librorum venditores libros de obscenis ex professo tractantes ne vendant, commodent, retineant; ceteros

44 Hurley, *l. c.*, p. 172 f.

45 Vermeersch, *l. c.*, n. 34.

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prohibitos venales ne habeant, nisi debitam licentiam a Sede Apostolica impetraverint, neve cuiquam vendant, nisi prudenter existimare possint ab emptore legitime peti.

Catholic booksellers [46] are bound in conscience:

1.° Not to sell, loan, or keep books which treat *ex professo* of *obscene subjects*. Here again no distinction is made between classical and ordinary authors, and therefore all obscene books are included. However, it stands to reason that purged or corrected editions of classical authors may be sold.

2.° Not to *offer for sale any other forbidden books,* except with the permission of the Apostolic See (*i. e.,* the Holy Office), nor to sell any such books to anyone of whom it cannot be reasonably supposed that he asks for them lawfully.

Venales habere means to exhibit or offer for sale. Since the term "*retinere*" does not occur in this clause, we may reasonably suppose that booksellers are allowed to keep such books in stock, but only in a hidden or secret place, not publicly. But they may not list them in their catalogues or advertise them unless they have obtained a papal indult to this effect. Even if they have such an indult, they should be careful not to sell forbidden books indiscriminately. If a customer asks for a forbidden book, they are not indeed obliged to ask whether he has permission to read and keep it, but they should be morally certain that he does not ask unreasonably.

46 A distinction between Catholic and non-Catholic booksellers was drawn in "*Officiorum ac munerum,*" n. 46, but it is not repeated in our Code, because the Code legislates for Catholics only.

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CAN. 1405

§ 1. Licentia a quovis obtenta nullo modo quis eximitur a prohibitione iuris naturalis legendi libros qui ipsi proximum spirituale periculum praestant.

§ 2. Ordinarii locorum aliique curam animarum habentes opportune moneant fideles de periculo et damno lectionis librorum pravorum, praesertim prohibitorum.

§ 1. A license to read forbidden books does not in any way exempt one from the prohibition of the natural law against reading books which are to him a proximate occasion of sin. Therefore

§ 2. The local Ordinaries and all those in charge of souls should warn the faithful of the danger and injury caused by reading bad, especially forbidden, books.

It is obvious that one who disobeys the law of the Church and neglects the precautions dictated by reason, cannot expect supernatural help against temptations.

For completeness' sake we here add can. 2318.

PENAL SANCTION

CAN. 2318

§ 1. In excommunicationem Sedi Apostolicae speciali modo reservatam ipso facto incurrunt, opere publici iuris facto, editores librorum apostatarum, haereticorum et schismaticorum, qui apostasiam, haeresim, schisma propugnant, itemque eosdem libros aliosve per apostolicas litteras nominatim prohibitos defendentes aut scienter sine debita licentia legentes vel retinentes.

§ 2. Auctores et editores qui sine debita licentia sacrarum Scripturarum libros vel earum adnotationes aut commentarios imprimi curant, incidunt ipso facto in excommunicationem nemini reservatam.

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§ 1. Those who publish books written by apostates, heretics, and schismatics defending apostasy, heresy, or schism, incur the excommunication reserved *speciali modo* to the Holy See. The same penalty is incurred by those who defend such books or others nominally forbidden by Apostolic letter, or who knowingly read or retain them without due permission.

§ 2. Authors and publishers who, without due permission, print books of Sacred Scripture or annotations and commentaries thereon, incur excommunication reserved to no one.

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TITLE XXIV

THE PROFESSION OF FAITH

WHO MUST MAKE IT

CAN. 1406

§ 1. Obligatione emittendi professionem fidei, secundum formulam a Sede Apostolica probatam, tenentur:

1.° Coram praeside eiusve delegato, qui Oecumenico vel particulari Concilio aut Synodo dioecesanae intersunt cum voto seu consultivo seu deliberativo; praeses autem coram eodem Concilio vel Synodo;

2.° Coram Sacri Collegii Decano, Cardinalibus primis in ordine presbyterorum et diaconorum et S. R. E. Camerario, promoti ad cardinalitiam dignitatem;

3.° Coram delegato ab Apostolica Sede, promoti ad sedem episcopalem etiam non residentialem, vel ad regimen Abbatiae vel Praelaturae *nullius*, Vicariatus Apostolici, Praefecturae Apostolicae;

4.° Coram Capitulo cathedrali, Vicarius Capitularis;

5.° Coram loci Ordinario eiusve delegato et coram Capitulo, qui ad dignitatem vel canonicatum promoti sunt;

6.° Coram loci Ordinario eiusve delegato et coram aliis consultoribus, assumpti ad officium consultorum dioecesanorum;

7.° Coram loci Ordinario eiusve delegato, Vicarius Generalis, parochi et ii quibus provisum fuit de bene-

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ficiis quibusvis, etiam manualibus, curam animarum habentibus; rector, professores sacrae theologiae, iuris canonici et philosophiae in Seminariis, initio cuiuslibet anni scholastici vel saltem initio suscepti muneris; omnes promovendi ad ordinem subdiaconatus; librorum censores, de quibus in can. 1393; sacerdotes confessionibus excipiendis destinati et sacri concionatores, antequam facultate donentur ea munia exercendi;

8.° Coram Ordinario eiusve delegato Rector Universitatis vel Facultatis; coram Rectore vero Universitatis vel Facultatis eiusve delegato, professores omnes in Universitate seu Facultate canonice erecta, initio cuiusque anni scholastici vel saltem initio suscepti muneris; itemque qui, periculo facto, academicis gradibus donantur;

9.° Coram Capitulo vel Superiore qui eos nominavit eorumve delegato, Superiores in religionibus clericalibus.

§ 2. Qui, priore dimisso, aliud officium vel beneficium aut dignitatem etiam eiusdem speciei consequuntur, rursus debent fidei professionem emittere ad normam huius canonis.

The profession of faith was generally connected with the oath of obedience imposed on prelates since the XIIth century, especially on those immediately subject to the Holy See.[1] The Pope himself used to send a kind of public profession to the patriarchs of the East soon after his accession to the papal throne[2]; and documents of the VIIth century testify that a public profession of faith was made by the Pontiff on the occasion of his election or cor-

1 Cfr. c. 4, X, I, 6; c. 13, X, I, 33; c. 4, X, II, 24. The formula for the Italian bishops in Sickel, *Liber Diurnus,* form 73, 75.

2 Cfr. Reg. Greg. I, ed. Ewald-Hartmann, I, 5, 28, 39, 438, 448.

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onation.[3] The Council of Trent established substantially the present discipline, and later decrees specified more closely the persons who had to make profession of faith.[4] The present prescribed *form* is contained in our Code and must be followed always. Besides this profession, there is no special oath prescribed in the Code, and therefore the oath demanded by Pius X in the "*Sacrorum Antistitum*" (Sept. 1, 1910) would be abolished (according to can. 6, n. 6) had not the Holy Office since declared that the *Antimodernist Oath* continues in force until the Holy See expressly abrogates it.[5] Our canon deals only with the *profession of faith,* which, according to § 1, must be made by the following ecclesiastics:

1.° By all those who attend a general or particular *council* or *diocesan synod* with the right to cast either an advisory or a decisive vote. These must make their profession of faith before the presiding officer or his delegate; the presiding officer himself before the synod or council.

2.° Newly created *cardinals* must make profession of faith before the Dean of the Sacred College, the first in rank among the cardinal priests and deacons, and the Camerlengo of the Holy Roman Church.

3.° *Bishops,* residential as well as titular, Abbots or Prelates *nullius,* Vicars Apostolic and Prefects Apostolic, before the papal delegate.

4.° The Vicar Capitular before the cathedral chapter. Since in this country the consultors supply the cathedral chapter (can. 427), our diocesan administrators must make their profession of faith before the consultors as a body.

3 Wernz, *Ius. Decret.,* III, n. 14, p. 15 f.

4 *Trid.,* Sess. 24, c. 1, 12, *De Ref.,* Pius IV, "*Iniunctum Nobis,*" Nov. 13, 1504; S. C. C., Jan. 20, 1877 (*Coll. P. F.,* n. 1464).

5 S. O., March 22, 1918 (*A. Ap. S.,* X, 136.)

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5.° Those who have been promoted to a *dignity or canonicate* must make their profession of faith before the local Ordinary or his delegate, and at the same time before the chapter. We say: "at the same time," for if the bishop or his delegate (who *propter decentiam* should be an ecclesiastical dignitary) is not present when the profession is made before the chapter, it would have to be made again.[6] There cannot be any doubt that *canons of collegiate chapters,* too, are now obliged to make the profession of faith before they take possession of their office or benefice.[7]

6.° *Diocesan consultors* must make their profession of faith before the local Ordinary or his delegate and, at the same time, before the other consultors, who should therefore meet together with the bishop in a convenient place, — the cathedral or another church, the episcopal residence, or a priest's house.

7.° The following must make profession before the *local Ordinary or his delegate:* (a) the vicar general; (b) *pastors*[8] and those provided with a benefice (even though manual only) to which the care of souls is attached; (c) *rectors of seminaries* and *professors* of sacred theology, canon law, and philosophy, at the beginning of each scholastic year,[9] or at least when they assume office; (d) those about to be ordained subdeacons; (e) the censors of books, as mentioned in can. 1393; (f) all priests who are to act as *confessors* or *preachers,* before they are given their appointment or faculties. Under this

6 S. C. C., Jan. 25, Feb. 9, 1726, ad III (Richter, *Trid.*, p. 353, n. 19).

7 Although the decision just quoted (ad I) would exempt them, yet can. 405, § 2, requires it.

8 See can. 461; pastors are not obliged to make this profession of faith on the day of installation before the people; S. Rit. C., July 21, 1855 (*Dec. Auth.*, n. 3035).

9 This rule might also be observed concerning the Antimodernist oath, for it appears very awkward—to say the least—to repeat it every year.

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heading, no doubt, also come our assistants or curates, and the confessors and chaplains of nuns [10] and religious institutions.

8.° The *rector* of a *university or faculty* must make his profession of faith before the local Ordinary or his delegate; all the *professors* of a canonically established university or faculty, before the rector at the beginning of each scholastic year, or at least when they assume the office of teaching; the same rule applies to all those who receive *academic degrees,* after they have passed their examinations. Academic degrees, in the proper sense, are the licentiate and the doctorate; the baccalaurate is regarded only as a stepping-stone to the former. The time for making the profession of faith for such graduates is between the examinations and the ceremony of conferring the degree. The profession may most properly be made in the chapel or church, before the staff, board, or faculty of the university, and in presence of the students, or in the *aula academica* before the rector and some professors.

9.° *Superiors of clerical institutes* must make their profession of faith before the chapter or the superior who has appointed them. Thus an abbot should make it before the president or vice-president of his congregation and the monastic chapter.[11] If the superior is appointed by a higher one, this latter, or his delegate, should receive the profession.

§ 2 requires *that the profession of faith* be repeated, according to the rules prescribed in § 1 of this canon, whenever one assumes a new office, benefice or dignity, after giving up the former, even if the new office is of the same species. If a canon or dignitary of a cathedral

10 See can. 529.

11 The profession of faith is not to be identified with the *iuramentum* at the *benedictio abbatis;* cfr. *Pontif. Rom., s. h. t.*

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church obtains a new benefice, office, or dignity in the same cathedral (or collegiate) church, he must renew his profession of faith; and if the change should occur during the vacancy of the episcopal see, the renewal must take place before the vicar-capitular and the chapter.[12]

This rule also applies to pastors who obtain another parish in the same diocese.

Can. 1407

Obligationi fidei professionem emittendi non satisfacit qui eam per procuratorem vel coram laico emittit.

Can. 1407 declares a profession of faith made *by proxy* or before a layman invalid. The validity of such an act had been sustained by canonists of note, such as Navarrus, Sanchez, Barbosa, Reiffenstuel, and Boekhn; but the S. C. C. was of contrary opinion, and its view is here espoused.[13] This is so true that if, for instance, a prelate or canon had made his profession before the Cardinal Vicar of Rome, he would nevertheless have to renew it upon his return to the benefice.

A *layman* cannot validly receive a profession of faith because he lacks spiritual power.

Can. 1408

Reprobatur quaelibet consuetudo contra canones huius tituli.

Every custom contrary to the canons of this title (XXIV) is hereby reprobated.

What we said under can. 1356, § 1, also applies here.

12 S. C. C., 1595, 1622 (n. 19); Nov. 23, 1630 (Richter, *l. c.* n. 22).

13 S. C. C., Jan. 25, Feb. 9, 1726, ad II (Richter, *l. c.*, 19).

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PART V

BENEFICES AND OTHER NON-CORPORATE ECCLESIASTICAL INSTITUTIONS

Part V treats of a subject which was once of great importance for the Church at large and, therefore, lavishly discussed by canonists. We can limit ourselves to a few observations.

The term *benefice,* taken from the Germanic law, signifies a grant, especially of real estate or landed property, to subjects or vassals in recognition of services rendered. The practice dates back to the Vth century, and benefices were sanctioned as a permanent source of ecclesiastical revenue by civil and ecclesiastical law. The ecclesiastical benefice arose from the distribution of clerical support, which was formerly held in common, under the supervision of the bishop. The bishop was supposed, through his deacons, to distribute all the voluntary offerings into four, or three, parts, one portion of which was especially assigned for the maintenance of the clergy. With the increase of country parishes and the growth of ecclesiastical holdings, especially in land, it was but natural that the bishops should grant to the country clergy a certain portion of the land destined for their support.[1] This appor-

1 Concerning England, see Lingard, *History and Antiquities of the Anglo-Saxon Church,* ed. 2, 1858, pp. 162 ff. on benefices in general; see Thomassin, *Vetus et Nova Eccles. Disciplina circa Bene-*

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tionment was made upon a *precaria* or petition presented by the clergyman concerned, which had to be renewed every time the place became vacant. When, in the VIth century, the revenue or grant became legally attached to the church itself, the *precaria* was turned into a permanent title or claim, or was attached to the property and church served by the respective cleric.

A similar development is noticeable in the property and revenues of cathedral churches. When the canons ceased to live in common, about the Xth century, each received from the common stock (*massa communis*) a share, which was called *praebenda.* When the so-called secularization set in the ecclesiastical benefice did not lose its character of a benefice, but was distributed in the form of a yearly salary from the government. Thus it is still in Italy, where the pastors, and canons, and all other priests acknowledged by the State receive their income from the public treasury.

In the *U. S.* benefices are almost unknown. A solitary example in New Orleans figured as a notable exception in the decrees of the Second Plenary Council. A few parochial benefices are found in the province of San Francisco. In England, also, benefices are the exception, but in Canada they are more common.[2]

ficia, 1688; N. Garcias, *Tractatus de Beneficiis,* 1636; P. Lewienius, *Forum Beneficiale* 1742; U. Stutz, *Geschichte des Kirchl. Benefizialwesens,* 1895; Idem, *Die Eigenkirche,* 1895; and the commentators on X, III, 5.

2 See *Cath. Encycl.,* II, 474; as to Canada, see Pouliot, *Le Droit Paroissiale,* 1918.

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TITLE XXV

ECCLESIASTICAL BENEFICES

DEFINITION

CAN. 1409

Beneficium ecclesiasticum est ens iuridicum a competente ecclesiastica auctoritate in perpetuum constitutum seu erectum, constans officio sacro et iure percipiendi reditus ex dote officio adnexos.

A benefice is a *juridical entity* permanently established or erected by competent authority, and consisting of a sacred office and the right of receiving the revenues from the endowment attached thereto.

Ens iuridicum is the genus of all institutions, with or without corporate character, having a legal foundation. We may say that the material element, the *beneficium* proper, is personified, inasmuch as it is presented as the subject of rights and duties. It may also be called a fictitious person, but without personal rights. It is the end (*finis*) alone that specifies these rights, and therefore becomes, as it were, the subject of them. The end or purpose of a benefice is spiritual, *viz.*, the sacred office, and the revenues are granted for the sake of the service one renders (*beneficium propter officium*).[1]

A benefice is a *juridical* entity, because the ecclesiastical law[2] has, if not introduced, at least sanctioned the com-

1 C. 10, X, III, 1; c. 15, 6°, I, 3. 2 *Ibid.*

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bination of two widely different elements, the material and the spiritual. This connection could be effected only by *ecclesiastical authority,* for the end being entirely spiritual, it cannot be attached to any material object except by the authority which controls the spiritual element, and this is the Church.

The revenues of a benefice are granted on account of the sacred office, but in order that they may be given, there is need of a source or treasury from whence they may be taken. This is the endowment (*dos*), which term has a wide significance.

Can. 1410

Dotem beneficii constituunt sive bona quorum proprietas est penes ipsum ens iuridicum, sive certae et debitae praestationes alicuius familiae vel personae moralis, sive certae et voluntariae fidelium oblationes, quae ad beneficii rectorem spectent, sive iura, ut dicitur, stolae intra fines taxationis dioecesanae vel legitimae consuetudinis, sive chorales distributiones, exclusa tertia earundem parte, si omnes reditus beneficii choralibus distributionibus constent.

The *various sources of ecclesiastical endowment* are:

1.° Property of any kind, movable or immovable, *owned by the benefice itself* as a juridical entity or fictitious person; for instance, a piece of land owned by a church, in which case the owner is the church, not the pastor, or the trustees, or the congregation;

2.° Contributions imposed on families or corporations, such as tithes to be paid by the persons themselves (*decimae personales*), or on goods, produce, stock (*decimae praediales, reales, animalium*);

3.° *Voluntary offerings of the faithful,* which belong

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to the rector of the benefice, such as pew-rent, at least in part, plate collections, and subscriptions;

4.° *Stole fees,* to be paid according to diocesan taxation or lawful custom; but never manual mass stipends, as is clear from the text;

5.° *Choir distributions,* except the third part of the same, if the entire revenue of the benefice consists of such distributions. This provision is manifestly intended for canons. Note that these revenues must be connected with the office permanently (*in perpetuum*).

This quality was styled by canonists the *obiectiva perpetuitas* of a benefice and constitutes an essential element of the same, but no longer of a parish.[3]

What about *our parishes?* The conclusion is forced upon us that the elements of a benefice may also be found in them. For there can no longer be any doubt that when the three conditions pointed out by the Code and by the decree of the S. C. Consist. of Aug. 1, 1919, are verified (*viz.,* residence, endowment, and boundaries), the rectors of such parishes are pastors. This would mean at least objective perpetuity.

A doubt may reasonably be maintained concerning "national" parishes, because they are actually and almost necessarily more or less subsidiary and fluctuating. On the other hand, the *ens iuridicum,* as well as the purpose of this quasi-corporate entity, are contained in every parish. Besides, since our Code has considerably enlarged the notion of endowment, it is almost impossible to deny the character of benefices to our parishes. Yet a solid doubt remains as to the permanent and stable character of a separate or distinct juridical entity.

[3] The law of Justinian (Cod. I, 2) supposed that the Saint to whom the church was dedicated was the quasi-proprietor.

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DIVISION OF BENEFICES

CAN. 1411

There are different kinds of ecclesiastical benefices, to wit:

1.° *Consistorial benefices, i. e.,* such as are bestowed in consistory (now-a-days chiefly prelatures with dignity); all others are called non-consistorial;

2.° *Secular benefices* are those which may be claimed by the secular clergy, who are, by reason of legal presumption, entitled to all benefices established outside a church or house of religious, even to those which are doubtful. But if a lawful custom or the will of the founder reads differently, there can be no doubt. *Religious benefices* are those existing in the churches or houses of religious, as well as those existing outside these churches or houses that have been given to religious by lawful custom or the will of the founder.

3.° *Double or residential* are those benefices which require residence in addition to service. Those which demand no permanent residence are called *simple* or *non-residential.*

Here it may be noted that a somewhat different characteristic is assigned to double benefices, because they are said to have the care of souls or jurisdiction attached. However, since these latter functions certainly require residence, it was logical to draw the distinction from this obligation.

4.° *Manual, temporary, or removable* are those benefices which are bestowed subject to the will of the appointer; *perpetual* or *irremovable* those which are not only themselves perpetual, but have an incumbent who cannot be removed at will.

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5.° *Curata* are benefices that involve the care of souls. They are sometimes united with simple benefices which oblige the holder, for instance, to recite the office or to say Mass in some chapel or on a certain altar.

CAN. 1412 AND 1413

The following *do not go by the name of benefices* in law, although they may resemble benefices:

1.° The office of parish vicar when not erected forever;

2.° Lay chaplaincies not established by competent ecclesiastical authority, that is to say, founded by lay persons from their own money with the obligation of saying Mass;

3.° The office of coadjutor, with or without the right of succession;

4.° Personal pensions;

5.° *Temporary* grants of income made from the property of a church or monastery to an ecclesiastic on condition that if he looses his claim, the revenues shall revert to the church or monastery.

Canons 147–195, unless the contrary is manifest, apply only to non-consistorial benefices that are benefices in the proper sense of the term, for these canons treat of appointment to, and loss of, offices.

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CHAPTER I

ESTABLISHMENT OR ERECTION OF BENEFICES

COMPETENT AUTHORITY

CAN. 1414

1.° Consistorial benefices are erected by the *Apostolic See* alone.

2.° Besides the Roman Pontiff, the *local Ordinaries* can establish in their respective dioceses, non-consistorial benefices, with the exception of dignitaries of cathedral and collegiate chapters (can. 394, § 2).

3.° The Vicar-General needs a special commission from his Ordinary for establishing a benefice.

4.° A Cardinal may erect non-curate benefices in his own title or *diaconia,* unless the church belongs to exempt clerical religious.

REQUISITES OF ERECTION

CAN. 1415–1418

These four canons sum up the conditions required for the lawful erection of a benefice, *viz.,* the endowment, the coöperation of the persons concerned, and the necessary document; can. 1417 refers to conditions in the strict sense.

The *endowment* (*dos*) must be *stable, viz.,* prospec-

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tively durable and *sufficient* for the maintenance of the building, the divine worship, and the ministers.[1]

If the endowment is made in specie or cash, the Ordinary should, in union with the board of administration, see to it that the money is safely invested in *interest-bearing property or titles, i. e.,* stocks or bonds.

It is not forbidden to establish a parish or quasi-parish, even if a sufficient endowment is not immediately available, provided it can be reasonably foreseen that the necessary support will be forthcoming.

Can. 1416 rules that, before a benefice is erected, those *who are interested* in its erection should be *invited and heard,* to wit, the parishioners, and others who may have to contribute or who will probably suffer a detriment. But the omission of this formality does not invalidate the establishment of a benefice or parish.[2]

Can. 1417 permits the founder to lay down *certain conditions* in the charter with the *consent of the Ordinary, i. e.,* the diocesan bishop or the superior of exempt clerical religious if the benefice is to be a religious one. These conditions may be contrary to common law, but they must be *reasonable* and *compatible with the nature of the benefice.* Thus, for instance, the founder may stipulate that the holder of the benefice must be of a certain nation or family,[3] or the youngest among a certain group. This may contravene the common law requiring a certain age; yet the law in our case upholds the will of the founder.[4] However, if a stipulated condition would be subversive of ecclesiastical discipline, or derogatory to divine worship, or contrary to sound morality, it would not bind.[5] Im-

1 Cfr. c. 9, Dist. 1, *de cons.;* c. 26, X, III, 5; c. 1, X, III, 29.

2 Cfr. c. 3, X, III, 48.

3 This was not infrequently done in monastic foundations in Ireland; see Bury, *Life of St. Patrick,* 1905, p. 174 ff.

4 Reiffenstuel, III, tit. V, n. 110.

5 A *coniugatus* is unfit, and hence this condition would be invalid; S.

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possible conditions would be looked upon as not existing. Concerning irregular persons mentioned in the conditions, a distinction should be made: if the irregularity is not plainly against the honor of the sacred ministry and is, as a rule, dispensed from by the Holy See, we believe that a dispensation should be asked for, provided the candidate is otherwise fit. For to install unfit candidates would be against the nature of an ecclesiastical benefice. If the irregularity is great and one not easily dispensed from, the condition should be treated as impossible.

Conditions once accepted *cannot be validly suppressed or changed* by the local Ordinary, unless the change be favorable to the Church, and even then only with the consent of the founder or patron if the benefice is one of advowson.[6] This rule also holds good if the condition is added that the benefice or beneficiary is not bound to assume other obligations, for instance, preaching, hearing confessions, etc. In this case the Ordinary has no right to compel the beneficiary to accept such obligations.

Can. 1418 requires for the establishment of a benefice a *legal document,* in which the place of the benefice is designated, and the endowment, rights, and obligations are described. Such a paper must be drawn up by the ecclesiastical authority, in our country with the coöperation of a notary public.

C. C., Sept. 20, 1727; Aug. 19, 1730 (Richter, *Trid.*, p. 443); Santi-Leitner, 1898, III, tit. 5, n. 40.

6 Reiffenstuel, III, 5, n. 112 ff.

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CHAPTER II

UNION, TRANSFER, DIVISION, DISMEMBERMENT, TRANSFORMATION, AND SUPPRESSION OF BENEFICES

UNION

CAN. 1419–1420

1°. A union of benefices is called *extinctiva,* or *per confusionem,* when out of two or more suppressed benefices an entirely new one is created, or when two or more benefices are combined with a third so that they cease entirely to exist, *i. e.,* as a juridical entity. In both cases the new benefice assumes all the rights and obligations of the suppressed or united benefices. However, if these rights and obligations should conflict, only the more substantial and favorable ones are to be retained.

2°. A union is called *aeque principalis* if two or more benefices, though united, remain as before, neither one becoming subordinate to the other. In this case each benefice retains its nature, rights and obligations, but one and the same cleric may hold titles to all. Two independent dioceses held by one and the same bishop would afford an example of such a union (*e.g.,* Viterbo-Aoscanella). Two dioceses thus united may hold their synods either separately or together, have two vicars-general, distinct revenues, feasts, etc.[1] The same rule applies to two par-

1 S. C. C., Jan. 11, 1783 (Richter, *Trid.,* p. 35 f.).

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ishes united *aeque principaliter:* — their boundaries remain distinct, so that marriages must be performed in the respective parish churches, etc. There is no overlapping in this case, but one and the same pastor attends to both parishes and holds the titles to them.

3.° *Minus principalis* is a union *per subiectionem* or *per accessionem,* in which the several benefices remain distinct, but one is made subordinate or accessory to the other. In this case the accessory benefice follows the principal one, upon which it depends, so that the clergyman who obtains the principal, *eo ipso* receives the accessory benefice, and is bound to comply with the obligations incumbent on both. No doubt this is the meaning of the term *subsidiary parishes* or *chaplaincies,* which the S. Congregation had in view when it directed our American bishops to create such within the boundaries of existing parishes whenever lack of endowment or shifting of the population do not permit the erection of new parishes.[2]

TRANSFER, DIVISION, DISMEMBERMENT, ETC.

CAN. 1421

A benefice is *transferred* when its seat,— for instance, a chapel or church,— is changed from one place to another, whilst the benefice remains the same as to its nature, rights, and obligations.

A *division* of benefices is made if two or more benefices are created out of one; this is also applicable to our parishes.

Dismemberment takes place when a part of the territory or the revenues belonging to one benefice is taken away and united to another benefice, or to a charitable or ecclesiastical institution, as, for instance, a seminary.

2 S. C. Consist., Aug. 1, 1919 (*Eccl. Rev.*, Vol. 61, p. 551 f.).

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Transformation is a specific change of benefices, for instance, if *non curata* would be turned into *curata,* or a collegiate into a cathedral benefice.[3]

Suppression is the extinction of a benefice; this cannot be lawfully done by the civil government.

CAN. 1422

The extinction, suppression, and dismemberment of benefices, when the revenues are withdrawn and no new benefice is erected; the union, whether *aeque* or *minus principalis,* of a religious with a secular benefice, or *vice versa;* and the transfer, division, and dismemberment of benefices belonging to religious, are reserved to the Apostolic See.

RIGHTS OF THE LOCAL ORDINARIES

CAN. 1423

§ 1 and § 2. Local Ordinaries may, for reasons of necessity or great and evident utility of the Church, either *aeque* or *minus principaliter unite parish churches* with one another or with *non-curate* benefices. However, a *unio minus principalis* of a parish with a *non-curate* benefice must be made in such a manner that the latter becomes an accessory to the parish.

This union cannot be performed by the *Vicar-Capitular,* on account of can. 436, nor by the *Vicar-General,* unless he has obtained a special commission for that purpose.

§ 3 rules that such a union must be made for good (*in perpetuum*), in order to avoid a cumulation or plurality of benefices.[4] Reasons of *necessity or utility* would be

[3] S. C. C., July 24, 1875 (*A. S. S.,* IX, 8 ff.).
[4] *Trid.,* Sess. 21, c. 5, *De Ref.*

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poverty, decrease of the population, the settling of quarrels, increase of divine worship, etc.[5]

Ordinaries *may not unite* a parish with the *mensa* of the chapter or of the bishop, nor with a monastery or church in charge of religious (this being reserved to the Holy See), nor with any corporation, nor with cathedral or collegiate dignities or benefices. However, they *may* unite a *parish with the cathedral or collegiate church* if the latter is located within the boundaries of the same, but in doing so must provide that the parish revenues are invested in the cathedral or collegiate benefice and the actual pastor or his substitute is paid a decent income (the *congrua*).

Can. 1424

Can. 1424 forbids Ordinaries to unite either curate or non-curate benefices *against the will of the actual incumbents,* if the latter suffer damage by that union. It also forbids them to unite benefices of advowson (*iurispatronatus*), either lay or ecclesiastical, with benefices of free collation, without the advowee's consent, and to unite *benefices of one diocese with such of another diocese,* even though both are united *aeque principaliter* and governed by the same bishop. Finally it forbids Ordinaries to unite *exempt* benefices, or such as are *reserved* to the Apostolic See, with others. The reason for this prohibition lies partly in the danger of alienation, partly in the confusion of rights and subsequent litigation.

[5] Wernz, *Ius. Decret.*, II, n. 271, p. 372.

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RELIGIOUS BENEFICES

CAN. 1425

This canon distinguishes between unions *semipleno iure* and *pleno iure,* made by the Apostolic See. The latter term, according to can. 1422, must be understood of perpetual union, not merely *ad tempus,* for a temporary union may be made by the Ordinary, if it is only partial. The law is:

§ 1. If a parish has, by papal rescript,[6] been united to a religious house as to *temporalities* only, the religious house is entitled to the revenues, and the superior must present to the local Ordinary a member of the *secular clergy,* who is then appointed pastor and receives his salary from the religious house. This arrangement was sometimes made to support religious houses or colleges.[7] Note that the clergyman to be presented for appointment must belong to the diocesan clergy and that he obtains his spiritual jurisdiction from the local Ordinary, upon whom he is entirely dependent as to pastoral rights. The clergyman presented by the religious superior, if he has the necessary qualifications, must be appointed by the bishop, who would otherwise infringe upon the rights of the religious.[8]

§ 2. If a parish is incorporated *pleno iure* with a religious community by the Holy See,[9] the religious superior may designate one of his subjects to take charge of the same; but the local Ordinary has the right to subject the appointee to an examination and to give him his canon-

6 See can. 452.

7 S. C. C., Sept. 20, 1727; Jan. 30, 1740; Sept. 20, 1692 (Richter, *Trid.*, p. 367, nn. 2 ff.)

8 S. C. C., July 18, 1761, *et pluries* (Richter, *l. c.*, p. 53, n. 11 ff.).

9 See can. 456.

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ical appointment.[10] Besides, the *pastor religiosus* is subject to the jurisdiction, coercive power, and visitation of the local Ordinary in whatever belongs to the care of souls, as explained under can. 631.

TRANSFER OF SECULAR PAROCHIAL BENEFICES

CAN. 1426

For reasons of necessity, or great and evident utility, Ordinaries may *transfer* the seat of a secular parochial benefice to another place within the boundaries of the same parish; but other benefices they may transfer to the mother church, or to another church of the same or a nearby place, only if the church in which said benefices were founded, has collapsed and cannot be restored. If such a transfer has to take place, the altars or chapels should, if possible, be erected in the church to which the benefice was transferred under the same titles which they had in the original benefice, and all the revenues and burdens of the former church are transferred to the latter.

DIVISION OF PARISHES

CAN. 1427

§ 1. Possunt etiam Ordinarii ex iusta et canonica causa paroecias quaslibet, invitis quoque earum rectoribus et sine populi consensu, dividere, vicariam perpetuam vel novam paroeciam erigentes, aut earum territorium dismembrare.

§ 2. Causa canonica ut divisio aut dismembratio paroeciae fieri possit, ea tantum est, si aut magna sit diffi-

10 If the religious has not obtained this appointment, the bishop may recall him at any time; S. C. C., Nov. 10, 1734 (Richter, *l. c.*, p. 54, n. 21).

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cultas accedendi ad ecclesiam paroecialem, aut nimia sit paroecianorum multitudo, quorum bono spirituali subveniri nequeat ad normam can. 476, § 1.

§ 3. Paroeciam dividens, Ordinarius debet vicariae perpetuae aut paroeciae noviter erectae congruam portionem assignare, servato praescripto can. 1500; quae, nisi aliunde haberi queat, desumi debet ex reditibus ad ecclesiam matricem quoquo modo pertinentibus, dummodo sufficientes reditus eidem matrici ecclesiae remaneant.

§ 4. Si vicaria perpetua aut nova paroecia dotetur ex reditibus ecclesiae a qua dividitur, debet matrici honorem deferre modo et finibus ab Ordinario praestituendis; qui tamen vetatur baptismalem fontem matrici ipsi reservare.

§ 5. Divisa paroecia quae ad aliquam religionem iure spectat, vicaria perpetua aut paroecia noviter erecta non est religiosa; pariter divisa paroecia iuris patronatus, nova paroecia est liberae collationis.

It is evident that this canon refers not only to benefices in the strictly canonical sense of the word, but also to parishes and quasi-parishes. We say, this is evident, because not only this canon, but also can. 476, § 8, expressly mentions parishes. Hence this *canon is law also in the United States.*

§ 1. Ordinaries may, for a just and canonical reason, *divide parishes of any kind* by establishing a perpetual chaplaincy or a new parish, or dismembering the territory of such parishes; and they may do so even against the will of the rectors of the parishes, and without the consent of the people.

This part of our canon should create no difficulty, since the right of the Ordinary to divide or dismember parishes

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was established by the Decretals as well as by the Council of Trent.[11] However, there is a canonical hitch concerning parishes which belong (*pleno iure*) to religious. According to can. 1425, § 2, such a parish is a "religious parish," and can. 1422 strictly reserves the division and dismembration of religious benefices to the Apostolic See. Can. 1427 speaks of *quaslibet paroecias,* whilst can. 1422 uses *quaelibet* in speaking of division or dismembration. Here, then, two canons seem to clash. However, we may apply here the juridical axiom: "*generi per speciem derogatur,*" which finds its application whenever general and specific terms occur[12] in the same law. Taken in this light, the *genus* would be benefice, and the *species,* parish. Consequently, the general rule of can. 1422 would suffer an exception as to parishes. This is probably the mind of the lawgiver, because Ordinaries with regard to parishes have *intentionem fundatam in iure.* This was also the guiding principle of that passage of "*Romanos Pontifices*" which refers to parishes in England, subsequently applied to the U. S.,[13] and does not question the right of Ordinaries to divide parishes belonging to regulars. The necessity of abiding by all the formalities was the real point under discussion, and the Constitution decided that these are not strictly required because the missions in England (and the U. S.) are not parishes erected according to the rules of canon law. From this it may be seen that the practice of the Roman Court[14] gives free sway to our Ordinaries and those of England (and other countries, too) in the matter of dividing or dismembering parishes of religious. However,

11 C. 3, X, III, 48; *Trid.,* Sess. 21, c. 4; Sess. 24, c. 13, *De Ref.*

12 Barbosa, *Tractatus Varii,* Axioma 107 (ed. Lugd., 1660, p. 72 f.).

13 May 8, 1881; extended to the U. S. in 1885 (*Coll. P. F.,* n. 1552).

14 See S. C. C., June 22, 1743 (Richter, *Trid.,* p. 117, n. 5).

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since an incorporated parish of religious can only be obtained by the Holy See (can. 452; can. 1425), it would seem rather presumptuous for an Ordinary to proceed to a division or dismembration without informing the Apostolic See. This seems at least a reasonable assumption, especially since the boundaries of every religious parish are accepted and sanctioned by the Holy See.[15]

§ 2. The sole *canonical reasons* for dividing or dismembering a parish are: great difficulty on the part of the people to come to the parish church or impossibility of properly attending to their spiritual needs because of too great a number.

Note the expression "*ea tantum*"; only the two reasons mentioned are acknowledged as canonical. Hence a desire to create more parishes within a city or diocese cannot be considered a canonical reason for dividing the existing parishes. The *distance* has been sometimes described in Roman decisions[16] as of one or two hours (to be walked, of course), sometimes as 1500 *passus* (about a mile and a quarter), sometimes three Italian miles, sometimes simply a long and arduous way, especially if impeded by a torrent or river.

The phrase "*too great a number*" is relative; it means, if the spiritual welfare of the faithful suffers because there are too many souls to be taken care of. In 1905 and 1907 the S. Congregation[17] decided the case of a parish in charge of the Capuchins, which numbered about 6,500 souls and was well taken care of, but divided by the Ordinary. The S. Congregation first refused to sanction the

15 This information, of course, is not required *ad validitatem*.

16 S. C. C., June 22, 1743; Sept. 27, 1732; Jan. 29, 1735, etc. (Richter, *Trid.*, 117, nn. 5 ff.); a distance of 30 miles would certainly be sufficient; S. C. C., March 28, 1903 (*Anal. Eccl.*, XI, 116 ff.).

17 S. C. C., Jan. 21, 1905; July 27, 1907 (*Anal. Eccl.*, XIII, 23 ff.; XV, 338 ff.); a legacy of 30,000 lire was promised to the newly erected church.

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decree, but new reasons advanced by the episcopal court finally led to a ratification of the same. However, neither the distance [18] from church nor the number [19] of parishioners has ever been definitely settled by the Roman authorities, and it would be futile, therefore, to try to determine either. Local circumstances must be considered and the welfare of souls looked to as the supreme law. The latter does not, however, demand that a flourishing congregation, say of four or five hundred or more families be broken up for the sake of a few "kickers" or to make a vain display of parishes. The fact that old parishes are sometimes loaded down with debts and new parishes often require heavy sacrifices should be duly taken into account.[20] The faithful should not be needlessly burdened, especially in critical times such as ours. A parish with 300 or 400 families who live within a radius of about one mile and a half with good roads or streets, and sometimes street railways and automobiles, can easily be taken care of by the pastor with the aid of one or two assistants and certainly does not call for dismembration, unless perhaps dangerous tracks, or factories, or undesirable quarters would have to be passed by a considerable number of the parishioners.

§ 3. The Ordinary, when he divides a parish, must assign sufficient revenues or provide in some other way (see can. 1500), for the new parish or chaplaincy. If no other source of revenue is available to provide the new parish with sufficient funds, these must be taken from the

18 A distance of one Italian mile has never been considered sufficient for dismembration; see *Anal. Eccl.*, XIII, 27.

19 One parish had 26,000 souls (= about 5,000 families), which number appeared too great for one pastor with his assistants to attend to properly; S. C. C., Jan. 25, 1879 (*A. S. S.*, XIII, 287 ff.)

20 This reason was also advanced in the petition mentioned above of 1905 and 1907.

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mother church, provided, however, that a sufficient income is left to the latter. Of course, this holds also if the new parish was detached from a religious parish. Here it is not superfluous to remark that the accounts of a parish in charge of religious should be kept strictly separate from those of the monastery. If there are any accrued funds, the salary to the pastor, as well as the expenses for the upkeep of the church and divine worship must first be deducted, and if anything is then left, the old parish is bound to share it with the newly erected one.

But what if there are *debts on the old parish?* Here the injustice of some divisions becomes apparent. As it is entitled to a share of the revenues, the new parish has to share also the debts,[21] for it would be unjust to saddle a debt which was calculated for 400 or more families, on 150 or even less.

§ 4. If the chaplaincy or new parish is endowed from the revenues of the old, the latter, as the *mother church, is entitled to certain marks of honor,* which should be determined by the Ordinary, who, however, is not allowed to reserve the right of the baptismal font to the mother church. Sometimes a candle had to be offered, sometimes the baptismal water had to be gotten from the mother church,[22] but the latter practice is now forbidden, and justly so, for a parish without a baptismal font is badly handicapped. The bishop may decide what signs of honor should be paid, for instance, a procession, an invitation to preach, etc.

§ 5. A parish detached from one which belongs to religious, does not become a religious parish, and the relig-

21 See can. 1500, which confirms what is said in the text.

22 S. C. C., Sept. 20, 1879; April 24, 1880 (*A. S. S.*, XIII, 298, 514 ff.).

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ious may not claim it, but to obtain it need the recommendation of the bishop and a papal indult.[23]

CAN. 1428

§ 1. Locorum Ordinarii uniones, translationes, divisiones, dismembrationes beneficiorum ne faciant nisi per authenticam scripturam, auditis Capitulo cathedrali et iis, si qui sint, quorum intersit, praesertim rectoribus ecclesiarum.

§ 2. Unio, translatio, divisio, dismembratio facta sine canonica causa irrita est.

§ 3. Adversus decretum Ordinarii unientis, transferentis, dividentis aut dismembrantis beneficia, datur in devolutivo tantum recursus ad Sanctam Sedem.

Can. 1428 mentions certain *formalities* which the local Ordinaries must observe when they unite, transfer, divide, or dismember benefices. One of these is that an *authentic document* be drawn up, signed, and sealed with the diocesan seal. The other formality consists in hearing the *advice* of the chapter; or, with us, of the *diocesan consultors,* which is to be given *collegialiter, i. e.,* at a meeting.[24] Besides, the bishop must also *summon all those who are interested* in the transaction, *viz.,* the parishioners or their representatives, and especially the *rectors of the churches.* However, if these formalities (viz., writing, obtaining the advice of the consultors, hearing the parishioners and pastors) were omitted, it would ***not affect the validity of the act.***[25]

23 Cfr. Leo XIII, *Romanos Pontifices,* May 8, 1881; S. C. C., Jan. 25, 1879, (*A. S. S.,* XII, 287 ff.).

24 Formerly the *consent* of the chapter was required for validity (Wernz, *l. c.,* II, n. 267, p. 367), though in this country only the advice of the consultors and the rector of the mission needed to be obtained; *Conc. Balt. III,* n. 20.

25 Cfr. *A. S. S.,* III, 396 ff.

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§ 2. A union, transfer, division, or dismembration made *without a canonical reason is invalid,* because every such act involves a change in the status of a church or benefice, and is therefore a species of alienation which no one inferior to the Supreme Pontiff can validly perform without a reason.[26] Therefore if neither the distance nor the number of parishioners demands a division, it is invalid.

§ 3. If the Ordinary deems the reason just and canonical, whilst the greater part of the congregation and the old pastor think it unjustified, the union, transfer, division, or dismembration takes effect, but *recourse is open to the Holy See.* This recourse, however, is not properly an appeal, and, therefore, does not suspend the effect of the episcopal decree, but devolves the matter on the S. C. Concilii.[27]

PENSIONS

CAN. 1429

§ 1. Beneficiis quibuslibet nequeunt Ordinarii locorum pensiones perpetuas aut temporarias imponere quae ad vitam pensionarii durent, sed possunt, dum beneficium conferunt, ex iusta causa in ipso collationis actu exprimenda, eisdem imponere pensiones temporarias, quae durent ad vitam beneficiarii, salva huic congrua portione.

§ 2. Beneficiis autem paroecialibus non possunt, nisi in commodum parochi vel vicarii eiusdem paroeciae a munere abeuntis, imponere pensiones, quae tamen ne excedant tertiam partem reditus paroeciae, quibusvis deductis expensis et incertis reditibus.

§ 3. Pensiones beneficiis sive a Romano Pontifice

26 C. 8, X, III, 5.

27 C. 3, X, III, 48; Benedict XIV, "*Ad Militantis,*" March 30, 1742, §§ 11, 16, 32; Leo XIII, "*Romanos Pontifices,*" May 8, 1881.

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sive ab aliis collatoribus impositae, cessant morte pensionarii, qui tamen nequit eas alienare, nisi id expresse concessum sit.

An ecclesiastical pension may be called an annual allowance from an ecclesiastical benefice, granted by the competent authority either to its former holder, or to a stranger, generally for some service rendered to the benefice itself, or to the beneficiary, or at least to the church.

A pension is *personal* if paid by the ecclesiastical beneficiary; *real* if incumbent on the benefice itself. If a real pension is attached to a benefice in such a way that not only the present pensionary, but after his death others are entitled to the pension, it is a *strictly perpetual* pension, whereas one paid during the lifetime of the pensionary only is called *relatively perpetual,* and one paid during the lifetime of the beneficiary, although paid from the benefice itself, is called *temporary.*[28]

§ 1 rules that the local Ordinaries may not impose on any kind of benefice either *perpetual* or *temporary* pensions, which last during the lifetime of the pensionary, but may, when conferring a benefice, for a just reason to be mentioned in the act of bestowal, impose a temporary pension to be paid during the lifetime of the beneficiary, provided, however, the latter's income is safeguarded.

§ 2. On *parochial* benefices the Ordinaries can impose pensions only in favor of a pastor or substitute (*coadiutor*) when he leaves his office (as *rector* or *pastor emeritus*). But the amount of this pension shall never exceed the third part of the entire parish revenues, after all expenses and uncertain revenues have been deducted.

Note the expression "*parish revenues,*" which is not

28 Traces of pensions are found in the acts of the Council of Chalceton, A. D. 451; they were increased after separate parish and canon's benefices had been introduced; Wernz, *l. c.,* II, n. 321, p. 433.

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synonymous with the "pastor's revenues." Hence in our country only the pew-rent, plate and house collections, sure subscriptions, and perhaps interest from money loaned out would have to be considered. From these revenues the current expenses for the pastor's salary and the upkeep of the church, etc., may be deducted.

§ 3. Pensions imposed on benefices either by the Roman Pontiff, or by other collators, cease with the death of the pensioner, who, unless expressly empowered to do so, may not alienate his pension.

TRANSFORMATION

CAN. 1430

Benefices that have the cure of souls attached to them cannot be transformed by the Ordinaries into such as have no such charge, nor can religious benefices be changed into secular ones, or *vice versa*. On the other hand, simple benefices may be changed into *curate* ones, provided there be no express stipulation to the contrary on the part of the founder.

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CHAPTER III

BESTOWAL OF BENEFICES

CAN. 1431

The Roman Pontiff, being the supreme authority and endowed with universal jurisdiction, may confer benefices in the whole Church and reserve their collation to himself. This proposition is directed against the libelous book of Eybel, which is full of invectives against the Holy See from the point of view of the Febronian and Josephinist schools.[1]

CARDINALS AND ORDINARIES

CAN. 1432

§ 1. Cardinals may confer benefices in their titular churches or deaneries, and Ordinaries in their own dioceses, because they have the priority or right in their favor (*habent intentionem fundatam in iure*).[2]

§ 2. The vicar general, however, cannot confer benefices unless he has received a special commission for this purpose by his bishop. The *Vicar-Capitular* or Administrator, however, can confer parochial benefices, but only

1 The book: *Was ist der Papst?* was put on the index, and Pius VI, Nov. 28, 1876, issued a special Brief, "*Super Soliditate*"; see Denzinger, n. 1303.

2 This is truly called a presumption in law, which has the effect that the bishop in our case is released from proving his right, and the burden of proving it against the bishop devolves on the plaintiff or the one who disputes the bishop's right; see Reiffenstuel, II, tit. 23, n. 45.

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according to can. 455, § 2, n. 3; other perpetual benefices he may not confer at all, on account of can. 436.

§ 3. If the Ordinary does not make an appointment to a vacant benefice within six months from the time when the vacancy became known to him, the right of making the appointment passes to the Apostolic See, unless (can. 458) special reasons permit a delay, and an administrator is left in the place.

Can. 1433

Can. 1433 reserves the appointment of *coadjutors* to beneficiaries, with or without the right of succession, to the Apostolic See. But this reservation does not apply to the temporary coadjutors and assistants mentioned in canons 475 and 476.

BENEFICES RESERVED TO THE HOLY SEE

Can. 1434–1435

Benefices *reserved to the Apostolic See* cannot be validly conferred by inferior prelates, for instance, bishops.

Besides all consistorial benefices and dignitaries in cathedral and collegiate chapters (can. 396, § 1) the following are reserved to the Apostolic See, even though the latter be vacant:

1.° All benefices, including *curata,* which become vacant by the promotion, resignation, or transfer of cardinals, papal legates, the higher officials (assessor, prefect, secretary, subsecretary, regent) of the Roman Congregations, tribunals and offices of the Roman Court and the papal household, even though they be purely honorary.

2.° All benefices which, though founded outside the

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Roman Court, become vacant by the death of the beneficiary in the city of Rome.[3]

3.° All benefices invalidly conferred by reason of simony.

4.° Finally all benefices in which the Roman Pontiff, either himself or through a delegate, is interested for one of the following reasons:

(a) Because he had declared the election to the benefice null and void;

(b) Because he had forbidden the electors to proceed to an election;

(c) Because he had accepted the resignation of the incumbent;

(d) Because he had promoted, transferred, or deprived the beneficiary of his benefice:

(e) Because he had given the benefice *in commendam.*

No manual benefices, or such of lay or mixed advowson (*iurispatronatus*) are reserved, unless expressly stated.

As to the bestowal of benefices founded in Rome, the particular laws in force there must be observed.[4]

ACCEPTANCE

CAN. 1436–1437

No benefice can be validly conferred on a cleric who is unwilling to accept it, or who does not expressly declare his acceptance of the same.

No one can bestow a benefice upon himself, because the one who bestows and the one who accepts must be different persons.[5] This is true also of a clergyman whose father holds a benefice.[6] Hence, for instance, a

3 This is part of *Regula XIX* of the Cancellaria Apostolica.

4 S. Pius V, "*Intolerabilis,*" June 1, 1569, § 8.

5 C. 7, X, III, 7.

6 C. 15, X, III, 38; there is not much danger of this, except in case of advowson.

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bishop cannot validly bestow a benefice of his own diocese upon himself; an abbot cannot be a canon of a cathedral or collegiate chapter, even though it be a simple canonicate.[7] Consequently, too, an abbot cannot confer upon himself a parish benefice, nor could the bishop validly give it to him, even though he has all the necessary qualities.

PROVISION TO BE MADE FOR LIFE

CAN. 1438

All secular benefices must be conferred for *life,* unless the will of the founder, or an immemorable custom, or a special indult rules otherwise.

QUALITIES OF BENEFICIARIES

CAN. 1439

§ 1. No clergyman is capable of accepting or holding *several benefices,* either in his own name, or *in commendam* (see. can. 156).

§ 2. Benefices, the obligations of which the beneficiary cannot fulfil personally, as well as benefices of which one suffices for the decent support of the incumbent, are *incompatible.*

NO DEDUCTIONS PERMISSIBLE

CAN. 1440–1441

"Ecclesiastical benefices must be conferred without diminution," was the complete and authentic title of one of the Decretals (III, 12), and the commentators comprised under this heading the imposing of new burdens,

[7] S. C. C., March 3, 1880 (*A. S. S.*, XIII, 461).

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division, dismemberment and suppression of benefices.[8] Our canon exclusively intends the first only, *viz.*, the *imposition of new burdens*. These may be of two kinds: *spiritual* and *temporal*. By law, then, the bishops may not impose new *obligations* which would burden either the office holder or the benefice, if these obligations are not mentioned in the original grant.

Such new burdens would be the duty of performing pastoral work, saying more Masses than required, etc., etc. No such burdens may be imposed, although the beneficiaries may be asked to assume them, if necessary.[9]

Temporal obligations would be the giving up of part of the revenues, of charges for certain purposes, etc. All such are forbidden and savor of simony.

Can. 1441 forbids and *reprobates* as simoniacal all deductions made from the revenues, all compensations and payments in the act of preferment, no matter whether they accrue to the appointer, or to the advowee, or to others.[10]

ON WHOM BENEFICES MAY BE CONFERRED

CAN. 1442

Secular benefices may be conferred on secular clerics only, religious benefices only on religious of the institute to which the benefice belongs.

Hence a benefice belonging, *e. g.*, to the Franciscans should not be conferred on a Benedictine, and *vice versa*. This rule also holds with regard to prelacies,[11] and must

8 Cfr. Engel, III, 12, n. 1 f.

9 Wernz, *l. c.*, II, n. 321, p. 430 f.

10 C. un. X, III, 12; cc. 8, 9, 41, 44, V, 3; *Trid.*, Sess. 24, c. 14, *de Ref.*

11 C. 1, Clem. I, 3.

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be observed when a higher superior confers a benefice [12] by devolutive right.

INSTALLATION

CAN. 1443–1445

No one shall take possession of a benefice conferred upon him, on his own authority, or before he has made profession of faith, if the benefice requires such profession. In regard to non-consistorial benefices, the right of installation belongs to the local Ordinary, who may, however, delegate another ecclesiastic,— generally the rural dean.

The *manner* in which installation should take place is prescribed by particular — for instance, diocesan — statutes, or by custom, and the prescribed rite must be observed unless the Ordinary has granted a written dispensation, in which case the dispensation takes the place of the formal installation.

The installation may be performed *by proxy* if a special mandate to that effect has been issued by the appointee.

PRESCRIPTION AND TITULUS COLORATUS

CAN. 1446

If a cleric who possesses a benefice is able to prove that he has had peaceful possession of the same for three full years and in good faith, the benefice is his by prescription, even though his title was invalid, provided, however, that no simony was committed.

Concerning the application of prescription to benefices, there was a controversy among canonists [13]; our Code has

12 C. un. Clem. I, 5.

13 Cfr. Reiffenstuel II, 26, n. 35.

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adopted the affirmative view, under certain conditions, *viz.*:

(a) The possession must have been *peaceful,* with no suit pending;

(b) This peaceful possession must have lasted *three full years,* without interruption;

(c) The possessor must have been honestly ignorant of the fact that he held the benefice unlawfully; and

(d) No simony must have been committed either by him or his proxy.

All this the incumbent has to prove by witnesses or documents. If he succeeds, the benefice is his, even though his original title was doubtful for some reason, for instance, that he was appointed by the administrator or vicar-general against the common law. This benefit is granted to avoid unnecessary litigation.[14]

A LITIGANT BENEFICE

CAN. 1447

To understand this canon it is necessary to know what a petitory and a possessory trial is. A petitory trial turns about the question whether a title or claim is just and valid, whilst in a possessory trial the plaintiff claims the object or right, or asks that he be not disturbed in its possession. A "peacefully possessed benefice" is one that is not disputed, either as to title or as to actual possession (*de iure et facto possessum*).

The text rules that the one who claims a benefice that is peacefully possessed by another, on the supposition or pretence that it is vacant, must clearly state in his petition the name of the possessor, how long he has been in possession, and the particular reason why he has no right

14 C. un. Clem. II, 6, but only *ad argumenti instar.*

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to the benefice. But the benefice cannot be conferred upon the plaintiff or claimant before a petitory trial has cleared up the title. For the general rule is that only benefices which are vacant by right and in fact (*de iure et facto*) can be validly conferred.

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CHAPTER IV

IUSPATRONATUS OR ADVOWSON

The *iuspatronatus* arose from a transfer of landlordism, plus feudalism, to ecclesiastical soil. The Church accepted the protection of the civil power as well as that of laymen who should have been her patrons (*advocati*, hence advowson), but frequently played the part of oppressors and robbers. In course of time certain spiritual rights were granted to lay benefactors,[1] chief among them the right of presenting candidates for ecclesiastical benefices and some honorary and material privileges. If the balance betwen advantages and disadvantages accruing to the Church from advowson were fairly drawn, we believe the latter would exceed the former. Hence we need not be surprised that the Code is not very enthusiastic in this matter, as is apparent from can. 1449, which defines, divides, and limits the *iuspatronatus*.

CAN. 1448

The *iuspatronatus* is the sum total of the privileges and obligations that belong, by ecclesiastical authority, to Catholic founders of churches, chapels, or benefices, and

1 A Latin verse comprises the reasons for admitting advowson thus: *Patronum faciunt dos, aedificatio, fundus;* see the commentators on the Decretats III, 38; also Wernz, *Ius Decret.*, III, n. 401 pp. There is no mention of the iuspatronatus in the *Acta Conc. Balt. III; Conc. Balt. II* (n. 184) according to *Prov. Balt. I* (1829) rejects the iuspatronatus in this country (*Coll. Lac.* III, p. 27).

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also to such as have obtained a canonical title from the founders.

The *ecclesiastical authority* alone can connect a material right or favor with a spiritual right, such as presentation radically is. Whether this is done explicitly or implicity is irrelevant.

The *founder* must be a *Catholic,* as shall be seen from can. 1543, although it must be confessed that in Hungary, even Jews tried to obtain the *iuspatronatus.* The term *founder* must not be too strictly interpreted. It includes not only the original or first founder, endower, maintainer, but also those who have restored a church, chapel, or benefice.

"*Qui ab illis causam habent,*" means that the *iuspatronatus* may be obtained not only by a direct privilege or prescription, but also by succession, donation, exchange, and sale; not directly, but indirectly, by reason of another right. That *obligations* correspond to the privileges is evident, because these two terms are always correlative.

CAN. 1449

The *iuspatronatus* is *real* if attached to an object or thing, as, for instance, real estate, or a building, or an office. It is *personal* if it inheres in a person. It is *ecclesiastical* if the title itself is ecclesiastical, for instance, a church, a prebend, an office. It is *laical* (lay patronage) if the title is secular, for instance, a civil office or right like that of inheritance. It is *mixed* if it springs from both an ecclesiastical and a civil title, for instance, if a pastor has the right of presentation as pastor and as a member of a certain family. It is *hereditary* if it is obtained through succession or by last will. It is a *family* patronage if it remains among, and is limited to, the next descendants.

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It is a clan patronage if it extends to all the descendants comprised by the name *gens,* tribe, or clan, for instance, all the *O'Rourkes.* It is *mixed* if one or more of the above-mentioned titles concur.[2]

CAN. 1450–1451

No patronage can be established validly on any title in future. *Local Ordinaries* may, however,

(a) Grant to those of the faithful who build churches or found benefices, either entirely or in part, a claim to *spiritual suffrages* in proportion to their generosity, either for a certain time, or forever; for instance, a founded Mass or office;

(b) Admit the foundation of a benefice on condition that for the first time the founder himself, if he is a clergyman, be appointed to the benefice or another clergyman presented by him.

Local Ordinaries should endeavor to induce patrons to abdicate their *iuspatronatus,* or at least the right of presentation, in exchange for *spiritual suffrages* for themselves and their families. If a patron is unwilling to cede the *iuspatronatus,* this can be exercised only in accordance with the following canons.

POPULAR PATRONAGE

CAN. 1452

Elections and presentations to *parochial benefices by the people* (*i. e.,* congregations, as for instance, in Switzerland) can be *tolerated* only if the people elect one of three candidates designated by the local Ordinary. Hence

2 The distinction between *familiare* and *gentilitium* is not explained in the same way by all writers.

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neither the government, nor the municipality, nor the congregation as such, are allowed to reject all three candidates proposed by the Ordinary.

TRANSMISSION OF PATRONAGE

CAN. 1453

A personal *iuspatronatus cannot be validly transmitted,* either by inheritance, donation, change or sale, to infidels, public apostates, heretics, schismatics, members of secret societies condemned by the Church, or to any one who is under a declaratory or condemnatory sentence of excommunication.

That a personal *iuspatronatus* may be validly transmitted to others, the written consent of the Ordinary is required, with due regard to the last will of the founder, which, once accepted, must be kept sacred.

If a *real* patronage passes to any of the above-named persons it remains suspended, *viz.,* until said person becomes reconciled to the Church.

AUTHENTIC PROOF REQUIRED

CAN. 1454

No *iuspatronatus* can be admitted unless it is established by an authentic document or other lawful proofs, as seen in Book IV.

PRIVILEGES OF PATRONS

CAN. 1455

The privileges of patrons are the following:

1.° To *present* a clergyman (not a layman) for a vacant church or benefice;

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2.° To obtain *support* from the revenues of the church or benefice, if there are any left, should he (the patron) become reduced to poverty without his fault. This claim remains even if the patron has renounced the advowson in favor of the church, or if a pension was by mutual agreement reserved to the patron but proves insufficient for his support. However, this equitable right can be claimed only if the patron has complied with his obligations as advowee, and the beneficiary has a decent support.

3.° To enjoy certain *honorary* prerogatives, where these are customary. These prerogatives are:

(a) To have his family coat-of-arms placed in the church;

(b) To precede all other laymen at processions and other similar functions;

(c) To occupy a more prominent seat in the church, but outside the sanctuary and without a canopy.

Sometimes two swings of the censer at the incensation are permitted.

WIFE AND MINORS

CAN. 1456

A wife exercises the *iuspatronatus* herself, children who are not yet of age, through their parents or guardians; if the parents or guardians are non-Catholics, the patronage remains suspended until the minors come of age, or the parents or guardians become Catholics.

TIME OF PRESENTATION

CAN. 1457–1458

The presentation for a vacant benefice, whether lay, ecclesiastical, or mixed, must, if there be no obstacle,

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be made within at least *four months* from the day on which the collator, *i. e.*, generally the local Ordinary, has notified the patron of the vacancy, and from among the priests who have successfully passed the concursus, if the benefice requires a concursus.

Exceptions to this rule are:

(a) Any legitimate obstacle which prevents the patron from making the presentation, *e. g.*, illness, or suspension, or a journey to Rome [3];

(b) The fact that a *shorter time* is prescribed either by the will of the founder or by lawful prescription.

If no presentation has been made within the prescribed time, the church or benefice becomes, for this time only, one of *free collation, i. e.*, the Ordinary can appoint whom he pleases, without consulting the patron. But if a quarrel or *dispute* arises during the four months, concerning the right of presentation, either between the Ordinary and the patron, or between different advowees, or about the candidates, who of them should be accepted, the *appointment must be suspended* until the controversy is settled, and, if necessary, an administrator (*oeconomus*) shall be appointed by the Ordinary for the church or benefice.

COLLEGIATE PRESENTATION

CAN. 1459–1460

§ 1. If several individuals are patrons, they may agree among themselves, both for themselves and for their successors, to exercise the right of presentation alternately.

§ 2. But in order to be valid this agreement must have the written consent of the Ordinary, which consent, when once given, cannot be validly revoked against the will of

[3] C. 5, X, III, 8; formerly ecclesiastical patrons had six, lay patrons only four months for making the presentation; c. 22, X, III, 38.

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the patrons either by the Ordinary himself or by his successor.

Whilst canon 1459 treats of patrons severally, can. 1460 mentions a body or college of patrons, which may be a corporation, for instance, a monastery or university which possesses the *iuspatronatus*. For such collegiate presentation the following rules are laid down:

§ 1. If the advowson is exercised by a *college* or *body of patrons,* the candidate who obtains the *majority of votes,* according to can. 101, § 1, must be considered as chosen or presented. After two ballots have been cast without result, all those are to be considered as presented who obtain a majority in the third ballot, even though they receive the same number of votes.

§ 2. The same principle is applied to a *non-collegiate body, i. e.,* when several patrons have an individual right of presentation. If they cannot agree as to alternate presentation, the candidate who obtains at least a relative majority of the votes cast by the litigant patrons is regarded as presented, and if several candidates are selected with the same number of votes, they must all be considered as presented.

§ 3. He who is entitled to exercise a patronage on *various* grounds, (for instance as founder, endower, builder, or by reason of inheritance) enjoys as many votes as he has titles.

§ 4. Every patron may, before the presentation is accepted, present more than one candidate, either at once or successively, because the *ius ad rem* is not yet acquired; but he must present these candidates within the prescribed time and not exclude those whom he presented first.

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CANDIDATES

CAN. 1461–1464

No one, even though he be a clergyman and the most worthy candidate available, *can present himself,* nor vote with others in order to obtain the number of votes necessary for presentation. To do this would savor of ambition, and is forbidden, even by proxy.[4]

The patron, even if he be a layman, can not present for a church or benefice a cleric who has not successfully passed the *concursus,* whenever this is required.

The *candidate to be presented must be fit, i. e.,* he must have all the qualities required by common law, or particular statutes, or the charter of foundation on the day when the presentation is made, or at least on the day when he accepts the presentation. The qualities required by common law are laid down in Book II of our Code.

The *presentation must be made to the local Ordinary,* to whom it appertains to judge whether the candidate is fit.

To form his judgment the Ordinary shall make inquiry about the candidate,[5] and obtain information, if necessary in secret.

The Ordinary is not obliged to manifest to the patron the reasons for rejecting a candidate.

He may do so, but cannot be compelled, because compulsion might involve unnecessary odium.

4 Cc. 15, 26, X, III, 38; Reiffenstuel, *h. t.,* n. 72.

5 See can. 149.

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REJECTION OF THE CANDIDATE PRESENTED

CAN. 1465

§ 1. If the candidate is found unfit, *i. e.,* if he lacks the qualities required (can. 1463) and is therefore rejected by the Ordinary, the patron (no matter whether he be an ecclesiastical or a lay advowee), provided the four months have not elapsed through his own negligence or carelessness, *may present another candidate* within another four months. If this one, too, is found *unfit,* the Ordinary may, for this occasion, freely appoint one of his own *choice,* and we believe he not only may but should make use of this right, unless the patron has recourse to the Holy See within ten days from the day when he was notified of the rejection. If recourse is taken, this fact must naturally be communicated to the Ordinary. Pending a decision, the benefice remains vacant. In the mean time, the Ordinary shall, if necessary, appoint an *oeconomus* to the vacant church or benefice.

§ 2. A presentation tarnished with the stain of simony is *null and void* by law, and the same rule holds of the subsequent installation of the candidate by the Ordinary.

EFFECT OF ACCEPTED PRESENTATION

CAN. 1466–1468

Every candidate who has been lawfully presented and found fit, by accepting presentation, obtains the right (*ius ad rem*) to be canonically installed.

The right to grant canonical institution belongs to the local Ordinary, but not to the Vicar-General, unless he has obtained a special mandate to that effect.

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If several candidates have been lawfully presented, and all are proved fit, the Ordinary may choose from among them the one whom he deems most suitable or worthy.

The canonical installation for any and every benefice, even if it has no cure of souls attached to it, should take place *two months* from the date of presentation, unless a legitimate obstacle prevents.

If the candidate presented resigns his right or dies before the canonical installation has taken place, the patron again has the right of presentation, to be exercised, as before, within four months.

OBLIGATIONS OF PATRONS

CAN. 1469

§ 1. The burdens or *obligations* of patrons are the following:

1.° To notify the local Ordinary if the property of the church or benefice is suffering material damage, without, however, meddling in the administration of the same;

2.° To *rebuild* a church if it has collapsed, or to make the repairs that are judged necessary by the Ordinary, if the advowson was obtained by reason of having built the church and this burden of repairing or rebuilding is not incumbent on others, according to can. 1186.

3.° If the patronage is based upon the title of *endowment,* the patron must supply new revenues in case the old revenues of the church or benefice become so insufficient, that either divine worship cannot be properly kept up, or the benefice cannot be conferred.

§ 2. In case the church has collapsed, or is in need of urgent repair, or if the endowment has become insufficient, the *iuspatronatus* remains suspended until the patron is able or willing to comply with his obligation.

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§ 3. If the patron rebuilds or repairs the church, or supplies the needed revenues, the *iuspatronatus* within the time set by the Ordinary, revives; otherwise it ceases *ipso iure* and without any declaration after the expiration of the term.

LOSS OF THE IUSPATRONATUS

CAN. 1470

§ 1. The *iuspatronatus* is lost, as we have seen in the preceding canon, if the patron fails to rebuild, repair, or re-endow the benefice. It may also cease for one of the following reasons:

1.° If the patron renounces his right; this renunciation may be either total or partial; but if one of several individual patrons gives up his right, no prejudice is thereby created to the others.

2.° If the Holy See revokes the right or permanently suppresses the church or benefice.

3.° If there is a legitimate *prescription* against the patron. This is but another form of tacit resignation.

4.° If the property or office in which the *iuspatronatus* inheres perishes; or the family, clan (*gens*) or line to whom the advowson was reserved, dies out. In this latter case the patronage does not become hereditary, nor can the Ordinary validly permit it to pass over to persons not connected by blood relationship with the patron, family, or clan.

5.° If, with the consent of the patron, the church or benefice is united with another, which is of free collation, or if it becomes elective or regular. This, too, is a kind of tacit resignation.[6]

6 Cfr. Santi-Leitner, III, 38, n. 43 f.

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6.° By *crime,* as follows:

(a) If the patron attempts, even though unsuccessfully, to transfer his *iuspatronatus* to another by *simony;*

(b) If he becomes an apostate, a heretic, or a schismatic;

(c) If he unjustly usurps or retains rights and property belonging to the church or benefice;

(d) If he, either personally or through another, kills the rector or any other cleric attached to the advowson church, or the beneficiary.

§ 2. This last-named crime affects also the heirs, whilst the three first mentioned concern only the patron himself.

§ 3. To incur privation of advowson on account of any of the four crimes mentioned, a declaratory sentence is required and suffices.

§ 4. No one is allowed to exercise the *iuspatronatus,* or to enjoy its privileges, who has incurred a censure or infamy by law, inflicted by a condemnatory or declaratory sentence, as long as this censure is not removed.

INDULT OF PRESENTATION

CAN. 1471

If the Apostolic See has, either by a concordat or otherwise, granted the privilege of presentation to a vacant church or benefice, this grant must *not* be construed as *iuspatronatus,* but the indult must be interpreted strictly according to its tenor. This is clearly intended for countries where the separation of Church and State is not yet in effect, either totally or partially. The interpretation must be applied in a similar manner to concordats.

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CHAPTER V

RIGHTS AND DUTIES OF BENEFICIARIES

RIGHTS IN GENERAL

CAN. 1472–1473

Every beneficiary, after having taken canonical possession of his benefice, is entitled to all the rights, temporal and spiritual, attached to the same.

These rights are, of course, the rights specially connected with the benefice. Besides these there are the general rights arising from the clerical state, as set forth in can. 118–123, which are by no means curtailed through the fact of one's being installed in a benefice.

Of the *temporal rights* the foremost is that of enjoying the revenues derived from the benefice, as far as they are needed for the beneficiary's decent support. He is entitled to these revenues even though he may possess other property, but is *obliged* to devote the superfluous *revenues* to the poor or to charitable institutions.

Since this canon is undoubtedly intended also for pastors and curates who hold no strictly so called benefices, it may be well to recall the *different kinds of clerical property*. They are:

(1) *Patrimonial,* if derived from the cleric's patrimony, *e. g.,* by inheritance;

(2) *Quasi-patrimonial,* or industrial, if acquired by the clergyman's own industry or diligence, from work

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which has no connection with his benefice, for instance, as a lecturer, a musician, an author;

(3) *Parsimonial,* if acquired from ecclesiastical or beneficiary revenues by living very frugally, so that something is left over and above the expenditures for decent support;

(4) *Beneficiary,* if acquired from the benefice after a decent support has been deducted, in other words from the surplus revenues.

What is a *decent support* must be decided according to the circumstances of time and place. It includes moderate and customary hospitality, which has always been inculcated by the Church, and suitable recreation and provision for old age and inability, for instance, by life insurance or interest-bearing investments.[1]

Our text speaks of *superfluous* revenues. What are they? Discarding the patrimonial and quasi-patrimonial, there can be question only of parsimonial and strictly beneficiary income. However, since the Code mentions *congrua,* it is not likely that parsimonial incomes are understood, and canonists generally do not apply the law to them. Hence only the *strictly beneficiary* revenues, which are left after one has provided for his decent support, can be understood. These are *superfluous,* and must therefore be applied, as the law says,[2] *to the poor or to charitable institutions.* Note that this is a strict *obligation,* not *ex mera caritate,* but *ex iustitia.* Our text is quite explicit on this point, since it calls the beneficiary only the *usufructary,* not the possessor or lord, of his benefice. Usufruct is the right of enjoying a thing

1 Cfr. Santi-Leitner, III, tit. 25, n. 2 f.

2 Cfr. c. 16, X, III, 5; c. 44, X, V, 3; *Trid.,* Sess. 25, cc. 1, 9, *de Ref.;* Santi-Leitner, III, tit. 25, n. 7, opposes this interpretation, but without a good reason.

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which is not one's property. This law is very logical, because the right of property in case of a benefice, by a fiction of law, is invested in the juridical entity, which is the benefice itself.

ORDER AND CANONICAL HOURS

CAN. 1474–1475

If a benefice requires the reception of an *order*, be it minor or major, the beneficiary must receive that order before he can be installed.

§ 1. A beneficiary is obliged faithfully to fulfill the special obligations connected with his benefice, and, besides, to recite the *canonical hours* daily.

§ 2. If he neglects the obligation of reciting the divine office without a lawful reason, he is bound to make *restitution* of the revenues received, in proportion to the extent of his culpable omission, and should give the amount due to the church building, or to the diocesan seminary, or to the poor.

The obligation of reciting the divine office (*Breviary*) has been dealt with in Vol. II of this Commentary. From the decisions of the Holy Office we here supply the following points: One who holds either a chaplaincy or other ecclesiastical benefice cannot comply with the obligation of reciting the divine office through another, on the ground that his time is occupied with literary studies.[3] Nor is the recitation of the entire office on one day sufficient for the next.[4] Those who cannot recite Matin and Lauds, but are able to recite the little hours, are obliged to say the latter.[5]

3 *Prop.* 21 *damn. a S. O.*, Sept. 24, 1665 (Denzinger, n. 992).

4 *Prop.* 35 *damn. a S. O.*, March 18, 1666 (*ibid.*, n. 1006).

5 *Prop.* 54 *damn. a S. O.*, March 4, 1679 (*ibid.*, n. 1071).

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The *proportion* in which restitution is to be made has been declared by Pius V as follows: Those who omit the entire office, lose all their revenues corresponding to the day or days on which this duty was entirely neglected; those who neglect Matins only lose one-half of the revenues; those who omit the rest of the hours, also one-half, and for each single hour the sixth part of the revenues of the respective day.[6] These rules, however, apply only to such beneficiaries as have no other duty than to recite the divine office.[7]

OBLIGATIONS OF ADMINISTRATION

CAN. 1476–1478

§ 1. As guardian of his benefice, the beneficiary must administer the goods belonging to the same according to law.

§ 2. If he has been culpably *negligent,* he is bound to *repair the damage,* and the local Ordinary shall compel him to make up for the loss. If the beneficiary is a pastor, he can be removed (can. 2147 ff.).

§ 1. The *ordinary expenses* of administration and of collecting the revenues must be borne by the beneficiary.

§ 2. *Extraordinary* expenses incurred for repairing the beneficiary's residence must be borne by those who are obliged to make these repairs, unless the charter of the foundation or mutual stipulation and custom provide otherwise.

§ 3. *Minor repairs* which the beneficiary has to make at his own expense should be made as soon as possible, to avoid greater ones.

[6] S. Pius V, "*Ex proximo,*" Sept. 20, 1571.

[7] A pastor, for instance, even supposing he were a beneficiary, receives his salary chiefly for pastoral work; and therefore the duty of

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The local Ordinary is obliged to see to it, through the rural deans, that the property belonging to benefices is preserved and properly administered.

LEASES

CAN. 1479

In leasing property belonging to benefices it is not permitted, without the consent of the Ordinary, to demand that the money be paid over six months in advance. In extraordinary cases the Ordinary should provide by appropriate precepts, that such a lease does not result in damage to a pious institution or to the beneficiary's successors.

HOW THE REVENUES ARE TO BE DIVIDED IN CASE OF THE BENEFICIARY'S DEATH

CAN. 1480

In case of death, the yearly revenues must be divided between the beneficiary's successor and predecessor, or their heirs, in proportion to the time either has served the benefice, taking into account all the revenues and expenses. If the predecessor was in office four months, for example, he or his heirs are entitled to one-third of the revenues, minus any obligations that remain unpaid.

However, legitimate custom or particular statutes may provide another mode of distribution.

restitution is reduced to a minimum. Cfr. Noldin, *De Praeceptis*, 1914, n. 758, f., p. 794, who justly maintains that barely the tenth part of the revenues would have to be restored.

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WHAT IS TO BE DONE IN CASE OF VACANCY

CAN. 1481–1482

All revenues accruing during the vacancy of a benefice go in equal parts to the endowment or common fund, and to the building or vestry (sacristy) of the Church. The expenses, especially the salary of the administrator, may, of course, be deducted.

Lawful custom may permit these funds to be applied to the common good of the diocese.

As to the so-called *media annata, i. e.,* the taxes to be paid for certain benefices from the income of the first year (*fructus primi anni*), this should be retained wherever it is in vogue, and the peculiar statutes and praiseworthy customs of each diocese or region with regard to the *media annata* should be upheld.

The *media annata,* which originated under Boniface VIII, was never introduced into this country.

EPISCOPAL REVENUES

CAN. 1483

The property of the *mensa episcopalis* shall be carefully administered by the bishop. His residence must be kept in good condition, and if repairs are required, the expenses are to be paid from said *mensa,* unless others are obliged to defray them.

The bishop shall also take care that an accurate inventory is made of all the movable property belonging to the episcopal residence, and that everything is safely transmitted to his successor.

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CHAPTER VI

RESIGNATION AND EXCHANGE OF BENEFICES

RESIGNATION

CAN. 1484–1486

The general principles governing the resignation of beneficiaries are the same as those laid down in can. 184–191, to which we may therefore refer the reader (see Vol. II of this Commentary). The substance of the above three canons is as follows:

1. Since sordid occupations or begging are unbecoming to the clerical state in general,[1] and more particularly to *clerics in higher orders,* the Ordinary is not allowed to accept the resignation of any cleric in *major orders* unless he is certain that the beneficiary has other means of procuring a decent support. Proof to this effect must be given before the Ordinary can lawfully accept such a resignation. The oath of the beneficiary alone would not suffice, but at least one trustworthy witness is required and he must testify under oath.[2]

2. This rule holds more especially if the benefice which a cleric wishes to resign, constitutes the title upon which he was ordained (*titulus beneficii*). Such a resignation would be *null and void,* unless the beneficiary expressly

1 *Trid.*, Sess. 21, c. 2, *de Ref.*

2 S. C. P. F., April 18, 1757, ad 1 (*Coll.*, n. 405); S. C. C., Feb. 9, 1726, ad III and IV (Richter, *Trid.*, 113, n. 7).

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stated that he had been ordained to that title *and* had substituted another legitimate title with the consent of the Ordinary. Two, or rather say, three conditions are therefore required:

(a) An express statement of the title of ordination;

(b) Proof that another title has been substituted, and

(c) The consent of the Ordinary into whose hands the benefice is resigned.

An express statement is one to which no qualification (for instance, "perhaps," "I believe," etc.) is attached.

The consent of the Ordinary must be given by means of a declaration that the substitution has been lawfully made.[3]

A legitimate title is any one of those mentioned in can. 979, and, no doubt, now also one of those enumerated in can. 981, because *service* and *mission* have been legitimated by our Code.

A *conditional resignation* (canon 1486) may be made in favor of another (*in commodum aliorum*) or under some condition proper which either affects the appointment to the benefice itself, or its revenues, or burdens imposed upon the benefice. Such a resignation in favor of another is strictly forbidden by reason of the danger of introducing hereditary succession.[4] The other kind, too, is here forbidden, and Ordinaries may not accept it.

The *provisio beneficii* may be affected by a threefold kind of resignation, which the canonists designate by *accessus, ingressus,* and *regressus.*

A resignation by *accessus* is that made by a cleric who has obtained only the *ius ad rem, i. e.,* a claim to the benefice by accepted presentation or nomination.

[3] S. C. C., Feb. 9, 1726 (*l. c.*).

[4] *Trid.*, Sess. 25, c. 7 *de Ref.*; S. Pius V, "*Quanta Ecclesiae,*" April 1, 1568; "*Intolerabilis,*" June 1, 1569; this was called a resignation with the clause "*non aliter.*"

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A resignation by *ingressus* is that made by a cleric who has the *ius in re,* that is to say, the right to hold the benefice, but has not yet taken possession thereof.

A resignation by *regressus* is that made by a cleric of a benefice which he actually possesses.[5] This, too, is forbidden, for the reason alleged above, and also because of the restriction imposed on the bestower as well as on the patron.

But the Code admits one conditional resignation, viz., that of a *benefice disputed* either by a petitory or a possessory claim, provided the resignation is made in favor of one of the contestants, in order to end the quarrel.

EXCHANGE OF BENEFICES

CAN. 1487–1488

An exchange is a mutual transfer of equal interests, the one in consideration of the other[6]; and if the objects are ecclesiastical benefices, the exchange is a *permutatio beneficiorum.*

Such an exchange, says can. 1487, can be made only for a reason involving the necessity or utility of the Church, or for some other just cause, provided, moreover, that both beneficiaries really possess their benefice.[7] Valid exchange further requires:

(a) That no other interested persons suffer a detriment;

(b) That, if the benefice be one of advowson, the consent of the patron be obtained;

(c) That the exchange be made with the permission of the local Ordinary, *i. e.,* the bishop; the Vicar-general

5 Santi-Leitner, I, tit. 9, n. 24.
6 Blackstone-Cooley, *Comment.,* II, 323.
7 C. 13, X, II, 25.

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needs a special mandate to ratify such an exchange and the Vicar-Capitular cannot ratify it at all;

(d) That, finally, the exchange be made either in writing or before two witnesses.

The local Ordinary must either refuse his consent or give it within *a month,* and the exchange is valid from the date of the consent given. But the local Ordinary cannot ratify an exchange if one or both of the benefices involved are reserved to the Holy See; because the latter's right of free collation might thereby be injured.[8]

An exchange supposes benefices of equal or nearly equal value and importance. When *two benefices are unequal* as to income or other value, an exchange, according to can. 1488, is not permissible if it is made by reserving part of the revenues or the payment or grant of any valuable object, because of the danger of simony. This rule, it appears, comprises all kinds of unequal exchange, between conventual as well as parish benefices, between individuals as well as corporations.[9]

An exchange of benefices cannot be made between more than *two* beneficiaries. Hence no triangular or quadrangular exchanges are permitted, except by special permission from the Supreme Pontiff.[10]

8 Santi-Leitner, III, 19, n. 8.

9 C. 5, X, III, 19; c. 6, X, III, 19 is antiquated.

10 Reiffenstuel, I, 9, n. 123 ff.

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TITLE XXVI

OTHER NON-CORPORATE ECCLESIASTICAL INSTITUTIONS

CAN. 1489–1494

§ 1. Local Ordinaries may erect hospitals, orphanages and similar institutions destined for religious or charitable (spiritual or temporal) works; they may also endow such institutions with the character of ecclesiastical corporations.

The right of the Church to found such institutions cannot be disputed. This right is set forth in Part VI, which immediately follows. The canonical nomenclature for a hospital, orphanage, or similar institution under ecclesiastical control is *domus religiosa,* a religious or rather *ecclesiastical* foundation or house. To deserve this name, an institution must be destined for works of piety or charity by the *ecclesiastical authority, i. e.,* the local Ordinary or an exempt religious superior. An institution founded by private persons without ecclesiastical authority, even though its purpose be sacred, is called merely *domus pia.*

The text says: *et per eius decretum persona iuridica in ecclesia constitui.* The *corporate character* attached to such an institution by the decree of the Ordinary may be taken in a twofold sense: as a corporation proper and as an institute or juridical entity. The corporate character can only be given if the house belongs to a community or religious corporation which owns and administers it,

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either by itself or in the name of the Church. For neither patients nor orphans constitute a corporation; they are merely beneficiaries or *destinatarii*. In the wider sense, the object (*finis*) of an institute is, by a legal fiction, the carrier or subject of its rights and duties, *i. e.*, generally the officials or representatives acknowledged by law.

§ 2. Before the local Ordinary gives his approval, or issues a decree, he must *assure himself that the foundation is really useful and sufficiently endowed*, or that it has prospects of obtaining sufficient funds. If he neglects this duty, the blame falls on the Ordinary, together with such undesirable consequences as debts, etc.

§ 3. In all such institutions the rector or syndic shall *administer the temporalities* according to the by-laws laid down in the charter. His rights and obligations are the same as those of the administrators of other ecclesiastical property.

The *charter must contain an accurate description of the constitution*, purpose, endowment, administration, and government of the institution, also of the use to be made of the revenues and who is to succeed to the property in case the institution goes out of existence.

Of the charter and by-laws *two copies* must be made, one of which is to be kept in the archives of the institution itself, the other in the diocesan court.

The local Ordinary has the *right and the duty of visiting* all such institutions, even though they are corporations or otherwise exempt.

If non-corporate institutions are in charge of a *religious diocesan* community, they are entirely (*i. e.*, both in spiritual and temporal matters) subject to the jurisdiction of the local Ordinary; if they are in charge of a *pontifical* or papal religious community, they are under the supervision of the local Ordinary in whatever con-

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cerns faith and morals, pious devotions, and the administration of the Sacraments.

Although a pious or ecclesiastical institution may, in virtue of its charter, or by prescription, or by a papal privilege, have obtained exemption from the jurisdiction and visitation of the local Ordinary, the latter is *entitled to demand an account* of its affairs, and every contrary custom is hereby reprobated.

If a founder insists that the administrators should not be obliged to render an account to the local Ordinary, the foundation cannot be accepted as an ecclesiastical one.

The local Ordinary shall see to it that the *pious desires* of the faithful, as set forth in the charter of such institutions, be *fully carried out*.

Without the *permission of the Apostolic See* such institutions cannot be suppressed or incorporated with others, or converted to purposes other than those prescribed by the founders, unless the charter provides differently.

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PART VI

THE TEMPORAL POSSESSIONS OF THE CHURCH

This last part of the administrative law of the Church treats first of the property-right of the Church and then of the mode of acquiring temporal goods and their administration. To this are added two specific kinds of obligation which involve some peculiarities as to form and object, *viz.*, contracts and pious foundations.

That this part of the Code brings the Church into closer relation with the State and the world at large goes without saying, for it forms the sensible or commercial link between the two societies, but also the necessary bridge between the spiritual and the temporal domain.

RIGHT OF THE CHURCH TO POSSESS PROPERTY

CAN. 1495

§ 1. Ecclesia catholica et Apostolica Sedes nativum ius habent libere et independenter a civili potestate acquirendi, retinendi et administrandi bona temporalia ad fines sibi proprios prosequendos.

§ 2. Etiam ecclesiis singularibus aliisque personis moralibus quae ab ecclesiastica auctoritate in iuridicam personam erectae sint, ius est, ad normam sacrorum canonum, bona temporalia acquirendi, retinendi et administrandi.

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The first of the four introductory canons of this Part vindicates the natural and historic right of the Church to possess material property in these words:

§ 1. The *Catholic Church and the Apostolic See have the inherent right, freely and independently of any civil power, to acquire, retain, and administer temporal goods for the pursuit of their own ends.*

§ 2. Individual churches and other *corporations* established as such by ecclesiastical authority, are also endowed with the right of acquiring, retaining, and administering their own property, according to Canon Law.

To a practical American these propositions appear as evident as that two and two are four.[1]

1. The Catholic Church, being a perfect, *i. e.*, autonomous, legal, and visible society, with its own proper end, cannot lack the means which are necessary to attain that end. Now, one of these means is the right to possess property. For the Church is founded for men who are endowed not only with a soul, but also with a body that needs support and is subject to the senses. The Church needs temples, sacrifices, and sacraments, and it needs ministers, who also are men. All these things are *essential* to the society founded by the Son of One, who is at the same time, God. His ministers cannot live on the word alone; they need at least some bread. Divine worship also requires material aid and support. Now, divine worship certainly belongs to the Church, in virtue of her very existence and end. Nor can we imagine that God in

1 It is not necessary to recall all the obnoxious laws of *morte main* which were made from the twelfth to our century; see Coulondre, *Des acquisitions des biens par les Etablissements de la Religion Chrétrienne en Droit Romain et dans l'Ancien Droit Français*, 1886; Mamacchi, *Del Diritto Libero della Chiesa di acquistare e di possidere Beni Temporali si mobile che stabili*, 1769; C. Scheys, *De Iure Ecclesiae acquirendi et possidendi Bona Temporalia*, Louvain, 1892; *Archiv. für Kath. K.-R.*, 1904, 22 ff.

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his providence should have left her destitute of the power necessary to procure these necessary means, or that He should have thrown her upon the mercy of the State, for this would involve a handicap and a dependence which would make her the mercenary and slave of a society which, as to its end, is inferior to the Church.

Neither can there be, *per se,* any conflict between the spiritual and the temporal society, as if the latter would be curtailed by the acknowledgment of the property right vested in the Church. For although the State has a material right to temporal goods, yet this right is neither absolute nor unlimited. It is not *absolute* because the State is not independent of the Supreme Governor of the universe. It is not *unlimited* because the State is entitled to material goods only as far as its end requires it, and as far as the rights of individuals are not trespassed upon. For the individual citizen has a right to exist, and consequently also to own what is necessary for his existence, prior to any right of the State. And if the State interferes without necessity and in violation of that natural freedom which belongs to every human being, then the individual has a natural right to resist.[2] If this is true of the individual, it is also, and *a fortiori,* true of the society founded by God, which is also made up of individuals. If we say that *per se* no conflict is possible between Church and State, we suppose, of course, that each society keeps within its own proper sphere, claiming only what is necessary for the pursuit of its specific and well defined end.

2. There is another, more specific reason for the Church's claim. The Church has the innate right and duty to establish, foster, and protect *charitable* works of

2 See Fr. Cuthbert, O. S. F. C., *Catholic Ideals in Social Life,* 1905, p. 27.

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all kinds, which are commanded by her divine Founder.[3] The most luminous pages in her history are those recording her deeds of charity. To sever these from the Church would be the same as tearing a child away from his mother. The exercise of charity, however, requires substantial means and unhampered liberty, which again is possible only if the Church is endowed with the inherent right to possess property.

3. Not only the first Church historian, St. Luke,[4] but also many later writers [5] bear witness to the fact that the Church always possessed temporal goods. Even pagan emporers acknowledged that right. Thus Aurelian (270–275) adjusted a question of property in favor of the Church against Paul of Samosata. To mention the edict of Milan 313 is sufficient to prove that Constantine did not grant, but merely *restored,* the property right of the Church.[6] It is superfluous to add further proofs. It was but natural and logical that the Holy See condemned the contrary tenet, namely, that "the Church has no inherent and lawful right to acquire and possess property." [7]

The present canon vindicates this right of holding property to the Church at large and to the Apostolic See; then, with some limitation, also to single corporations.

The term *Apostolic See* must be understood according to can. 7 of the Code. However, here it evidently has the special meaning of the primatial See of St. Peter, and there seems to be a covert allusion to the *temporal power of the Pope.* To set forth the whole *Roman Question,* so-

3 See Matth. 25, 35 ff.; Acts II, 29 ff.; Gal. 2, 9 f.; I Cor. 16, 1; II Cor. 8 ff.; Rom. 15, 26.

4 Acts 2, 44 f.; 4, 34 ff.

5 Justin, *Apol.,* I, nn. 14, 67; Tertull., *Apologet.,* n. 39; Cyprian, *Ep.* 66, c. 16.

6 Cfr. Lactantius, *De Mortibus Persecutorum,* c. 12; Eusebius, *Hist. Eccl.,* VII, 13; S. Brandi, S. J., *Di Chi Sono le Chiese?* 1898, p. 16 ff.

7 Syllabus of Pius IX, n. 26; Heiner, *Der Syllabus,* 1905, p. 142 f.

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called, would require a treatise for itself. Let us emphasize but two points, namely, (1) that the temporal dominion of the Pope, in its limited sense, *i. e.*, as it actually existed before 1870, cannot be said to be *iuris divini*, though it may justly be called providential. Providence and divine right are not identical terms, else the Church would have lacked an essential feature for about 700 years; (2) that temporal dominion is compatible with spiritual power[8]; the latter, as the superior power, may subject to itself a temporal rule or government, but not conversely, because the power of assimilation is wanting in a merely temporal factor.

The Apostolic See, then, being the Church personified or visibly vested in the Supreme Pontiff, enjoys the right to possess property to the same extent and in the same sense as the Church at large.

"*Individual churches*" are dioceses or organizations which have their own superiors, endowed with jurisdiction *in foro externo*, who act as representatives of the universal Church. *Parishes* are not such corporations in the ecclesiastical sense because their purpose is entirely dependent on the superior end of the diocese, of which they form a subordinate part, and, besides, the pastor is not a representative *in foro externo*. However, by participation, parishes may share in the nature of a corporation proper, and thus be acknowledged by the Church for the sake of convenience in administration. The State may recognize them as corporations, provided the local Ordinary is not excluded. Note that single churches or corporations (for instance, religious communities) are capable of exercising ecclesiastical property rights only so long and in so far as they belong to the body of the

8 Syllabus Pii IX, n. 75; Heiner, *l. c.*, p. 331 ff.

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Catholic Church. The reason is that the partial end, such as pursued by single churches and corporations, necessarily follows the universal end of the Church at large, and borrows from it its juridical entity. Hence if a particular church or organization departs from unity of faith or government, or adopts a worship different from that of the universal Church, it can lay no claim to any property which it enjoyed whilst united to the entire, supremely sovereign organism. This has also been ruled by courts in the United States.[9]

These individual churches and corporations, then, are dependent upon the Church for their existence, for they cannot grow except on ecclesiastical soil, and become dead outside the pale. They depend on the universal Church also in as far as the *common law of the same* is binding on them concerning the acquisition, possession, and administration of property. It does not follow from this proposition that there are two subjects of such ecclesiastical property rights, one the Church universal, and the other an individual corporation. The Code is against such a splitting up of the one and indivisible property right. *"Ius est,"* it is a right, dependent only in as far as the welfare of the whole Church requires. In a similar manner our civil corporations depend on the State, but enjoy the complete and autonomous right to possess and administer their property.[10]

Can. 1496

Ecclesiae ius quoque est, independens a civili potestate, exigendi a fidelibus quae ad cultum divinum, ad honestam clericorum aliorumque ministrorum susten-

9 Zollmann, *American Civil Church Law*, 1917, p. 194.

10 Cfr. Bachofen, *Summa Iuris Eccl. Publ.*, 1910, p. 42; Tanquery, *Summa Theol. Moral.*, ed. 2, III, p. 85.

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tationem et ad reliquos fines sibi proprios sint necessaria.

Can. 1496 is a corollary of the preceding canon, and vindicates to the Church, independently of any civil power, the right to *demand of the faithful* whatever is necessary for divine worship, for the support of her clergy and other servants, and for the pursuit of her proper ends. This is a corollary, or logical deduction, from what was stated above, because it follows from the inherent right of the Church to possess property sufficient for her support. The legal standing of the Church requires such an independent right, since the faithful belong to her by divine right, having been consecrated to her by baptism.

To this right, of course, corresponds a *duty on the part of the faithful.* What was said under can. 463, must here, proportionately, be applied to all the purposes mentioned.[11]

CAN. 1497

§ 1. Bona temporalia, sive corporalia, tum immobilia tum mobilia, sive incorporalia, quae vel ad Ecclesiam universam et ad Apostolicam Sedem vel ad aliam in Ecclesia personam moralem pertineant, sunt *bona ecclesiastica.*

§ 2. Dicuntur *sacra,* quae consecratione vel benedictione ad divinum cultum destinata sunt; *pretiosa,* quibus notabilis valor sit, artis vel historiae vel materiae causa.

§ 1. All kinds of church property are, according to can. 1497, called *ecclesiastical,* no matter whether it belongs to the universal church, or to the Apostolic See, or to an

11 See Vol. II, 539 f.

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ecclesiastical corporation, and no matter whether it is corporeal (movable or immovable) or incorporeal.

"Right of property" is taken in the subjective sense as the moral faculty of doing something, or of holding or exacting property. Hence it is something intellectual and moral, not perceived by the senses. If a distinction is drawn between corporeal and incorporeal property it is because of the objects which these categories comprise; they are *corporeal,* if they fall under the senses; such are landed property, buildings, chattel, objects, etc.; *incorporeal* if they cannot be seen or perceived by the senses, except as far as they are asserted; such are advowsons, titles, franchises, pensions, rents, leases, etc.[12]

§ 2. If goods or objects belonging to the Church have received a consecration or blessing by which they were destined for divine worship, they are called *sacred.* This character, of course, adheres to corporeal things only. *Precious* objects are such ecclesiastical things as have a considerable value on account of the artistic skill with which they are wrought, or because of their antiquity or historical associations, or on account of the material contained in them.

Can. 1498

In canonibus qui sequuntur, nomine Ecclesiae significatur non solum Ecclesia universa aut Sedes Apostolica, sed etiam quaelibet persona moralis in Ecclesia, nisi ex contextu sermonis vel ex natura rei aliud appareat.

By the term *Church* in the following canons are understood not only the universal Church, or the Apostolic See, but any ecclesiastical corporation, unless the contrary appears from the context.

12 Blackstone-Cooley, *l. c.,* II, 15 ff.

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TITLE XXVII

THE ACQUISITION OF ECCLESIASTICAL PROPERTY

CAN. 1499

§ 1. Ecclesia acquirere bona temporalia potest omnibus iustis modis iuris sive naturalis sive positivi, quibus id aliis licet.

§ 2. Dominium bonorum, sub suprema auctoritate Sedis Apostolicae, ad eam pertinet moralem personam, quae eadem bona legitime acquisiverit.

Can. 1499 vindicates to the Church the right of acquiring property by all *just means* which are permitted by either natural or positive law to *other citizens or individuals, i. e.,* by contract, donation, inheritance, etc.

The title or ownership is vested in the corporation itself, though, of course dependently on the Holy See, *i. e.,* on common law.

Here it may not be amiss to point out the different forms of holding church property. They are: (a) by *corporation sole,* which consists of one person, who transfers it to his successor in office; thus a bishop or pastor holds property in the name and as officer of the diocese or pastor; (b) by *corporation aggregate,* when the church members are the incorporators and whatever property they possess or acquire is vested in the body corporate;[1]

1 Cfr. Zollmann, *American Civil Church Law,* 1917, p. 38 ff.

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(c) in *fee simple,* which conveys absolute and direct ownership of the property, and was looked upon in former days as vested in the bishop for all diocesan property.[2]

DIVISION AND TRANSFER OF CHURCH PROPERTY

CAN. 1500

Diviso territorio personae moralis ecclesiasticae ita ut vel illius pars alii personae morali uniatur, vel distincta persona moralis pro parte dismembrata erigatur, etiam bona communia quae in commodum totius territorii erant destinata, et aes alienum quod pro territorio contractum fuerat, ab auctoritate ecclesiastica, cui divisio competat, cum debita proportione ex bono et aequo dividi debent, salvis piorum fundatorum seu oblatorum voluntatibus, iuribus legitime quaesitis, ac legibus peculiaribus, quibus persona moralis regatur.

CAN. 1501

Exstincta persona morali ecclesiastica, eius bona fiunt personae moralis ecclesiasticae immediate superioris, salvis semper fundatorum seu oblatorum voluntatibus, iuribus legitime quaesitis atque legibus peculiaribus quibus exstincta persona moralis regebatur.

If a territory, say a diocese or corporation, is *divided* so that part of its territory is united to another corporation, or a distinct juridical person is established out of the dismembered part, the *property* that belonged to the territory as a whole must be divided and the *debts* distributed by the competent ecclesiastical authority. This division must be made according to the *principles of justice and*

2 Blackstone-Cooley, *Comment.,* II, 104 f. The S. C. prefers ownership by corporation sole.

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equity, with due regard to the will of the founders or donors and to the acquired rights and the particular statutes governing the moral person who sustained the division. This is a corroboration of what was stated under can. 1427 concerning the division of parishes, to which also the note of Cardinal Gasparri refers, thus hinting that this canon must also be applied to parishes, even though they may not come up to the notion of a corporation proper. But *persona moralis* may also signify a juridical entity of the species of benefices, and as these may be divided or dismembered, so also parishes.

The *proportion* to be observed is twofold: general and particular. The *general proportion* is indicated by the phrase, "*bonum et aequum.*" But since it is a maxim that equity follows the law, it is evident that justice must be the first measure, to be taken not in the arithmetical, but in the geometrical sense, for it would be next to impossible to make such an equal division that cent for cent and inch for inch would be shared. The *particular proportion* is to be gauged by the acquired rights (because *melior est conditio possidentis*), the charter and by-laws. This same proportion in can. 1501 is applied to the case where a moral or juridical person *ceases to exist.* For this particular proportion means that all the property left by such an extinct person passes to the immediate superior. Thus, for instance, the property of an extinct parish goes to the diocese; if a diocese were suppressed, we suppose the S. C. Consistorialis would provide. If a monastery or convent of a centralized order becomes extinct, its property passes to the province, unless the constitutions rule otherwise.

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CAN. 1502

Ad decimarum et primitiarum solutionem quod attinet, peculiaria statuta ac laudabiles consuetudines in unaquaque regione serventur.

As to tithes (*dîmes*) and first-fruits, the special statutes and praiseworthy local customs should be observed.

BEGGING

CAN. 1503

Salvis praescriptis can. 621–624, vetantur privati tam clerici quam laici sine Sedis Apostolicae aut proprii Ordinarii et Ordinarii loci licentia, in scriptis data, stipem cogere pro quolibet pio aut ecclesiastico instituto vel fine.

Private persons, whether clerics or laymen, are *forbidden to collect alms* for any charitable or ecclesiastical institution or purpose, unless they have the *written permission* of the Apostolic See or that of their own and of the local Ordinary.

Concerning religious enough has been said under can. 621–624, which must be strictly followed. It is hardly to be presumed that collectors will go about collecting alms, as they formerly did,[3] under false pretences, even promising people eternal joy. But churches are still being built, and hospitals and schools erected, which require an appeal to Christian charity. Hence this regulation, which is intended to keep order.

Who are the private persons here intended? All those who beg without official or public capacity, authority or warrant, no matter whether they belong to the ranks of

[3] C. 2, Clem. V, 9.

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the clergy or the laity. A *pastor* is no private person, and may therefore collect within the boundaries of his parish, but not beyond without the required permission, because outside his own district he has no official capacity. It is a wise ruling, and in keeping with our canon, if diocesan statutes forbid priests in charge of souls to collect either directly or indirectly, for instance, by selling tickets or chances.[4] The so-called chain-letters belong in the waste-basket.

Are *bishops* allowed to collect in another diocese than their own? If they have obtained the written consent of the respective Ordinary, they certainly are allowed to do so.

The text says, "for any charitable or ecclesiastical *purpose*." This means that a pastor, or any other priest, is not allowed to collect for others, say a hospital or sisterhood, unless he has the permission of the Apostolic See (S. Congregatio Concilii; can. 250), or of the two Ordinaries concerned. Of course, if the collector does not cross the boundary line of another diocese, he needs only the writter permission of his own Ordinary. If he has obtained this, he requires no permission from the pastor in whose parish he wishes to collect, although courtesy may move him to apply for it. Besides, the diocesan statutes must be observed.

THE CATHEDRATICUM

CAN. 1504

Omnes ecclesiae vel beneficia iurisdictioni Episcopi subiecta, itemque laicorum confraternitates, debent quotannis in signum subiectionis solvere Episcopo ca-

[4] Thus the diocesan statutes of Leavenworth and St. Joseph, n. 58; but the first clause must now be changed according to our canon.

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thedraticum seu moderatam taxam determinandam ad normam can. 1507, § 1, nisi iam antiqua consuetudine fuerit determinata.

In Spain and in Italy it was customary, in the sixth century, to pay two solidi to the diocesan bishop, either on his visit or otherwise, "*propter honorem cathedrae.*"[5] This tribute was, as the Latin term shows, paid as a token or earnest of the dependence and submission of the church and clergy. After exemptions became more numerous, the monasteries paid a certain tribute to the Holy See as a sign of papal patronage and exemption from episcopal jurisdiction. Hence exempt regulars did not pay the cathedraticum to their diocesan bishop unless they held incorporated benefices or parishes.[6] Those who were wont to pay this tribute, usually offered it at the diocesan synod, whence it came to be called *synodaticum.*

Our canon rules that *all churches and benefices subject to the jurisdiction of the bishop,* as well as lay confraternities, are obliged to pay annually, as a sign of subjection, the so-called cathedraticum, a moderate tax to be levied according to can. 1507, § 1, unless some other method exists by ancient custom.

Hence, (1) *all churches and public oratories* subject to episcopal jurisdiction must pay the cathedraticum, even though they may not have been subject to it formerly. This certainly holds concerning all churches ruled by the secular clergy. Churches or public oratories in which *exempt religious* hold services for themselves only, and not for outsiders, or for these only *per accidens,* need not pay the cathedraticum. But if exempt religious have a

[5] Cc. 1, 4, 6, C. 10, q. 3—the underlying idea being that all churches sprang from the cathedral church.

[6] C. 16, X, I, 31; c. 1, X, III, 35.

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parish church, even though it be an abbey or a convent church, or an incorporated public oratory, and even though one of their own number acts as pastor or chaplain, they are obliged to pay this tax.[7]

(2) All *benefices* not exempt from episcopal jurisdiction must also pay the cathedraticum. Thus canons beneficiaries, who possess a distinct benefice, also the *theologus* and *poenitentiarius,* are bound by this obligation.[8]

(3) *Lay confraternities* must pay the cathedraticum if they own not merely a chapel erected in honor of a saint in some church, but a church or public oratory of their own, even though no benefice is connected with that church or oratory.[9]

(4) The *amount* of this tribute was formerly established at *two solidi* (about $6.00) a year.[10] But the Code leaves it to be settled by provincial councils.

SUBSIDIUM CHARITATIVUM

CAN. 1505

Loci Ordinarius, praeter tributum pro Seminario, de quo in can. 1355, 1356, aut beneficialem pensionem de qua in can. 1429, potest, speciali dioecesis necessitate impellente, omnibus beneficiariis, sive saecularibus sive religiosis, extraordinariam et moderatam exactionem imponere.

When there is particular need on the part of the diocese, the *local Ordinary* may demand, besides the *seminaristicum* and the pension mentioned in can. 1429, a con-

7 *Ibid.*, and the commentators; Reiffenstuel, III, tit. 39, n. 12 f.; Santi-Leitner, III, 39, n. 6; S. C. C., Feb. 26, 1707 (Richter, *Trid.*, p. 336, n. 19); also churches *iuris-patronatus laicalis;* S. C. C., July 24, 1760 (Richter, *l. c.*, n. 22).

8 S. C. C., March 18, 1775; April 7, 1742 (Richter, *l. c.*, n. 20 f.).

9 S. C. C., May 22, 1734, July 24, 1734 (Richter, *l. c.*, n. 24 f.).

10 See cc. 4-6, C. 10, q. 3.

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tribution from all beneficiaries, secular as well religious, but this contribution must be moderate and can be demanded only extraordinarily, not regularly. It is called a charitable subsidy, and, as such, differs from the regular diocesan taxes, though it may be demanded in justice, and therefore under threat of penalty.

The term *Ordinaries* here, according to the common opinion of canonists, based on the Decretals,[11] means only the bishops or Ordinaries themselves, not the Vicars-General.

Metropolitans cannot impose this tax on their entire province, but only on their own archdiocese.[12] Apostolic administrators and coadjutors appointed by the Apostolic See, also Vicars Capitular (our administrators) are entitled to demand this subsidy.[13]

Those upon whom the *subsidium charitativum* may be imposed are the *beneficiaries,* as explained under can. 1504, and to the same extent, also exempt religious if they hold a parish church or other benefice.

The *reason* is stated as being a *special need of the diocese.* Such special needs are: a large indebtedness contracted by the bishop or his predecessor for the welfare of the diocese; extraordinary support of the Apostolic See; expenses required for the *visitatio ad limina* or a journey to a general or provincial council.[14]

It must, however, be observed that the S. Congregation has forbidden bishops to collect this subsidy if they possess a rich income or revenues (*pingues reditus habentes*) or if no real and urgent reason exists, or if the beneficiaries from whom the tax is demanded have but a bare living.[15]

11 C. 6, § *Prohibemus,* X, III, 39.
12 Reiffenstuel, III, tit. 37, n. 20.
13 *Ibid.,* n. 23.
14 *Ibid.,* n. 31.
15 S. C. C., Feb. 27, 1603 (Richter, *Trid.,* p. 336, n. 27).

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Can. 1506

Aliud tributum in bonum dioecesis vel pro patrono imponere ecclesiis, beneficiis aliisque institutis ecclesiasticis, quanquam sibi subiectis, Ordinarius potest tantummodo in actu fundationis vel consecrationis; sed nullum imponi tributum potest super eleemosynis Missarum sive manualium sive fundatarum.

Can. 1506 forbids Ordinaries to impose any other tax besides those mentioned, for the benefit of the diocese or a patron (advowee), upon churches, benefices, and other ecclesiastical institutions, subject to their jurisdiction, except on the occasion of their foundation or consecration. All other taxes are against the common law (can. 1429) and looked upon as either simoniacal or as an unjust diminution of benefices. *Never* can a tax or contribution be imposed upon either manual or foundation *masses*.

Can. 1507

§ 1. Salvo praescripto can. 1056 et can. 1234, praefinire taxas pro variis actibus iurisdictionis voluntariae vel pro exsecutione rescriptorum Sedis Apostolicae vel occasione ministrationis Sacramentorum vel Sacramentalium, in tota ecclesiastica provincia solvendas, est Concilii provincialis aut conventus Episcoporum provinciae; sed nulla vi praefinitio eiusmodi pollet, nisi prius a Sede Apostolica approbata fuerit.

§ 2. Ad taxas pro actibus iudicialibus quod spectat, servetur praescriptum can. 1909.

Can. 1507 governs the manner of *fixing ecclesiastical taxes*. It should be done at a *provincial council* or meeting of the bishops, but needs the approval of the Holy See

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to have legal force. The taxes here comprised are (a) those levied for the exercise of voluntary jurisdiction, *i. e.*, dispensations, commutations (except matrimonial dispensations; can. 1056), and funeral taxes (can. 1234); (b) the *executoriae* or fees for the execution of papal rescripts; (c) charges for the administration of the Sacraments and sacramentals. Not included are taxes imposed for ecclesiastical trials, which are subject to the rules laid down in can. 1909.

PRESCRIPTION

CAN. 1508

Praescriptionem, tanquam acquirendi et se liberandi modum, prout est in legislatione civili respectivae nationis, Ecclesia pro bonis ecclesiasticis recipit, salvo praescripto canonum qui sequuntur.

This canon admits for ecclesiastical property *prescription,* as it is current or in vogue under the civil law in each country; the following canons limit prescription.

Prescription (called in Roman law *usucapio*) is the mode of acquiring a title to property by long-continued and uninterrupted possession. It also means freeing oneself from an obligation due to another, for instance, tithes or pensions, in which case the term signifies the loss of a property right brought about by omission to assert the same within a given time. Finally, prescription also has the meaning of the period or time required for legal acquisition or loss of this right.

The new Code accepts prescription in the same sense and with the same conditions under which it operates according to the laws of different countries, provided the following canons are observed.

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CAN. 1509

Praescriptioni obnoxia non sunt:

1.° Quae sunt iuris divini sive naturalis sive positivi;

2.° Quae obtineri possunt ex solo privilegio apostolico;

3.° Iura spiritualia, quorum laici non sunt capaces, si agatur de praescriptione in commodum laicorum;

4.° Fines certi et indubii provinciarum ecclesiasticarum, dioecesium, paroeciarum, vicariatuum apostolicorum, praefecturarum apostolicarum, abbatiarum vel praelaturarum *nullius*.

5.° Eleemosynae et onera Missarum;

6.° Beneficium ecclesiasticum sine titulo;

7.° Ius visitationis et obedientiae, ita ut subditi a nullo Praelato visitari possint et nulli Praelato iam subsint;

8.° Solutio cathedratici.

Can. 1509 excepts from prescription the following objects and rights:[16]

1.° *Things enjoined either by the natural or by divine law,* for instance, the right of parents to their children, the primacy of the Roman Pontiff, the Sacraments, the constitution of the Church.

2.° *Things that can be obtained only by an Apostolic privilege,* for instance, exemption of persons not comprised by law.

3.° *Spiritual rights of which laymen are incapable,* if prescription concerns things or rights in favor of laymen, for instance, lay investiture, or election of laymen to an ecclesiastical benefice.

16 Cfr. the commentators on lib. II, tit. 26; Wernz, *l. c.*, III, n. 298; p. 333 f.; see under can. 1701 ff.

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4.° *Certain and undisputed boundary lines* of ecclesiastical provinces, dioceses, parishes, vicariates apostolic and prefectures apostolic, abbacies and prelacies *nullius*.

5.° *Alms or mass stipends and obligations;* however, although these as such cannot be prescribed against by any contrary custom, yet they may be transferred from one to another; thus if the canons or prebendaries of a church were in turn obliged to say and apply Mass for the benefactors, this obligation could be imposed upon the dean or provost of the chapter by prescription.[17]

6.° *Ecclesiastical benefices obtained without title, i. e.,* without at least a *titulus coloratus* (see can. 1446).

7.° *The right of canonical visitation and obedience,* so that the subjects could not be visited by any prelate or would not be under obedience to any prelate. But a mere transfer of obedience or visitation from one prelate to another (*translativa praescriptio*) may take place by prescription.[18] The fact is that exemption rested, centuries ago, on prescription.

8.° *The payment of the cathedraticum,* which cannot itself be subject to prescription, although the amount is liable to prescription.[19]

CAN. 1510

§ 1. Res sacrae quae in dominio privatorum sunt, praescriptione acquiri a privatis personis possunt, quae tamen eas adhibere nequeunt ad profanos usus; si vero consecrationem vel benedictionem amiserint, libere acquiri possunt etiam ad usus profanos, non tamen sordidos.

§ 2. Res sacrae, quae in dominio privatorum non

17 S. C. C., June 17, 1879; April 27, 1901 (*Anal. Eccl.* IX, 201 ff.).

18 Reiffenstuel, II, 26, n. 52 ff.

19 Santi-Leitner, III, 39, n. 6.

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sunt, non a persona privata, sed a persona morali ecclesiastica contra aliam personam moralem ecclesiasticam praescribi possunt.

Can. 1510 concerns sacred things (*res sacrae*) owned by *private persons.* These may be acquired by prescription, but not used for profane purposes, unless they have lost their consecration or blessing, and even then the purpose must not be unbecoming (*sordidus*). Sacred objects which are not owned by private persons cannot be acquired by prescription by a private, but only by a *juridical person,* against whom only an artificial person can prescribe.

Can. 1511

§ 1. Res immobiles, mobiles pretiosae, iura et actiones sive personales sive reales, quae pertinent ad Sedem Apostolicam, spatio centum annorum praescribuntur.

§ 2. Quae ad aliam personam moralem ecclesiasticam, spatio triginta annorum.

Can. 1511 reasserts the ancient privilege of the *Roman Church,* against which only a prescription of 100 years is admitted, no matter whether it concerns landed property, precious movable property, rights, or personal as well as real actions. Against other ecclesiastical corporations or juridical entities a term of thirty years suffices for prescription.

Can. 1512

Nulla valet praescriptio, nisi bona fide nitatur, non solum initio possessionis, sed toto possessionis tempore ad praescriptionem requisito.

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No prescription, however, is valid which is not based upon good faith at the beginning as well as throughout the whole period permitted for prescription. This rule has always been upheld by the Church against the Roman law, which required good faith only at the beginning.[20] Hence modern civil law, which follows the Roman law, cannot be accepted in this case. Good faith, which is the prudent and sincere judgment that one holds or possesses a thing by right or without infringement of another's rights, is required by natural law, because bad faith would render the possession sinful and therefore illicit, and no human or divine positive law could declare it just or lawful.

DONATIONS AND LEGACIES

CAN. 1513

§ 1. Qui ex iure naturae et ecclesiastico libere valet de suis bonis statuere, potest ad causas pias, sive per actum inter vivos sive per actum mortis causa, bona relinquere.

§ 2. In ultimis voluntatibus in bonum Ecclesiae serventur, si fieri possit, sollemnitates iuris civilis; hae si omissae fuerint, heredes moneantur ut testatoris voluntatem adimpleant.

He who, by natural and ecclesiastical law, is free to dispose of his property, may bequeath the same, either by donation or last will and testament, in favor of pious institutions or causes.

Testamentary bequests of the faithful in favor of the Church should, if possible, be made in legal form, *i. e.*,

20 Cfr. cc. 5, 8, 17, 20, X, II, 26; 1. un. *Inst.*, II, 6; 1. un., *Cod.*, VII, 31.

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according to the rules prescribed by civil law. If this precaution has been omitted the heirs must be admonished to carry out the testator's will.

Wiclif's propositions: that it would be sinful to found convents, that to bequeath money to the clergy would be against the teaching of Christ, and that the emperors were mistaken in endowing the Church, were deservedly condemned.[21] Nevertheless, the nineteenth century revamped these impious theories.[22]

The question whether a last will or donation not drawn up in legal form is binding in conscience was decided by the S. Poenitentiaria, which said that it is the Roman practice to hold such legacies valid and binding in conscience, but the heirs are easily admitted to an agreement with the church or pious institution.[23]

Can. 1514

Voluntates fidelium facultates suas in pias causas donantium vel relinquentium, sive per actum inter vivos, sive per actum mortis causa, diligentissime impleantur etiam circa modum administrationis et erogationis bonorum, salvo praescripto, can. 1515, § 3.

Can. 1515

§ 1. Ordinarii omnium piarum voluntatum tam mortis causa quam inter vivos exsecutores sunt.

21 Propp. 31-33 (Denzinger, nn. 507-509).

22 Pius IX, "*Quanta Cura*," Dec. 8, 1864.

23 S. Poenit, Jan. 10, 1901 (*Coll. P. F.*, n. 2099). As to the *legal form* to be observed in making wills, see *Am. Eccl. Rev.*, Vol. 33, 306 ff.; also "*After My Death*," 1918; Jones, *Legal Forms*, 7th ed. Notice also that "contracts to procure a third person to make a will in favor of a particular person or object, or to use his influence to procure such testamentary disposition, are illegal;" see Harriman, *The Law of Contracts*, 1901, § 214.

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§ 2. Hoc ex iure Ordinarii vigilare possunt, ac debent, etiam per visitationem, ut piae voluntates impleantur, et alii exsecutores delegati debent, perfuncti munere, illis reddere rationem.

§ 3. Clausulae huic Ordinariorum iuri contrariae, ultimis voluntatibus adiectae, tanquam non appositae habeantur.

Can. 1514 and 1515 emphasize the great care which the Church has ever bestowed on the faithful *administration* and *distribution* of property left by donation or bequest. They are specially intended for executors, who are obliged to attend to speedy execution, according to the term permitted by civil law. In the business of execution they must chiefly attend to the wording of the will. They are not allowed to substitute one pious institution for another, unless the document permits them to do so, nor are they permitted to apply a legacy "for the poor" to one poor person only. Among the poor those of the deceased person's home town should be favored and the most needy selected.[24]

These general rules should also guide the *Ordinaries,* who, according to can. 1515, are the executors of all pious gifts, by donation as well as by last will (*mortis causa*). They may and must, at the canonical visitation, take cognizance of pious bequests, and other executors are obliged to render an account to the Ordinaries after they have discharged their office. Every *clause* which runs counter to this right of the Ordinary must be looked upon as non-existing.

"Ordinaries" here includes the superiors of exempt religious. Religious, too, (except Friars Minor) may

24 Reiffenstuel III, tit. 26, n. 772 ff.

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be executors of last wills, but must in each case obtain previous permission from their superiors.[25]

Can. 1516

§ 1. Clericus vel religiosus qui bona ad pias causas sive per actum inter vivos, sive ex testamento fiduciarie accepit, debet de sua fiducia Ordinarium certiorem reddere, eique omnia istiusmodi bona seu mobilia seu immobilia cum oneribus adiunctis indicare; quod si donator id expresse et omnino prohibuerit, fiduciam ne acceptet.

§ 2. Ordinarius debet exigere ut bona fiduciaria in tuto collocentur et vigilare pro exsecutione piae voluntatis ad normam can. 1515.

§ 3. Bonis fiduciariis alicui religioso commissis, si quidem bona sint attributa loci seu dioecesis ecclesiis, incolis aut piis causis iuvandis, Ordinarius de quo in § § 1, 2, est loci Ordinarius; secus, est Ordinarius eiusdem religiosi proprius.

Can. 1516 plainly shows that not only the *secular clergy* but religious, too, may be executors and trustees. If a cleric or religious receives a donation or a bequest *in trust,* he must notify his Ordinary of that fact and indicate to him all the property held in trust, movable as well as immovable, together with the obligations attached thereto. Should a donor have expressly forbidden the intervention of the Ordinary, no religious or cleric can accept the bequest or donation.[26]

The Ordinary must insist that the property held in trust is *safely invested* and watch over the fulfillment of the testator's will, according to can. 1515. A safe investment, according to Roman practice, is that in land.

[25] *Ib.*, n. 777 ff.
[26] S. C. C., Aug. 7, 1909, (*A. Ap. S.*, I, 766).

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When a *religious* has received property in trust, the Ordinary referred to in § 1 and § 2 of this canon is the local *Ordinary* if the property is destined for a church of the town or diocese, or for the inmates of charitable institutions existing in that town or diocese; in all other cases the Ordinary is the superior of the exempt religious; for only exempt clerical superiors go by the name of Ordinaries, according to can. 198.

It seems doubtless that by "*loci seu dioecesis ecclesiis*" must be understood such churches as are either incorporated or parish churches. For if a donation or bequest were made to a church belonging exclusively to exempt religious, who use it for their own purposes only, even though it were a public oratory, it is incredible that the local Ordinary should have to intervene. This interpretation is borne out by the obvious meaning of the term, "*dioecesis ecclesiae,*" churches of the diocese, in the *genitivus subjectivus;* for in that sense churches owned by religious, but not as parish or beneficiary churches, are not *of* the diocese, although *in* the diocese.

CHANGE OF LAST WILL

CAN. 1517

§ 1. Ultimarum voluntatum reductio, moderatio, commutatio, quae fieri ex iusta tantum et necessaria causa debent, Sedi Apostolicae reservantur, nisi fundator hanc potestatem etiam Ordinario loci expresse concesserit.

§ 2. Si tamen exsecutio onerum impositorum, ob imminutos reditus aliamve causam, nulla administratorum culpa, impossibilis evaserit, tunc Ordinarius quoque, auditis iis quorum interest, et servata, meliore quo fieri potest modo, fundatoris voluntate, poterit

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eadem onera aeque imminuere, excepta Missarum reductione quae semper Sedi Apostolicae unice competit.

§ 1. To reduce, mitigate, or change testamentary bequests is reserved to the *Apostolic See,* which can proceed only for a just and necessary cause. The *local Ordinary* may act only if the founder has expressly granted this power to him, and he too is bound by reasons of justice and necessity, for both the natural and the divine law, as well as positive law, demand that the last will of the faithful be conscientiously executed and the money bequeathed by them expended for those purposes for which it was intended. It may not be applied to a seemingly better cause, or in a more suitable manner, because such a change would frustrate the last will of the testator and injure the Church, since the faithful would hesitate to make donations if they were not certain that the money would be properly applied. Hence, even the Sovereign Pontiff is bound by the law of justice and necessity and cannot validly make a change or reduction [27] in a will without a proportionate cause. It is therefore quite natural to find that very rare use has been made of this power, and the negative answers of the S. Congregatio Concilii are more numerous than the permissive ones. Thus a change of a *mansionariatus* (simple benefice of a chapter) into a canonicate was rejected; a proposed change of manual masses into chaplaincies was rejected, etc., etc.[28]

§ 2. However, if, on account of decreased revenues or for other reasons not due to faulty administration, the *obligations cannot possibly be complied* with, the Ordinary, after having heard those concerned, may equitably dimin-

27 *S. C. P. F.*, 1807, (*Coll.*, n. 689).

28 S. C. C., Nov. 4, 1705; Feb. 27, 1734; June 26, 1772 (Richter, *Trid.*, p. 164).

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ish the burdens, but must, as well as he is able, abide by the will of the founder. From this power is *excluded the reduction of Mass obligations,* which is reserved to the Holy See.

This canon makes quite a concession to the Ordinaries, because formerly such faculties were granted only for very particular reasons of distance or slow travelling.[29] But the local Ordinaries are obliged in conscience to make use of this privilege only for *just and solid reasons.* Besides, since it has always been the practice of the Roman Court to ascertain the probable or *likely mind of the testator* before permitting a change,[30] this should also be the guiding principle for Ordinaries. Here is a case in point: A pious Catholic had left a sum of money for the purpose of founding a home for poor girls exposed to danger. The legacy proved insufficient (here the reason) and the foundation appeared rather useless for the town in question. Hence the money was assigned to a convent for nuns on condition that they would receive a poor girl without the dowry otherwise required (here the interpretation of the probable desire of the founder).[31]

From this now *ordinary episcopal power,* in which exempt religious superiors do not participate, is excluded the reduction of *mass obligations,* which is strictly reserved to the Apostolic See (S. C. Consilii), as will be further explained in can. 1551.

29 S. C. P. F., 1807 (*l. c.*).
30 S. C. C., Feb. 12, 1735 and *pluries* (Richter, *l. c.*, p. 135, n. 8).
31 S. C. C., Aug. 19, 1724 (*l. c.*, n. 2).

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TITLE XXVIII

THE ADMINISTRATION OF CHURCH PROPERTY

THE SOVEREIGN PONTIFF

CAN. 1518

Romanus Pontifex est omnium bonorum ecclesiasticorum supremus administrator et dispensator.

The Roman Pontiff is the supreme administrator and steward of all church property.

This right flows, of course, from the plenitude of his power, which embraces the final end of the Church as well as its means. Waiving the question as to the rights which were formerly vindicated to him by reason of the relation of vassalage that existed between some nations and the Apostolic See,[1] it is evident that the Code considers only actual or present-day conditions. The name *dispensator* was given to the Pope by St. Bernard [2] as well as by St. Thomas. The Angelic Doctor says: The possessions of the Church belongs to the Pope, not as their lord and owner, but as their principal dispenser. This means that the Pope may dispense or dispose of all church property, even that owned by single corporations, in favor of the universal Church if an urgent reason exists and the welfare or tranquillity of the Church requires it. This power is given for the edification of the society founded

1 See Hergenröther, *Kath. Kirche und Christl. Staat*, 1872–1878.

2 *De Consideratione*, l. IV; see Fagnani in c. 7, *Relatum*, III, 50.

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by Jesus Christ, not for its destruction, or for the enrichment of the Pontiff or of his family or nation.[3] There is nothing absurd in the exercise of this power, for the State, too, claims the right of *eminent domain,* in virtue of which it confiscates or expropriates private property. The law is based upon the well-known maxim: *"Bonum privatum cedere debet bono publico."*

THE LOCAL ORDINARIES

CAN. 1519

§ 1. Loci Ordinarii est sedulo advigilare administrationi omnium bonorum ecclesiasticorum quae in suo territorio sint nec ex eius iurisdictione fuerint subducta, salvis legitimis praescriptionibus, quae eidem potiora iura tribuant.

§ 2. Habita ratione iurium, legitimarum consuetudinum et circumstantiarum, Ordinarii, opportune editis peculiaribus instructionibus intra fines iuris communis, universum administrationis bonorum ecclesiasticorum negotium ordinandum curent.

§ 1. The local Ordinaries should watch carefully over the administration of all church property located in their dioceses, except that which has been withdrawn from their jurisdiction. If lawful prescription gives the bishop the right to administer property otherwise not subject to his power, he may make use of this right. The reason is that the bishop has the *"intentio fundata in iure," i. e.,* the original right of administering all diocesan property because he is the pastor of the whole territory.

Exemption, as the term implies, spells an exception from the rule. Therefore, if exempt religious or other

3 Benedict XIV, *"Cum Encyclicas,"* May 24, 1754, § 4.

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exempt communities or individuals permit prescription against themselves, the original right revives. But exemption creates a right of independent administration as far as the canons admit. For it signifies freedom from episcopal jurisdiction as well as from the law of the diocese; from the right in *dando* as well as from the right in *recipiendo,* with due regard, of course, to the common law.[4] But note well, the Ordinaries are only the administrators,[5] not the dispensers of diocesan property.

Therefore § 2 of can. 1519 provides that the Ordinaries should regulate the whole business of the administration of diocesan property according to the *common law of the Church* and with due regard to special, lawful customs, which are the best interpreters of the law, and to circumstances. To this effect, and with these objects in view, they may issue, either in synod or outside, particular statutes which bind the whole diocese, provided they keep within the common law.

DIOCESAN BOARD OF ADMINISTRATION

CAN. 1520

§ 1. Ad hoc munus rite obeundum quilibet Ordinarius in sua civitate episcopali Consilium instituat, quod constet praeside, qui est ipsemet Ordinarius, et duobus vel pluribus viris idoneis, iuris etiam civilis, quantum fieri potest, peritis, ab ipso Ordinario, audito Capitulo, eligendis, nisi iure vel consuetudine peculiari iam alio aequivalenti modo legitime fuerit provisum.

§ 2. Citra apostolicum indultum, ii a munere administratoris excluduntur, qui cum Ordinario loci primo

4 Cfr. c. 24, C. 12, q 1; c. 18, X, I, 31, and the gloss to the same.

5 S. C. P. F., April 1, 1816 (*Coll. P. F.*, n. 712).

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vel secundo consanguinitatis vel affinitatis gradu coniuncti sint.

§ 3. Loci Ordinarius in administrativis actibus maioris momenti Consilium administrationis audire ne praetermittat; huius tamen sodales votum habent tantum consultivum, nisi iure communi in casibus specialiter expressis vel ex tabulis fundationis eorum consensus exigatur.

§ 4. Sodales huius Consilii iusiurandum de munere bene ac fideliter adimplendo coram Ordinario emittant.

§ 1. In order that this business be properly attended to, every Ordinary shall establish in his episcopal city a *board of administrators,* consisting of the president, who is the bishop himself, and two or three capable men, experienced also in civil law, if possible, to be appointed by the Ordinary after having heard the advice of his chapter (or consultors). Should there be in the diocese a particular law or custom which provides an equally effective mode of administration, this may be retained. But some kind of a council (*consilium*) there must be, according to the admonition of the wise man: "Do nothing without counsel, and thou shalt not repent, when thou hast done." [6]

§ 2. Excluded from this council of administrators are all relatives in the first and second degree (*affines et consanguinei*) of the local Ordinary, unless the Apostolic See should grant a dispensation to the contrary.

§ 3. Local Ordinaries shall not fail to call the council of administrators as often as any business of importance is to be transacted. Such business would be alienation of property, for which a papal indult is required, the effective exercise of supervision over the administration of tem-

[6] Ecclus. 32, 24.

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poralities, and the rendering of accounts to be given annually by those who are obliged to do so.[7] But the vote of these administrators is *advisory* only, unless a decisive vote is required in certain cases expressed in law or in the charter of a foundation.

§ 4. The members of this board must take oath to the effect that they will perform their duty well and faithfully.

It may be observed that these administrators may also be laymen, provided, of course, they are Catholics.

ADMINISTRATORS OF INDIVIDUAL INSTITUTIONS

CAN. 1521

§ 1. Praeter hoc dioecesanum Consilium administrationis, Ordinarius loci in administrationem bonorum quae ad aliquam ecclesiam vel locum pium pertinent et ex iure vel tabulis fundationis suum non habent administratorem, assumat viros providos, idoneos et boni testimonii, quibus, elapso triennio, alios sufficiat, nisi locorum circumstantiae aliud suadeant.

§ 2. Quod si laicis partes quaedam in administratione bonorum ecclesiasticorum vel ex legitimo fundationis seu erectionis titulo vel ex Ordinarii loci voluntate competant, nihilominus universa administratio nomine Ecclesiae fiat, ac salvo iure Ordinarii visitandi, exigendi rationes et praescribendi modum administrationis.

§ 1. According to Roman as well as ecclesiastical law each institution should have an administrator, or, as he was formerly called, *syndicus*.[8] Our Code prescribes the appointment of such syndics, in addition to the diocesan

7 S. C. P. F., Oct. 18, 1883, n. XIV, (*Coll.*, n. 1606).

8 Cfr. Cod. Iust., I, 2; c. 2, Clem., III, 11; *Trid.*, Sess. 7, c. 5; Sess. 25, c. 8, *de Ref.*

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board of administrators. For all churches or pious institutions which have no syndics either by law or charter, the Ordinary should choose prudent and capable men of good repute to administer the property. The term of these administrators lasts three years, unless local circumstances counsel a more or less frequent change. It is evident that our American parishes need no special administrators, because the parish priests themselves, aided by the trustees, administer the property.

§2. If the charter or the will of the local Ordinary calls upon *laymen* to take part in the administration of ecclesiastical property, the whole administration must nevertheless be conducted in the name of the Church, and the Ordinary's right of visitation and of demanding a regular account and prescribing the mode of administration must be safeguarded.

THE GENERAL DUTIES OF ADMINISTRATORS

The following canons set forth the duties of administrators appointed by law or charter or by order of the Ordinary; first, before assuming office:

CAN. 1522

Antequam administratores bonorum ecclesiasticorum, de quibus in can. 1521, suum munus ineant:

1.° Debent se bene et fideliter administraturos coram Ordinario loci vel vicario foraneo iureiurando cavere;

2.° Fiat accuratum ac distinctum inventarium, ab omnibus subscribendum, rerum immobilium, rerum mobilium pretiosarum aliarumve cum descriptione atque aestimatione earundem; vel factum antea inventarium acceptetur, adnotatis rebus quae interim amissae vel acquisitae fuerint;

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3.° Huius inventarii alterum exemplar conservetur in tabulario administrationis, alterum in archivo Curiae; et in utroque quaelibet immutatio adnotetur quam patrimonium subire contingat.

Before they assume office, the administrators of church property, (a) must *take an oath* before the local Ordinary or the rural dean, by which they promise that they will perform their obligations properly and faithfully. (b) They must *sign the inventory,* which must be made accurately and distinctly, of all the immovable property, as also of precious movable goods, clearly described and appraised; or accept an inventory already made, which should account for things either lost or acquired in the meantime. (c) Of this inventory *two copies* must be drawn up, one of which must be kept in the archives of the administrative council and the other in the archives of the diocesan court, in each of which all changes in the property must be duly noted.

Can. 1523

Administratores bonorum ecclesiasticorum diligentia boni patrisfamilias suum munus implere tenentur; ac proinde debent:

1.° Vigilare ne bona ecclesiastica suae curae concredita quoquo modo pereant aut detrimentum capiant;

2.° Praescripta servare iuris tam canonici quam civilis, aut quae a fundatore vel donatore vel legitima auctoritate imposita sint;

3.° Reditus bonorum ac proventus accurate et iusto tempore exigere exactosque loco tuto servare et secundum fundatoris mentem aut statutas leges vel normas impendere;

4.° Pecuniam ecclesiae, quae de expensis supersit et

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utiliter collocari potest, de consensu Ordinarii, in emolumentum ipsius ecclesiae occupare;

5.° Accepti et expensi libros bene ordinatos habere;

6.° Documenta et instrumenta, quibus iura ecclesiae in bona nituntur, rite ordinare et in ecclesiae archivo vel armario convenienti et apto custodire; authentica vero eorum exemplaria, ubi commode fieri potest, in archivo vel armario Curiae deponere.

Administrators of ecclesiastical property should administer their office like a good father of a family; in particular,

1.° They should see to it that nothing entrusted to their care is lost or damaged;

2.° They shall observe the rules laid down by both ecclesiastical and civil law, and the regulations imposed by the founder or donor, or by lawful authority;

3.° They shall collect the revenues and fees (produce, rent, etc.), at the proper time, keep them safely, and use them in accordance with the will of the founder and the rules of the charter;

4.° They shall invest the surplus profitably, with the consent of the Ordinary, and to the advantage of the Church;

5.° They shall keep the books of income and expenditures in good order;

6.° They shall keep the holographs and title deeds of the church in good order and place them in the archives or safe of the church, and copies or abstracts in the diocesan archives or safe.

Can. 1524

Omnes, et praesertim clerici, religiosi ac rerum ecclesiasticarum administratores, in operum locatione de-

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bent assignare operariis honestam iustamque mercedem; curare ut iidem pietati, idoneo temporis spatio, vacent; nullo pacto eos abducere a domestica cura parsimoniaeque studio, neque plus eisdem imponere operis quam vires ferant neque id genus quod cum aetate sexuque dissideat.

This canon refers to a duty incumbent on administrators of church property, which is of a preëminently social character because it enjoins on them the obligation of paying *fair wages* to workingmen. All administrators, it says, especially clerics and religious, must pay their employees a just and adequate wage; they should also see to it that the workingmen be allowed a convenient time for fulfilling their religious duties; they should never keep them from their domestic duties or from habits of thrift nor impose upon them more work than their strength, age or sex enables them to perform. The whole famous encyclical letter of Leo XIII "On the Condition of the Working Classes" is here contained in a nutshell.[9] We will not, although the temptation is strong, dwell on this point. On the one hand, an example is to be set of really religious interpenetration of work and prayer, and on the other, the world is to be shown that the Church is opposed to slavish drudgery, but not to wholesome social and domestic pursuits. If priests and religious fail to do justice to workingmen, how can the world expect enlightenment and guidance from the Church in the solution of the labor question?

9 "*Rerum Novarum*," May 15, 1891; J. A. Ryan, *A Living Wage*. This canon also applies to housekeepers and janitors.

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SPECIAL DUTIES OF ADMINISTRATORS

CAN. 1525

§ 1. Reprobata contraria consuetudine, administratores, tam ecclesiastici quam laici, cuiusvis ecclesiae etiam cathedralis aut loci pii canonice erecti aut confraternitatis, singulis annis officio tenentur reddendi rationem administrationis Ordinario loci.

§ 2. Si ex peculiari iure aliis ad id designatis ratio reddenda sit, tunc etiam Ordinarius loci vel eius delegatus cum his admittatur, ea lege ut aliter factae liberationes ipsis administratoribus minime suffragentur.

§ 1 of canon 1525 *reprobates any custom contrary* to the duty, established by long standing law,[10] of *rendering annual accounts to the local Ordinary*. This law is binding on clerical as well as lay administrators

(a) *Of every church,* including the cathedral church, and every public oratory, with the exception of churches belonging to *exempt religious* exclusively and solely by reason of their own service and for their own purpose, without being a parish or incorporated church by way of a benefice. Parish churches governed by religious must also render an account of their administration.[11]

(b) Accounts must also be rendered of any and all *charitable or pious institutions canonically erected,* no matter whether governed by secular or religious, even exempt, clergymen. Thus, if religious conduct a hospital or an asylum of any kind, an account must be given, the reason being that such charitable institutions concern the faithful, or the Church at large, and are often of the na-

10 C. 11, C. 10, q. 1, (*Synod. Tolet. IV*).

11 C. 31, X, III, 5; see can. 532 f.; can. 1504.

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ture of foundations connected with a last will.[12] This rule holds also concerning institutions under royal protection.[13]

(c) The syndics of *each and every confraternity,* without exception, even though affiliated with an archconfraternity in the City of Rome, for instance, that of the "Good Death," and even though it be erected in a church of exempt religious,[14] must likewise render an account to the bishop. Of course, this is to be understood only of such confraternities as have revenues of their own, and form at least a juridical entitiy (*un' ente morale*).

§ 2. If there is a special statute requiring that accounts be rendered to others designated for that purpose, the local Ordinary or his delegate must also be allowed to inspect the accounts, and all stipulations made for the purpose of excluding the Ordinary are void. Thus, for instance, if a municipality is entitled to receive the account of a pious foundation, which contains a clause to the effect that the local Ordinary be excluded, this clause would be invalid in the ecclesiastical court.[15] The same is true of any custom that may have crept in against the present canon.[16]

CAN. 1526

Administratores litem nomine ecclesiae ne inchoent vel contestentur nisi licentiam obtinuerint scripto datam Ordinarii loci, aut saltem, si res urgeat, vicarii

12 Cfr. c. 2, Clem. III, 11, where *xenodochia, leprosariae, eleemosynariae, hospitalia,* though exempt, are mentioned; see Leo XIII, "*Romanos Pontifices,*" May 8, 1881.

13 S. C. C., Dec. 10, 1621, and *saepius* (Richter, *Trid.*, p. 168, n. 4 f.).

14 S. C. C., Sept. 20, 1710; March 24, 1725 (Richter, *l. c.*, nn. 6 f.).

15 S. C. C., June 6, July 11, 1750 (Richter, *l. c.*, n. 2).

16 S. C. C., Jan. 18, 1757 (*ibid.*, n. 3).

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foranei, qui statim Ordinarium de concessa licentia certiorem reddere debet.

Administrators of church property must not *institute or contest a lawsuit* in the name of the church without having obtained written permission from the local Ordinary or, in urgent cases, from the rural dean, who shall immediately inform the Ordinary when he has granted such a permission.

"*Nomine ecclesiae*" means in the name of the church or pious foundation. For going to law the administrators need the formal and written consent of the local Ordinary, because he is *the* administrator of all church property in his diocese.

CAN. 1527

§ 1. Nisi prius ab Ordinario loci facultatem impetraverint, scriptis dandam, administratores invalide actus ponunt qui ordinariae administrationis fines et modum excedant.

§ 2. Ecclesia non tenetur respondere de contractibus ab administratoribus sine licentia competentis Superioris initis, nisi quando et quatenus in rem suam versum sit.

If they disregard his advice and are defeated in a lawsuit, they are bound in conscience and by ecclesiastical law to make up for the loss sustained.[17] The *church is not responsible* for contracts made by the administrator without the permission of the competent superior, unless the contract is favorable. This *favor ecclesiae* is to be extended to lawsuits as well.

According to § 1 of can. 1527, administrators per-

17 S. C. EE. et RR., Nov. 29, 1850, ad 1 (Bizzarri, *l. c.*, p. 125 ff.).

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form even otherwise legal acts *invalidly* if they exceed the limits and mode of ordinary administration without having obtained the necessary written permission of the local Ordinary.

Ordinary administration as a rule excludes the acceptance or refusal of legacies, bequests, donations, the purchase of immovable property, mortgages and rents for more than three years, alienation of precious objects, borrowing a considerable sum, building new edifices and cemeteries, making repairs of importance, suppressing parishes and institutions, imposing taxes or taking up collections.[18] For all these acts, therefore, the bishop's permission is required.

CAN. 1528

Etsi ad administrationem non teneantur titulo beneficii vel officii ecclesiastici, administratores qui munus expresse vel tacite susceptum arbitratu suo dimittunt ita ut damnum ecclesiae obveniat, ad restitutionem tenentur.

Administrators are obliged to *restitution* if they relinquish an office which they have either explicitly or tacitly assumed and thereby cause loss to the church. This rule holds even though they were not bound to act as administrators by reason of an ecclesiastical benefice or office.

Hence also laymen may be bound to make restitution according to the rules laid down in moral theology.

18 S. C. P. F., July 21, 1856, n. 20 (*Coll.*, n. 1127).

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TITLE XXIX

CONTRACTS

ECCLESIASTICAL AND CIVIL CONTRACTS

CAN. 1529

Quae ius civile in territorio statuit de contractibus tam in genere, quam in specie, sive nominatis sive innominatis, et de solutionibus, eadem iure canonico in materia ecclesiastica iisdem cum effectibus serventur, nisi iuri divino contraria sint aut aliud iure canonico caveatur.

Whatever the civil law of a country determines with regard to contracts, general and specific, named and nameless, as well as payments, shall be observed also in ecclesiastical law and with the same legal effects, unless the civil laws run counter to divine law, and, unless the canons provide otherwise.

A contract is a formal agreement made between two or more parties ("*duorum vel plurium in idem placitum consensus*").[1] Contracts are sometimes divided into *nominati and innominati,* the former being such as have obtained special names in law, as, for instance, contracts of sale, rent, lease, whilst nameless contracts are comprised under the fourfold class of: *do ut des, facio ut facias, do ut facias, facio ut des.* The third is especially applied to pious foundations (can. 1544).

The essential elements of a contract are: the consent of

1 Cfr. Engel, I, tit. 25, n. 7 ff.

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the contracting parties, their ability to contract, and the consideration itself. The civil law prescribes formalities or rules which must be observed in order that a contract be valid. These formalities may concern all contracts in general or only a *certain class* of contracts. These civil formalities, says our canon, must be observed even if the subject matter, or the consideration, or the contracting parties belong to the Church. But there are two exceptions: (1) provided the contract does not contravene the divine positive law, and (2) provided the canon law is not against its observance. Whether the term "divine law" includes natural law is not quite evident. Neither is the doubt completely solved by can. 1513, where natural and ecclesiastical law only are mentioned, and where a will lacking the formalities required by civil law is held to be valid in the court of conscience. We leave it to the theologians to decide this problem. Clearly opposed to divine law would be a civil law excluding ecclesiastical persons, either physical or moral, from the right of making contracts. The ecclesiastical law differs in some respects from the civil law with regard to religious, as may be seen in can. 536. Against ecclesiastical law is also the obligatory form of civil marriage, which, besides, violates the divine law. These exceptions admitted, it is safe to follow the civil law, because after all, a law worthy of the name should be nothing else than a more detailed application of the natural law, and jurists should be grateful that the new Code offers an illustrious example of the conciliatory spirit of the Church and her readiness to adapt herself to the reasonable demands of the State. Modern jurists define a contract as "a promise or agreement enforceable by law," but complain that the definition is not satisfactory.[2] All

2 Harriman, *The Law of Contracts*, 1901, § 3 ff.; § 610 ff.

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more or less agree that a formal contract at least needs the support of law. Which is true, as far as material coercion is concerned; but a contract may be binding in conscience. However, our Code accepts the *formal contract* with the reservation pointed out. Formal contracts in our law are those the existence of which can be established by a record or a deed. *Unilateral* contracts impose an obligation on one party only, whereas *bilateral* contracts impose obligations on both parties. Requisites for valid contracts are set forth by the jurists as affecting the promise itself, the one who makes it, and the one to whom it is made. Yet, though all the elements of a contract be present, there may be a law which prevents their effecting a contractual obligation, and therefore, renders a contract illegal. Of these there are quite a number in canon law.[3]

ALIENATION

CAN. 1530

§ 1. Salvo praescripto can. 1281, § 1, ad alienandas res ecclesiasticas immobiles aut mobiles, quae servando servari possunt, requiritur:

1.° Aestimatio rei a probis peritis scripto facta;

2.° Iusta causa, idest urgens necessitas, vel evidens utilitas Ecclesiae, vel pietas;

3.° Licentia legitimi Superioris, sine qua alienatio invalida est.

§ 2. Aliae quoque opportunae cautelae, ab ipsomet Superiore pro diversis adiunctis praescribendae, ne omittantur, ut Ecclesiae damnum vitetur.

Alienation implies the turning away of a thing from its proper purpose or destiny.[4] From this it was but logical

3 *Ibid.*, § 171 ff.

4 Cfr. c. 2, C. 12, q. 2: "*quae a religioso aliena sunt proposito.*"

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to apply the term to any act by which the ownership or usufruct or any right belonging to the Church was transferred to another. However, it also implies a transfer that is detrimental,[5] which indeed is verified in any loss of a right, but may nevertheless be more useful than its retention. Besides, it must be remembered that the purpose of Church property is wide, and that the poor and captives always had a special claim on the property of the Church. Hence the alienation even of sacred vessels was not considered forbidden if captives had to be redeemed or the poor succored.[6] Forbidden, however, was any unwarranted and purposeless alienation, (under the feudal system any alienation without the consent of the Lord.)[7] This is still traceable in the present legislation, the reason for which is stated in can. 1518.

Alienation, then, is the transfer of an object or right from one to another and partakes of the nature of an onerous contract, which involves a deterioration in the condition of the holder. The *acts* by which this transfer is made are: sale, exchange, payment, donation, mortgage, leases for more than three years, bailment and security, and *cessio iuris,* or cession of a right acquired, such as admitting a servitude.[8] The *objects or rights* which are or may be transferred by way of alienation are things of material value or price (*res pretio aestimabiles*); hence movable as well as immovable goods.

Movable goods are either such as can be preserved or kept without loss, (*quae servando servari possunt*), for instance, title deeds, books, treasures, etc.; or things that

5 Thus c. 52, C, 12, q. 2: "*ut meliora prospiciat.*"

6 Cfr. cc. 14, 15, 70, C. 12, q. 2.

7 Blackstone-Cooley, *Comment.*, II, 288 f.

8 All these acts occur in the sources of law; see Santi-Leitner, III, 13, n. 1; Wernz, III, n. 154, who justly observes that a *repudiatio lucri*, though illicit, is no alienation, because it is not yet property acquired.

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are easily consumed or corrupted, for instance, produce.[9] Movable goods may be *precious,* or have little value, at least for the time being. Precious things, can. 1497, § 2 says, are such as have a considerable artistic value (paintings, sculptures by great artists) or a *historical* value (manuscripts or archaeological objects) or are made of precious material (jewelry, rare stones, pearls). The term *precious* might also be applied to an entire library, or to the sacred treasure of a church.

Immovable property consists of land, buildings, lakes, rivers, mines, etc. These too are estimated in proportion to their value, according to the canon "*Terrulas*" (c. 53, c. 12, q. 2).[10] Immovable, though incorporeal, property are rights of way, the privilege of fishing or hunting, etc. To give up such rights or privileges or to surrender them when in dispute (*cessio litis*), would be alienation.

Alienation is not forbidden absolutely, for, as stated above, this act signifies a deterioration of the material condition of a church or corporation, which the common law endeavors to prevent by administrative restrictions or regulations. An absolute prohibition might involve a *summa iniuria,* which the legislator certainly does not intend. Therefore can. 1530 sets forth certain conditions which render alienation lawful and valid.

For the alienation of sacred relics the express permission of the Holy See is required, according to can. 1281, § 1. All other ecclesiastical goods, whether immovable or movable, may be alienated, under the following conditions:

9 To this class also belong: young stock, calves, pigs, lambs, chickens, the right of selling which canonists admit, but not the entire herd at once.

10 The value of this less valuable property, according to an antiquated opinion, would be about $50, or 268 francs; Santi-Leitner, *l. c.,* n. 6.

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1.° An appraisement of the goods must be made by conscientious experts;

2.° There must be a just cause, *i. e.*, urgent necessity, or evident utility on the part of the church, or piety;

3.° The competent superior must give his permission, without which alienation would be invalid.

The superior may also prescribe other precautions and formalities, as the circumstances of the case may demand, in order to prevent damage to the church.

Here it may be noted that *perishable* or easily consumable goods require no formalities; hence live stock or produce may be bought, sold, or exchanged without any scruples of conscience, unless the competent superior has prescribed special rules, as, for instance, that no exports shall be made in time of public calamity beyond certain boundaries, or nothing be bought from a place or country infected by a contagious disease or an epidemic.

Valuation or appraisement is not required under pain of nullity. Nor is the *cause* required under such a penalty. However, if alienation were made without any reason, the one who made it to the detriment of the church would certainly be obliged to restitution, because administrators of church property are not possessors, but trustees.

Just reasons for lawful alienation are these three: necessity, utility, piety. *Necessity* must be *urgent* here and now, for instance, the paying of a debt, redeeming a mortgage, the indispensable support of the ministers, repair of the church, etc. The *utility* must be *evident, i. e.*, considering all the circumstances of the case, alienation must be more profitable than the retention of the property, for instance, buying a piece of property to round out one already held, a rare occasion of buying a library, etc. *Piety* may mean gratitude towards those from whom we have received favors, aid and succour of the poor and captives,

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as stated above, in fact the whole field of practical corporeal works of Christian mercy and charity.

CAN. 1531

§ 1. Res alienari minore pretio non debet quam quod in aestimatione indicatur.

§ 2. Alienatio fiat per publicam licitationem aut saltem nota reddatur, nisi aliud circumstantiae suadeant; et res ei concedatur qui, omnibus perpensis, plus obtulerit.

§ 3. Pecunia ex alienatione percepta caute, tuto et utiliter in commodum Ecclesiae collocetur.

This canon rules, not, however, under pain of nullity,

1.° That no thing should be alienated for less than what it was appraised at, because this would involve injustice and grafting;

2.° That alienation should take place by *auction,* or at least by advertisement of a public sale, unless circumstances advise the contrary; and the property to be disposed of should, everything being considered, be given to the highest bidder;

3.° That the sum realized from alienation should be invested safely and profitably.

Concerning the public auctioning of church property, the rules usually given by canonists are somewhat out of date and inapplicable to modern conditions.[11] But public auction is still commendable, in as much as it is apt to prevent favoritism and nepotism. For the rest, the civil law governing public auctions may safely be followed. *Circumstances* may demand less publicity, as when church property has to be sold on account of bankruptcy, or to

11 Bened. XIV, "*Essendo,*" Nov. 23, 1742; S. C. EE. et RR., March 18, 1835 (Bizzarri, *l. c.,* p. 62 f.).

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protect the church against an iniquitous civil law, or to spare the good name of an institution.[12]

CAN. 1532

§ 1. Legitimus Superior de quo in can. 1530, § 1, n. 3, est Sedes Apostolica, si agatur:

1.° De rebus pretiosis;

2.° De rebus quae valorem excedunt triginta millium libellarum seu francorum.

§ 2. Si vero agatur de rebus quae valorem non excedunt mille libellarum seu francorum, est loci Ordinarius, audito administrationis Consilio, nisi res minimi momenti sit, et cum eorum consensu quorum interest.

§ 3. Si denique de rebus quarum pretium continetur intra mille libellas et triginta millia libellarum seu francorum, est loci Ordinarius, dummodo accesserit consensus tum Capituli cathedralis, tum Consilii administrationis, tum eorum quorum interest.

§ 4. Si agatur de alienanda re divisibili, in petenda licentia aut consensu pro alienatione exprimi debent partes antea alienatae; secus licentia irrita est.

Can. 1532 determines the *lawful superior* whose permission is required for valid alienation. This superior is:

1.° The *Apostolic See, i. e.,* the S. C. Concilii (can. 250, § 2), if (a) *precious things* of any kind or amount are to be alienated, for they are not precisely appraised in our

12 That the investment should be made in safe securities, is a wise ruling, but has nothing to do with the validity of the act, if the sum does not exceed the value stated in can. 1532. Hence, despite the decision of the S. C. C., quoted in the *Irish Eccl. Record,* Jan., 1920, p. 67, the answer there given shoots beyond the mark and is against can. 1530, § 1, n. 3.

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canon; or (b) if property is to be disposed of, the value of which exceeds the sum of 30,000 lire (or francs),[13] *i. e.*, about $6,000 to $10,000.

2.° If the value of the property to be alienated *does not exceed the sum of 1,000 lire (or francs)*, i. e., about $200, the local Ordinary may proceed after having heard the advice of the board of administrators — unless the property is of very little value — and with the consent of those concerned.

"Those *concerned*" are the contracting parties, who, however, must be in a condition to give their consent. While a benefice is vacant, or while an episcopal see is vacant, no alienation of property belonging to the benefice or to the *mensa episcopalis* is permitted, even though the amount would be small. Hence the canon "Terrulas" cannot be applied here, because it would be contrary to can. 436: "*Sede vacante nihil innovetur.*"[14]

3.° If the value of the property to be alienated is *between 1,000 and 30,000 lire (or francs)*, the local Ordinary may proceed, provided a threefold consent has been obtained, viz., (1) that of the cathedral chapter (or diocesan consultors), which must be given *collegialiter, i. e.*, by vote at a meeting; (2) the consent of the board of administrators, and (3) that of the persons concerned. The penalties are stated in can. 2347.

4.° If the property to be alienated is *divisible,* the parts which have been previously alienated must be mentioned in the petition for permission or consent, under pain of nullity. Hence no concealment is admissible, because it may endanger the validity of the transaction.

13 What was said under can. 534 (see this Commentary, Vol. III, p. 186) must be reaffirmed, provided, of course, the valuta is normal.

14 See C. 1, X, III, 9; S. C. EE. et RR., June 14, 1788 (Bizzarri, *l. c.*, p. 40 f.).

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This holds concerning the papal indult as well as with regard to anyone's consent.

We call attention to can. 81, which certainly may be applied in cases that brook no delay or where delay would entail serious loss.

FORMALITIES OF ALIENATION

CAN. 1533

Sollemnitates ad normam can. 1530-1532 requiruntur non solum in alienatione proprie dicta, sed etiam in quolibet contractu quo conditio Ecclesiae peior fieri possit.

Can. 1533 applies the formalities set forth in can. 1530–1532 not only to alienation in the technical sense of the word, but to any contract by which the status of the Church might be impaired. Prelates may improve the condition of their churches, but are not allowed to render it worse.[15] A deterioration may be brought about by mortgages or securities as well as by donations (see can. 1535) and onerous contracts.[16] Alms or offerings collected by missionaries also constitute ecclesiastical property and may not be acquired or disposed of at will by the missionary, even though it were for the benefit of the mission.[17] This rule, of course, includes the *making of debts,* which is always dangerous, especially if done by such as do not know the value of money or lack business capacity.

CAN. 1534

§ 1. Ecclesiae competit actio personalis contra eum qui sine debitis sollemnitatibus bona ecclesiastica alienaverit et contra eius heredes; realis vero, si alien-

15 C. 2, X, III, 24.
16 C. 2, X, III, 23.
17 S. C. P. F., May 27, 1881 (*Coll.*, n. 1553); see can. 534.

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atio nulla fuerit, contra quemlibet possessorem, salvo iure emptoris contra male alienantem.

§ 2. Contra invalidam rerum ecclesiasticarum alienationem agere possunt qui rem alienavit, eius Superior, utriusque successor in officio, tandem quilibet clericus illi ecclesiae adscriptus, quae damnum passa sit.

The Church, *i. e.,* each single church corporation, or juridical entity (through its syndic) has the right to bring a *double action.* A *personal* action may be brought against anyone who has alienated church property without observing the formalities required by law. This action, brought to recover the damage or property itself, is also extended to the *heirs* of the one who is guilty of illegal alienation, because the heir is supposed to be identical in law with the deceased who acted unlawfully. *Real action* may be brought, in case of invalid alienation, against any one who acquired church property that was alienated illegally, even if he bought it in good faith. However, the possessor thus brought to law may, on his side, bring suit against the one who performed an illegal alienation.[18] But it also must be added that if the illegally alienated property was obtained by personal action, no real action is to be brought against the possessor, because the same thing cannot be demanded twice, and *vice versa.*

§ 2 says that *invalid alienation* can be revoked either by the alienator himself, or by his superior, or by the successor of either, and, finally, by any clergyman assigned to the church which has sustained a loss by the invalid alienation. The text from which our canon is taken threatens with penalties the clergyman who neglects to denounce the illegal alienator or donator.[19]

18 Cfr. c. 6, X, III, 13; I. 3, X, III, 21; Reiffenstuel, III, 13, n. 62.

19 C. 6, x, III, 13; c. 2, x, III, 14; c. 2, x, III, 24 (against donation).

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DONATIONS

CAN. 1535

Praelati et rectores de bonis mobilibus suarum ecclesiarum donationes, praeterquam parvas et modicas secundum legitimam loci consuetudinem, facere ne praesumant, nisi iusta interveniente causa remunerationis aut pietatis aut christianae caritatis; secus donatio a successoribus revocari poterit.

Prelates and rectors are allowed to make *only small and moderate donations* from the *movable property* of the Church, according to legitimate local custom; large donations may be made only for a just reason, as reward, piety, or Christian charity. Donations made against this rule may be revoked by the successors.

Donations are free gifts and are here understood of movable property only, to the exclusion of immovable property.[20] Since prelates are not the owners of church property, but only the administrators, they are not allowed to deteriorate the condition of their church. Therefore only *small* and infrequent donations are permitted. The judgment concerning quantity and quality is left to the donor, who must be guided by *local custom* and by the circumstances of time and persons. But local custom must not be stretched so as to cover large donations because such a custom would be a corruption and therefore unreasonable. However *three reasons* may justify larger and more important donations: reward or remuneration, piety, and charity. *Reward* is here understood as a remuneration for services done to the church or to the

20 It is evident that the text intends only donations *inter vivos*, gifts to living persons, not donations *mortis causa*, made to go into effect after the donor's death; see commentators on lib. III, tit. 24.

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prelate or rector, provided a certain equality or proportion be observed between the merits and the reward. *Piety,* as stated, may signify gratitude and duty either to one's relatives and friends, or to outsiders. Household, town, and diocese should determine the gradation. *Christian charity* is wider, embracing, as it does, all *causae piae* of every description. But the donor must always keep in view the condition of the church; for to go beyond the means at hand would be unreasonable and involve an unjustice.[21]

CAN. 1536

§ 1. Nisi contrarium probetur, praesumendum ea quae donantur rectoribus ecclesiarum, etiam religiosorum, esse ecclesiae donata.

§ 2. Donatio facta ecclesiae, ab eius rectore seu Superiore repudiari nequit sine licentia Ordinarii.

§ 3. Repudiata illegitime donatione, ob damna quae inde obvenerint actio datur restitutionis in integrum vel indemnitatis.

§ 4. Donatio ecclesiae facta et ab eadem legitime acceptata, propter ingratum Praelati vel rectoris animum revocari nequit.

§ 1 says that *donations* made to rectors of churches, secular or religious, are supposed to be made *to the church,* unless there is reason to presume the contrary (see can. 533).[22]

§§ 2 and 3 lay down certain rules concerning the refusal of donations. In order lawfully to refuse a donation made to a church, the rector or superior of the same needs the permission of the Ordinary. An illegal refusal, if a

21 Reiffenstuel, III, 24, n. 37 ff.
22 See this Commentary, Vol. III, p. 182.

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loss is caused thereby, justifies an action for *restitutio in integrum* or indemnity.

§ 4 departs from the Decretals,[23] inasmuch as the Code does not permit a donation made to a church and lawfully accepted by the latter, to be revoked on account of ingratitude or enmity on the part of the prelate or rector.

CAN. 1537

Res sacrae ne commodentur ad usum qui earundem naturae repugnet.

Sacred things, i. e., such as have received ecclesiastical consecration or blessing,[24] *may not be loaned for a purpose repugnant to their nature.* Thus a church should never be turned into a concert hall, a chalice is not to be used for banquets,[25] even though it were only by a transitory loan and the money were sorely needed. The rule is absolute and admits of no exception.[26]

MORTGAGES AND DEBTS

CAN. 1538

§ 1. Si ecclesiae bona, legitima interveniente causa, oppignoranda vel hypothecae nomine obliganda sint, vel agatur de aere alieno contrahendo, legitimus Superior, qui ad normam can. 1532 licentiam dare debet, exigat ut antea omnes, quorum interest, audiantur, et curet ut, cum primum fieri poterit, aes alienum solvatur.

§ 2. Hac de causa annuae ratae ab eodem Ordi-

23 C. 10, x, III, 24 admitted revocation on account of qualified ingratitude, such as violence, atrocities, serious injury.

24 Can. 1497, § 2.

25 See Dan. 5, 2 f.

26 Reg. Iuris 51 in 6°.

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nario praefiniantur quae exstinguendo debito sint destinatae.

§ 1. If, for a lawful reason, church property has to be pawned or mortgaged, or debts have to be made, the lawful superior who is entitled to grant permission, according to can. 1532, shall first hear all concerned, *i. e.*, the administrators and rectors, or syndics, and endeavor to pay off the debt as soon as possible.

§ 2. For this purpose the Ordinary should determine the amount of annual payments. If the church has fixed revenues, this may be done by subtracting the necessary amount therefrom.[27] But if no fixed endowment or revenues are available, as is the case with most of our churches, a "sinking fund" should be established to wipe out the debt.

SALE AND EXCHANGE

CAN. 1539

§ 1. In venditione aut permutatione rerum sacrarum nulla ratio consecrationis vel benedictionis in pretii aestimatione habeatur.

§ 2. Administratores possunt *titulos ad latorem*, quos vocant, commutare in alios titulos magis aut saltem aeque tutos ac frugiferos, exclusa qualibet commercii vel negotiationis specie, ac de consensu Ordinarii, dioecesani Consilii administrationis aliorumque quorum intersit.

§ 1. When *sacred things* are sold or exchanged, the fact that they are consecrated or blessed shall not influence their valuation, *i. e., no higher price* can be lawfully

27 S. C. P. F., July 30, 1867, n.4 (*Coll.*, n. 1310).

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charged for a consecrated or blessed object merely because it is consecrated or blessed. To do so would be simony.[28]

§ 2. The administrators may convert *notes payable to bearer* into other titles or investments which are safer than, or at least equally safe and profitable as, the former.

In doing so, however, they must avoid every species of trading or speculation, and, besides, obtain the previous consent of their Ordinary, of the diocesan board of administrators, and other interested persons.

ADMINISTRATORS AND RELATIVES EXCLUDED

CAN. 1540

Bona ecclesiae immobilia propriis administratoribus eorumque coniunctis in primo aut secundo consanguinitatis vel affinitatis gradu non sunt vendenda aut locanda sine speciali Ordinarii loci licentia.

Immovable church property cannot lawfully be sold or leased to the administrators themselves, or to persons related to them in the first or second degree either by blood or marriage, without special permission of the local Ordinary.

LEASE OR RENT

CAN. 1541

§ 1. Contractus locationis alicuius fundi ecclesiastici ne fiant, nisi ad norman can. 1531, § 2; et in iis addantur semper conditiones de limitibus custodiendis, de bona cultione, de rite solvendo canone, de opportuna cautela pro conditionibus implendis.

28 See can. 730.

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§ 2. Pro locatione bonorum ecclesiasticorum, servato praescripto can. 1479:

1.° Si valor locationis excedat triginta millia libellarum seu francorum et locatio sit ultra novennium, requiritur beneplacitum apostolicum; si locatio non sit ultra novennium, servari debet praescriptum can. 1532, § 3;

2.° Si valor contineatur intra mille libellas et triginta millia libellarum seu francorum et locatio sit ultra novennium, servari debet praescriptum eiusdem can. 1532, § 3; si locatio non sit ultra novennium, praescriptum eiusdem can. 1532, § 2;

3.° Si valor non excedat mille libellas seu francos et locatio sit ultra novennium, servari debet praescriptum can. 1532, § 2; si locatio non sit ultra novennium, fieri potest a legitimis administratoribus, monito Ordinario.

§ 1. Land belonging to a church should not be rented except by public auction or announcement, as stated under can. 1531, § 2, and exact conditions must be laid down in the lease or rent contract as to the boundaries, appropriate methods of cultivation, payment of rent, and the necessary safeguards for the fulfillment of the conditions.

§ 2. Anticipated payments being excluded according to can. 1479, the *following rules* must be observed in leasing or renting church property:

1.° If the rental exceeds 30,000 lire (or francs) and the lease is made for more than *nine years,* a *papal indult* is required; if the contract is made for less than nine years, the *local Ordinary* may give the permission, with the consent of his cathedral chapter (or diocesan consultors), the board of administrators, and those interested.

2.° If the rental is between 1,000 and 30,000 lire (or

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francs) and the lease runs *more than nine years,* the local Ordinary may grant permission, with the consent of those just mentioned; but if the contract is made for *less than nine years,* the local Ordinary has only to consult with the board of administrators and obtain the consent of those concerned.

3.° If the rental is *less than* 1,000 lire (or francs) and the contract reads for more than nine years, the local Ordinary has to consult with the board of administrators and obtain the consent of those concerned; if the contract is for nine years or less, the administrators themselves may sign the contract and notify the Ordinary.

The Code has extended the time limit from three to nine years.

CAN. 1542

§ 1. In emphyteusi bonorum ecclesiasticorum emphyteuta nequit canonem redimere sine licentia legitimi Superioris ecclesiastici de quo in can. 1532; quod si redemerit, eam saltem pecuniae vim ecclesiae dare debet, quae canoni respondeat.

§ 2. Ab emphyteuta congrua exigatur cautio pro solutione canonis et conditionibus implendis; in ipso instrumento pacti emphyteutici forum ecclesiasticum arbiter statuatur ad dirimendas controversias inter partes forte exorituras et expresse declaretur meliorationes solo cedere.

Emphyteusis has little practical value, at least in our law. Ancient jurists distinguished it from *locatio,* defining the latter as an informal contract by which the usufruct, or use, of an object, or the labor of a person is let or hired,[29] whereas *emphyteusis* was a species of indefinite

[29] Santi-Leitner, III, 18, n. 1; n. 11.

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lease of immovable property, under which the tenant paid rent, but had all but the nominal ownership of the land.[30] *Enfeoffment* would most nearly correspond to emphyteusis; but the general term *lease* conveys the idea just as well. Now our canon says that the lessee of church property cannot redeem the rent without the permission of the competent ecclesiastical superior, and if he does redeem the fee — which is generally paid annually — he must give at least as much as the whole rent for the entire time would amount to. Besides the lessee must give security for the payment of the rent and for complying with the other conditions. The lease itself must contain the clause that the ecclesiastical court is the competent court to settle disputes between the parties and that all improvements accrue to the soil.

INTEREST

CAN. 1543

Si res fungibilis ita alicui detur ut eius fiat et postea tantundem in eodem genere restituatur, nihil lucri, ratione ipsius contractus, percipi potest; sed in praestatione rei fungibilis non est per se illicitum de lucro legali pacisci, nisi constet ipsum esse immoderatum, aut etiam de lucro maiore, si iustus ac proportionatus titulus suffragetur.

"Fungible" goods are such as can be replaced in kind. If such goods are given to a person in such a way that he becomes the owner thereof, and are restored in kind to the same amount, no interest can be demanded by reason of the contract itself, for it would be usury to demand back

30 Blackstone-Cooley, *Comment.*, II, 309 ff.; Stimson's Law Dictionary, 1911, *s. v.* "Emphyteusis."

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more than was given (*"nihil in mutuo vi mutui accipiendum ultra sortem principalem"*). However, it is not *per se* forbidden to make loans under the usual legal conditions, provided no excessive interest is charged; nor is it forbidden to stipulate a higher rate of interest if a just and proportionate reason can be advanced.

The quintessence of this canon is that interest on loans is permitted according to the usual and legal rate, not precisely by reason of the contract, but by reason of the risk incurred and other circumstances.[31]

31 Cfr. Bened. XIV, *"Vix pervenit,"* Nov. 1, 1745; S. C. P. F., Instr. 1873 (*Coll.*, n. 1393, where the documents referring to these subjects are given and the question is treated *ex professo*).

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TITLE XXX

PIOUS FOUNDATIONS

DEFINITION

CAN. 1544

§ 1. Nomine piarum fundationum significantur bona temporalia alicui personae morali in Ecclesia quoquo modo data, cum onere in perpetuum vel in diuturnum tempus ex reditibus annuis aliquas Missas celebrandi, vel alias praefinitas functiones ecclesiasticas explendi, aut nonnulla pietatis et caritatis opera peragendi.

§ 2. Fundatio, legitime acceptata, naturam induit contractus synallagmatici: *do ut facias.*

CAN. 1545

Loci Ordinarii est normas praescribere de dotis quantitate infra quam pia fundatio admitti nequeat et de eius fructibus rite distribuendis.

The term "pious foundation" signifies temporal goods conveyed to some ecclesiastical juridical person with the perpetual or long-continued obligation to say Masses, or to perform certain ecclesiastical functions, or works of piety or charity, in consideration of the revenues received from said endowment. Hence every foundation, after it has been duly accepted, has the nature of a bilateral contract: "*do ut facias.*"

If Title XXVI is compared with the present, the dif-

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ference between them may appear very slight; however, there is a distinction between the institutions mentioned there and the foundations named in our canon. First, temporal goods enter into can. 1544, *in directo,* whereas in can. 1489 they are omitted as a member of the definition. Besides, our canon presupposes an artificial person already in existence, whereas can. 1489 mentions a decree that creates such persons. In other words, there is a juridical person existing either really or at least by a legal fiction and represented by legal authority. Lastly, the purpose of a pious foundation does not constitute the legal person, but obliges the respective person to perform certain things or acts in consideration of the goods donated. There is the temporal element on one side and the spiritual on the other, and between both stands the mediator, *viz.,* the moral person. Hence such foundations can be called neither corporations nor institutions, but there is a juridical person who accepts the object of the contract, and the contract itself is called: "*do ut facias.*" For in every contract, whether express or implied, there must be something given in exchange for something else, a mutual or reciprocal consideration. This is the case between master and servant, or employer and employee, when the former agrees to give the employee a certain sum for performing certain work. Hence the *do* are the temporal goods, while the *ut facias* is the performance of certain works. But since the works to be performed are mostly spiritual, it is necessary that the competent authority should intervene. Hence can. 1545 demands that the local Ordinaries should fix the *minimum* of endowment below which no pious foundation may be accepted, as well as the manner in which the interest is to be distributed. This is somewhat similar to fixing the amount of mass stipends.

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SAFEGUARDS OF FOUNDATIONS

CAN. 1546

§ 1. Ut huiusmodi fundationes a persona morali acceptari possint, requiritur consensus Ordinarii loci, in scriptis datus, qui eum ne praebeat, antequam legitime compererit personam moralem tum novo oneri suscipiendo, tum antiquis iam susceptis satisfacere posse; maximeque caveat ut reditus omnino respondeant oneribus adiunctis secundum cuiusque dioecesis morem.

§ 2. In acceptatione, constitutione et administratione fundationis patronus ecclesiae nullum ius habet.

This canon (§ 1) commands that *no more obligations* be accepted than can be complied with, and that none be accepted *for less* than the customary tax. The *written consent* of the local Ordinary is required for the acceptance of foundations by ecclesiastical persons. This consent should never be given unless the Ordinary is assured that the institution is capable of fulfilling the new as well as any old obligations it has assumed or is to assume. The Ordinary shall also see to it that the consideration is in proportion to the obligations, according to local custom.

§ 2 provides that the *patron* has nothing to say about the acceptance, constitution, or administration of such pious foundations.

It may not be amiss to state that the *local* Ordinary is here intended for foundations under his jurisdiction.

CAN. 1547

Pecunia et bona mobilia, dotationis nomine assignata, statim in loco tuto, ab eodem Ordinario designando, deponantur ad eum finem ut eadem pecunia vel

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bonorum mobilium pretium custodiantur et quamprimum caute et utiliter secundum prudens eiusdem Ordinarii arbitrium, auditis et iis quorum interest et dioecesano administrationis Consilio, collocentur in commodum eiusdem fundationis cum expressa et individua mentione oneris.

This canon provides for the *safekeeping and safe investment* of pious foundations. All money and movable property assigned as an endowment, must be deposited in a safe place, to be designated by the local Ordinary. This, with us, generally is a bank. Titles and other valuable papers may be put in a safety vault. If stock or produce were offered, the easiest way would be to sell them.

The Ordinary shall then consult with those interested, *i. e.*, the founder or his heirs, those who have accepted the foundation, and the diocesan board of administrators, as to the safest and most profitable way of *investing* the property for the benefit of the foundation. Each investment of this kind must be accompanied by express and specific mention of the *obligation* resting on the investment.

FORMALITIES

CAN. 1548

§ 1. Fundationes, etiam viva voce factae, scripto consignentur.

§ 2. Alterum tabularum exemplar in Curiae archivo, alterum in archivo personae moralis, ad quam fundatio spectat, tuto asservetur.

Pious foundations, even when made orally, must be *set down* in *writing;* one of the records must be kept in

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the diocesan archives, the other in the archives of the institution which is obliged to fulfill the obligation.

CAN. 1549

§ 1. Servatis praescriptis can. 1514-1517 et can. 1525, in qualibet ecclesia onerum ex piis fundationibus incumbentium tabella conficiatur, quae apud rectorem in loco tuto conservetur.

§ 2. Pariter praeter librum de quo in can. 843, § 1, alter liber retineatur et apud rectorem servetur, in quo singula onera perpetua et temporaria eorumque implementum et eleemosynae adnotentur, ut de iis omnibus exacta ratio Ordinario loci reddatur.

In every church there must be kept a list of the obligations arising from pious foundations; this list must be preserved in a safe place in the rectory.

Besides the book for manual stipends,[1] mentioned in can. 843, § 1, there must be another, kept by the rector, in which each and every obligation, whether perpetual or temporary, is duly entered, as also the record of fulfillment (when a mass was said) and the amount of the alms, — so that an accurate account may be rendered to the local Ordinary.

EXEMPT RELIGIOUS

CAN. 1550

Si agatur de piis fundationibus in ecclesiis, etiam paroecialibus, religiosorum exemptorum, iura et offiicia

1 We cannot accept the theory advanced in a magazine that a priest who receives, say, $100 for "masses," can satisfy his obligation by saying 20 "high or sung masses," intead of 100 low masses. For this is a substantial, not merely an accidental, change, the ceremony of singing being a mere *accidens;* and the priest would therefore defraud the donor of eighty masses. Who can admit such a pious fraud?

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Ordinarii loci, de quibus in can. 1545–1549, exclusive competunt Superiori maiori.

As to pious foundations made and accepted by churches belonging to exempt religious, even if they be parish churches, all the rights and duties of the local Ordinary mentioned in canons 1545–1549, devolve on the *major superior exclusively,* according to the constitutions of the respective institute.

It may be added that the Constitution "*Nuper,*" of Innocent XII,[2] from which these laws are chiefly taken, revokes and annuls all contrary privileges granted to any order.

REDUCTION OF OBLIGATIONS

CAN. 1551

§ 1. Reductio onerum quae pias fundationes gravant, uni Sedi Apostolicae reservatur, nisi in tabulis fundationis aliud expresse caveatur, et salvo praescripto can. 1517, § 2.

§ 2. Indultum reducendi Missas fundatas non protenditur nec ad alias Missas ex contractu debitas nec ad alia onera piae fundationis.

§ 3. Indultum vero generale reducendi onera piarum fundationum ita intelligendum est, nisi aliud constet, ut indultarius potius alia onera quam Missas reducat.

The reduction of obligations arising from pious foundations is reserved to the Apostolic See, unless the charter contains an express provision to the contrary and with due regard to can. 1517, § 2, which admits the reduction of certain foundations under certain conditions, but excepts masses.

2 § 30.

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The S. C. Concilii sometimes grants an *indult* reducing foundation-masses, but this indult does not extend to masses to be said by some other species of contract different from that by which a foundation is accepted, nor to other works imposed by a pious foundation. Hence this particular kind of indult must be strictly interpreted. If a *general indult* is granted for reducing the obligation arising from a pious foundation, this must be understood and interpreted to mean that the grantee should reduce other works rather than the masses, unless the text of the indult reads differently. Thus if, besides Masses, the recitation of the divine office or certain prayers are prescribed in the foundation, the latter should be reduced rather than the masses.[3] Sometimes the wording of a general indult, or a particular indult, expressly permits the reduction of masses. Such indults need close inspection. For instance, it may be that the indult mentions *legata taxative* or *demonstrative concepta*. A legacy which is drawn up *taxative* is one which first fixes the sum of the endowment, say $1,000, and then the obligations to be fulfilled, say a requiem high mass every year on such and such a day. If the obligation is mentioned first, and the endowment afterwards, we have a legacy worded *demonstrative*. This kind of legacy is also called approximate and has this peculiarity that the heirs of the founder could, by ecclesiastical law, be compelled to supply the deficient funds so as to continue the fulfillment of the obligation, although the value of the endowment may have decreased.[4] However, this is often impossible. Hence, if the indult draws no distinction between the different kinds of bequests, the heirs are not to be bothered.

[3] S. C. C., May 6, 1803 (Richter, *Trid.*, p. 139, n. 80); if the will of the founder does not appear, this rule must be followed; S. C. C., Sept. 11, 1717 (*ibid.*, n. 81).

[4] S. C. C., Sept. 9, 1702; Bened. XIV, *De Syn. Dioec.*, XIII, 25, 32.

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The *practice* of the Roman Court, mentioned in rescripts, is to change *missae cantatae* into low Masses, provided the funds suffice for the same number.[5] If a reduction has already been granted, and another is asked for, there must be new reasons to justify the request.[6]

Reasons for granting a reduction of mass obligations are *insufficiency of funds* brought about by a considerable decrease in the endowment; and the *poverty of the priests* who would be obliged to say them.[7] In some cases the needy condition of the patron and the necessity of repairing the church were considered sufficient reasons at least for a temporary reduction.[8]

5 S. C. C., Feb. 3; Aug. 4, 1725 (Richter, *l. c.*, p. 140, n. 83 f.).

6 S. C. C., Sept. 7, 1793 (*ibid.*, n. 82).

7 S. C. C., Aug. 17, 1793, and *pluries* (*l. c.*, n. 82).

8 S. C. C., Dec. 2, 1775; Nov. 29, 1777 (*ibid.*).

END OF VOL. VI

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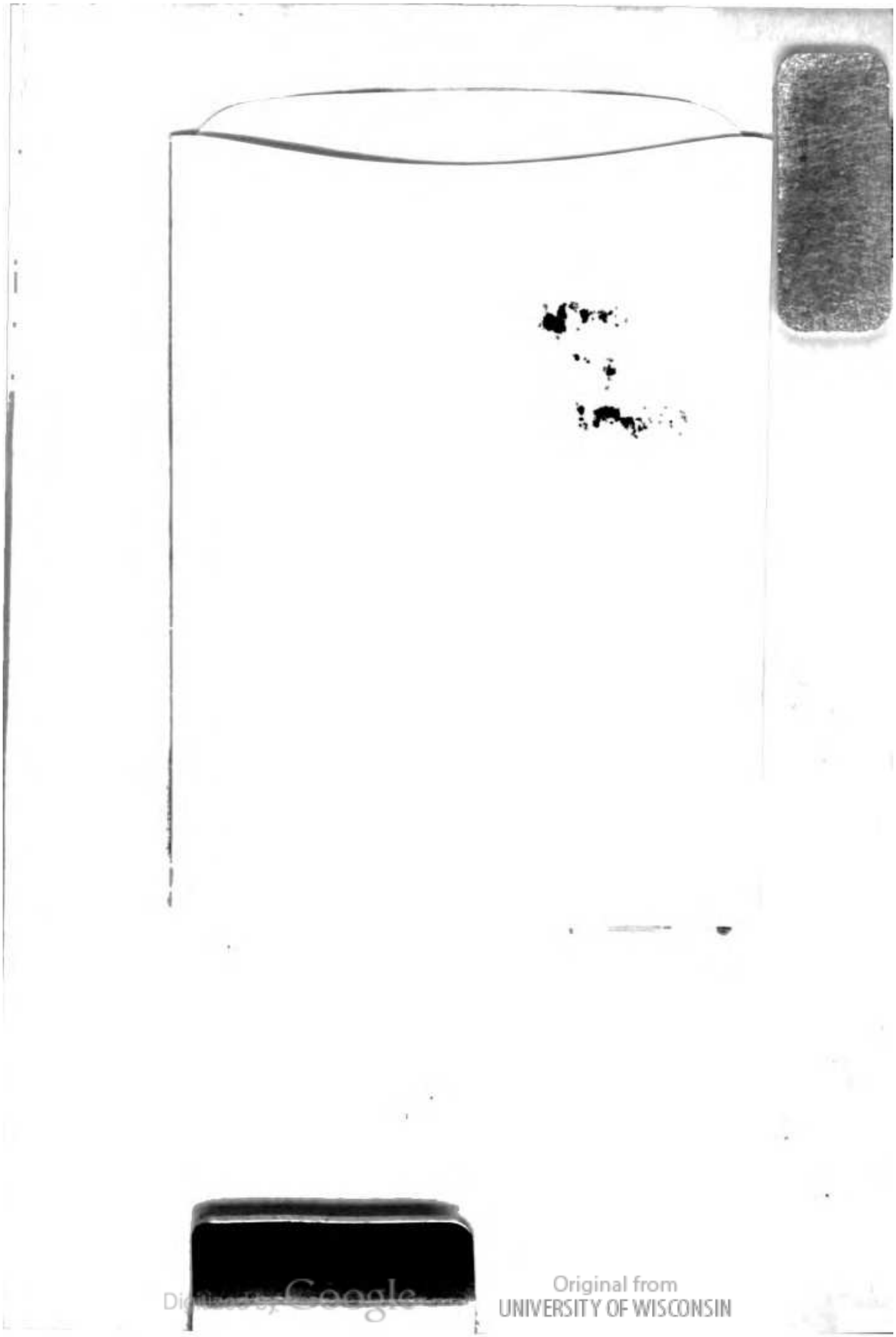
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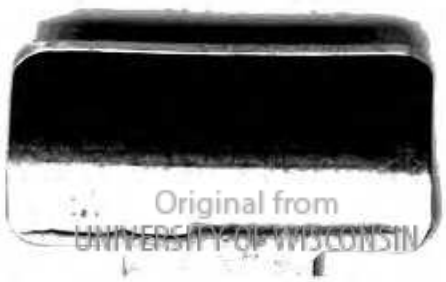
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A COMMENTARY ON THE NEW CODE OF CANON LAW

By THE REV. P. CHAS. AUGUSTINE, O.S.B., D.D.
Professor of Canon Law

VOLUME VII
Ecclesiastical Procedure (Book IV)
(Can. 1552-2194)

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THE NEW CODE OF CANON LAW

BOOK IV

ECCLESIASTICAL PROCEDURE

INTRODUCTION

There is no part of Canon Law which is so conspicuously based on, nay governed by, Roman Law as the book which we now undertake to describe and, as far as necessary, to explain. The reason for this phenomenon is not far to seek. For not only did the Roman Law rest on the principles of natural justice and equity, but through the influence of the Christian emperors it became familiar to the Church at large. Not only the soil on which it had grown, but its very terminology, had become the common possession of the Christianized nations, not even excepting the Teutonic race, though the Germanic law had not been influenced as largely as others. An exception, however, was the English law. The little island of Britannica had its peculiar laws, to which the nobility as well as the laity clung conservatively, whilst the bishops and the clergy, many of them foreigners, applied themselves to the study of the civil, *i. e.*, Roman and canon law.[1] But the clerical element was finally eliminated or forced to retreat to its schools and monas-

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teries. Thus it happened that the English law has least of all received the structure and outlines of Roman or ecclesiastical law. In its stead it has introduced a terminology which needs a special study of Anglo-Saxon and old French. This we state in order to make it plain that some terms of Canon Law are not easily rendered into English, but require circumlocution. Therefore time-honored and concise terms shall be retained in their original Latin. The essentials of the trial, being common to all civilized nations, are the same in English law as in others.

The Code divides Book Four, which embodies the second book of the decretals, into three parts:

I. Trials, or Ecclesiastical Procedure.
II. Beatification and Canonization.
III. Procedure in Particular Cases.

1 Blackstone-Cooley, *Commentary* I, 18 f.

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PART I

TRIALS

DEFINITION, DIVISION AND OBJECT

CAN. 1552

§ 1. Nomine iudicii ecclesiastici intelligitur controversiae in re de qua Ecclesia ius habet cognoscendi, coram tribunali ecclesiastico, legitima disceptatio et definitio.

§ 2. Obiectum iudicii sunt:

1.° Personarum physicarum vel moralium iura persequenda aut vindicanda, vel earundem personarum facta iuridica declaranda; et tunc iudicium est *contentiosum;*

2.° Delicta in ordine ad poenam infligendam vel declarandam; et tunc iudicium est *criminale.*

CAN. 1553

§ 1. Ecclesia iure proprio et exclusivo cognoscit:

1.° De causis quae respiciunt res spirituales et spiritualibus adnexas;

2.° De violatione legum ecclesiasticarum deque omnibus in quibus inest ratio peccati, quod attinet ad culpae definitionem et poenarum ecclesiasticarum irrogationem;

3.° De omnibus causis sive contentiosis sive criminalibus quae respiciunt personas privilegio fori gaudentes ad normam can. 120, 614, 680.

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§ 2. In causis in quibus tum Ecclesia tum civilis potestas aeque competentes sunt, quaeque dicuntur mixti fori, est locus praeventioni.

CAN. 1554

Actor, qui causas mixti fori ad iudicem ecclesiasticum deductas ad forum saeculare iudicandas defert, congruis poenis puniri potest ad normam can. 2222 et privatur iure contra eandem personam de eadem re et de connexis causam agendi in foro ecclesiastico.

CAN. 1555

§ 1. Tribunal Congregationis S. Officii suo more institutoque procedit sibique propriam consuetudinem retinet; et etiam inferiora tribunalia, in causis quae ad S. Officii tribunal spectant, normas ab eodem traditas sequantur oportet.

§ 2. Cetera tribunalia servare debent praescripta canonum qui sequuntur.

§ 3. In iudicio pro dimissione religiosorum serventur praescripta can. 654–667.

The Roman Law constantly employs, not *processus,* but *iudicia* (judgments), which were divided into public and private. Our Code, too, speaks here of *iudicium ecclesiasticum,* which it *defines* as the lawful discussion and settlement before the ecclesiastical court of a disputed matter of which the Church is entitled to take cognizance.

Can. 1553 determines which *matters belong by inherent and exclusive right* to the ecclesiastical court. They are:

1.° All *merely spiritual matters* and such strictly con-

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nected with spiritual things. This is a very moderate vindication of a right which cannot be denied to any autonomous society. That the spiritual element is superior to the material or temporal, the divine to the human, the spirit to the flesh, should be evident. Yet it was necessary to repeat that truth against the encroachments of emperors and rulers who would pose as popes.[1] A conflict was inevitable. Undeniably there were exaggerations on both sides, especially at the time of Boniface VIII, when some writers vindicated to the Pope everything except creation.[2] Such unwarranted assertions could not fail to provoke resistance, from which it was but a short step to encroachments. But the rights of the Church needed no concessions, which indeed had voluntarily been made by loyal rulers who perceived the mighty influence of the Church over a semi-barbarous populace. The orderly procedure of the ecclesiastical courts gradually permeated the civil courts, to the gain of a more equitable and just handling of trials.[3] This of course can only be understood in the light of unbiased history. The ecclesiastical legislator vindicates to his court:

(a) All *spiritual matters*. Such are everything belonging to faith and morals, the Sacraments and sacramentals, divine worship and the sacred liturgy, dispensations from vows and oaths, ecclesiastical offices, rights and obligations of the clergy, beneficiaries and religious, the extent of, and exemption from, ecclesiastical jurisdiction, etc.[4]

(b) Matters which might *per se* be called temporal, but are *intimately connected with the spiritual,* such as

1 Cc. 3, 6, Dist. 10.

2 See Scholz, *Publizistik zur Zeit Philipps des Schönen und Bonifaz VIII.* (Stutz, *Kirchenrechtl. Abhandlg.*, 6–8, 1903); Alex. Carerius, *De Potestate Summi Pontificis*, 1601, still asserts what is said in the text.

3 Cfr. Hergenröther, *Kath. Kirche u. Christl. Staat*, 1872, p. 26 f.

4 Cfr. c. 34, *Venerabilem*, X, I, 6; cc. 2, 3, X, II, 1; 15, X, V, 31.

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advowson, church revenues, ecclesiastical burial, legitimacy of children, real immunity, etc.[5]

2.° The ecclesiastical court may also claim cases of *violation of ecclesiastical laws* and all matters in which the question of sin is involved, in so far as the determination of guilt and the infliction of ecclesiastical punishments comes into play. It is evident that here especially the *leges plus quam perfectae* and *perfectae* are intended, *i.e.*, such as have an invalidating clause or a penal sanction attached. As to penalties inflicted upon transgressors they are more especially the censures and vindictive penalties which may be meted out not only to the clergy but also to the faithful. This is sometimes expressly mentioned in concordats, where also the punishment of public sinners and transgressors of the holy-days of obligation are specially noted.[6]

The second clause, *viz.*, to take cognizance of matters which underlie the *ratio peccati*, is an allusion to a famous decretal of Innocent III, "*Novit*," in which this great Pontiff assures the King of France and John Lackland of England that he has "no intention to judge feuds, but to decide concerning sin, which undoubtedly belongs to him."[7] Hence our text only mentions guilt and ecclesiastical punishment. This power is called *potestas directiva*, and consists in wielding the spiritual sword or the functions of an authoritative teacher vested with ecclesiastical or spiritual weapons.[8] This power necessarily follows from the legislative power, inasmuch as the latter would be ineffective without the executive power

[5] Cfr. c. 3, X, II 1; c. 3 X, III, 30; c. 3, X, II, 10; c. 9, X, IV, 17; X, III, 28, *de sepulturis;* c. 4, 6°, III, 23; Wernz, *Ius Decret.*, Vol. V, 1914, 3. 223, n. 268.

[6] Cfr., for inst., can. 1428, 1512, 1527, and all the diriment impediments.

[7] Nussi, *Conventiones*, 1870, pp. 92, 105, 151, 185, 312.

[8] C. 13, X, II, 1; see Hergenröther, *l. c.*, p. 403 ff.

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proper. Even a religious society cannot do without the rod.

3.° A third category of matters strictly belonging to the ecclesiastical court comprises a certain class of persons (*ratione personae*). Hence the civil as well as the criminal cases of the *clergy* and all those who share the clerical privileges of the forum are subject to the ecclesiastical court. These, *i.e.*, the clergy proper as mentioned under can. 120, the religious as per can. 614, and the members of pious communities, though not religious in the canonical sense of the word, as per can. 680. All these, says the text, are subject to the ecclesiastical judge in civil as well as criminal matters.

Can. 1552, § 2 distinguishes two classes of procedure, *ratione objecti, i.e.*, by reason of the purpose. For if an individual or a corporation goes to law, they are supposed to have sustained an injury or a wrong, for which they think it worth while to demand satisfaction. This

Concerning the threefold power distinguished by authors we may here add the following: The *postestas directa* would represent the Pope as endowed with unlimited power in spiritual as well as temporal matters, although the temporal power he wields through the worldly rulers, or rather these wield it by his command. The *postestas indirecta* is differently explained, but in general features there is agreement: the Pope rules directly over spiritual matters, whilst over temporal things he has power only as far as the object of the Church requires it. Hence the Pope may not depose secular princes, but he may change the occupants or transfer kingdoms, he may not issue or nullify secular laws, but he may absolve the faithful from the obligation of observing them if they are contrary to salvation; he may not judge in temporal matters, as a rule, but only assume the office of judge in case of two rivals or in case there is no one to judge. (See Bellarmine, *De Rom. Pont.*, l. V, c. 6). The *potestas directiva*, too, is not always explained in the same manner. But what is said in the text comprises all explanations. The Church is the supreme spiritual and infallible director of every conscience, giving admonitions, explanations and counsels to high and low. But this is not all,—the Church, being an autonomous society, also enjoys the right of exercising the judiciary and executive power over her members. (See Hergenröther, *Kath. Kirche und Christl. Staat*, 1872, pp. 411 ff. J. Milita, *De Eccl. Potest. Indirecta*, Rome 1891.

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wrong may affect the person or corporation only, *i.e.*, a private interest for which they seek redress. Take, for instance, can. 1534, where personal and real actions are permitted in case of unlawful alienation. It may be that the property unlawfully alienated is claimed, or it may be that the alienators can prove that they have observed the prescribed formalities and wish to have their acts justified and declared legal. But the interest around which the prosecution circles is private, touching the persons only. Such a proceeding is called *contentious* or civil, in order to distinguish it from the following. For it may be that the person bringing a suit has at heart not private interests, but the public order or the welfare of the community. This happens when a crime, a *delictum publicum,* is committed, which may also affect a person, inasfar as he or she has suffered an injury by the perpetration of the crime. Yet the accusation is made against the perpetrator not for personal revenge, but for the sake of the vindication or restoration of the public order that was disturbed by the crime. This is called *criminal proceeding.* It now-a-days concerns almost exclusively the clergy, *i.e.,* persons who enjoy the *privilegium fori,* as explained under can. 120.

§ 2 of can. 1553 and can. 1554 mention matters subject to a *mixed court, i.e.,* matters in which the ecclesiastical as well as the secular judge are competent to render a verdict. Such matters, as far as the civil procedure is concerned, are: (a) *contracts made under oath,* as far as the carrying out of the contract, not the oath, is involved; (b) *cases of widows, orphans, and other destitute persons* allowed to choose the forum; (c) cases of *legacies* made by laymen partly in favor of pious institutions or foundations; (d) cases of *dowry, tithes, advowson,* provided

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the fact of temporal possession or the right of possession is involved.[9]

As to criminal procedure, the cases subject to a mixed court are mentioned under can. 1933, § 3.

In such cases, then, subject to a mixed court, the ecclesiastical judge, provided he is otherwise competent, may preoccupy the jurisdiction of the secular judge, and *vice versa.* If a *plaintiff* should, therefore, venture to bring suit before a secular court in a matter which has already been brought before an ecclesiastical court, he may be punished by the lawful ecclesiastical superior, if scandal was given or the importance of the case requires a punishment; and that punishment may be meted out without previous warning or threat.[10] Besides, such a plaintiff loses the right of bringing suit against the same person in the same matter or one connected with the matter at issue. Formerly excommunication was decreed for such who declined to accept the *forum ecclesiasticum* in mixed matters, and other punishments were inflicted on ecclesiastical persons of higher and lower dignity who attempted a change of forum.[11]

Can. 1555 sets forth, in general terms, the *method of procedure:* (a) for the *Holy Office,* which must proceed according to the norms prescribed and in the manner customary with that sacred tribunal; the same rules must be observed by the inferior tribunals of the Roman Court, if they are called upon to judge in matters pertaining to the Holy Office. This is especially the case in matters

9 A damage or libel suit, especially among or against clerics, belongs to the criminal court according to can. 1935 and can. 1938. Yet what is stated in the text is perfectly true, for even injuries and libel suits, when directed against the clergy, affect the State as such.

10 Cfr. Reiffenstuel, II, til. 2, n. 151 ff. Can. 2222.

11 Martin V, "*Ad reprimendas insolentias,*" Feb. 1, 1428 (*Bull. Rom.,* ed. Luxemburg, I, 306 f.).

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of faith and morals, the validity of holy orders, and the matrimonial cases arising from the Pauline privilege, disparity of worship and mixed religion, if the case is tried in a judiciary way.[12]

(b) For all *other tribunals* the following canons form the rule of procedure. This is particularly the case with the *S. Roman Rota* and the *Signatura Apostolica,* which are mentioned later (can. 1597–1605). In trials for the *dismissal of religious,* canons 654–668 must be observed.[13]

12 Cfr. *Normae Peculiares,* P. II, c. VII, Art. 1, n. 6 (*A. Ap., S.,* I, 78 ff.).

13 See this Commentary, Vol. III, p. 396 ff.

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SECTION I

TRIALS IN GENERAL

TITLE I

THE FORUM COMPETENS

Every trial consists of two elementary parts, the persons concerned and the process or trial itself.

The persons chiefly concerned are the judge, who in the first title is comprised under the term competent court, the plaintiff, and the defendant.

Besides these, there are persons who assist these main actors in the trial. Then there is the process itself.

The Code premises a canon which is no doubt intended to preclude a false idea concerning the Supreme Head of the Church, as if he were subject to human judges.

EXEMPTION OF THE POPE

CAN. 1556

Prima Sedes a nemine iudicatur.

The *first or primatial see is subject to no one's judgment*. This proposition must be taken in the fullest extent, not only with regard to the object of infallibility. For in matters of faith and morals it was always customary to receive the final sentence from the Apostolic See, whose judgment no one dared to dispute, as the

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tradition of the Fathers demonstrates.[1] Neither was it ever allowed to reconsider questions or controversies once settled by the Holy See.[2] But even the person of the Supreme Pontiff was ever considered as unamenable to human judgment, he being responsible and answerable to God alone, even though accused of personal misdeeds and crimes. A remarkable instance is that of Pope Symmachus (498–514). He, indeed, submitted to the convocation of a council (the *Synodus Palmaris,* 502), because he deemed it his duty to see to it that no stain was inflicted upon his character, but that synod itself is a splendid vindication of our canon. The synod adopted the Apology of Ennodius of Pavia, in which occurs the noteworthy sentence: "God wished the causes of other men to be decided by men; but He has reserved to His own tribunal, without question, the ruler of this see."[3] No further argument for the traditional view is required. A general council could not judge the Pope, because, unless convoked or ratified by him, it could not render a valid sentence. Hence nothing is left but an appeal to God, who will take care of His Church and its head.

RESERVED COMPETENCY

CAN. 1557

§ 1. Ipsius Romani Pontificis dumtaxat ius est iudicandi:

1.° Eos qui supremum tenent populorum principatum horumque filios ac filias eosve quibus ius est proxime succedendi in principatum;

1 Zozimus, "*Quamvis Patrum traditio,*" March 21, 418 (Migne, *P. L.*, 20, 676).

2 Boniface I, "*Retro maioribus tuis,*" March 11, 422 (*ibid.*, col. 776).

3 See c. 14, C. 11, q. 3; c. 10, Dist. 96; cc. 10, 13, C. 9, q. 3; Reuben Parsons, *Studies in Church History,* ed. 2, 1901, Vol. I, p. 351 ff.

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2.° Patres Cardinales;

3.° Legatos Sedis Apostolicae, et in criminalibus Episcopos, etiam titulares.

§ 2. Tribunalibus vero Sedis Apostolicae reservatur iudicare:

1.° Episcopos residentiales in contentiosis, salvo praescripto can. 1572, § 2;

2.° Dioeceses aliasve personas morales ecclesiasticas quae Superiorem infra Romanum Pontificem non habent, uti religiones exemptas, Congregationes monasticas, etc.

§ 3. Alias causas quas Romanus Pontifex ad suum advocaverit iudicium, videt iudex quem ipsemet Romanus Pontifex designaverit.

CAN. 1558

In causis de quibus in can. 1556, 1557, aliorum iudicum incompetentia est *absoluta*.

It has been an ancient custom for the Roman Pontiff to reserve certain cases (*causae maiores*) to his own *exclusive tribunal*. These are:

(a) The cases of actual *rulers* of nations, their sons and daughters, and proximate successors, provided, of course, their cases are brought before the Supreme Pontiff, as often happened when rulers still called themselves Christian;

(b) The cases, civil as well as criminal, of *cardinals*[4] and legates of the Apostolic See;

(c) The criminal cases of bishops, titular as well as residential.

To the *tribunals of the Apostolic See* are reserved:

4 A famous instance is the Caraffa trial under Pius IV; see R. Ancel, O.S.B., "Paul IV, et le Concile," Extract from la *Revue d'Histoire Ecclés.*, 1907.

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(a) The civil cases of residential bishops, with the exception mentioned in can. 1572, § 2;

(b) All cases of dioceses and other exempt corporations immediately subject to the Roman Pontiff, such as exempt religious organizations and monastic congregations. If the Roman Pontiff calls other cases before his tribunal, that judge is competent whom he designates. This happened in the case of the English Ladies founded by Mary Ward.[5]

The cases mentioned (in can. 1156 and 1157) are so reserved that every other than the judge or tribunal mentioned is *absolutely excluded,* no preliminary hearing or taking cognizance of the case is permitted, and any attempted sentence would be *ipso iure* invalid. This is called *absolute incompetency,* because competency means nothing else but the jurisdiction proper to a judge, not only concerning the matter at issue (*ratione causae*), but also with regard to the person (*ratione personae*),[6] and where both are wanting, as under can. 1556 and 1557, the incompetency is complete in every respect.

ORDINARY AND EXTRAORDINARY FORUM

CAN. 1559

§ 1. Nemo in prima instantia conveniri potest, nisi coram iudice ecclesiastico qui competens sit ob unum ex titulis qui in can. 1560–1568 determinantur.

§ 2. Incompetentia iudicis cui nullus ex his titulis suffragatur, dicitur *relativa.*

§ 3. Actor sequitur forum rei; quod si reus multiplex forum habeat, optio fori actori conceditur.

5 See Bened. XIV, "*Quamvis iusto,*" April 30, 1749.

6 Wernz, *l. c.,* Vol. V, P. I, n. 275, p. 227.

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Can. 1560

Forum necessarium habent:

1.° Actiones de spolio, coram Ordinario loci rei sitae;

2.° Causae respicientes beneficium, quamvis non residentiale, coram Ordinario loci beneficii;

3.° Causae quae versantur circa administrationem, coram Ordinario loci ubi administratio gesta est;

4.° Causae quae respiciunt hereditates aut legata pia, coram Ordinario loci domicilii testatoris, nisi agatur de mera exsecutione legati, quae videnda est secundum ordinarias competentiae normas.

Can. 1561

§ 1. Ratione domicilii vel quasi-domicilii quilibet conveniri potest coram Ordinario loci.

§ 2. Ordinarius autem domicilii vel quasi-domicilii iurisdictionem in subditum, quamvis absentem, habet.

Can. 1562

§ 1. Qui peregrinus est in Urbe, licet per breve tempus, potest in ipsa tanquam in proprio domicilio citari; sed ius habet revocandi domum, idest petendi ut ad proprium Ordinarium remittatur.

§ 2. Qui in Urbe ab anno commoratur, ius habet declinandi forum Ordinarii et instandi ut coram Urbis tribunalibus citetur.

Can. 1563

Vagus proprium forum habet in loco ubi actu commoratur; religiosus in loco domus suae.

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CAN. 1564

Ratione rei sitae pars conveniri potest coram Ordinario loci, ubi res litigiosa sita est, quoties actio in rem directa sit.

CAN. 1565

§ 1. Ratione contractus pars conveniri potest coram Ordinario loci in quo contractus initus est vel adimpleri debet.

§ 2. In actu autem contractus permittitur contrahentibus, obligationis declarandae, urgendae vel implendae gratia, locum eligere, in quo etiam absentes citari et conveniri possint.

CAN. 1566

§ 1. Ratione delicti reus forum sortitur in loco patrati delicti.

§ 2. Licet post delictum reus e loco discesserit, iudex loci ius habet illum citandi ad comparendum, et sententiam in eum ferendi.

CAN. 1567

Ratione connexionis seu continentiae ab uno eodemque iudice cognoscendae sunt causae inter se connexae, nisi legis praescriptum obstet.

CAN. 1568

Ratione praeventionis, cum duo vel plures iudices aeque competentes sunt, ei ius est causam cognoscendi qui prius citatione reum legitime convenit.

Forum is a Latin word and formerly signified a place for giving judgment. The *forum* or *comitium* of

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the old Romans meant jurisdiction, or the power of passing judgment. *Competent* means proper jurisdiction over the person and case in question.

The *person* who determines the *forum competens* is the defendant, according to the well known adage: *"Actor sequitur reum," i.e.,* the plaintiff follows the defendant's court. However, this is to be understood as a rule which has its exceptions. For the Code itself makes exceptions in can. 1560, 1567, and 1568. Whilst, therefore, the principle *"actor sequitur reum"* constitutes the ordinary or *voluntary* forum, because it depends on the defendant's will, the other three mentioned in the three canons may be called *extraordinary* modes of following the forum, although even this distinction [7] is not quite adequate, since the law itself establishes these exceptions. The Code has a proper name only for one forum, which it calls *necessarium,* and hence the other six might be called voluntary *fora.*

Canon 1559 states that no one can be sued in the first instance (*instantia prima*) except before the ecclesiastical judge who is competent in virtue of one of the seven reasons stated in can. 1560–1568. If none of these seven titles justifies the judge in hearing the case, his *incompetency is relative,* because it may be that he would be competent by reason of the person being subject to his jurisdiction. Then the general rule is reaffirmed: *Actor sequitur forum rei.* But an exception is admitted in case the defendant is sued on various counts, which permit a choice of judges. This choice is left, not to the defendant, but to the plaintiff. Thus, if domicile and contract are in question, the plaintiff may choose either Ordinary.

[7] Wernz, *l. c.*, n. 259, according to customary teaching, distinguishes: *forum legale — conventionale; commune — singulare; universale — particulare; ordinarium — extraordinarium.*

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Can. 1560 constitutes a *forum necessarium* in the following cases:

1.° All actions concerning forcible deprivation or *disseissin,* of which more under can. 1698, where the term *spolium* recurs;

2.° All cases touching *benefices,* even though non-residential, which must be decided before the Ordinary in whose diocese the benefice is located;

3.° All cases of *administration,* which must be tried before the Ordinary in whose diocese the administration was conducted;

4.° All cases in which *pious* bequests or legacies are involved, must be tried before the Ordinary in whose diocese the testator had his domicile, unless the question should turn about the mere execution of a legacy, when it may be settled according to one of the following reasons of competency.

By reason of *domicile* or *quasi-domicile,*[8] under can. 1561, anyone may be sued before the local Ordinary, who in this case also has jurisdiction over an absent subject. This court is the chief, ordinary, and natural forum for trying the defendant, even though he be absent from the diocese. If the plaintiff be absent, the summons suffices to render him in contempt in case he does not appear.[9]

This forum concurs with any other mentioned,[10] except, of course, the one spoken of in can. 1560.

A peculiar right is vindicated to the *City of Rome* as the "mother and teacher of all churches." As under the Decretals,[11] so now by our Code (can. 1562) a *peregrinus, i.e.,* any clergyman or layman who is in Rome, even though only for a short time, may be summoned there

8 Cfr. can. 91 ff., and our Comment., Vol. II, p. 14 ff.

9 Cfr. cc. 11, 17, 19, X, II, 2; c. 3, X, II, 14.

10 Santi-Leitner, II, tit. 2, n. 10; Smith, *Elements of Ecclesiastical Law,* Vol. II, p. 63.

11 C. 20, X, II, 2.

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as if he were in his own domicile; and since a summons constitutes the beginning of a trial (can. 1725), it follows that the whole process may be finished there. However, the right of having the case pleaded at home remains, wherefore such a one may ask for leave to appear before his own Ordinary.

The *ius revocandi domum,* as the commentators say,[12] is not the same as that of declining the forum. The latter supposes that the judge is not competent, whilst in the case of *revocatio domum* the competency is admitted. Formerly the favor of *revocatio* was granted if the pilgrim came to Rome for a just and necessary reason, as stated in the Decretals. Our text has no such conditional clause, wherefore the old law must be looked upon as corrected in this case. We may, however, admit what the same writers say concerning two other conditions for making use of the *revocatio*. They deny the right if delay would be dangerous and if the *peregrinus* has committed a crime in the City of Rome. Our text adds a new regulation in § 2, can. 1562: One who has lived in Rome for one year, has the right (not the duty) to decline the forum of his own Ordinary and to demand that his case be tried before the tribunals of the City.

However, if we mistake not, the whole of canon 1562 must be understood in conformity with can. 1560, and hence the *privilegium urbis* cannot be applied. This seems to be deducible from the fact that the favor is subsumed under "domicile"; since this is not applicable in the cases mentioned in can. 1560, can. 1562 may not be alleged against can. 1560.

Those who have neither domicile nor quasi-domicile, *i.e., vagi,* are tried in the place where they happen to

[12] Cfr. Reiffenstuel, II, 2, nn. 108 ff.

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reside, "there and then," even if they had made up their mind to settle in another place.[13]

Religious are subject to the forum of the place in which their house is located (can. 1563). Religious who have made perpetual vows, lose their domicile;[14] but not those who have taken only temporary vows. However, in our case the quasi-domicile must be considered sufficient to establish the competent forum for all religious. If one would be dismissed or dispensed, and leave the religious house, he would regain his former domicile or quasi-domicile, and therefore the ecclesiastical court of the diocese in which he originally had a domicile or quasi-domicile, and not the court of the diocese in which the religious house is located, would be the *forum competens* for him.[15]

By reason of res sita (can. 1564) or location of the litigious object, one may be sued in any place where a real (not a personal) action is brought against him, on account of the object being permanently located in that place. The disputed object may be movable or immovable, in possession of the litigants or not, but whether it must be permanently situated there, not merely *in transitu,* is a disputed question.[16] Thus, for instance, if two bishops should get into a dispute over a bequest, that bishop's court would be competent in whose diocese the property was located.[17] But the text permits only a *real action, i.e.,* one against the thing itself, not against the person. Hence the judge who is competent by reason of the location of the disputed object may not proceed against the defendant by censures, or by declaring him contumacious; nor can he,

13 Reiffenstuel, II, 2, n. 45.

14 Can. 585.

15 Cfr. can. 641; S. C. EE. et RR., May 2, 1864 (*A. S. S.*, I, 365 f.).

16 Reiffenstuel, II, 2, n. 99 f. favors the opinion that *in transitu* is sufficient, nor is our text against that opinion.

17 C. 3, X, II, 2.

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properly speaking, summon the defendant if the latter does not belong to his territory. But he may, in case of contempt, put the plaintiff in possession of the disputed object.[18]

By *reason of a contract* (can. 1565) one may be tried by the local Ordinary in whose diocese the contract was made, or must be fulfilled. A *contract,* as generally understood, is any agreement which involves the fulfillment of an obligation, including guardianship or tutorship.[19]

Since contracts are generally determined as to obligations and circumstances, the Code permits the contracting parties to state in the contract itself the *place* where the obligation is to be fulfilled or urged. This also determines the forum to which the absentee must be summoned and before which he must be sued.[20] If no stipulation was made as to the place where the contract is to be carried out, the place where it was made determines the forum. And consequently in such a case the laws of the respective diocese or province must be followed (can. 1529).

By *reason of crime* (can. 1566) one may be tried in the place where he committed the justiciable act, no matter whether it was grievous or not. The law only says: "*delictum,*" *i.e.,* an external crime committed against the public order. The *whole* crime must have been perpetrated in the diocese whose Ordinary is thus rendered competent, but it is not necessary that the effects should have followed in the same diocese. If a cleric were shot in diocese A, and died in diocese B, the Ordinary of diocese A would be competent.[21]

All clerics of whatever condition or rank (laymen are now tried before the secular judge), except those men-

18 Wernz, *l. c.,* n. 289, p. 242, note 138.
19 Santi-Leitner, II, 2, n. 13.
20 C. 17, X; II, 2.
21 Wernz, *l. c.,* n. 290, p. 244.

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tioned in can. 1556, are here comprised. Therefore also exempt religious (see can. 616).

But what if the *perpetrator is at large, i.e.,* absent from the territory where the crime was committed? § 2 of our canon, for which no previous authority of law could be alleged, rules that even in this case the local judge is entitled to summon the criminal and to pronounce sentence on him.

By *reason of connection* (can. 1567) or contents one and the same judge may take cognizance of cases which have some connection with one other, unless the law expressly prohibits this. This may happen:

(a) When one suit *depends* upon the settlement of another, as the principal may depend on an incidental question. Thus, a matrimonial case which involved an inheritance, if the validity of the marriage were concerned, could not be decided by a lay judge, and therefore the lay judge would be unable to take cognizance of the whole case, even though he were competent to judge of the right to the inheritance. The law (can. 1553, § 1, n. 1) prohibits him to be judge in spiritual matters and matters connected therewith.[22] But if the question would only be whether the person was born in or out of lawful wedlock, the lay judge would be competent in the whole affair.[23]

(b) A *connexio causarum* also exists when a general action is brought, *i.e.,* one which implies several suits or causes by reason of one's main office or quality, for instance, a tutor, guardian, or general manager may have several suits on hand on account of his official capacity, and hence may be called to court by various Ordinaries and may plead before one and the same judge cases otherwise belonging to several courts.[24]

22 Cc. 5, 7, 9, X, IV, 17; c. 3, X, II, 10.

23 Santi-Leitner, II, 2, n. 21.

24 *Ibid.*, n. 22.

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By *reason of prevention* (can. 1568) one of several otherwise equally competent judges may be entitled to take cognizance of a case, because he was the first to issue a lawful summons to the defendant. Can. 1553, § 2, dealt with the case of a mixed forum, when the ecclesiastical judge preoccupies the case by a legitimate summons. But it may also happen that a criminal who has changed his domicile is summoned by the judge of the former domicile or diocese; the judge who first issues the summons is the competent one.[25] Finally, prevention may take place when several judges are competent jointly and severally (*in solidum*), for in this case *regula juris 54* holds: "He has the better title who was prior in time."[26] However the summons must have been served legitimately, *i.e.*, according to the rules laid down in our Code;[27] otherwise exception might be taken to the judge's competency.

25 C. 19, X, II, 2.
26 C. 8, 6°, I, 14; Reiffenstuel, II, 2, nn. 43, 166 ff.
27 See can. 1711–1725.

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TITLE II

DIFFERENT STAGES AND SPECIES OF TRIBUNALS

ROMAN TRIBUNALS

CAN. 1569

§ 1. Ob primatum Romani Pontificis integrum est cuilibet fideli in toto orbe catholico causam suam sive contentiosam sive criminalem in quovis iudicii gradu et in quovis litis statu, cognoscendam ad Sanctam Sedem deferre vel apud eandem introducere.

§ 2. Recursus tamen ad Sedem Apostolicam interpositus non suspendit, excluso casu appellationis, exercitium iurisdictionis in iudice qui causam iam cognoscere coepit; quique idcirco poterit iudicium prosequi usque ad definitivam sententiam, nisi constiterit Sedem Apostolicam causam ad se advocasse.

Can. 1561 mentioned a prerogative of Rome. Another is set forth in the following canon, which embodies a principle that has been acknowledged since immemorial time, *viz.*, the right of *appeal to the Apostolic See* from any inferior tribunal and at any stage of a trial. The Council of Sardica (343) clearly stated this right,[1] and there is no need to recur to the Pseudo-Decretals.[2] The right of appealing to Rome was practised in every cen-

1 Cfr. c. 36, C. 2, q. 6; Hefele, *Konzilien-Geschichte*, I, 341, 541 ff.; Reuben Parsons, *Studies in Church History*, 1901, I, p. 209 ff.

2 See cc. 4–8, C. 2, q. 6.

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tury and in various and distant provinces, and the Febrorian synod or meeting of Ems was probably the first to demand that Rome should reject and abolish appeals.[3] The right of accepting and deciding appeals rests on the *primacy of the Roman Pontiff*,[4] and is coextensive with his legislative and judiciary power. Hence our Code vindicates this right to the Holy See, to which any civil or criminal case may be appealed in any stage or instance and from any phase a trial may have taken in any part of the Catholic universe.[5]

§ 2 of this canon says that *recourse* to the Apostolic See does not suspend the exercise of the jurisdiction of the ordinary or delegated judge, who has commenced a trial by issuing the lawful summons. Suspension of jurisdiction is attached only to an *appeal* properly so-called. Hence in case of mere recourse, the judge-in-ordinary may proceed with the trial and pronounce final sentence, unless he has been duly informed that the Apostolic See has called the case before its own court. The difference between appeal and recourse is explained in can. 1889. For an apparent exception as to parishes and benefices see can. 2146.

CAN. 1570

ORDINARY TRIBUNALS

§ 1. Exceptis causis Sedi Apostolicae reservatis aut ad eandem advocatis, ceterae omnes cognoscuntur a diversis tribunalibus, de quibus in can. 1572 seqq.

§ 2. Quodlibet tamen tribunal, quod attinet ad

3 Pius VI, *"Super soliditate,"* Nov. 28, 1786, § 4.

4 *Conc. Vatic.*, Sess. IV, c. 3, *De vi et ratione primatus.*

5 *Gradus* means stage or instance, as we say, "first or second instance"; *status* implies the condition or status in which the trial happens to be, for instance, after the summons, before the closing of the acts, after the interlocutory or definitive sentence, etc.

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partium et testium examen aut citationem, documentorum, vel rei controversae inspectionem, decretorum intimationem aliaque huiusmodi, ius habet in auxilium vocandi aliud tribunal, quod normas pro singulis actibus iure praescriptas servare debet.

CAN. 1571

Qui causam vidit in uno iudicii gradu, nequit eandem causam in alio iudicare.

With the exception of the cases reserved to, or called before the Apostolic See, *i.e.*, the *causae maiores,* which are such either by reason of the matter involved or of the persons concerned, all other cases are tried by the several tribunals mentioned below (can. 1572 sqq).

Causae maiores are also excluded from the S. Roman Rota and the Signatura Apostolica.[6]

Now these regular or ordinary tribunals may find it difficult to examine or summon the parties and witnesses, to obtain and examine the necessary papers, to notify the decrees, and so forth, because the parties and witnesses may live in distant and separate dioceses, or even in countries with which communication is difficult. This happens especially in matrimonial trials.[7] What is to be done in such cases? The Code rules that in such cases the tribunal which is in a condition to furnish the necessary information or to procure the legal procedure, ***must assist*** the tribunal which tries the case. Of course, the court thus called upon to assist is held to obey the legal norms prescribed in the Code.

This applies also to the *S. Romana Rota.* If the party

6 Pius X, "*Sapienti consilio,*" June 29, 1908 (*A. Ap. S.*, I, 15); *Lex Propria S. R. R.*, can. 15 (*ibid.*, p. 24).

7 S. C. EE. et RR., June 11, 1880, n. 19; S. C. P. F., 1883, n. XIX (*Coll.*, nn. 1534, 1586).

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is not present in Rome and has no procurator there, the diocesan court may be told to assist the S. Tribunal, which issues either a letter — which is a mild form of command — or a decree to the Ordinary in question to supply the processual acts.[8] Sometimes a *iudex instructor* is selected from outside the *Curia* (sc. *Romana*), who has to gather the proofs from witnesses, experts, and documents. This is done by a letter called *litterae rogatoriae seu remissoriae*. Such letters are also sent to diocesan courts when the litigants reside outside of Rome and cannot be easily summoned.[9] It is evident that the diocesan courts are obliged to give information and to proceed according to judicial rules, for otherwise the parties might escape by making exceptions which would draw out the trial indefinitely.

The *iudex instructor*, as assistant of another court than the trial court proper, must not be confounded with the court of appeal, or court of second instance, because no sentence is given by the assisting court. Only if a case has been decided by a court in one stage or instance, the same case can not be decided again by the same court in another stage (can. 1571), because an appeal requires two different courts, one lower and the other higher.[10]

8 Cfr. *Regulae S. R. R.*, Aug. 4, 1910, c. 14 (*A Ap. S.*, II, 788).

9 *Ibid.*, can. 106, can. 143 (*l. c.*, p. 818, 827).

10 Cfr. c. 35, X, II, 28. *Iudex instructor* is not easily translated into English, although it has been rendered "judge of inquiry," according to the Italian "*giudice istruttore.*" However, the very term *judge* seems to convey too much, as if a sentence were implied; but as the Latin also uses the term *iudex* it may be accepted, although *auditor* would perhaps be better; cfr. Messmer, *l. c.*, p. 53.

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CHAPTER I

THE ORDINARY TRIBUNAL OF THE FIRST INSTANCE

ART. I

THE JUDGE

CAN. 1572

THE LOCAL ORDINARY

§ 1. In unaquaque dioecesi et pro omnibus causis a iure expresse non exceptis, iudex primae instantiae est loci Ordinarius, qui iudiciariam potestatem exercere potest ipse per se, vel per alios, secundum tamen canones qui sequuntur.

§ 2. Si vero agatur de iuribus aut bonis temporalibus Episcopi aut mensae vel Curiae dioecesanae, controversia dirimenda deferatur vel, Episcopo consentiente, ad dioecesanum tribunal collegiale quod constat officiali et duobus iudicibus synodalibus antiquioribus, vel ad iudicem immediate superiorem.

Aside from the cases excepted by law, *i.e.*, those expressly mentioned in can. 1556 and 1557 and those assumed or accepted by the Apostolic See (can. 1570, § 1), all cases must be tried by the *local Ordinary*, who may exercise his power personally or by proxy, but must invariably proceed according to the rules laid down in the following canons. This is the law, new as well as old,[1]

1 C. 1, X, I, 31; *Trid.*, Sess. 24, c. 20, *de ref.*

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for every diocese. *Exempt religious,* of course, are bound to this tribunal only in cases expressed by law (can. 616); otherwise their competent judge is the respective superior (can. 1579).

If a case concerns the *rights or temporal property of the bishop,* of the *episcopal mensa* (revenues), or of *the diocesan court,* it may, with the consent of the bishop, be tried in a body by the diocesan tribunal, consisting of the official and two senior synodal judges, or it may be brought before the court of the immediate superior.

The *antiquiores* are those longest in office, and the immediate superior would be the metropolitan. If the latter is a party to the trial, the immediate superior is the Delegate Apostolic, provided his instructions give him that power; otherwise, Rome.

CAN. 1573

THE OFFICIAL

§ 1. Quilibet Episcopus tenetur officialem eligere cum potestate ordinaria iudicandi, a Vicario Generali distinctum, nisi parvitas dioecesis aut paucitas negotiorum suadeat hoc officium ipsi Vicario Generali committi.

§ 2. Officialis unum constituit tribunal cum Episcopo loci: sed nequit iudicare causas quas Episcopus sibi reservat.

§ 3. Officiali dari possunt adiutores, quibus nomen est vice-officialium.

§ 4. Tum officialis tum vice-officiales esse debent sacerdotes, integrae famae, in iure canonico doctores vel ceteroqui periti, annos nati non minus triginta.

§ 5. Sunt amovibiles ad nutum Episcopi; vacante sede a munere non cessant, nec a Vicario Capitulari

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amoveri possunt; adveniente autem novo Episcopo, indigent confirmatione.

§ 6. Qui Vicarius Generalis est idemque officialis, sede vacante, cessat quidem a Vicarii, non autem ab officialis munere.

§ 7. Si officialis eligatur in Vicarium Capitularem, ipse novum nominat officialem.

Our text insists upon the appointment of a diocesan *officialis*. This official is first mentioned in the Decretals [2] of Boniface VIII, whence we may conclude that the office was introduced after 1234. The *officialis* was appointed or commissioned by the bishop, and his office was ordinary, though limited. Later it appears to have been absorbed by that of the vicar-general. Now the Code rules that *every bishop is obliged to choose an official* with ordinary judiciary power. This office is distinct from that of the vicar-general. Only in case the diocese is small and there is not much business, may the bishop entrust the vicar-general with this office. How small or how large a diocese should be to require an *officialis,* is difficult to say; it depends upon the territorial extent as well as upon the number of the Catholic people and clergy residing there.

The tribunal of the *officialis* and the bishop form but *one* tribunal. Consequently no appeal is possible from the one to the other, or *vice versa*. Besides, the *officialis cannot render judgment in cases* which the bishop has *reserved to himself*. There is no doubt some similarity between the offices of the vicar-general and the *officialis;* but there is also a difference, for the bishop cannot lawfully curtail the power of the vicar-general beyond the

2 C. 2, 6°, I, 14. His *cognitio causarum* was general; but the *potestas inquirendi, corrigendi aut puniendi* was denied him; neither could he decree any removal from benefice, office, or administration

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cases mentioned in law, whilst the power of the *officialis* is entirely subject to the good pleasure of the bishop. Of course, the bishop has to make it clear which cases he has reserved to himself; otherwise the *officialis* may proceed, because his power is ordinary.

The *officialis* may be given *assistants,* but their power is not ordinary, nor must they be looked upon as quasi-judges *in solidum.* At least this seems to us a natural assumption because otherwise there would hardly be any unity of government.

The *officialis* as well as the *vice-officialis* must be *priests* in good standing, doctors in canon law or otherwise experienced, and at least thirty years of age. They are *removable* at the bishop's pleasure. Their office does not cease during the vacancy of the episcopal see, nor may they be removed by the vicar-capitular (administrator). But they need ratification by the new bishop.

If the offices of vicar-general and *officialis* are held by one person, the office of vicar-general, but not that of *officialis,* ceases when the episcopal see becomes vacant. If the *officialis* is elected vicar-capitular (administrator), he shall appoint another *officialis.*

SYNODAL JUDGES AND COUNSELORS

CAN. 1574

§ 1. In qualibet dioecesi presbyteri probatae vitae et in iure canonico periti, etsi extradioecesani, non plures quam duodecim eligantur ut potestate ab Episcopo delegata in litibus iudicandis partem habeant; quibus nomen esto *iudicum synodalium* aut *pro-synodalium,* si extra Synodum constituuntur.

§ 2. Quod ad eorum electionem, substitutionem,

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cessationem aut remotionem a munere attinet, serventur praescripta can. 385–388.

§ 3. Nomine iudicum synodalium in iure veniunt quoque iudices pro-synodales.

CAN. 1575

Unicus iudex in quolibet iudicio duos assessores consulentes sibi adsciscere potest; quos tamen ex iudicibus synodalibus eligere debet.

Among ecclesiastical persons were mentioned synodal judges, whose election, removal from office, etc., was described in can. 385–388.[3] The Code now rules that such judges, elected either at, or outside of a synod, should be not more than twelve in number for *every diocese*. They must be *priests* of approved morals and experts in canon law. They may be chosen from another diocese if, to use a colloquial expression, the necessary "timber" is not to be found in the diocese itself. Their office is *delegated* by the bishop, by virtue of which fact they may assist in handling ecclesiastical trials.

No discrimination is made between synodal and pro-synodal judges because in law the latter are regarded as synodal judges pure and simple. One of their prerogatives consists in being assumed as *counselors* by the judge, who is entitled to select two of them in every trial (can. 1575). This is the rule inculcated by the Council of Trent; but in course of time it seems that protonotaries *non participantes* were often elected to the detriment of the synodal judges. Benedict XIV restored the Tridentine enactment by admonishing the patriarchs, primates, archbishops, and bishops to entrust the synodal judges with ecclesiastical trials. Their number was to be in

3 Cfr. Vol. II of our *Commentary*, p. 418 ff.

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proportion to the size and importance of the diocese, but no less than four, priests of knowledge and proved ability, should be chosen for each.[4]

COLLEGIATE BOARD OF JUDGES

CAN. 1576

§ 1. Reprobata contraria consuetudine et revocato quolibet contrario privilegio:

1.° Causae contentiosae de vinculo sacrae ordinationis, et matrimonii, vel de iuribus aut bonis temporalibus cathedralis ecclesiae; itemque criminales in quibus res est de privatione beneficii inamovibilis aut de irroganda vel declaranda excommunicatione, tribunali collegiali trium iudicum reservantur;

2.° Causae vero quibus agitur de delictis quae depositionis, privationis perpetuae habitus ecclesiastici, vel degradationis poenam important, reservantur tribunali quinque iudicum.

§ 2. Loci Ordinarius tribunali collegiali trium vel quinque iudicum cognitionem committere potest etiam aliarum causarum, idque praesertim faciat quando de causis agitur quae, attentis temporis, loci et personarum adiunctis et materia iudicii, difficiliores et maioris momenti videantur.

§ 3. Duo vel quatuor iudices qui una cum praeside tribunal collegiale constituunt, inter iudices synodales Ordinarius, nisi pro sua prudentia aliter opportunum existimaverit, eligat per turnum.

CAN. 1577

§ 1. Tribunal collegiale collegialiter procedere debet, et ad maiorem suffragiorum partem sententias ferre.

4 "*Quamvis paternae*," Aug. 16, 1741.

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§ 2 Eidem praeest officialis vel vice-officialis, cuius est processum dirigere et decernere quae pro iustitiae administratione in causa quae agitur necessaria sunt.

CAN. 1578

Exceptis causis de quibus in can. 1572, § 2, Episcopus semper potest tribunali ipse per se praeesse; sed valde expedit ut causas, praesertim criminales et contentiosas gravis momenti, iudicandas relinquat tribunali ordinario, cui praesit officialis vel vice-officialis.

Canon 1576 concerns a modern[5] institution which the legislator prudently and seriously demands to be set up in every diocese. How seriously he wishes to be taken here may be judged from the very first clause, declaring "every *contrary custom* is *reprobated* and every *contrary privilege is revoked.*" This institution is a *collegiate board of judges,* consisting either of three or five ecclesiastics, who form, not a corporation, but what was formerly called a society or college, and hence go by the name of *collegiate tribunal;* they must meet in a body and all be present at the same time.

§ 1 rules that to a *board of three judges* are reserved the following cases: (a) civil or *contentious* causes turning about the bond of sacred ordination (*vinculum s. ordinationis,* see can. 1993), the marriage tie (not mere separation), and the rights and property of the cathedral church; (b) *criminal* cases which concern privation of an irremovable benefice, which we believe must also be applied to the case of privation (not the mere removal) of an irremovable pastor; or which concern infliction or dec-

5 If we say *modern,* we mean in the sense of an ordinary stable tribunal; for several delegated judges are mentioned more than once in the Decretals; c. 13, X, I, 3; c. 21, 22, 34, X, I, 29.

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laration of excommunication, which may also touch laymen.[6]

To a *board of five judges* are reserved all criminal cases which involve the penalty of deposition, of perpetual privation of the ecclesiastical habit, or of degradation.

§ 2 permits the Ordinary to entrust the collegiate tribunal of three or five also with the cognizance of other cases, especially such as are more difficult and important by reason of circumstances of time, place, or person, or of the matter involved, for instance, in a mixed marriage when satisfaction is to be decided and the persons concerned are of high social standing. The same rule may be applied to clerics who hold important offices and to tendencies which are peculiar to a whole province or generation.

§ 3 commands the Ordinary to choose the two or four judges who constitute the collegiate tribunal together with the president, who is no one else than the diocesan *officialis,* in turn, from among the *synodal judges,* as, for instance, is done by the Roman Rota, where three proceed *per turnum.* The *turnus* may be taken either by seniority, or one senior and one junior, etc. But the Ordinary may depart from this rule if he deems it advisable, and select ecclesiastics who are not synodal judges.

Can. 1577 determines the *mode of procedure* to be followed by the board of judges. They must proceed *collegialiter, i. e.,* in a body, and give sentence by majority vote. Thus, if there are three judges, including the *officialis,* there must be two votes cast either for or against a sentence; if five judges vote, at least three votes are required to pronounce either an interlocutory or definitive sentence.[7]

[6] The text draws no distinction between different kinds of excommunication.

[7] *Lex propria S. R. R.,* April, 1908, can. 31, § 5; *Regulae S. R. R.,* Aug. 4, 1910, § 176 (*A. Ap S.,* I, p. 28; II, 834).

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We said, "including the *officialis*," for § 2 of can. 1577 rules that the *officialis* or *vice-officialis* is the *president* of the tribunal, whose duty it is to direct the trial and decree what is required for administering justice in the case. Of course he must follow the general rules prescribed by the Code. But, like any other judge, he may follow the dictates of reason as long as these do not clash with the essentials of justice.

Although the *officialis* or *vice-officialis* is *ex officio* the president of the trial, the *bishop* himself may preside, and, of course, also vote when a sentence is to be pronounced. However, since no one should be judge in his own case the bishop is precluded from presiding in all matters concerning himself or his diocesan court, according to can. 1572, § 2. Besides, according to canon 1578, it is highly advisable, that he leave the decision of criminal and contentious (civil) cases, especially those of importance and consequence, to the ordinary tribunal presided over by the official or vice-official, lest he incur an odium which might impair his authority.

CAN. 1579

§ 1. Si controversia sit inter religiosos exemptos eiusdem religionis clericalis, iudex primae instantiae, nisi aliud in constitutionibus caveatur, est Superior provincialis, aut, si monasterium sit sui iuris, Abbas localis.

§ 2. Salvo diverso constitutionum praescripto, si res contentiosa agatur inter duas provincias, in prima instantia iudicabit ipse per se vel per delegatum supremus religionis Moderator; si inter duo monasteria, supremus Moderator Congregationis monasticae.

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§ 3. Si demum controversia enascatur inter religiosas personas physicas vel morales diversae religionis, aut etiam inter religiosos eiusdem religionis non exemptae vel laicalis, aut inter religiosum et clericum saecularem vel laicum, iudex primae instantiae est Ordinarius loci.

If a dispute arises between *individual* exempt religious of the same order or congregation, the judge of the first instance is the *provincial,* or the abbot of an autonomous monastery, provided the respective constitutions do not ordain otherwise.

Unless the respective constitutions provide some other mode, a civil case pending between *two provinces* must be tried, in the first stage, before the superior general or his delegate; or before the abbot president of monastic congregations if the controversy is between two autonomous monasteries. If a quarrel arises either between individual religious, or between religious corporations of different congregations or orders, or between individual religious of non-exempt congregations or lay institutes, or between religious and secular clerics or laymen, the judge in the first instance is the *local Ordinary.* The last-named case, of course, supposes that both litigants are in the same diocese. If they are not in the same diocese, the other rules of competency are to be followed, *viz.,* those mentioned under can. 1564–1568 (location of the litigious object, contract, crime, etc.).

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Article II

AUDITORS AND REFEREES

Can. 1580

§ 1. Potest Ordinarius unum aut plures auditores, seu actorum instructores, sive stabiliter sive pro certa aliqua causa constituere.

§ 2. Iudex auditorem eligere potest tantummodo pro causa quam cognoscit, nisi Ordinarius iam providerit.

Can. 1581

Auditores pro tribunali dioecesano, quantum fieri potest, deligantur ex iudicibus synodalibus; pro tribunali vero religiosorum deligendi semper sunt ex alumnis eiusdem religionis ad normam constitutionum.

Can. 1582

Eorum est testes citare et audire, aliaque acta iudicialia instruere secundum tenorem mandati, non autem sententiam definitivam ferre.

Can. 1583

Auditor in quovis litis momento ab officio removeri potest ab eo qui eundem elegit, iusta tamen de causa, et citra partium praeiudicium.

Can. 1584

Tribunalis collegialis praeses debet unum de iudicibus collegii ponentem seu relatorem designare qui in coetu iudicum de causa referat et sententias in scriptis redigat; et ipsi idem praeses potest alium ex iusta causa substituere.

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Auditor [8] in our text means one who prepares the acts of a trial (drafter or draftsman). He is therefore also called *instructor actorum*. Such a one, or more than one, may be appointed by the Ordinary either permanently or for any special case. But a judge may choose an auditor only for a trial which he himself conducts, unless the Ordinary has appointed one for the same case, in which hypothesis the judge has to accept the auditor appointed by the Ordinary (can. 1580).

Auditors for the diocesan court should, if possible, be taken from among the synodal judges. For tribunals of religious, members of the respective institute should be selected (can. 1581). Auditors play a conspicuous part in the Decretals. They were generally appointed by the Pope upon the demand, or at least petition, of the parties. They had to "hear" (from *audire*), to examine, to take cognizance of the matters entrusted to them, and take down in writing what seemed important. Besides, they were obliged to report minutely and conscientiously to the Pope, which act was designated by the Latin term "*referre*." [9] But they seldom or never pronounced judgment. This right was given them only after they had been established as a regular college, under the name of Rota.

Can. 1582 defines the duties of auditors. Their *office* consists in summoning and hearing witnesses, in preparing the judiciary acts or documents according to the tenor or wording of their commission or mandate. An auditor may also be called upon to draw up a *restrictus* or summary of the acts.[10] But he is never allowed to pronounce a final sentence.

8 *Auditor* is sometimes taken as identical with *iudex instructor* or judge of inquiry; cfr., Messmer, *Canonical Procedure*, 1897, p. 53.

9 Cfr. c. 3, X, II, 12; c. 15, X, II, 13; c. 3, X, III, 27; c. 18, X, III, 5; 16, 21, X, I, 6; c. 23, X, I, 29; c. 4, X, II, 12; Phillips, *K.-R.*, 1864, Vol. VI, p. 467 f.

10 S. C. EE. et RR., June 11, 1880, n. 29 (*Coll. P. F.*, n. 1534).

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Can. 1583 permits the judge to remove the auditor at any moment of the trial, provided he has a plausible reason for so doing, and the parties suffer no disadvantage.

Besides the auditor, a referee or *ponens,* taken from the board of judges, is appointed by the president. This official must report to the judges on the process of the trial and write down the sentence. This is generally given in the form of an answer to a query, *e. g.: "Utrum constet de nullitate matrimonii? Resp. Affirmative* (or *negative,* as the case may be). If the judge who is appointed as *ponens,* wishes to decline the honor (or burden), he may do so, but he should have at least the semblance of a good reason,[11] in which case the president may substitute one of the other judges to act as *ponens.*

Article III

NOTARY, PROSECUTING ATTORNEY, DEFENSOR VINCULI

At every process or trial there must be present a *notary,* who at the same time acts as secretary. No papers or acts are valid unless written, or at least signed, by him. This latter clause permits the use of a typewriter. A rubber stamp is not admissible for the signature.

The notary must take down in writing the depositions of the witnesses who are present, as well as the answers sent in from other courts, which were asked for by the *litterae rogatoriae.*[12]

The notary must be chosen by the judge, before the trial begins, from among the notaries lawfully engaged in practice — in Rome they have to undergo an examination and are formally admitted to practice — unless the Ordinary has specially appointed one for the case.

11 *Regulae S. R. R.,* Aug. 4, 1910, § 179; § 9 (*A. Ap. S.,* II, 835, 785).

12 *Ibid.,* § 114; § 144 (*l. c.,* p. 821, 827).

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PROMOTOR IUSTITIAE AND DEFENSOR VINCULI

CAN. 1586

Constituatur in dioecesi *promotor iustitiae* et *defensor vinculi;* ille pro causis, tum contentiosis in quibus bonum publicum, Ordinarii iudicio, in discrimen vocari potest, tum criminalibus; iste pro causis, in quibus agitur de vinculo sacrae ordinationis aut matrimonii.

CAN. 1587

§ 1. In causis in quibus eorum praesentia requiritur, promotore iustitiae aut vinculi defensore non citato, acta irrita sunt, nisi ipsi, etsi non citati, revera interfuerint.

§ 2. Si legitime citati aliquibus actibus non interfuerint, acta quidem valent, verum postea eorum examini subiicienda omnino sunt ut ea omnia sive voce sive scriptis possint animadvertere et proponere quae necessaria aut opportuna iudicaverint.

CAN. 1588

§1. Eadem persona officium promotoris iustitiae et defensoris vinculi gerere potest, nisi multiplicitas negotiorum et causarum id prohibeat.

§ 2. Promotor et defensor constitui possunt tum ad universitatem causarum tum pro singulis causis.

CAN. 1589

§ 1. Ordinarii est promotorem iustitiae et vinculi defensorem eligere, qui sint sacerdotes integrae famae, in iure canonico doctores vel ceteroqui periti, ac prudentiae et iustitiae zelo probati.

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§ 2. In tribunali religiosorum promotor iustitiae sit praeterea eiusdem religionis alumnus.

CAN. 1590

§ 1. Promotor iustitiae et vinculi defensor electi ad universitatem causarum a munere non cessant, sede episcopali vacante, nec a Vicario Capitulari possunt removeri; adveniente autem novo Praelato, indigent confirmatione.

§ 2. Iusta tamen intercedente causa, Episcopus eos removere potest.

Each diocese should have its *prosecuting attorney* and its *defensor vinculi.*

Benedict XIV, in his well-known constitution, "*Dei miseratione,*" Nov. 3, 1741, decreed *ex plenitudine potestatis,* that each and every diocese, no matter how small or how large, should have a defender of the marriage bond. To this task is now added another, *viz.,* that of defending the bond of sacred ordination, which forms, as it were, a spiritual tie between the clergyman in higher orders (*i. e.,* from subdeaconship upward) and the diocese to which he belongs.

The *prosecuting attorney* (*promotor iustitiae*) is appointed for civil cases which, though perhaps of a private nature, may, in the Ordinary's view, concern the welfare of the diocese or the public welfare (*bonum publicum*). Thus, for instance, a quarrel between two clergymen about the possession of a benefice or office may scandalize the whole diocese.

The *promotor iustitiae* also functions in *criminal cases* which, as already stated, almost exclusively concern clergymen.

If these two officials are not summoned to trials which

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require their presence, all the *acts are null and void,* unless the officials in question were actually present, even though not summoned. Hence *actual presence* is required, not a summons. In civil matters the *promotor iustitiae* may be summoned by the *instructor processus,* but his absence would not invalidate the proceedings, whereas in criminal cases his presence is absolutely required. The presence of the *defensor vinculi* is indispensable in all trials concerning the marriage bond or the validity of ordination.[13]

However, if the promoter and the defender were not present, though summoned, at one or the other hearing, the validity of the proceedings is not impaired, but these officials may inspect the minutes afterwards, in order to make, either orally or in writing, such remarks as they may deem necessary or opportune.

One and the same person may be promoter and defender, unless a multiplicity of affairs and cases prevents, as may happen in large dioceses, or when cases are tried by several courts, or in different places at the same time.

The offices of promoter and defender may be held for all cases that may arise (*ad universitatem causarum*) or one may be appointed for each individual case (can. 1588). Those elected for all cases do not lose their office during the vacancy of the episcopal see, nor may they be removed by the vicar-capitular; they need, however, the approval of the new prelate. Besides, the bishop may remove them from office for any just cause (can. 1590). This rule Benedict XIV established concerning the *defensor.*[14] The same Pontiff also described the *qualities* which a *defensor* should have. The Code is even more explicit and, besides, strictly requires the priestly character. The promoters and defenders, therefore, should be

[13] *Regulae S. R. R.*, Aug. 4, 1910 (*A. Ap. S.*, II, 819).

[14] "*Dei miseratione*," Nov. 3, 1741, § 5.

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priests in good standing, doctors in canon law or at least able canonists, of tried prudence and justice.

In trials of religious the promoter must moreover be a member of the same institute.

Article IV

Beadles and couriers

Can. 1591

§ 1. Ad acta iudicialia intimanda, nisi alia sit probata tribunalis consuetudo, constituantur cursores sive pro omnibus causis sive pro causa peculiari; item apparitores ad sententias ac decreta iudicis, eo committente, exsecutioni mandanda.

§ 2. Eadem persona utroque officio defungi potest.

Can. 1592

Laici ipsi sint, nisi prudentia in aliqua causa suadeat ut eccclesiastici ad id muneris assumantur; quod vero ad eorum nominationem, suspensionem et revocationem attinet, eaedem serventur regulae quae pro notariis can. 373 statutae sunt.

Can. 1593

Acta quae hi confecerint, publicam fidem faciunt.

Couriers (*cursores*) were formerly employed by the Apostolic Chancery to affix papal bulls on four well-known public places in Rome, namely, St. Peter's, the Lateran, the Apostolic Chancery, and the Campo de' Fiori. This act constituted official promulgation.[15] The Code

15 *Ibid.*, § 17.

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wants them to be appointed either as regular employees of diocesan courts, or for individual cases, unless the respective diocese or tribunal observes some other satisfactory custom. These couriers have the duty of communicating the judiciary proceedings or acts, of serving summonses, etc.

The *apparitores* (beadles, constables) are employed to carry out the sentences and decrees of the court. The two offices named in this canon may be held by one and the same person. The acts of *cursores* and *apparitores* are official and must be so accepted by the public (can. 1593).

As a rule these offices should be given to *laymen;* but if prudence demands that in some particular case an ecclesiastic be entrusted with such a mission, it may be done. They are appointed, suspended, or removed like notaries.[16]

16 See can. 373.

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CHAPTER II

THE ORDINARY TRIBUNAL OF THE SECOND INSTANCE

CAN. 1594

§ 1. A tribunali Episcopi Suffraganei appellatur ad Metropolitam.

§ 2. A causis in prima instantia pertractatis coram Metropolita fit appellatio ad loci Ordinarium, quem ipse Metropolita, probante Sede Apostolica, semel pro semper designaverit.

§ 3. Pro causis primum agitatis coram Archiepiscopo qui caret Suffraganeis vel coram loci Ordinario immediate Sedi Apostolicae subiecto, fit appellatio ad Metropolitam, de quo in can. 285.

§ 4. Inter religiosos exemptos, pro omnibus causis coram Superiore provinciali actis tribunal secundae instantiae est penes supremum Moderatorem; pro causis actis coram Abbate locali, penes supremum Moderatorem Congregationis monasticae; pro causis vero de quibus in can. 1579, § 3, servetur praescriptum §§ 1, 2, 3 huius canonis.

CAN. 1595

Tribunal appellationis eodem modo quo tribunal primae instantiae constitui debet; et eaedem regulae, accommodatae ad rem, in causae discussione servandae sunt.

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CAN. 1596

Si collegialiter causa in prima instantia cognita fuerit, etiam in gradu appellationis collegialiter nec a minore iudicum numero definiri debet.

Appeal from the court of a suffragan bishop lies to the metropolitan. If a case was tried in the first instance by the metropolitan court, appeal lies to the court of that local Ordinary whom the metropolitan, with the approval of the Holy See, has chosen once for all as court of appeal.[1] Can. 285 insists that archbishops who have no suffragans, and Ordinaries (including prelates or abbots *nullius* who are immediately subject to the Apostolic See) must choose the nearest metropolitan (*viciniorem metropolitam*) for conciliar or synodal purposes. This same nearest metropolitan is the court of appeals from the archbishops and Ordinaries, as mentioned above.

For *exempt religious* the second instance, in all cases tried by the provincial, is the superior general and in cases tried by the local abbot, the abbot president. For cases mentioned under can. 1579, § 3, the competent tribunal of appeal is the metropolitan or the suffragan approved by the Apostolic See, or the nearest metropolitan, also approved by the same Holy See. It depends on whether the local Ordinary has a metropolitan, or whether the case was tried by the metropolitan in the first stage, or whether the archbishop or Ordinary had to choose the nearest metropolitan.

The court of appeal must be established in the same fashion as the court of the first instance; hence the collegiate board with the official and vice-official must be constituted also in courts of appeal, and the same rules

1 In the *Acta Ap. Sedis* there are now being published many such approvals.

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proportionately must be observed in the proceedings. If the case was tried *collegialiter* by the first court, it must be tried *collegialiter* also by the court of appeal; if three judges functioned in the lower court, three must act in the court of appeal; if five in the first, also five in the second instance.

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CHAPTER III

THE ORDINARY TRIBUNALS OF THE APOSTOLIC SEE

CAN. 1597

Romanus Pontifex pro toto orbe catholico ad normam can. 1569 iudex est supremus, qui vel ipse per se ius dicit, vel per tribunalia ab ipso constituta, vel per iudices a se delegatos.

On the history of the *S. Romana Rota* enough has been said elsewhere.[1] That Pius X has restored its ancient splendor, no canonist will regret. As to the *Signatura Apostolica* something will be said in Art. II, *infra*.

Although these two tribunals are constituted in *foro externo*, or for judiciary matter proper, it must be understood that the Roman Pontiff has not thereby unreservedly committed himself to them. He remains the supreme judge in all matters, especially of appeal, as laid down in can. 1569. Hence, instead of leaving a case to these tribunals, he may pronounce judgment himself or entrust trial to delegated judges, who then act in his name, according to can. 199, §§ 1, 2. However, as a rule, all affairs which do not belong to the class of *causae maiores*, are entrusted to the two ordinary tribunals.

1 Cfr. Vol. II, p. 267 f. of our *Commentary*.

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ART. I

THE SACRA ROTA ROMANA

CAN. 1598

§ 1. Tribunal ordinarium a Sancta Sede constitutum pro appellationibus recipiendis est Sacra Rota Romana, quae est tribunal collegiale constans certo Auditorum numero cui praesidet Decanus, qui primus est inter pares.

§ 2. Ii sacerdotes esse debent laurea doctorali in utroque saltem iure praediti.

§ 3. Auditorum electio Romano Pontifici reservatur.

§ 4. Sacra Rota ius dicit aut per singulos turnos trium Auditorum, aut videntibus omnibus, nisi aliter pro aliqua causa Summus Pontifex constituat.

CAN. 1599

§ 1. Sacra Rota iudicat:

1.° In secunda instantia causas quae a quorumvis Ordinariorum tribunalibus in primo gradu diiudicatae fuerint et ad Sanctam Sedem per appellationem legitimam deferantur;

2.° In ultima instantia causas ab ipsa Sacra Rota et ab aliis quibusvis tribunalibus in secunda vel ulteriore instantia iam cognitas, quae in rem iudicatam non transierint.

§ 2. Hoc tribunal iudicat etiam in prima instantia causas de quibus in can. 1557, § 2, aliasve quas Romanus Pontifex sive motu proprio, sive ad instantiam partium ad suum tribunal advocaverit et Sacrae Rotae commiserit; easque, nisi aliud cautum sit in commissionis rescripto, Sacra Rota iudicat quoque

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in secunda et tertia instantia ope turnorum qui sibi invicem succedunt.

CAN. 1600

Causae maiores penitus excluduntur ab ambitu competentiae huius tribunalis.

CAN. 1601

Contra Ordinariorum decreta non datur appellatio seu recursus ad Sacram Rotam; sed de eiusmodi recursibus exclusive cognoscunt Sacrae Congregationes.

The S. R. Rota now consists of ten prelates or auditors, chosen by the Roman Pontiff and presided over by the dean, as the first among equals. The auditors must be doctors of both civil and canon law, and priests. They form the ordinary court of appeals, and a regular collegiate board of judges, who sit in judgment by turns, each consisting of three auditors, or in full session, unless the Pope decrees otherwise in some particular case. They have their special rules or by-laws, which are not secret, but have been officially published.[2]

The *competency* of the S. Roman Rota is as follows:

1.° It passes judgment in the *second* instance on all cases tried by any court of Ordinaries in the first stage and lawfully appealed to the Holy See. Here it may be well to state that the Rota will not accept any case unless a sentence has been rendered by the first judge or in the first instance. Otherwise the S. R. Rota has to ask for a *sanatio* or return the acts, all of which causes delay.

2.° The Rota judges also cases which have already been tried by itself or by another court in the second or any

2 See *A. Ap. S.*, I, 22 ff., II, 783 ff.

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other stage, provided these cases have not yet passed as *res iudicata* or been definitively adjudged (cfr. can. 1902 f.).

3.° Finally, the S. Romana Rota gives judgment in the first instance on cases mentioned in can. 1557, § 2, and others which the Roman Pontiff, either of his own accord or at the demand of the litigants, has reserved to himself and entrusted to the Rota. The same cases may also, unless the writ of commission is worded otherwise, be tried by the S. Rota in the second and third instance by way of succeeding turns. For the ten auditors are divided into ten turns, the first consisting of the three last (or junior) auditors, the second and third, of the six preceding auditors, the fourth of the Dean and the two last auditors, who again have to take their turn, etc. Hence there is always one who did not sit with the same two auditors.[3]

From the competency of the Rota are entirely excluded the *causae maiores,* which are such by reason either of the persons involved or of the importance of the matter.[4] To this class belong the cases mentioned under can. 1556 and 1557, § 1.

Can. 1601 rules that an *appeal or recourse* to the S. Rota is admissible *against the decrees of Ordinaries,* because such cases are exclusively handled by the S. Congregations. Hence whatever a local Ordinary settles administratively, for instance, division of parishes, etc., and in general all *recursus in devolutivo*[5] *tantum,* must be addressed to the S. Congregations, not to the Rota, and the episcopal court must pass a sentence if the case is tried in a judiciary way and appealed to Rome.

3 *Lex propria,* c. 12, § 1 (*A. Ap. S.,* I, 22).

4 *Ibid.,* can. 15 (*l. c.,* p. 24).

5 See can. 345; 513, § 2; 1340, § 3; 1395, § 2; 1428, § 3; 2243, § 3.

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ART. II

THE SIGNATURA APOSTOLICA

CAN. 1602

Supremum Signaturae Apostolicae Tribunal constat nonnullis S. R. E. Cardinalibus, quorum unus Praefecti munere fungitur.

CAN. 1603

§ 1. Apostolica Signatura videt potestate ordinaria:

1.° De violatione secreti ac de damnis ab Auditoribus Sacrae Rotae illitis eo quod actum nullum vel iniustum posuerint;

2.° De exceptione suspicionis contra aliquem Sacrae Rotae Auditorem;

3.° De querela nullitatis contra sententiam rotalem;

4.° De expostulatione pro restitutione in integrum adversus rotalem sententiam quae in rem iudicatam transierit;

5.° De recursibus adversus sententias rotales in causis matrimonialibus quas ad novum examen Sacra Rota admittere renuit;

6.° De conflictu competentiae quem enasci contingat inter tribunalia inferiora, ad normam can 1612, § 2.

§ 2. Videt ex potestate delegata de petitionibus per supplices libellos ad Sanctissimum porrectis ad obtinendam causae commissionem apud Sacram Rotam.

CAN. 1604

§ 1. In causa criminali, de qua in can. 1603, § 1, n. 1, si forte locus sit iudicio appellationis, hoc obtinetur penes ipsum Supremum Tribunal.

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§ 2. In casu suspicionis, Apostolica Signatura definit utrum sit locus recusationi Auditoris, necne; quo facto, iudicium ad Sacram Rotam remittit, ut, secundum suas regulas ordinarias, procedat, Auditore, contra quem exceptio mota fuit, in suo turno manente vel excluso.

§ 3. In casu querelae nullitatis aut restitutionis in integrum aut recursus de quibus in can. 1603, § 1, nn. 3, 4, 5, de hoc tantum iudicat num sit nulla sententia rotalis, num locus sit restitutioni vel recursus sit admittendus; et nullitate declarata aut restitutione concessa vel admisso recursu, causam remittit ad Sacram Rotam, nisi Sanctissimus aliter providerit.

§ 4. In examine supplicum libellorum Signatura, habitis opportunis notitiis et auditis iis quorum interest, decernit utrum precibus annuendum sit, necne.

Can. 1605

§ 1. Supremi Tribunalis Signaturae sententiae suam vim habent, quamvis rationes in facto et in iure non contineant.

§ 2. Nihilominus sive ad instantiam partis sive ex officio, si res postulet, Supremum Tribunal edicere potest ut praedictae rationes exponantur secundum regulas Tribunalis proprias.

After the auditors of the papal household had been constituted a formal corporation or court of trials, they were withdrawn from the immediate entourage of the Pope, who was then served by chaplains, called *referendarii*. These had to examine the petitions submitted to the Pontiff and present those worthy of acceptance to the Pope for his signature. Among these petitions, of course, there were such as required judiciary procedure, in which

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the *referendarii* lacked competency. Hence they could only issue decrees to other Roman tribunals, which perhaps had refused to render a decision or to accept the case at all. Although, therefore, the *Signatura* was not a tribunal in the proper sense of the word, yet it decided the competency of other tribunals and enforced the acceptance of cases when refused. This was the office of the *Signatura Iustitiae*. Besides this, there was another, which had more especially to deal with favors that belonged neither to the *Dataria* nor to the *Poenitentiaria*. The persons that made up this college were called collectively *Signatura Gratiae*. When the distinction between the two bodies was clearly made, is uncertain, but it probably dates from the time of Innocent VIII (1484–1492). In course of time both *signaturae* were reformed, their rights and privileges more accurately determined,[6] etc. But after the year 1870 their significance waned. Pius X resuscitated the *Signatura* as one tribunal, under the name *Signatura Apostolica,* which now consists of four Cardinals, one of whom is prefect (can. 1602). Its *present ordinary competency* is described by the Code as follows:

1. It takes cognizance of any violation of secrecy or damage done by the auditors of the S. Rota in not rendering justice or doing an injustice, whether by fraud or through culpable negligence. In cases of such violation or damage which involve a crime, appeal may be made by the accused auditor to the supreme tribunal of the Signatura.

2. The Signatura is also competent in any case of *suspicion* pleaded against any of the auditors of the S.

6 See Phillips, *K.-R.*, Vol. VI, 498 ff.; Bangen, *Die Röm. Curie*, 1854, 391 ff.; Hilling (Engl. Transl.) *The Roman Court*, 1907, p. 127 f.; Benedict XV, "*Attentis expositis*," June 28, 1915 (*A. Ap. S.*, VII, 325) restored the two colleges of *votantes* and *referendarii*.

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Rota. In every such case the Signatura shall decide whether the exception is well founded or not, and leave it to the S. Rota to proceed according to the established rules.

3. Furthermore the Signatura is competent when the *plaint of nullity* is made against a rotal sentence, for instance, when a marriage has been declared null.

4. Also in cases of *restitutio in integrum* being demanded against a rotal sentence which has become a *res iudicata.*

5. Also in *recourses* against a rotal sentence concerning matrimonial cases which the S. Rota refused to reconsider.

In the three last named cases (3, 4, 5) the Signatura alone has to judge whether the rotal sentence was null and void (on account of technical errors), whether restitution is justified or recourse is to be admitted. After the Signatura has rendered judgment, the case must be remanded to the S. Rota, unless the Holy Father provides otherwise.

6. The Signatura is also competent when there is a conflict *of competency* between inferior tribunals (can. 1612, § 2). Finally, the present Pope has enlarged its competency by giving to the Signatura a *delegated power* by virtue of which it may take cognizance of petitions addressed to the Holy Father to the effect that the S. Rota may be entrusted with a case brought before his Holiness. The Signatura, after having gathered information and heard the parties concerned, decides whether and how far the petition may be favored.[7] The decisions or sentences of the Signatura, to be effective, require no statement of reasons as to fact or law, but the sacred tribunal either *ex officio, i.e.,* if it deems it necessary and opportune, or if the parties insist, may explain the reasons on which it based a decision, according to its own by-laws.

7 *"Attentis expositis," l. c.*

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CHAPTER IV

DELEGATED TRIBUNALS

CAN. 1606

Delegati iudices servare tenentur regulas statutas in can. 199–207, 209.

CAN. 1607

§ 1. Iudex a Sancta Sede delegatus uti potest ministris constitutis in Curia dioecesis in qua iudicare debet; sed potest etiam alios quoscunque maluerit eligere et assumere, nisi in delegationis rescripto aliud cautum sit.

§ 2. Iudices vero ab Ordinariis locorum delegati uti debent ministris Curiae dioecesanae, nisi Episcopus in aliquo peculiari casu ob gravem causam proprios et extraordinarios ministros constituendos decreverit.

Delegated judges must follow the rules laid down in can. 199–207 and 209. A *judge delegated by the Holy See* may avail himself of the assistance of the officials of the court of the diocese in which he is to judge; but, unless his rescript reads otherwise, he may also choose or take to himself whomsoever he pleases.

Judges delegated by the *local Ordinaries* are bound to employ the officials of the diocesan court, unless the bishop, for a weighty reason and in an individual case, decides to appoint special and extraordinary officials.

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TITLE III

RULES TO BE OBSERVED BY ECCLESIASTICAL TRIBUNALS

After defining the cases that may be judged by ecclesiastical courts, and describing the various tribunals, higher and lower, in every stage, the Code now lays down some general rules which are to be observed in all trials. These rules concern the judges and officials of tribunals, the order in which cases should be tried, the delays in law, the time and place of judgment, and the persons that may be admitted to court. Note, however, that these are only preliminaries of the trial proper.

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CHAPTER I

JUDGES AND OTHER OFFICIALS

This chapter commences with the so-called *exceptio fori declinatoria,* when exception is taken to the person of the judge because he is regarded as incompetent to try the case at issue.

COMPETENCY AND SUSPICION

CAN. 1608

Iudex competens parti legitime requirenti suum ministerium ne recuset, firmo praescripto can. 1625, § 1.

CAN. 1609

§ 1. Iudex antequam aliquem ad suum trahat tribunal et iudicaturus sedeat, videat utrum ipse sit competens, necne.

§ 2. Eodemque modo antequam aliquem ad agendum admittat, cognoscere tenetur num is in iudicio possit iure consistere.

§ 3. Non est tamen necesse ut de his referatur in actis.

CAN. 1610

§ 1. Si exceptio proponatur contra iudicis competentiam, hac de re ipse iudex videre debet.

§ 2. In casu exceptionis de incompetentia relativa, si iudex se competentem pronuntiet, eius decisio non admittit appellationem.

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§ 3. Quod si iudex se incompetentem declaret, pars quae se gravatam reputat, potest intra decem dierum spatium appellationem ad superius tribunal interponere.

CAN. 1611

Iudex quovis in stadio causae se absolute incompetentem agnoscens, suam incompetentiam declarare tenetur.

CAN. 1612

§ 1. Si inter duos iudices pluresve controversia oriatur quisnam eorum ad aliquod negotium competens sit, res definienda est a tribunali immediate superiore.

§ 2. Quod si iudices, inter quos exsistit competentiae conflictus, subsint distinctis tribunalibus superioribus, controversiae definitio reservatur tribunali superiori illius iudicis, coram quo actio primo promota est; si non habeant tribunal superius, conflictus dirimatur vel a Legato Sanctae Sedis, si adsit, vel ab Apostolica Signatura.

CAN. 1613

§ 1. Iudex cognoscendam ne suscipiat causam, in qua ratione consanguinitatis vel affinitatis in quolibet gradu lineae rectae et in primo et secundo gradu lineae collateralis, vel ratione tutelae et curatelae, intimae vitae consuetudinis, magnae simultatis, vel lucri faciendi aut damni vitandi, aliquid ipsius intersit, vel in qua antea advocatum aut procuratorem egerit.

§ 2. In iisdem rerum adiunctis ab officio suo abstinere debent iustitiae promotor et defensor vinculi.

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Can. 1614

§ 1. Cum iudex, etsi competens, a parte recusatur ut suspectus, haec exceptio, si proponatur contra iudicem delegatum in causa unicum vel contra collegium vel maiorem delegatorum iudicum partem, definienda est a delegante; si contra unum vel alterum ex pluribus iudicibus delegatis, etsi Collegii praesidem, a ceteris iudicibus delegatis et non suspectis; si contra Auditorem Sacrae Rotae, a Signatura Apostolica ad normam can. 1603, § 1, n. 2; si contra officialem, ab Episcopo; si contra auditorem, a iudice principali.

§ 2. Si ipsemet Ordinarius sit iudex et contra ipsum exceptio suspicionis opponatur, vel abstineat a iudicando vel quaestionem suspicionis definiendam committat iudici immediate superiori.

§ 3. Si exceptio suspicionis opponatur contra promotorem iustitiae, defensorem vinculi aut alios tribunalis administros, de hac exceptione videt praeses in tribunali collegiali vel ipse iudex, si unicus sit.

Can. 1615

§ 1. Si iudex unicus aut aliquis vel etiam omnes iudices qui tribunal collegiale constituunt suspecti declarentur, personae mutari debent, non vero iudicii gradus.

§ 2. Ordinarii autem est in locum iudicum qui suspecti declarati sunt, alios a suspicione immunes subrogare.

§ 3. Quod si ipsemet Ordinarius declaratus fuerit suspectus, idem peragat iudex immediate superior.

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CAN. 1616

Exceptio suspicionis expeditissime definienda est, auditis partibus, promotore iustitiae vel vinculi defensore, si intersint, nec in ipsos suspicio cadat.

CAN. 1617

Quod ad tempus attinet quo exceptiones incompetentiae et suspicionis proponendae sint, servetur praescriptum can. 1628.

Since a judge is by virtue of his office appointed to administer *justice,* he is *not at liberty to refuse his services* to those who request it. Hence our Code (can. 1625, § 1) has established certain penalties against those who unreasonably fail to exercise their function as judges, when duly called upon. And the superiors have to see to it that they comply with their obligations, as Innocent III already enjoined.[1]

However, compliance with these obligations supposes *competency.* Therefore the judge, before he summons any one to his tribunal, and when about to take his seat,[2] must first ask himself whether he is competent, either by reason of his jurisdiction over the person, or by reason of the matter he is to judge. This is done by considering the various reasons which establish the competent forum. If he is a delegated judge he must, besides, be aware of the tenor of the rescript under which he acts, in order not to overstep the limits of his power.

Here the commentators refer to the famous law *Barbarius*[3] which offers the example of a fugitive slave

1 C. 17, X, II, 1.

2 The act of sitting is becoming to a judge, yet it is certainly not required for the validity of the sentence, as § 3 of can. 1609 makes evident, and can. 1877 seems to imply.

3 L. 3, Dig. 1, 14, *de officio praetorum.*

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who acted as a judge, though he was no Roman citizen. All the glossators hold with Ulpian that the acts of such a judge would be valid, because this assumption is more human and in keeping with the public welfare. However an intruder, if the *titulus coloratus* (common error) were wanting, could not function validly.[4]

The judge must also consider whether those who seek his services are entitled thereto, that is, in general, whether they are persons endowed with the right of prosecution, of which more shall be said under title IV, ch. I.

It is not necessary, however, to put all this into the minutes (*in actis*) of the case.

If the defendant (*reus*) takes *exception to the judge,* on the claim that he is incompetent for one reason or another, he must state the grounds for his claim. Such a ground may be incompetency for lack of one of the reasons which establish a competent forum, as stated in can. 1560–1568 (relative incompetency). But if the judge declares that his competency in the case is established, no appeal is permitted from his sentence. There may be other reasons brought up by the defendant to establish the incompetency of the judge. Thus if the judge is delegated by another, it may be objected that he obtained his rescript by fraud.[5] Besides, the defendant may oppose the judge as being partial, because of aversion for the defendant and similar reasons. In that case the defendant may appeal to the higher court within ten days from the date of the exception made, provided the judge has admitted his incompetency and proof was furnished.

If the judge has found himself *absolutely incompetent,*

4 Reiffenstuel, II, 1, n. 200; Santi-Leitner, II, 1, n. 14.

5 C. 38, X, I, 29.

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i.e., by reason of the person to be judged as well as of the matter under adjudication, he is bound to make a declaration to that effect, no matter how far the trial may have proceeded (can. 1611).

The question of competency may be raised, not by the defendant, but by the colleagues or *co-judges*, as to which of them is entitled to hear the case. This quarrel should be settled by the immediate superior or next higher court, according to the rules of appeal. If the judges belong to different higher courts, the competent higher court is the one to which the controversy was first brought for settlement. If there is no higher court, the question is to be settled either by the legate of the Holy See or by the Signatura Apostolica.

Exception against the judge on account of *blood relationship and affinity* is extended by can. 1613 to the whole direct line and to the first and second degree of the collateral line. Besides, the judge may be interested in the case he has to judge for other reasons: he may be guardian or administrator,[6] he may be bound by the ties of friendship, he may be an enemy, political or personal, of the parties, or he may have a personal interest in the case, either of gain or loss, or he may have acted as attorney or proxy in the same case before. All these reasons militate against the judge, who therefore should not accept such a case for trial, though the Code does not state the nullity of the act. Exceptions must be heard and disposed of before the trial begins.

The same rules also apply to the *promotor iustitiae* and the *defensor vinculi*, who therefore should waive jurisdiction under such circumstances.

According to can. 1614, a plea of exception which arises

[6] Thus c. 36, X, II, 28, which, however, mentions only a delegated judge.

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not from lack of competency, but from *suspicion,* must be settled by the *delegans,* if one judge, or all the judges, or the greater part of the collegiate board of judges with delegated power are objected to as suspicious. If the suspicion is alleged only against one or the other of the board of judges, even though the suspected one may be the president, the question must be decided by the other, non-suspected judges. The Signatura Apostolica settles all questions with regard to a suspected auditor of the S. Rota. The bishop is competent to judge the plea of suspicion against his official. And if there is an auditor in any court, according to can. 1580, the exception is disposed of by the chief judge, who in the case of a collegiate tribunal would be the official, or the vice-official if he takes the place of the official.

If the *Ordinary himself* is judge, and the plea of suspicion is brought against him, he shall either abstain from judging the case, or first have the exception settled by his immediate superior, according to can. 1594.

If exception is taken to the *promotor iustitiae,* or the *defensor vinculi,* or another official of the acting court on the ground of suspicion, the president of the collegiate board is competent to adjudge the matter.

If the judge sole, or one or all of a collegiate body of judges, are *declared* to be suspect, they must be changed, but the stage or instance of the court remains the same; the Ordinary should replace the suspected judges by others who are beyond suspicion. Should the Ordinary himself have been declared suspected, his immediate superior, *i.e.,* the metropolitan, should replace him for this case by another judge. The plea of exception must be disposed of as *quickly as possible* in order not to conflict with can. 1620. When a case under that plea comes up, the respective parties must be heard, and also

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the promoter and defender, provided they are present and not suspected themselves.

The *time* within which these exceptions of incompetency and suspicion must be brought, is to be determined according to can. 1628.

DUTIES OF THE JUDGE

CAN. 1618

In negotio quod privatorum solummodo interest, iudex procedere potest dumtaxat ad instantiam partis; sed in delictis et in iis quae publicum Ecclesiae bonum aut animarum salutem respiciunt, etiam ex officio.

CAN. 1619

§ 1. Si actor pro re sua probationes quas afferre posset, non afferat, vel reus exceptiones sibi competentes non opponat, iudex ne suppleat.

§ 2. Si vero agatur vel de publico bono vel de animarum salute, eas supplere potest et debet.

CAN. 1620

Iudices et tribunalia curent ut quamprimum, salva iustitia, causae omnes terminentur, utque in tribunali primae instantiae ultra biennium non protrahantur, in tribunali vero secundae instantiae ultra annum.

CAN. 1621

§ 1. Excepto Episcopo qui per se potestatem iudiciariam excerceat, omnes qui tribunal constituunt aut eidem opem ferunt, iusiurandum de officio rite et fideliter implendo coram Ordinario vel coram iudice a quo electi sunt, vel coram viro ecclesiastico ab

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alterutro delegato, praestare debent: idque ab initio suscepti officii, si sint stabiles, aut antequam causa agatur, si pro peculiari aliqua causa sint constituti.

§ 2. Etiam iudex a Sede Apostolica delegatus vel iudex ordinarius in religione clericali exempta idem iusiurandum praestare tenetur cum primum constituitur, adstante ipsius tribunalis notario, qui de praestito iureiurando actum redigat.

Can. 1622

§ 1. Quotiescumque iusiurandum praestatur sive a iudicibus aut tribunalis administris, sive a partibus, testibus, peritis, semper emitti debet praemissa divini Nominis invocatione et a sacerdotibus quidem tacto pectore, a ceteris fidelibus, tacto Evangeliorum libro.

§ 2. Iudex partem, testem aut peritum ad iusiurandum recipiens, eum regulariter commonefaciat tum de sanctitate actus et de gravissimo delicto quod admittunt iurisiurandi violatores, tum etiam de poenis, quibus obnoxii fiunt qui falsum in iudicio iurati affirmant.

§ 3. Iusiurandum secundum formulam a iudice probatam praestari debet coram eodem iudice aut eius delegato, adstante utraque aut alterutra parte, quae interesse iurisiurandi praestationi velit.

Can. 1623

§ 1. In iudico criminali semper, in contentioso autem si ex revelatione alicuius actus processualis praeiudicium partibus obvenire possit, iudices et tribunalis adiutores tenentur ad secretum officii.

§ 2. Tenentur etiam semper ad inviolabile secretum servandum de discussione quae in tribunali collegiali

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ante ferendam sententiam habetur, tum etiam de variis suffragiis et opinionibus ibidem prolatis.

§ 3. Imo quoties causae vel probationum natura talis sit ut ex actorum vel probationum evulgatione aliorum fama periclitetur, vel praebeatur ansa dissidiis, aut scandalum aliudve id genus incommodum oriatur, iudex poterit testes, peritos, partes earumque advocatos vel procuratores iureiurando adstringere ad secretum servandum.

CAN. 1624

Iudex et omnes tribunalis administri, occasione agendi iudicii, munera quaevis acceptare prohibentur.

According to the nature of different cases, the judge is to act differently, and although, like a praetor, he may be a judge by virtue of his office, yet in *civil cases,* which concern private interests only, he can proceed only upon the demand of the parties who seek his services. Otherwise the judge might commit excesses[7] and interfere in matters which are not in his power. Judgment supposes a plaintiff, and where there is no complaint, no judgment is required for private affairs. The case is different, of course, when the public weal and the salvation of souls are concerned, as in all *criminal matters.* Hence if the judge has obtained notice or a complaint that a crime has been perpetrated,[8] provided, of course, it is not mere slander or defamation, but based on facts, he is obliged *ex officio* to proceed (can. 1618).

Different also is the way the judge must proceed in civil and criminal cases, respectively. If the plaintiff in a *civil case* offers no proofs, or the defendant pleads no

7 C. 1, X, V, 31.

8 S. C. EE. et RR., June 11, 1880, n. 11 (*Coll. P. F.*, n. 1534).

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exception, the judge is not supposed to supply the deficiency or put in an exception, but acts merely as judge between the litigant parties, and his knowledge is, as shall be seen under can. 1869, strictly judicial. This does not mean that he should act as judge even though he has no knowledge at all of the requirements of the office, for a judge culpably destitute of the knowledge required would not only commit a grievous sin, but be liable to all the damage caused by his judgment.[9]

In *criminal cases,* which concern the public weal or the salvation of souls, the judge *may* and *must,* if he can, *supply* deficient proofs, and use even his extrajudicial knowledge to ensure a fair and just judgment (can. 1619).

In order to prevent unnecessary and costly delays, which may cause considerable damage to the parties involved,[10] the Code emphasizes the duty incumbent on judges and tribunals, of *speedily finishing trials.* In the first instance a trial should not be protracted over *two years,* in the second, not over a year. However, speed is not haste, and a "hurry up" trial might involve injustice. Hence this rule must be understood *salva iustitia.*

To secure proper and conscientious trials and judgments the Code lays down another obligation for those who are engaged in a trial, including all the officials and assistants of the court, excepting the bishop, when he himself exercises judiciary power. It is the *oath.* This must be administered by the Ordinary or the judge who has selected them, to the other officials and assistants, or any one delegated by either of them, provided he be an ecclesiastic. Habitual judges must take the oath before they assume

9 Bouix, *De Iudicüs Ecclesiasticis,* 1855, Vol. I, p. 135 f.

10 Theologians justly maintain that a judge who culpably protracts a trial is held to indemnification; Bouix, *l. c.,* p. 136.

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office, and judges selected *ad hoc, i.e.,* for one special case, must take it before the trial begins. Also a *judge delegated by the Apostolic See,*— including the bishop if he acts as delegated judge and the judge of exempt clerical organizations,— must take this oath before the trial commences, in the presence of the notary of the court, who shall put it down in writing (can. 1621).

The *manner of taking* this oath is as follows: The judge and the officials or assistants of the court, together with the parties, witnesses, and experts, must first invoke the name of God; the priests hold their left hand to the breast, the rest of the faithful touch the book of the gospels.[11] Before administering the oath, the judge should warn the parties, witnesses, and experts, of the sacredness of oaths, of the grievousness of perjury, and of the penalties established for perjurers.[12]

The *formula* of the oath must be approved by the judge and be pronounced in his presence or that of his delegate, and of both or one of the parties who should witness the administration of the oath (can. 1622).

To the conscientious and proper administration of justice also belongs the keeping of the *official secret,* which can. 1623 inculcates. This is always to be kept in *criminal* trials. In *civil* trials it must be observed if a revelation of the proceedings would be prejudicial to the

11 The formula used in the Roman Curia is (*Acta Ap. S.*, I, 41): "*In nomine Domini. Ego N. N. spondeo, voveo ac iuro, fidelem et obedientem me semper futurum B. etro et Domino Nostro Papae eiusque legitimis successoribus; ministeria mihi commissa in hac S. Congregatione (Tribunali aut Officio) sedulo ac diligenter impleturum; munera mihi in remunerationem, etiam sub specie doni oblata, non recepturum: et secretum officii religiose servaturum in iis omnibus, quae sacri Canones aut Superiores ecreta servari iusserint, itemque, quoties ab Ordinariis id postulatum fuerit, et quando ex revelatione alicuius actus praeiudicium partibus aut Ecclesiae obvenire potest. Sic me Deus adjuvet, et haec sancta Dei Evangelia, quae meis manibus tango.*"

12 Cfr. can. 1757, § 2, n. 1; can. 1795, § 2.

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parties, either in a spiritual or material way. Therefore the judges as well as all other officials and assistants, must hold their tongue. The same persons are bound by an inviolable secret concerning preliminary discussions held by the board of judges before the final sentence is pronounced. They must also observe strict secrecy concerning the various ballots and the views pronounced at the balloting. Besides, if the nature of the case or of its proofs is such that a revelation of the proceedings (minutes) or arguments (proofs) would endanger the reputation of others, or cause contention or scandal, etc., the judge may command the witnesses, the experts, the litigant parties and their lawyers or proctors to keep the secret under oath.

A final obligation set down in can. 1624 is the *refusal to accept gifts,* no matter how small or great, whether of a consumable nature, such as drinks, eatables,[13] etc., or of a pecuniary or other kind, as a service, recommendation, etc. This prohibition obliges the judge and all the officials acting at a trial. Then the text says: *occasione agendi iudicii,* which certainly means, not only on the occasion of a trial, but also with respect or reference to the same, because the object is to preclude bribery, which the divine and ecclesiastical laws forbid.[14]

This is so true that even if the litigants have equally strong proofs in their favor, the judge is not allowed to accept money in favor of one against the other.[15]

13 C. 11, 6°, I, 3, permits acceptance of *poculenta* and *esculenta mera liberalitate oblata,* but our text excludes even these.

14 Cfr. Is. 1; Mich. 3; Bouix, *l. c.,* p. 137.

15 S. O., *Prop. 26 damn.,* Sept. 24, 1665 (Denz., n. 997).

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PENALTIES FOR JUDGES AND OFFICIALS

CAN. 1625

§ 1. Iudices qui cum certe et evidenter competentes sunt, ius reddere recusant, vel qui temere se competentes declarant, vel qui ex culpabili negligentia aut dolo actum nullum cum aliorum detrimento vel iniustum ponunt aut aliud litigantibus damnum inferunt, tenentur de damnis et ab Ordinario loci vel, si de Episcopo agatur, a Sede Apostolica, ad instantiam partis aut etiam ex officio, congruis poenis pro gravitate culpae puniri possunt, non exclusa officii privatione.

§ 2. Iudices qui secreti legem violare vel acta secreta cum aliis quoquo modo communicare praesumpserint, puniantur mulcta pecuniaria aliisque poenis, privatione officii non exclusa, pro diversa reatus gravitate, salvis peculiaribus statutis, quibus graviores poenae praescribantur.

§ 3. Eisdem sanctionibus subsunt tribunalis officiales et adiutores, si officio suo, ut supra, defuerint, quos omnes etiam iudex punire potest.

In order to give weight to the preceding laws, the legislator adds a penal sanction, which consists partly of a natural, or at least moral, consequence, and partly of a penalty to be imposed.

1. The *moral* or theological *penalty* consists in the obligation of making restitution or *paying the damages* that may arise from unqualified actions. These may be committed by:

a) *judges* who certainly and evidently are competent on every score, as provided in can. 1560–1568, but refuse to render judgment after complaint is made;[16]

16 C. 8, X, III, 149.

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b) those who rashly declare themselves competent, because rashness inculpates the judge;[17]

c) those who by culpable negligence or deceit proceed invalidly to the detriment of others, by omitting the necessary formalities or requisites as to the proceeding or hearing of witnesses;[18]

d) those who act unjustly, for instance, by inflicting a censure on innocent parties, or by bribery and avarice;[19]

e) those who injure the litigants in any other way, against their own conscience, through human respect or hatred.[20]

2. The *penal sanction,* which is, judicially speaking, also contained in the first clause, consists of *proportionate* penalties, which may be inflicted upon the demand of the injured parties, or *ex officio:*

a) By the *local ordinary,* if the judge is subject to his jurisdiction, or

b) By the *Apostolic See,* if the guilty judge is a bishop. This penalty may even be privation of the office of judge.

§ 2 threatens a pecuniary fine and other penalties, even privation of office, for judges who dare to *violate the law of secrecy* or communicate secret proceedings to outsiders in any shape or form.

The punishment must be proportionate to the guilt, and may be even severer if particular statutes provide severer penalties.

The same theological and penal sanctions threatened against judges may be inflicted by the judge on guilty officials and employees of his court.

17 C. 49, C. 11, q. 3.
18 C. 11, X, II, 19; c. 2, 6°, II, 1.
19 Cc. 8, 88, C. 11, q. 3; c. 1, 6°, II, 14.
20 C. 1, 6°, II, 14.

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SECURITY OR BAIL

CAN. 1626

Cum iudex praevidet actorem probabiliter spreturum esse sententiam ecclesiasticam si forte haec ipsi sit contraria, et idcirco conventi iuribus non satis consultum iri, potest, ad eiusdem conventi instantiam vel etiam ex officio, actorem adigere ad congruam cautionem praestandam pro ecclesiasticae sententiae observantia.

If the judge foresees that the plaintiff will not heed the ecclesiastical sentence in case it is against him, and that, therefore, the rights of the defendant will not be guaranteed, he may, either *ex officio* or upon the demand of the defendant, oblige the plaintiff to give bail or security to the effect that he will abide by the ecclesiastical sentence.

It is customary and required, when cases are brought before the S. Roman Rota, to deposit a certain sum of money for the expenses and as bailment.[21]

21 *Regulae S. R. R.*, Aug. 4, 1910, § 3 (*A. Ap. S.*, II, 795).

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CHAPTER II

ORDER OF PROCEDURE

CAN. 1627

Iudices et tribunalia tenentur causas ad se delatas eo ordine cognoscere quo fuerunt propositae, nisi aliqua earum celerem prae ceteris expeditionem exigat, quod quidem peculiari decreto a iudice seu a tribunali statuendum est.

CAN. 1628

§ 1. Exceptiones dilatoriae, eae praesertim quae respiciunt personas et modum iudicii, proponendae et cognoscendae sunt ante contestationem litis, nisi contestata iam lite primum emerserint aut pars iureiurando affirmet eas tunc tantum sibi innotuisse.

§ 2. Exceptio tamen de incompetentia iudicis absoluta a partibus opponi potest in quovis statu et gradu causae.

§ 3. Pariter exceptio excommunicationis opponi potest in quolibet iudicii statu et gradu, dummodo ante sententiam definitivam; imo si agatur de excommunicatis vitandis, aut toleratis contra quos sententia condemnatoria vel declaratoria lata fuerit, ii ex officio semper excludi debent.

CAN. 1629

§ 1. Exceptiones peremptoriae, quae dicuntur *litis finitae*, veluti exceptio rei iudicatae, transactionis, etc.,

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proponi et cognosci debent ante contestationem litis; qui serius eas opposuerit, non est reiiciendus, sed condemnetur in expensis, nisi probet se oppositionem malitiose non distulisse.

§ 2. Aliae exceptiones peremptoriae proponi debent post contestatam litem, et suo tempore tractandae sunt secundum regulas circa quaestiones incidentes.

Can. 1630

§ 1. Actiones reconventionales satius statim post litis contestationem, utiliter quovis iudicii momento, ante sententiam tamen, proponi possunt.

§ 2. Cognoscantur autem simul cum conventionali actione, hoc est pari gradu cum ea, nisi eas separatim cognoscere necessarium sit aut iudex opportunius existimaverit.

Can. 1631

Quaestiones de cautione pro expensis iudicialibus praestanda aut de concessione gratuiti patrocinii, quod statim ab initio postulatum fuerit, et aliae huiusmodi videndae regulariter sunt ante litis contestationem.

Can. 1632

Quoties, proposita principali controversia, quaestio praeiudicialis suboriatur, id est eiusmodi ex cuius solutione pendeat solutio quaestionis principalis, illa ante omnia a iudice cognoscenda est.

Can. 1633

§ 1. Si ex principali controversia quaestiones incidentes nascantur, cognoscantur prius eae quarum solutio viam sternat ad aliarum solutionem.

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§ 2. Quod si nullo nexu logico inter se cohaereant, quae prius ab alterutra parte propositae sunt, illae antea definiantur.

§ 3. Si de spolio incidat quaestio, haec ante omnia est dirimenda.

This chapter contains general rules for the judge, instructing him how to proceed. These rules concern the order of time in which cases must be tried, exceptions and reconventions, the giving of bail, and the logical or casual interdependence of cases.

1. First the Code rules (can. 1627) that judges and tribunals must try cases in the order of time in which they are proposed (*prior in tempore, prior in iure*). Hence a judge is not at liberty to give preference to one case over another, unless he is convinced that one should be disposed of as soon as possible.[1] But this view should always be objective. The inversion of the regular order, if deemed necessary, requires a special decree by the judge or the tribunal.

2. Next the Code lays down the rules for taking cognizance of so-called *exceptions*. These are statements or assertions of the defendant against the plaintiff, made in order to postpone or weaken his purpose. They are *dilatory*, if they defer action only for a time, and may, as can. 1628, § 1 says, regard either the persons concerned in the trial, *i.e.*, the judge or plaintiff, or the mode of the trial, for instance, the order in which it is conducted.

These exceptions must be proposed and disposed of *before the litis contestatio;* after that has taken place, exceptions are admissible only if they were raised after

1 For instance, a case of *matrimonium consummatum* on account of sinful occasion should be given preference to a case of *matrimonium contrahendum*.

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the issue in pleading, or if the party declares under oath that they became known to him only after the *litis contestatio*. Thus it may happen that suspicion is created only after the plaidoyer, or that a relationship existing between the judge and the plaintiff becomes known to the defendant only after the *contestatio*.

However, exception may be taken to the *competency* of the judge at any phase or stage (instance) of the trial, provided his alleged incompetency is *absolute, i.e.*, comprises the persons at law as well as the question proposed. This means that even if an incompetent judge has already given an interlocutory or final sentence, he can still be rejected on the plea of absolute incompetency.

A privileged exception is that of *excommunication* against the plaintiff. This claim, says our text, may be made at any stage or instance of the trial, up to the final sentence. This favor was granted in order to make ecclesiastical censures more respected. However, Innocent III as well as Gregory IX enacted that a defendant who deliberately omits to oppose the plea of excommunication, though it is to be admitted in the first instance, must be condemned to bear the expenses caused by protraction of the trial.[2] The Code is silent about this fine, and more probably does not sustain it.[3]

Those who are under a condemnatory or declaratory sentence of excommunication (either as *vitandi* or *tolerandi*) must be excluded from ecclesiastical trials *ex officio, i.e.*, by the judge or board of judges, or by the president or the local Ordinary. This exception may be raised even against the judge or judges.

Another species of exception is that called *peremptory*, which entirely quashes the action or intention of the plain-

2 C. 12, X, II, 25; c. 1, 6°, II, 12.

3 We say "more probably," by reason of comparing sect. 3 of can. 1628 with sect. 1, can. 1629 where the expenses are clearly stated.

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tiff. These are *litis finitae,* for instance, the proof that the matter at issue is already adjudged, or an agreement concerning a doubtful matter (*transactionis*), prescription, or payment made.[4] Such exceptions must be proposed and settled before the *litis contestatio.* But they may not be rejected even after the trial has entered that phase. However, unless the defendant can prove that his omission to oppose this exception sooner, was not intentional or malicious, *i.e.,* designed to vex or fatigue his adversary, he is to be condemned to pay the expenses caused by the delay.

Other peremptory exceptions, which amount rather to incidental questions, must be proposed after the *litis contestatio* and are considered under Title XI.

3. The Code next considers the counter-plea or *reconventio, i.e.,* an action or suit which the defendant may put in against the plaintiff before the same tribunal, for instance, when a wife sues her husband for separation, and the husband sues her for divorce, or the one pleads desertion and the other cruelty. Such counter complaints may be proposed from the *litis contestatio* to the moment before the final sentence.

The plea proposed by the plaintiff and the counter-plea opposed by the defendant should be tried at the same time, *pari gradu,* and by the same judge. But the plaintiff is to be heard first and the defendant must make answer to his allegations; whereupon the counter-plea of the defendant must be discussed. Thus the question may be settled at once.[5]

4. Questions concerning the bailment or *security* for defraying the expenses of the trial, or a gratuitous defence asked for at the beginning of the trial, and other

4 Engel, II, 25, n. 1, 6.
5 Cfr. c. 1, X, II, 4; c. 2, X, II, 10; Santi-Leitner, II, 4, n. 4.

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similar questions should as a rule be settled before the *litis contestatio* (can. 1631).

5. Finally the Code considers the *logical or causal connection* of dependent or related cases or controversies. If an apparently principal question depends on the solution of the prejudicial controversy, the so-called side-issue must be settled first. For instance, when a wife demands that her husband be restored to her, but the husband claims that blood relationship exists between them, the question of consanguinity, though *praeiudicialis,* must be settled first.[6]

Similarly a connection may exist between several *incidental questions* or countercharges that may be brought up. These must be settled so that the solution of one paves the way for the solution of the other. Thus, if an election is attacked, and the electors assert there was a conspiracy or censure, the question of conspiracy or censure must first be disposed of, even though it is purely incidental.[7]

If there is no *logical connection* between several questions the one which was first proposed must be settled first. When disseissin (*spolii*) is alleged, this charge must be disposed of first.

[6] Cfr. c. 1, X, II, 10; c. 5, X, I, 9. [7] C. 19, X, II, 1.

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CHAPTER III

DELAYS AND "FATALIA"

CAN. 1634

§ 1. *Fatalia legis* quae dicuntur, idest termini perimendis iuribus a lege constituti, prorogari non possunt.

§ 2. Termini autem iudiciales et conventionales, ante eorum lapsum, poterunt, iusta intercedente causa, a iudice, auditis vel petentibus partibus, prorogari.

§ 3. Caveat tamen iudex ne nimis diuturna lis fiat ex prorogatione.

CAN. 1635

Si dies, pro actu iudiciali indicta, sit feriata nec in decreto iudicis dicatur expresse tribunal vacaturum nihilominus causis cognoscendis, terminus intelligitur prorogatus ad primam sequentem diem non feriatam.

The Code wishes trials to be terminated within a reasonable time so that peace may be restored between the litigants. However, delays may be granted in order to enable the judge to obtain a fuller knowledge of the case and to pass judgment with greater security. For this purpose so-called *dilationes* or delays are granted either by law or by the judge, or agreed upon by the parties.

1. The delays which are granted by law concerning the time for appealing, or at least for finishing, an action, are called *fatalia legis*. They cannot be prorogued,[1] except, of course, by the supreme judge.

1 Cfr. c. 4, Clem. II, 12; Santi-Leitner, II, 8, n. 2.

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Judiciary delays, granted according to the prudent discretion of the judge, or the *conventional* delays agreed upon by the parties, may be prorogued if there is a just reason for such action and the parties were heard and asked for delay. However, the judge must always watch that the prorogation is not unduly lengthened, either by deceit or contumacy.[2]

If the day set for a trial or judicial action is a *feria, i.e.,* a legal holiday, and no mention is made in the decree of the judge that the tribunal does not sit on that day, the term is supposed to be the next court day which is not a *feria.*

2 Cfr. cc. 5, 10, X, II, 14.

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CHAPTER IV

PLACE AND TIME OF JUDGMENT

CAN. 1636

Quamvis Episcopus in quolibet suae dioecesis loco, qui non sit exemptus, ius habeat erigendi tribunal, nihilominus penes suam sedem aulam statuat, quae sit ordinarius iudiciorum locus: ibique Crucifixi imago emineat, et adsit Evangeliorum liber.

CAN. 1637

Iudex e territorio suo vi expulsus vel a iurisdictione ibi exercenda impeditus, potest extra territorium iurisdictionem exercere et sententiam ferre, certiore tamen hac de re facto loci Ordinario.

CAN. 1638

§ 1. In unaquaque dioecesi Ordinarius publico decreto dies et horas definiri curet, pro loci ac temporum adiunctis opportunas, quibus tribunal adiri regulariter possit, et ab eo iustitiae administratio exigi.

§ 2. Iusta tamen de causa, et quoties periculum sit in mora, fas est fidelibus quovis tempore iudicis ministerium in sui iuris vel boni publici tutelam invocare.

CAN. 1639

§ 1. Dies festi de praecepto, et ultimi tres dies hebdomadae sanctae feriati habeantur; et in iis citationes

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intimare, audientias habere, partes et testes excutere, probationes assumere, decreta et sententias ferre, denuntiare et exsequi vetitum est, nisi necessitas, christiana caritas, aut bonum publicum aliud postulent.

§ 2. Iudicis autem est in singulis casibus statuere et denuntiare, an et quae acta supra dictis diebus expleri debeant.

Although the bishop may set up a tribunal anywhere in his diocese (provided it be not exempt), yet he should establish a judgment hall in his episcopal city, which shall be the ordinary place for holding trials. There the Crucifix shall occupy a conspicuous place and there must also be a copy of the Gospels. The reason for choosing the episcopal city is, according to Boniface VIII that experts may usually be found there.[1]

A doubt may perhaps arise concerning *exempt religious,* who seem to live in an "exempt place." However, a monastery or convent, as such, is not exempt, but local exemption extends only as far as, and in virtue of, personal exemption. Hence it is licit to perform civil as well as criminal jurisdictional acts, to examine witnesses, or to write the acts of a trial in a convent or monastery of exempt religious: and such acts are certainly valid. Whether they would be valid if the entire trial, inclusive of the sentence, were conducted in such a place, seems doubtful.[2] Of course, if the place itself were exempt, for instance, a territory *nullius,* the proceedings would be invalid.[3]

The Council of Vienne (1311–1313) allowed bishops

1 C. 11, 6°, I, 3.

2 Cfr. c. 8, X, II, 20; c. 2, 6°, II, 1; Wernz, *Ius Decret.*, Vol. V, n. 315, p. 267, denies the validity according to a decision of the S. C. EE. et RR., Sept. 15, 1741; Messmer, *Canonical Procedure,* 1897, p. 143, asserts the validity, and quotes S. C. Imm., Jan. 21, 1821, and July 14, 1830.

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who had been forcibly driven from their dioceses, to give judgment in any strange diocese, although this was otherwise prohibited by law, according to the adage: "*Extra territorium ius dicenti non paretur impune.*"[3] Our text amplifies and to some extent moderates this law. The amplification consists in that it permits any judge who is driven away from his diocese or prevented from exercising judgment there (*e.g.*, on account of being a prisoner) to exercise jurisdiction outside his own territory, provided (not for valid exercise, but as a sign of respect), he notifies the local Ordinary of the fact,— a condition of which the Clementine decretal said nothing.

Ordinaries should make known the *days and hours* when the diocesan court may be approached by those seeking justice. These days and hours (office hours) should be set as conveniently as possible. The Code abstains from fixing the hours more closely, and hence any hour is valid.

Although the appointed days and hours should form the rule for holding trials or giving audience, there may be just reasons for seeking redress of grievances at other times. *Sundays and holydays of obligation,* and also the three last days of Holy Week are *feriae* or *dies feriati,* legal holidays on which no tribunal should be in session.[4] On these days, therefore, it is forbidden to issue summons, give audiences, hear parties or witnesses or discuss their testimony, accept proofs, issue decrees or sentences, denounce or execute criminals,— except in case of necessity or when Christian charity or the public welfare demand an exception. It is the right and duty of the judge to decide in each individual case which acts performed on forbidden days need supplementation. Here

[3] C. 2; 6°, I, 2.
[4] S. Pius V, "*Cum primum,*" April 1, 1566, § 8; Bened. XIV, "*Ab eo tempore,*" Nov. 5, 1745.

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the old law has been modified, for the Decretals [5] declared every judicial act performed on a sacred day or holiday to be null and void. A summons served on such a day did not render the party contumacious. Now it is left to the judge to determine what is valid and what not.

[5] Cc. 1, 5, X, II, 9.

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CHAPTER V

PERSONS ADMITTED TO TRIALS; METHOD OF DRAWING UP AND KEEPING JUDICIAL ACTS

The Code wishes to insure orderly procedure and correct treatment of the official acts which are drawn up for and during a trial. To procure the first, it determines the persons to be admitted.

CAN. 1640

§ 1. Dum causae coram tribunali aguntur, extranei ab aula arceantur et ii tantummodo adsint, quos ad processum expediendum iudex necessarios esse iudicaverit.

§ 2. Omnes, iudicio assistentes, qui reverentiae et obedientiae tribunali debitae graviter defuerint, iudex, etiam illico et incontinenti si coram tribunali sedente in id quis peccaverit, potest censuris quoque aliisve congruis poenis ad officium reducere, advocatos praeterea et procuratores etiam iure alias causas apud tribunalia ecclesiastica pertractandi privare.

CAN. 1641

Si alicui actui processuali interveniat persona linguae loci ignara et iudices ac partes linguam huius personae propriam non intelligant, interpres adhibeatur iuratus, et a iudice designatus, contra quem alterutra pars legitimam exceptionem non proposuerit.

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The court room is not to be encumbered by outsiders whilst a trial is going on, but only those whom the judge deems necessary for conducting a trial are to be admitted. This rule might be profitably copied by our civil courts. Newspaper reporters are not required for the proper conduct of a trial.

It may happen that those who are allowed to be present cannot control their temper but profess *contempt and scorn or otherwise act in a manner injurious and offensive to the respect and obedience due to the tribunal.* The offense must be of a serious nature, but it need not consist in actual maltreatment (for instance, spitting in the face of, or making fists, at the judge); seriously contumelious words suffice.[1] In order to bring such intemperate persons to their senses, the judge may punish them there and then by inflicting censures or other suitable penalties. Lawyers and proctors guilty of such behavior may be deprived of the privilege of acting at ecclesiastical trials.

Among those to be admitted is the *interpreter,* if any person among those called to the trial does not speak the language of the place where the trial is held, and the judges and parties to the trial do not understand his language. Interpreters must be sworn and no one can be appointed to this office against whom either party has raised a legitimate exception.

THE JUDICIAL ACTS

CAN. 1642

§ 1. Acta iudicialia, tum quae meritum quaestionis respiciunt, seu *acta causae,* ex. gr., sententiae et

1 C. 11, X, V. 37: "*de improbitate constat . . . adversus asserationem judicis temere prorumpentis.*"

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cuiusque generis probationes, tum quae ad formam procedendi pertinent, seu *acta processus*, ex. gr., citationes, intimationes, etc., scripto redacta esse debent.

§ 2. Nisi iusta causa aliud suadeat, quoad eius fieri potest, lingua latina redigantur; sed interrogationes et responsiones testium, aliaque similia, lingua vernacula confici debent.

Can. 1643

§ 1. Singula folia processus numerentur; et actuarii subscriptio cum sigillo tribunalis apponatur in unoquoque folio.

§ 2. Singulis actis completis vel interruptis seu ad aliam sessionem remissis, apponatur subscriptio actuarii et iudicis vel tribunalis praesidis.

§ 3. Quoties in actis iudicialibus partium aut testium subscriptio requiritur, si pars aut testis hanc facere nequeat vel nolit, id in ipsis actis adnotetur, simulque iudex et actuarius fidem faciant actum ipsum de verbo ad verbum parti aut testi perlectum fuisse, et partem aut testem vel non potuisse vel noluisse subscribere.

Can. 1644

§ 1. In casu appellationis, actorum exemplaria ad norman can. 1642, 1643 conscripta et in fasciculum religata, cum indice omnium actorum et documentorum et cum testificatione actuarii seu cancellarii de eorum fideli transcriptione et integritate, mittantur ad superius tribunal; si exemplaria sine gravi incommodo exscribi nequeant, mittantur cum opportunis cautelis acta ipsa originalia.

§ 2. Si eo mittenda sint ubi vernacula lingua non sit cognita, acta ipsa in linguam latinam vertantur,

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adhibitis cautelis ut de fideli translatione constet.

§ 3. Si acta debita forma et charactere confecta non fuerint, a iudice superiore repelli possunt: quo in casu illi, quibus culpa imputanda est, acta suis impensis denuo conficere et mittere tenentur.

CAN. 1645

§ 1. Iudicio expleto, documenta partibus restitui debent, nisi in criminalibus, bono publico ita exigente, iudex aliquod retinendum censuerit.

§ 2. Documenta omnia, quae apud tribunal manent, in archivo Curiae deponantur sive publico sive secreto, prout eorum natura exigit.

§ 3. Notarii, actuarii et cancellarius sine iudicis mandato tradere prohibentur exemplar actorum iudicialium et documentorum quae sunt processui acquisita.

§ 4. Anonymae epistolae quae nihil ad causae meritum conferunt, et etiam subscriptae quae sint certo calumniosae, destruantur.

Writing plays a conspicuous part in every trial, yet not all things that are or must be written are of equal importance. Some concern the *merits of the case* and are styled *acta causae*. To this class of documents belong all sentences, either interlocutory or final, and proofs of every kind, even those presented orally, because they, too, must be put down in writing. Other papers (*acta processus*) touch the mode or *form* of procedure. To this class belong the summons, intimations, the oaths taken, and, perhaps, the special rules laid down for proceeding in a particular case. If one should wish to call the *acta causae* "records," and the *acta processus* "minutes," he would, we believe, not commit a grievous mistake, al-

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though the word *records* has a wider significance, though not as wide as "minutes." Which of the *acta* must be put in writing in order to be valid is determined under each heading; thus, for instance, the summons must certainly be recorded (can. 1723 f.); but if no invalidating clause is attached, a trial cannot be attacked as invalid because some portion of the proceedings was not written out.

Some ecclesiastical acts are intended not only for private use, but for the Church at large,[2] whose language is Latin, and since these records in many cases must be forwarded to Rome, which acknowledges as official languages only Latin, Italian, and French,[3] all acts should, as far as possible, be composed in Latin, unless there is a just reason for departing from this rule. However, the questions put to the witnesses, their answers, the so-called *articuli* or specified charges and counter-charges of plaintiff and defendant, and also the reports of experts[4] are to be written in the vernacular language (see, however, can. 1644, § 2). Each and every sheet of the records as well as the minutes (*folia processus*) must be paginated and signed by the secretary, who has also to put the seal of the tribunal on each. As soon as any part of the acts (for instance, the defense, or the hearing of one set of witnesses, or the report of an expert) has been completed, the secretary should sign his name to the record, which is then passed on to the judge (or to the president of the tribunal, if a board of judges is sitting) for their respective signatures. This process must be repeated every time the session is interrupted or adjourned. The Code does not prescribe that only one page

2 S. C. C., Aug. 22, 1840 (*Coll. P. F.*, n. 911).

3 *Regulae S. R. R.*, Aug. 4, 1910, § 7 (*A. Ap. S.*, II, 785).

4 S. C. C., Aug. 22, 1840 (*l. c.*).

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of the sheet be written on, but we have become accustomed to use only one page. Typewriting is not excluded, but special ink should be used at least for important documents.

If the judicial acts have to be signed by the *parties to the trial and by the witnesses,* and these are either unable or unwilling to sign — they cannot be compelled to do so — this fact must be set down by the secretary or clerk in the minutes, and the record thereof accompanied by the testimony of the judge and the acting clerk that the acts were read to the respective parties or witnesses, and that they were either unable or unwilling to sign them (can. 1643).

The acts taken down and signed in the first instance or stage of a trial may be required for the *court of appeal.* In that case the original papers should remain with the court of the first instance and *copies* forwarded to the court of appeal. Each copy must be bound so as to form a booklet and contain a list of the minutes and records, and of all other documents, together with the attestation of the secretary, or clerk, or chancellor, that the copy is a faithful and complete transcript of the original text. If copies cannot be made without great inconvenience, the original text may be sent to the court of appeals, provided there is no danger that they be lost, abused, or damaged, or fall into strange hands. We hardly believe that a carbon duplicate, provided with the necessary signature, or a photographic reproduction with the signature in handwriting (no rubber stamp!) would be refused. If the acts are written in the vernacular (for instance, English) and have to be sent to a court (for instance, at Rome, where this language is unknown, or at least not officially acknowledged) they must be translated into Latin and the faithfulness of the translation guaranteed.

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Acts not composed in the proper form and style may be refused by the higher judge, and the official through whose negligence this has happened, is bound to have them redrawn and forwarded at his own expense (can. 1644).

Form refers to the condition of the sheets and the signatures.

Character may signify style, hence the expression "*stylus curiae,*" the style peculiar to judicial acts. The term "character" may also refer to the legibility of the acts and their arrangement; or to the language, which, as a rule, should be Latin, although if it is customary in a country to employ the vernacular, this fact would be a sufficient reason for composing the acts in that language. It sometimes requires an expert in both languages to translate certain terms into a dead language, and courts are not precisely intended for stylistic and linguistic exercises.

Here it may be added that a wise rule of the S. R. Rota prescribes that the written defence should not comprise more than twenty printed quarto pages, and the answers not more than ten pages of the same size.[5]

After the trial is *finished,* such documents as testimonials, deeds, letters of appointment, certificates, etc., which were required in court, must be restored to their owners. Only if the judge should deem it necessary to retain the one or other such document in a criminal case, may he keep it. But the documents which remain with the court (for instance, the charges and counter-charges, the depositions of witnesses, the defence, etc.) should be deposited in the diocesan archives, either the public or the secret archives — the latter in criminal and some secret marriage cases. The notaries, secretaries, and chan-

5 *Lex propria,* June 29, 1918; can. 29, § 1 (*A. Ap. S.,* I, 27).

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cellors [6] *are not allowed to give out copies of any judicial acts or documents* which have been acquired by reason of trials without a commission by the judge.

Anonymous letters which have little or no bearing on the merits of the case, and manifestly slanderous letters, though signed by their authors, must be destroyed.

6 What Archbishop (then Professor) Messmer wrote some twenty-three years ago (*Canonical Procedure*, 1897, p. 58) is still true: These different terms are "confoundedly confused"; neither can an adequate distinction be drawn from the Code. Hence a chancellor may act as notary and secretary, provided he can fill the office and is not otherwise employed in the same case; see can. 372.

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TITLE IV

THE PARTIES TO THE CASE

CHAPTER I

PLAINTIFF AND DEFENDANT

In each and every trial or case there is one who complains and one who is complained against, one who accuses and one who is accused. The accuser may be the judge himself, who, in certain criminal cases, must proceed *ex officio*.[1] Yet even in this instance he must have at least some knowledge of the case, gained from one source or another.

After setting forth the office of the judge and his duties, and outlining in general terms the mode and method of procedure, the Code now turns to the parties involved in a trial.

WHO MAY BE PLAINTIFF OR DEFENDANT

CAN. 1646

Quilibet potest in iudicio agere, nisi a sacris canonibus prohibeatur; reus autem legitime conventus respondere debet.

CAN. 1647

Licet actor vel reus conventus procuratorem vel advocatum constituerit, semper tamen tenetur in

1 Criminal action proper is reserved to the fiscal promoter; can. 1934.

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iudicio ipsemet adesse ad praescriptum iuris vel iudicis.

First, the general rule is laid down that *any one* not prevented by the Canon Law may be plaintiff. This is a natural and inalienable right which can be to some extent limited or taken away only by way of a judicial penalty.

The terms used to designate the plaintiff are *actor, agere in iudicio, habere personam standi in iudicio,*[2] from which it may be seen how intimately this right is connected with the personal rights of man. Nor is it surprising that the Roman Law, which refused to acknowledge slaves as persons, should deny them the right of being plaintiffs, except in a very few cases of later date. Christianity knows no slaves in the Roman sense of the word. However, the exercise of personal rights supposes certain necessary personal faculties, of reason and will. Therefore the law provides for cases which concern persons not fully developed. Besides, some kind of a dependent will must be acknowledged in religious and moral persons or corporations which have a corporate will. Lastly, the law may, as stated, deprive certain delinquents of the right of acting as plaintiffs; as *defendants* all must be admitted, and all must answer when called to a trial, or sued, or accused, as otherwise criminals might profit by their malice.[3]

The question arises whether plaintiff and defendant, when duly and personally summoned, must appear *personally* before the judge. The answer is given in can. 1647, according to a Decretal[4] of Boniface VIII, but in a more extended form. Plaintiff and defendant may present their case by proxy or through advocates (law-

2 This term might be rendered by *right to prosecute.*

3 Cfr. c. 7, X, II, 1; c. 11, X, V, 1.

4 C. 1, X, 6°, II, 1, which mentions only delegated judges.

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yers) unless the law — which here means first and above all, the common law, then also a particular law which does not contradict the common law — or the judge demand their personal presence. The supreme judge, *i. e.*, the Pope may give the power to summon the parties personally in his letter of delegation in criminal cases. But even in civil cases the judge who acts by virtue of his office may demand the personal appearance of either plaintiff or defendant, for instance, to test his mental capacity or character, or whenever the *iuramentum calumniae* is to be administered.[5]

MINORS

CAN. 1648

§ 1. Pro minoribus et iis qui rationis usu destituti sunt, agere et respondere tenentur eorum parentes aut tutores vel curatores.

§ 2. Si iudex existimet ipsorum iura esse in conflictu cum iuribus parentum vel tutorum vel curatorum, aut ipsos tam longe distare a parentibus aut tutoribus vel curatoribus, ut hisce uti aut minime aut difficulter liceat, tunc stent in iudicio per curatorem a iudice datum.

§ 3. Sed in causis spiritualibus et cum spiritualibus connexis, si minores usum rationis assecuti sint, agere et respondere queunt sine patris vel tutoris consensu; et quidem, si aetatem quatuordecim annorum expleverint, etiam per seipsos; secus per tutorem ab Ordinario datum, vel etiam per procuratorem a se, Ordinarii auctoritate, constitutum.

[5] Santi-Leitner, II, 1, n. 19.

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CAN. 1649

Nomine eorum de quibus in can. 100, § 3, stat in iudicio rector vel administrator, firmo praescripto can. 1653; in conflictu vero eorum iurium cum iuribus rectoris vel administratoris, procurator ab Ordinario designatus.

CAN. 1650

Bonis interdicti, et ii qui minus firmae mentis sunt, stare in iudicio per se ipsi possunt tantummodo ut de propriis delictis respondeant, aut ad praescriptum iudicis: in ceteris agere et respondere debent per suos curatores.

CAN. 1651

§ 1. Ut curator ab auctoritate civili alicui datus a iudice ecclesiastico admittatur, debet accedere consensus Ordinarii proprii illius cui datus est.

§ 2. Ordinarius potest quoque alium curatorem constituere pro foro ecclesiastico, si, omnibus mature perpensis, id statuendum esse prudenter censuerit.

To act personally at trials requires a normally developed mind and will. Personal rights cannot properly be exercised by infants or minors who lack judgment, and, consequently, to secure them from hurting themselves by improvident acts, not only the ecclesiastical, but the civil courts also, give them guardians.[6] Like unto infants are those adults who lack either the actual or the habitual use of reason. Therefore can. 1648 rules that for *minors* and those adults who lack the use of reason, parents or guardians are obliged to act as plaintiffs or defendants.

6 Blackstone-Cooley, *Comment.*, I, 464.

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The text says: "*aut tutores aut curatores.*" These two terms are comprised by the one English term *guardians,* although the Roman as well as ecclesiastical law draw a distinction between *tutores,* who are given to *impuberes,* and *curatores,* who are appointed for those who have reached *puberty,* but have not yet completed the age of twenty-one.[7] Also note the term "*tenentur*"; parents or guardians have the same obligation as the plaintiff or defendant himself, according to can. 1647.

However, it may be that parents or tutors have personal interests[8] of their own involved in a trial, and that these interests clash with the rights of the children or mentally incapacitated wards. In that case the judge should appoint a guardian. The same rule applies if the parents or guardians live so far away from the residence of their children or wards that they can not be present at the trial or can attend only with great difficulty. Attendance would be difficult if the distance were great or travelling inconvenient or expensive, or if there were danger of seriously delaying the trial.

The ecclesiastical law naturally favors *spiritual matters,* and matters closely connected with these, for instance, the Sacraments, *iuspatronatus* and beneficiary cases, pious legacies, etc. In all such cases minors who have attained the use of reason may act as plaintiffs or defendants without the consent of their parents or guardians; and after completing the age of fourteen, they may act by themselves without a procurator. But before they have completed the fourteenth year of age, minors, or rather

[7] The *tutor* had charge of the maintenance and education of the minor; the *curator* had the care of his fortune; or in English law terms: the *tutor* was the committee of the person, the *curator* the committee of the estate (Blackstone-Cooley, *l. c.,* I, 460).

[8] This may easily happen if the religion of the minor is at variance with that of the tutors, and these are bigots.

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impuberes, must be represented at trials by a guardian appointed by the Ordinary, or by a procurator whom they have chosen with the approval of the Ordinary. Thus disputed engagements of minors may be answered in court by the parties themselves if [9] they are over fourteen, and this holds not only for young men, but also for girls, because the text does not discriminate as to sex.

Can. 100, § 3, compares *moral* or artificial persons, whether corporate or non-corporate, with minors. If such are called to judgment, their rector or administrator must represent them (can. 1653). But if the rector or administrator has a special interest in the trial, which might clash with the interests or rights of the corporation or juridical entity which he represents, a procurator must be appointed for said juridical persons.

Can. 1650 considers the case of *prodigals* (*bonis interdicti*) and *weak-minded persons*. We say prodigals, because the Roman law put spendthrifts, who were supposed to be incapable of managing their own affairs, under guardianship.[10] The reason for this is to be sought partly in the abnormal mental condition which shows itself in one who squanders his property, and partly in the fact that such a person may not be able to defray the expenses of a trial. The aforesaid persons, then, need appear personally only in criminal cases or when the judge demands their personal presence, which he may, even in civil cases, as explained under can. 1647. Otherwise their curators may appear for them.

If *curators* have been appointed by the *civil authority*, must the ecclesiastical judge admit them? Yes, answers

[9] C. 14, X, II, 13; c. 3, 6°, II, 1.

[10] L. 1, Dig. 27, 10: "*Lege XII tabularum prodigo interdicitur bonorum suorum administratio.*" In Scotch law, *interdict* means a legal restraint from executing deeds imposed on persons of weak mind; Stimson's *Law Dictionary*, 1911, s. v. "Interdict."

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can. 1651, provided the Ordinary of the ward to whom the civil authority has given a curator, consents. But the same Ordinary may, if he deems prudent, appoint another curator.

Note that in canons 1648, § 3, 1649, 1651 the apposition *loci* is omitted, and hence, according to can. 198, the superiors of clerical exempt institutes are also competent.

RELIGIOUS AS PLAINTIFFS

CAN. 1652

Religiosi sine Superiorum consensu non habent personam standi in iudicio, nisi in casibus qui sequuntur:

1.° Si de vindicandis adversus religionem iuribus sibi ex professione quaesitis agatur;

2.° Si ipsi extra claustra legitime morentur et iurium suorum tuitio urgeat;

3.° Si contra ipsum Superiorem denuntiationem instituere velint.

Since religious have abdicated the habitual or actual right of holding property — which is the cause of most legal quarrels — and transferred it to the monastery, and since, besides, they depend on the will of their superiors, it follows that, to prosecute their rights as individual religious, they need the *consent of their superiors*.[11] But there are a number of exceptions, which the Code reduces to three, to wit:

1.° When a religious wishes to *prosecute rights which he has acquired* by reason of his *religious profession*, against the institute to which he belongs, he may proceed without the superior's permission. Thus if a sentence

11 Cfr. c. 11, C. 12, q. 1; c. 35, C. 16, q. 2; c. 7, X, I, 31; c. 6, X, III, 35.

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of dismisal or expulsion was inflicted, and the religious believes he has just reason to complain against the same, he may bring the case before the superior (provincial or abbot) and also appeal to the higher court (general or abbot president); he may do this also in case he was deprived of the right of voting (active or passive).[12]

2. If a religious lawfully dwells outside the enclosure and is compelled to defend his rights, he may proceed to do so without the superior's permission. Thus a religious who, by reason of his studies (see can. 606, § 2), is absent from his monastery, is lawfully absent, and may defend his rights in the ecclesiastical and civil courts according to can. 120; a religious who is rector of a church, or administrator of a pious foundation, or chaplain of an institution, may defend his case, because his office involves the right of defence, and the permission of his superior is included in the appointment to office.[13]

3. Finally, individual religious may *denounce* their own *superiors* and prosecute the case at the expense of the monastery. The sources from which our text is taken[14] mention in a general way the right of accusing superiors who commit crimes, but the second text has in view especially the reformation of monasteries. A criminal charge is never or rarely to be brought against superiors; rather, as our text says, should denunciation be made to the next higher superior, who shall decide what course is to be taken.[15]

12 Cfr. c. 22, X, I, 3; Santi-Leitner, II, 1, n. 17.

13 C. 16, X, II, 1; c. 1, Clem. I, 2; Reiffenstuel, II, 1, n. 167.

14 Cc. 11, 26, X, V, 1.

15 Wernz, *l. c.*, V, n. 166. Besides, it must be understood of crimes, not of mere transgressions, for instance, of a rubric which perhaps cannot be carried out on account of circumstances and admits a common-sense interpretation, nor of every transgression of a minor ecclesiastical law.

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ORDINARIES AND CORPORATIONS

CAN. 1653

§ 1. Ordinarii locorum possunt nomine ecclesiae cathedralis aut mensae episcopalis stare in iudicio; sed, ut licite agant, debent audire Capitulum cathedrale vel Consilium administrationis eorumve consensum vel consilium habere, quando periculo vertitur pecuniae summa pro qua alienanda ad normam can. 1532, §§ 2, 3 eorundum consensus vel consilium requiritur.

§ 2. Beneficiarii omnes nomine beneficii possunt in iudicio agere aut respondere; quod tamen ut licite faciant, servare debent praescriptum can. 1526.

§ 3. Praelati ac Superiores Capitulorum, sodalitatum et quorumlibet collegiorum stare in iudicio nequeunt, nomine suae cuiusque communitatis, sine eiusdem consensu ad normam statutorum.

§ 4. Adversus eos de quibus in §§ 1–3, si sine praescripto consensu aut consilio in iudicio egerint, piae causae aut communitati ius est ad refectionem damnorum.

§ 5. In casu vero defectus vel negligentiae illius qui administratoris munere fungitur, potest ipse loci Ordinarius per se vel per alium stare in iudicio nomine personarum moralium quae sub eius iurisdictione sunt.

§ 6. Superiores religiosi nequeunt nomine suae communitatis stare in iudicio, nisi ad normam constitutionum.

The right of *standi in judicio* by reason of administration, is a limited right because, like that of alienation, it is liable to restrictions or formalities set up by the law.

1. *Local Ordinaries* may prosecute for the rights attached to the cathedral church or to the *mensa episcopalis*.

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But in order to act lawfully (*licite*) they must have the consent or advice of the chapter (diocesan consultors) or the board of administrators (according to can. 1532, § 2, 3 on alienation).

2. *Beneficiaries* (which name certainly comprises our pastors) may act as plaintiffs or defendants in the prosecution of beneficiary rights, but for so doing they need the written consent of the local Ordinary, or, in urgent cases, that of the rural dean, according to can. 1526.

3. Prelates and superiors of chapters, sodalities, and collegiate bodies cannot go to court in the name of their communities without the consent of the latter, as required by their statutes. The statutes may distinguish between the revenues, or property proper to the prelate or superior, or at least subject to his personal and exclusive administration, and goods which the prelate or superior administers in the name of the community. For these latter rights the superior needs the consent or advice of his chapter or council according to the rules laid down in the constitution or bylaws. Concerning the goods or property which the superior administers in his own name, he is not tied to the consent or advice of chapter or council.[16] However, in religious communities with solemn vows, this distinction has little weight, except in orders where the *peculium* still exists.

§ 6, therefore, simply rules that *religious superiors* of male and female organizations cannot go to court in the name of their community except in so far as their constitutions permit.

4. Those persons mentioned under nn. 1–3, if they go to court without the prescribed consent or advice, *are*

16 Cfr. c. 21, X, I, 3; c. 16; X, II, 1; Reiffenstuel, II, 1, n. 170 ff. In America, as far as we know, there is no distinction between the *mensa abbatis* and the *mensa communitatis*.

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bound to make restitution of the damage caused to the *pia causa* or community by their action. The bishop is held to repair the damage to his cathedral or *mensa episcopalis,* the beneficiary to his benefice, prelates and superiors to their community. Of course, religious superiors who have no property of their own cannot be held to restitution, except as far as they are able and it is compatible with the vows, as stated elsewhere.[17]

5. If there is no administrator, or if he is negligent, the local Ordinary may himself or by proxy prosecute the case in the name of those juridicial persons who are subject to his jurisdiction, as, for instance, diocesan congregations.

EXCOMMUNICATED PERSONS

CAN. 1654

§ 1. Excommunicatis vitandis aut toleratis post sententiam declaratoriam vel condemnatoriam permittitur ut per se ipsi agant tantummodo ad impugnandam iustitiam aut legitimitatem ipsius excommunicationis; per procuratorem, ad aliud quodvis animae suae praeiudicium avertendum; in reliquis ab agendo repelluntur.

§ 2. Alii excommunicati generatim stare in iudicio queunt.

Those who are under a sentence, either declaratory or condemnatory, of excommunication, either as *vitandi* or *tolerati,* are allowed to appear as plaintiffs in ecclesiastical trials only in case they wish to plead against the justice or legitimacy (validity) of the sentence of excommunication, and in this case they may defend *themselves.* But

17 Cfr. Vol. III, p. 273 of this Commentary.

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if they wish to ward off spiritual injury or damage, they should act by *proxy*. If they are called into court in some other case, they must of course obey.[18]

All other persons, even though excommunicated, are admitted as plaintiffs. From this it would follow that non-Catholics are not excluded from ecclesiastical courts, as long as no declaratory sentence has been pronounced against them. (*De facto* they are excommunicated; can. 2314).

18 Cfr. c. 7, X, II, 1; c. 2, 14, 6°, V, 11; a spiritual damage would be a marriage case or danger of spiritual ruin; Wernz, Vol. V, n. 168.

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CHAPTER II

ATTORNEYS AND COUNSELS (ADVOCATES)

The difference between attorneys and counsels is explained by the commentators on Book I, tit. 38, *de procuratoribus*.[1] But much of what they say can hardly be applied to-day. We may say, broadly, that an attorney acts *ex officio*, while a counsel acts at random or upon the demand of the client. We did not get much enlightenment from perusing the English terminology,[2] in order to establish an adequate distinction between barristers, attorneys, advocates, and proctors. In the last analysis all these terms signify persons who plead the cause of others.

Our Code lays down certain conditions for a procurator which are not applicable to a counsel (see 1656, § 2). The procurator has limited power, whereas the counsel is not limited by established restrictions. Apart from this, as the Code itself admits, the distinction is but slight

CHOICE OF ATTORNEYS AND COUNSELS

CAN. 1655

§ 1. In iudicio criminali reus aut a se electum aut a iudice datum semper habere debet advocatum.

§ 2. Etiam in iudicio contentioso, si agatur de minoribus aut de iudicio in quo bonum publicum vertitur, iudex parti carenti defensorem ex officio at-

1 Cfr. Reiffenstüel, I, 38, nn. 7 ff.
2 Cfr. Stimson's *Law Dictionary, s. v.*

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tribuat, aut, si casus ferat, parti etiam habenti alium adiungat.

§ 3. Praeter hos casus pars libere potest advocatum et procuratorem constituere, sed potest quoque in iudicio per se ipsa agere et respondere, nisi iudex procuratoris vel advocati ministerium necessarium existimaverit.

§ 4. At Episcopus, si quando in causa est, aliquem constituat, qui eius personam, procuratorio nomine, gerat.

CAN. 1656

§ 1. Unicum quisque potest eligere procuratorem, qui nequit alium sibimet substituere, nisi expressa facultas eidem facta fuerit.

§ 2. Quod si, iusta causa suadente, plures ab eodem deputentur, hi ita constituantur, ut detur inter ipsos locus praeventioni.

§ 3. Advocati autem plures simul constitui queunt.

§ 4. Utrumque munus, procuratoris et advocati, etiam in eadem causa et pro eodem cliente eadem persona exercere potest.

In *criminal* cases the defendant *must choose* a counsel, or at least accept one appointed by the judge. This is now the rule,[3] though it appears to have been discountenanced by the Decretals,[4] which, perhaps owing to a confusion of the counsel with the proctor, rather deny that right or duty.

The appointment of a counsel may be made even against the will of the defendant (*"semper debet habere."*)

In *civil* cases also a *defensor* (the same as counsel or

3 S. C. EE. et RR., June 11, 1880, n. 30 f. (*Coll. P. F.*, n. 1534).

4 C. 1, 6°, I, 19; Santi-Leitner, II, 1, n. 19.

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advocatus) must be appointed by the judge for minors or in cases concerning the public welfare, if the parties have no counsel. Besides, if a counsel or lawyer chosen by the parties, or by the civil authorities, proves undesirable or lacks the necessary qualities, as described in can. 1657, the judge may appoint another counsel. This appointment, in all the cases mentioned, is *ex officio, i.e.*, the judge is in duty bound to make it.

With the exception of these cases, then (*viz.*: criminal cases, civil cases of minors or public interest, and of counsels not acceptable) it is left to the parties to the trial either to choose a counsel or defend their own case, unless the judge deems it necessary that a proctor or counsel should be chosen, as in case the defendant has not the necessary knowledge of legal procedure or the qualities of equipoise and calmness necessary to defend his case effectively. Besides, it may also be that the person himself does not care to be dragged into court, or that his or her state of life does not permit him or her to leave home.[5]

If the *bishop* is a party to a case, he should designate a proctor or attorney to act in his name. This rule was made to protect the episcopal dignity and to save bishops the trouble of leaving their pastoral occupations.[6]

Can. 1656 rules that only *one* attorney or *procurator* may be chosen by each party. This one cannot be substituted by another, unless he has obtained special permission to that effect. One reason for this ruling lies in the certainty required.[7] We believe another reason is that the procurator is chosen *de industria personae, i.e.*, on account of personal fitness, which may not be found in the substitute.

5 Cfr. cc. 1, 3, 6°, II, 1; Messmer, *l. c.*, p. 74.

6 *Trid.*, Sess. 13, c. 6, *de ref.*

7 C. 1, 6°, I, 19; Reiffenstuel, I, 38, n. 56.

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If *several proctors* are chosen, which can be done only for good reasons, these must be appointed to *act in solidum, i.e.,* the one who first takes hold of the cast must bring it to a finish.[8]

Counsels or *lawyers* are not limited as to number, and the parties to a trial may therefore choose several without restriction,

The office of proctor and counsel may be held by *one and the same person,* who may act in the same case and for the same client. In this case the limit as to number would certainly cease to be effective.

QUALITIES AND CONDITIONS OF ATTORNEYS AND COUNSELS

CAN. 1657

§ 1. Procurator et advocatus esse debent catholici, aetate maiores, bonae famae; acatholicus non admittitur, nisi per exceptionem et ex necessitate.

§ 2. Advocatus debet praeterea esse doctor vel alioqui vere peritus, saltem in iure canonico.

§ 3. Religiosus admitti potest, nisi aliud in constitutionibus caveatur, in causis tantum in quibus vertitur utilitas suae religionis, de licentia tamen Superioris.

CAN. 1658

§ 1. Quilibet pro lubitu a parte potest eligi et deputari procurator, dummodo secundum praecedentem canonem idoneus sit, quin opus sit ut Ordinarii approbatio antecesserit.

§ 2. Advocatus autem, ut ad patrocinium admittatur, indiget approbatione Ordinarii, quae aut generalis sit ad omnes causas aut specialis pro certa causa.

8 Reiffenstuel, *l. c.,* n. 24.

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§ 3. In iudicio coram Sanctae Sedis delegato, ipsius delegati est approbare et admittere advocatum, quo pars uti se velle ostenderit.

§ 4. Procurator et advocatus, in causis quae ad normam can. 1579, §§ 1, 2 aguntur in religionis tribunali, eligendi sunt ex eadem religione et ante patrocinii susceptionem approbandi ab eo, qui partes iudicis in causa agit; in causis vero quae ad normam eiusdem canonis § 3 apud tribunal Ordinarii loci pertractantur, admitti potest etiam religioni extraneus.

Attorneys and counsels must be *Catholics;* they must have completed the legal age of twenty-one years, and be of good moral standing. *Non-Catholics* are admitted only by way of exception and in cases of necessity.[9]

The text has a general bearing and requires only three qualities: religion, age, and reputation. Hence laymen and women are not excluded. The Roman law permitted women to act for their parents when sickness or age prevented them.[10] The third qualification would seem to exclude excommunicated and infamous persons.[11] However, since heretics are excommunicated, and are nevertheless admitted in cases of necessity, a rigid exclusion of censured persons can hardly be maintained. In cases of *necessity,* which should at the same time be exceptional, non-Catholics may act as attorneys or counsels for the defence. An able lawyer of a non-Catholic denomination may be more successful in defending a case; we could give instances of this.

[9] This canon may also be applied to cases of appeal, for instance, of parishioners who have recourse from the bishop's decree concerning boundary lines to the Apostolic Delegate; the latter should not be more lenient than the law prescribes for courts, especially if Catholic lawyers or attorneys are available.

[10] L. 41, Dig. 3, 3; but the mother was not allowed to act as defender of her orphan son; l. 18, Cod. II, 12.

[11] C. 7, X, II, 1; cc. 1, 2, C. 3, q. 7.

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Since juridical knowledge is also required, and the Code demands that counsel for defence be a *doctor* of canon law, or at least an expert in that science, it is evident that if this quality were wanting in a Catholic lawyer, but found in a non-Catholic lawyer, the case of necessity would be verified. The same rule may be proportionately applied to *Freemasons,* who belong to a condemned sect.

Religious may be admitted as attorneys and counsels to defend their own institute with the permission of their superiors and constitutions. If a religious has the same case to defend, according to can. 1652, he can be chosen procurator or counsel by the litigant religious; otherwise he needs the permission of his superior either for appointing, or being appointed as, or for acting as a substitute for, a procurator.[12]

Provided one has the qualities described in can. 1657, he may be chosen and appointed *procurator* without the formal approbation of the Ordinary. But in order to be chosen and admitted as *counsel for the defence* he must be approved by the Ordinary, who may grant that license once for all, *i.e.,* for all cases, or for a special case only.

In trials conducted before a *delegate of the Holy See,* the delegate himself is entitled to approve and admit the counsel desired by the defendant.

For trials which, according to can. 1579, § § 1, 2, are conducted exclusively by and for *religious,* the proctor and counsel for the defence are to be chosen from among the members of the institute in question. Before they assume the defence they must be approved by the judge. In cases to be tried by the local Ordinary, according to § 3, can. 1579, outsiders, *i.e.,* persons who are not members of the same religious institute, may be admitted as procura-

12 C. 3, Clem. I, 10.

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tors or counsels, provided they have the qualifications described in can. 1657, § § 1 and 2.

MANDATE OF ATTORNEY AND COUNSEL

CAN. 1659

§ 1. Procurator ne prius a iudice admittatur quam speciale mandatum ad lites scriptum, etiam in calce ipsius citationis, mandantis subscriptione munitum, et locum, diem, mensem et annum referens, apud tribunal deposuerit.

§ 2. Quod si mandans scribere nesciat, hoc ipsum ex scriptura constet necesse est, et parochus vel notarius Curiae vel duo testes, loco mandantis, mandatum subsignent.

CAN. 1660

Mandatum procurationis asservari debet in actis causae.

CAN. 1661

Advocatus, ut causae patrocinium suscipiat, habeat necesse est a parte vel a iudice commissionem ad instar mandati procuratorii, de qua in actis constare debet.

CAN. 1662

Nisi speciale mandatum habuerit, procurator non potest renuntiare actioni, instantiae vel actis iudicialibus, nec transigere, pacisci, compromittere in arbitros, deferre aut referre iusiurandum, et generatim ea agere pro quibus ius requirit mandatum speciale.

A proctor needs a special written commission, which is called *mandatum ad lites*. Before he has deposited this mandate with the tribunal, he cannot be admitted by the

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judge. The mandate must be signed by the *mandans* and note thereof must be made at the bottom of the official summons, from which fact it may be inferred that the mandate must be issued by the *mandans* before the summons, because after that proceeding the case has taken a legal turn (*res non amplius integra*).

The *mandate must mention the place where, and the day, month and year* when it was issued. If the *mandans* is unable to write, this fact must be noted, and the pastor or notary public of the ecclesiastical court or two witnesses must sign the mandate in his stead. The document by which a special mandate is issued to a proctor must be placed among the judicial acts of the trial.

A special mandate is required for all cases, for the text is general and therefore no cases or persons are excepted.[13] This is a very appropriate measure, because if no special mandate were necessary, there might be uncertainty as to the power of the mandatory and a loophole left for the party to attack the sentence by pleading incompetency of the proctor. Hence this special mandate, although given *ad lites,* and perhaps for all cases of a judiciary character, must define in clear terms the power of the proctor and its extent.

This special mandate *ad lites* differs from the one mentioned in can. 1662, which is also called a special mandate, but not included in the one named in can. 1659, unless expressly so determined and set down in writing. This special mandate concerns: foregoing actions, instances, and judicial acts; it may also concern transactions, agreements, compromises on arbiters, giving and requiring the oath of the other party,—all acts for which a special mandate is necessary.

13 The commentators allowed exceptions for relatives and co-litigants; Reiffenstuel, I, 38, n. 80 f.

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The *counsel,* too, must have a commission, similar to the procuratorial mandate, either from the parties or from the judge, before he can take up the defence; and the judicial acts must take note of this commission.

REMOVAL OF ATTORNEY AND COUNSEL

CAN. 1663

Tum procurator tum advocatus possunt a iudice, dato decreto, repelli sive ex officio sive ad instantiam partis, iusta tamen de causa.

CAN. 1664

§ 1. Advocati et procuratores possunt ab eo a quo constituti sunt, removeri, salva obligatione solvendi honoraria ipsis debita; verum ut remotio effectum sortiatur, necesse est ut ipsis intimetur, et, si lis iam contestata fuerit, iudex et adversa pars certiores facti sint de remotione.

§ 2. Lata definitiva sententia, ius et officium appellandi, si mandans non renuat, procuratori manet.

CAN. 1665

§ 1. Vetatur uterque emere litem, aut sibi de immodico emolumento vel rei litigiosae parte vindicata pacisci.

§2. Quae si fecerint, nulla est pactio, et a iudice vel ab Ordinario poterunt poena pecuniaria mulctari; advocatus praeterea tum ab officio suspendi, tum etiam, si recidivus sit, destitui et titulo privari.

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CAN. 1666

Advocati ac procuratores qui ob dona aut pollicitationes aut quamlibet aliam rationem suum officium prodiderint, ab officio repellantur, et, praeter damnorum refectionem, mulcta pecuniaria aliisve congruis poenis plectantur.

The attorney as well as the counsel for the defence may be *rejected* by the judge, who in that case must issue a corresponding decree, either *ex officio* or upon demand of the party.

However, a just cause is required for such action. Such a cause would be the fact of relationship or suspicion of conspiracy or inability discovered later.

The counsel as well as the procurator may be *discharged* by those who appointed them, provided, of course, their salaries have been paid or guaranteed. Besides, since a mandate was given, the revocation must be intimated to the proctor or counsel and also to the judge and the other party, after the *litis contestatio*. After this stage it is generally supposed that a just reason is required for revocation because of the expenses already incurred and of the good name of the attorney and counsel.[14] No reason, however, is required if the party who has appointed a proctor or counsel dies before the case has taken a legal turn, *i.e.*, before the judicial summons have been issued.

After the definitive or final sentence the *attorney is entitled and obliged to appeal* the case if his client does not object.

Attorney as well as counsel are forbidden to buy the case or to *make an agreement* as to large profit or part of the disputed object. Every such agreement is null and

14 Reiffenstuel, I, 38, n. 136.

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void, and the transgressor may, besides, be fined by the judge or Ordinary; the counsel may be suspended and, in case of relapse, be removed and deprived of his title.

Counsels or attorneys who allow themselves to be *bribed by gifts or promises,* or in any other way, thus betraying their trust, must be removed, condemned to repair the damage done, and fined by the court.

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TITLE V.

ACTIONS AND EXCEPTIONS

IN GENERAL

CAN. 1667

Quodlibet ius non solum actione munitur, nisi aliud expresse cautum sit, sed etiam exceptione, quae semper competit et est suapte natura perpetua.

CAN. 1668

§ 1. Qui ad rem sibi vindicandam, seu ad ius suum in iudicio persequendum titulo agit iuris auctoritate subnixo, actione dimicat quae *petitoria* dicitur.

§ 2. Si vero rei possessionem vel iuris quasi-possessionem postulat, eius actio *possessoria* vocatur.

CAN. 1669

§ 1. Actor pluribus simul actionibus, quae tamen secum ipsae non confligant, sive de eadem re, sive de diversis, reum convenire potest, si aditi tribunalis competentiam non egrediantur.

§ 2. Reus non prohibetur pluribus exceptionibus etiam contrariis uti.

CAN. 1670

§ 1. Actor potest una instantia cumulare actiones possessorias et petitorias, nisi spolii exceptio ex adverso opponatur.

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§ 2. Pariter fas est reo convento in petitorio, actorem reconvenire in possessorio; et viceversa, nisi res sit de spolio.

CAN. 1671

§ 1. Item fas est actori, antequam conclusum fuerit in causa, ab instituto iudicio petitorio regredi ad possessorium adipiscendae vel recuperandae.

§ 2. Imo ex iusta causa iudex etiam post conclusionem in causa, sed ante sententiam definitivam, hunc regressum permittere potest.

§ 3. Iudicis est, attentis partium allegationibus, aut utramque quaestionem unica sententia definire, aut prius uni, postea alteri satisfacere, prouti magis expedire ipsi videatur ad celeriorem et pleniorem iurium tuitionem.

What the Code sets forth in this title really forms part of the legal proceedings, because, according to the structure of the Roman trial, the *actio* as well as the *exceptio* were brought after the summons. However, they are appropriately treated here because they are remedies granted by law to redress grievances or injuries, and to reply to these by the defendant. For every right may be supported and sustained, not only by an action, but also by an exception, unless the law expressly forbids the latter.

Actio signifies the cause or legal demand of a right, either corporeal or incorporeal, spiritual or temporal. In Roman law it meant a certain prescribed form of words derived directly from the law upon which the claim was founded. To this form it was necessary to adhere strictly. The parties having appeared before the praetor, the plaintiff stated his claim (*intentio*) and asked leave to bring the suit into court (*actionem postulabat*). The defend-

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ant then either denied his liability or put in a plea in law (*exceptio*).[1] Such an exception or counter-charge is also admitted in ecclesiastical courts. It is always within the right of the defendant to put in this plea, which is by its very nature perpetual. Thus although prescription may eliminate penal action in criminal cases, yet the right of exception always remains intact ("*temporalia ad agendum, perpetua sunt ad excipiendum*").[2] This also holds good concerning possessory claims, as shall be seen under can. 1698.

There are two actions, especially in civil cases, which are here taken over from former law sources:[3] the one by which the plaintiff seeks to vindicate a thing in court or a right founded, as he believes, on the authority of law. This action is called petitory (*actio petitoria*). The other by which the plaintiff claims possession or quasi-possession of a thing (*actio possessoria*). For in every complete title to an object of right, either movable or immovable, two things are necessary: the possession or *seisin,* and the right or property, which in terms of old English law was called *iuris et seisinae coniunctio.*[4]

Possession or seisin may be severed from property, although in common parlance the two terms are used promiscuously. Possession is the retention of an object in which bodily and mental occupation concur with the law ("*rei detentio corporis, animi, iuris adminiculo suffulta*"). *Ius* here is taken, not in the subjective sense, to designate the moral faculty of holding a thing, but rather in the objective sense, to designate the law which

1 Cfr. Ramsay-Lanciani, *Roman Antiquities,* 1901, p. 32 ff.; the five *legis actiones* were: *sacramento, per judicis postulationem, per convictionem, per manus iniectionem, per pignoris captionem;* later these were superseded to a great extent by the *formula petitoria* and by *sponsio.*

2 S. C. EE. et RR., March 8, 1898 (*Coll. P. F.,* n. 1992).

3 See X, II, 12.

4 Blackstone-Cooley, *Comment.,* III, 176.

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protects the possessor.[5] Of course, where there is no title at all, either at the beginning or in the course of occupation, the ecclesiastical law (differing here from the Roman law) never defends possession, but the *auctoritas iuris* ceases.

The term *quasi-possession* in our Code indicates rights which are not properly possessed, but are incorporeal, for instance, the right of election. However, even in this case a visible or manifest assertion is required, as the text in the Decretals clearly proves.[6] Hence also in holding an immaterial right, a tangible proof or fact is necessary, and therefore the definition given above is to the point.

Property is a right to some thing, especially a corporeal object, by which the holder is empowered to dispose of it at his pleasure, to the exclusion of others. Property differs from possession in more than one way. Possession means the right of retaining a thing, whereas property is the title by which one vindicates something as his own. Again, property may be acquired by merely mental action, whereas possession requires actual holding, etc., etc.[7]

It is evident that the *causa proprietatis* is more important, but also more difficult to prove, than the *causa possessionis,* which, even though called momentary or transient, is more palpable.

If a plaintiff thinks he has *several cases,* either concerning the same object or different objects, he may bring them to court together, provided, of course, the respective tribunal is competent in all and there is no conflict between the different claims. On the other hand, the

5 Santi-Leitner, II, 12, n. 2.

6 C. 3, X, II, 12; the lower clergy of Sutri (in Italy) claimed the right of voting at the election of the bishop, and had exercised this right at the election of three bishops, — which was a manifestation of the title involved and was acknowledged by the pope; see c. 16, X, II, 2.

7 Reiffenstuel, II, 12, n. 30 ff.

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defendant is allowed to put in a counterplea to all the cases brought against him. Thus an advowee may bring suit for the right of presentation and the support he thinks he is entitled to, if he was disturbed in his possession. The mere fact of such a suit could be taken cognizance of by a lay judge, but the *ius patronatus* or the right of property cannot be decided by the lay judge, who therefore lacks competency.[8]

The plaintiff may bring a possessory and a petitory claim at the same time and before the same judge. On the other hand, the defendant is allowed to oppose to the petitory claim of the plaintiff his counterclaim of possession, and conversely. This is called bulking, or *cumulatio causae possessionis cum causa proprietatis.* For instance, a pastor who has been removed for some reason, claims salary due him. To obtain full justice he may assert that he is still the lawful pastor and in possession of the parish, although removed. The petitory claim is the title to the pastorship, the possessory claim, the actual holding of the parish. His rival may be able to prove that N. is not the pastor, or that N. has never held the legal title. These two conflicting claims may be settled at the same trial. Nor is it useless to bulk both claims, because the question may thus be more speedily settled. Besides, there is question of restitution. For the plaintiff may be victorious as to the petitory claim, but not as to the possessory claim, and in that case the revenues are due to him from the time when the petitory claim was settled, but not for the previous period.[9]

Bulking is not permitted in cases of disseisin (*causae spolii*) because these require the return of the object vio-

8 Cc. 2, 3, X, II, 1; Santi-Leitner, II, 12, n. 12.

9 Cc. 2, 3, 4, X, II, 12; c. 1, X, II, 13; Santi-Leitner, II, 12, n. 13 ff.

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lently seized to the original possessor, or at least that it be put in a safe place.

The law also allows the plaintiff *to change* the sequence of his claims. Thus if he brought the petitory cause or claim to property first, he may waive it for a time and have the possessory right settled first. However, this may concern only the right of obtaining or regaining possession, but not of retaining it, because he who claims possession in law, is not supposed to be in possession. Besides, this change is allowed only before the *conclusio causae, i.e.*, before all the proofs and depositions are given and the parties have renounced the right to produce additional evidence.[10]

The judge himself may, for a just reason, permit this change before the final sentence. Such a reason may be the quicker settlement of the disputed case and the saving of expense.

The judge may also decide a twofold controversy involving petitory and possessory claims *by one sentence,* if the allegations were such as to comprehend the whole case. Or he may first decide one claim and then the other, if he regards such action as conducive to the quicker and better defence of the rights at issue.

The Code now proceeds to consider various actions, or rather remedies of law and counterpleas, which must be settled before the final or definitive sentence can be rendered, and which tend to secure a full adjustment as well as security from damages and injuries while the case is pending.

10 Cfr. c. 36, X, II, 20.

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CHAPTER I

SEQUESTRATION AND INHIBITION

CAN. 1672

§ 1. Qui ostenderit super aliqua re ab alio detenta ius se habere sibique damnum imminere nisi res ipsa custodienda tradatur, ius habet obtinendi a iudice eiusdem rei sequestrationem.

§ 2. In similibus rerum adiunctis obtinere potest ut iuris exercitium alicui inhibeatur.

§ 3. Sequestratio rei et inhibitio exercitii iuris a iudice decerni potest ex officio, instante praesertim promotore iustitiae aut defensore vinculi, quoties bonum publicum id postulare videatur.

CAN. 1673

§ 1. Ad crediti quoque securitatem sequestratio rei admittitur, dummodo de creditoris iure liquido constet et servata norma de qua in can. 1923, § 1.

§ 2. Sequestratio extenditur etiam ad res debitoris quae depositi causa aut quolibet alio titulo apud alias personas reperiantur.

CAN. 1674

Sequestratio rei et suspensio exercitii iuris decerni nullatenus possunt, si damnum quod timetur, possit aliter reparari et idonea cautio de eo reparando offeratur.

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CAN. 1675

§ 1. Ad custodiam rei sequestrationi subiectae idonea persona, proponentibus partibus, a iudice designetur, quae sequester dicitur; si partes inter se dissentiant, iudex ex officio sequestrem deligat.

§ 2. Sequester in re custodienda, curanda et servanda non minorem diligentiam adhibere debet quam suis adhibet rebus, eamque postea, cui iudex decreverit, reddere tenetur cum omni causa.

§ 3. Iudex congruam decernat mercedem sequestri, si eam petat.

A plaintiff, under the Roman law,[1] sometimes requested the *praetor* to issue an *interdictum* or summary order to secure his rights by preventing anything from being done to deteriorate or injure the object claimed. This, in ecclesiastical language, is termed *sequestration*. It is a writ issued by the judge to take a disputed object held by any one, whether the plaintiff or the defendant, and place it in the custody of a third party, called *sequester*, in order to prevent the object from being damaged.

A kind of sequestration is that of the exercise of rights otherwise acknowledged; this is called *inhibition*. Thus a beneficiary may be commanded by the ecclesiastical judge to suspend the exercise of his rights; a husband, the validity of whose marriage is disputed in court, may be commanded to let the wife go to a place of security, or a bride claimed by two rivals may be told to go to a convent, until the question is settled.

Sequestration and inhibition (or injunction) may be decreed by the judge *ex officio* whenever the public welfare is at stake and the promoter or defender demand it. It

1 Cfr. Ramsay-Lanciani, *l. c.*, p. 327; in English law it means taking property of the defendant in contempt; Blackstone-Cooley, III, 444.

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may also be decreed in case a *creditor* has a clear and proved title to the thing which requires security. And in that case all the things which the debtor has in his custody as a deposit or pawn, or under another claim, may be sequestered.

But neither sequestration nor inhibition may be decreed if the danger of damage can be warded off otherwise and bail is given to cover possible deterioration or damage.

The *sequester* may be proposed either by the parties to the suit or by the judge if the parties cannot agree upon a fit person. The *sequester* must take care of the things entrusted to him as he would of his own belongings, *i.e.*, he must bestow ordinary (not extraordinary) care on them and in the end restore them to those to whom the judge awards them. The judge shall decide, at the request of the sequester, what recompense is due him for his trouble.

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CHAPTER II

NOVI OPERIS NUNTIATIO AND DAMNUM INFECTUM

CAN. 1676

§ 1. Qui ex aliquo novo opere damnum timet suae rei obventurum, potest illud iudici nuntiare ut opus interrumpatur, donec utriusque partis iura, iudicis sententia, definiantur.

§ 2. Is cui intimata fuerit prohibitio, continuo ab opere cessare debet, sed, dummodo idonee caveat se in pristinum omnia restituturum si absoluto iudicio victus discesserit, poterit a iudice continuationem eiusdem impetrare.

§ 3. Nuntianti novum opus ad ius suum demonstrandum duo menses praefiniuntur; qui ex iusta et necessaria causa a iudice, audita altera parte, prorogari vel reduci poterunt.

CAN. 1677

Si vetus opus magna ex parte immutetur, idem ius esto quod de novo opere can. 1676 constitutum est.

CAN. 1678

Qui grave damnum rei suae imminere pertimescit ex alieno aedificio quod ruinam minatur, ex arbore aut ex alia re quacunque, actionem habet *de damno infecto* ad obtinendam periculi remotionem, aut cautionem de damno vel avertendo, vel compensando, si forte evenerit.

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Under the Roman law a citizen was obliged to give notice of a new structure to the prefect of the city, who could command it to be discontinued for good reasons. This law, says a Decretal, was initiated or adopted by the Church.[1] Hence anyone who fears that a new structure may be prejudicial to his interests, either material or spiritual (for instance, because it damages his property or curtails his jurisdictional rights or revenues), may denounce the same to the ecclesiastical judge and demand a decree ordering the work to be discontinued until the claims of both parties can be adjusted by a judicial sentence.

The one who receives notice of such a prohibitory decree must desist from the work begun. However, he may ask to continue on condition that he give bail and restore everything to the *status quo* if he should lose the trial.

The one who objects to a new structure has two months to prove his claim; but this term may, at the demand of the other party, be either prolonged or shortened by the judge. The same rule applies to substantial changes in an old structure.[2]

Those who are afraid that a decaying edifice may cause them damage, may institute an action *de damno infecto*, in order to have the danger removed or to obtain security against possible damage. This strictly belongs to the competency of the civil court.

1 Cfr. cc. 1, 2, X, V, 32.
2 S. C. EE. et RR., Sept. 21, 1838.

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CHAPTER III

ACTIONS OF "NULLITAS ACTORUM"

CAN. 1679

Si actus aut contractus sit ipso iure nullus, datur ei, cuius interest, actio ad obtinendam a iudice declarationem nullitatis.

CAN. 1680

§ 1. Nullitas actus tunc tantum habetur, cum in eo deficiunt quae actum ipsum essentialiter constituunt, aut sollemnia seu conditiones desiderantur a sacris canonibus requisitae sub poena nullitatis.

§ 2. Nullitas alicuius actus non importat nullitatem actorum qui praecedunt aut subsequuntur et ab actu non dependent.

CAN. 1681

Qui actum posuit nullitatis vitio infectum, tenetur de damnis et expensis erga partem laesam.

CAN. 1682

Nullitas actus a iudice declarari non potest ex officio, nisi aut publice id intersit, aut agatur de pauperibus vel de minoribus aliisve qui minorum iure censentur.

CAN. 1683

Iudex inferior de confirmatione, a Romano Pontifice actui vel instrumento adiecta, videre non potest, nisi Apostolicae Sedis praecesserit mandatum.

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An act is called null and void if its essential constituents, or any of the formalities or requisites prescribed by law under penalty of nullity, are wanting. Thus ordination performed under physical compulsion is null and void.[1] A marriage contracted under the influence of grave fear (can. 1088) is null and void. A religious profession made under similar circumstances is invalid.[2] In marriage the solemnities or conditions are manifest, because a marriage contracted without the prescribed form is null and void.[3] A division of parishes is void if made without canonical reason.[4]

However, from the fact that an act is null and void, it by no means follows that the preceding or following acts are also null and void, unless indeed they depend upon the void act itself. Thus in contracts, whatever depends on the agreement itself, must necessarily be tainted with the defects inherent therein. Independent acts, as also records and minutes, are valid if not essentially connected with the invalid act. For instance, borrowing money in view of a division of a parish would not be invalid, because not necessarily connected with the act of division.

If one of the interested parties (not a third person) wishes to bring suit against an act he considers null, he may ask the judge to declare it null and void. Take the example of a religious profession which is claimed to be null and void on account of fear. In that case the judge would have to demand proofs; for a mere assertion cannot be accepted before the law.

Under can. 1682, the judge cannot *ex officio* declare the nullity of an act, unless the *public welfare* is at stake,

1 Can. 103, § 1.
2 Can. 572.
3 Can. 1096 f.
4 Can. 1428.

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and in case of minors. The public welfare is generally at stake in matrimonial cases, because marriage is a requisite of public order. The same is true of ordinations.

The judge may proceed *ex officio* in case of minors because these are under the special tutelage of the Church. Therefore, those who have not yet completed the age of twenty-one, as well as all ecclesiastical corporations and noncorporate entities,[5] enjoy the benefit of this law.

No judge who has common sense and a conscience will pronounce an act null, unless he has good reasons for doing so, for can. 1681 rules that he who acts invalidly is bound to indemnify the party injured by his invalid act.

It may be useful[6] to add that an act performed with deliberation (*i.e.*, every human act), must be considered valid until the contrary is proved or is at least notorious. The nullity of an act can be easily proved if a substantial formality has been omitted, or if the act contravenes a prohibitory statute or law, or if it exceeds the limits of a faculty or mandate, or the wording of a rescript. Otherwise an act, even if doubtful, must be regarded as valid.

If the judge is not acting in the capacity of ordinary or independent judge, but as delegate or inferior judge, the rule holds: "*Actus regulariter tribuitur ordinanti, non exequenti.*" This applies especially if the Roman Pontiff confirms an act or a document. The act of *confirmation* may concern an act of the judge (for instance, his sentence), a privilege, a contract (for instance, alienation), a statute or decree of appointment. If an inferior judge receives such a ratification from the Pope or from one of the S. Congregations or Tribunals, he must take cognizance of it, because the order of jurisdiction de-

[5] Can. 100, § 3.
[6] Cfr. Barbosa, *Tractatus Varii*, Axioma 13, *s.v.* "Actus"; cfr. can. 1625, § 1.

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mands that the authority of the inferior be silent when the superior places an act under his special protection. Hence the clause is sometimes added in rescripts: "*sublata cuilibet aliter iudicandi atque interpretandi facultate.*" Yet, since the Roman Pontiff does not claim infallibility in matters of an individual nature and of a judiciary character, and since fraud may have been committed by the petitioner, a means is needed to recognize even apostolic letters. This is expressed in our text, can. 1683 as follows: "*nisi Apostolicae Sedis praecesserit mandatum.*" It means that the judge, if he has a strong suspicion of fraud, can demand the *aperitio oris*, in order to be enabled to take cognizance of the facts and the proofs which elicited the confirmation. Thus are safeguarded on the one side the authority of the supreme judge and, on the other, the administration of justice.

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CHAPTER IV

RESCISSORY ACTIONS AND RESTITUTION IN INTEGRUM

These are two actions, of which one is called ordinary, the other extraordinary, because the latter supposes, as it were, that all ordinary means for obtaining redress have been exhausted. Hence it is granted (can. 1687) only when ordinary means prove insufficient.

RESCISSORY ACTION

CAN. 1684

§ 1. Si quis motus metu gravi iniuste incusso, vel dolo circumventus actum posuerit vel contractum inierit qui ipso iure non sit nullus, poterit, metu vel dolo probato, obtinere actus vel contractus rescissionem actione quae vocatur *rescissoria*.

§ 2. Eadem actione intra biennium uti potest, qui gravem ex contractu laesionem ultra dimidium ex errore passus est.

CAN. 1685

Īnstitui haec actio potest:

1.° Contra eum qui metum intulit aut dolum patravit, quamvis ipse non in suum, sed in alterius commodum talia peregerit;

2.° Contra quemlibet malae fidei et etiam bonae fidei possessorem, qui res metu vel dolo extortas possidet, salvo iure regressus contra quemlibet usque ad ipsum metus vel doli auctorem.

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CAN. 1686

Si is qui metum intulit aut dolum patravit, urgeat actus vel contractus exsecutionem, parti laesae seu deceptae competit exceptio metus vel doli.

Broadly speaking, a rescissory action is one brought to avoid an obligation or deed which follows an act or contract. Here the term is specially applied to an action based on fear or deceit (*metus vel dolus*). Canon 1684 says that one who acted under the influence of grave fear, unjustly inflicted, or who was deceived, is entitled to demand nullification of the act thus committed or the contract made. In order to understand this law it must be remembered that even grave fear does not render an act simply involuntary, but only *secundum quid,* unless the law makes a special exception, as, for instance, in favor of freedom of religious profession and marriage.[1] The conditions of fear have been explained elsewhere.[2] But a judge cannot proceed unless he has proofs as to the existence and degree of fear,— which proofs, as stated more than once, must be solid.

This *actio ex metu vel dolo* is also at the disposal of one who has by mistake sustained a loss of more than half of what was stipulated in a contract. In that case what is required is rather *restitutio in integrum.* However, the legislator appears to compare *error* to *dolus,* and, besides, the time is here split into half, so that this action may be brought within two years from the date when one obtained knowledge of the damage sustained.

Rescissory action may be brought, not only against the one who has threatened fear or committed deceit, but also against the one in whose behalf the threat was made. Be-

1 See can. 103, §2; can. 572; can. 1087.

2 Cfr. this *Commentary,* Vol. II, p. 29 ff.

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sides, it may be brought against any one who acted in bad faith or who, though in good faith, retains goods extorted by fear or deceit. However a possessor *bonae fidei* is entitled to retort the action upon the one who exercised the fear or deceit. Finally, if he who inspired fear or employed deceit should insist upon fulfillment of the contract or execution of the deed, the party who has been injured is entitled to put in a counterplea of fear or deceit (*exceptio metus vel doli*).

RESTITUTION IN INTEGRUM

CAN. 1687

§ 1. Minoribus vel minorum iure fruentibus graviter laesis eorumque heredibus et successoribus, ad laesionem reparandam ex negotio seu actu valido rescindibili, praeter alia ordinaria remedia, suppetit remedium extraordinarium restitutionis in integrum.

§ 2. Hoc beneficium maioribus quoque conceditur quos deficit rescissoria actio aut aliud ordinarium remedium, dummodo iustam subesse causam et laesionem sibi imputandam non esse probaverint.

CAN. 1688

§ 1. Restitutio in integrum peti debet ab ordinario iudice, qui competens est respectu illius, contra quem petitur, intra quadriennium ab adepta maioritate computandum, si agatur de minoribus, a die laesionis factae et cessati impedimenti, si de maioribus aut personis moralibus.

§ 2. Minoribus vel minorum iure fruentibus restitutio concedi potest a iudice etiam ex officio, audito vel instante promotore iustitiae.

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CAN. 1687–1689

Restitutio in integrum id efficit ut omnia revocentur in pristinum, idest restituantur in statum quo erant ante laesionem, salvis iuribus quae alii, bona fide, ante petitam restitutionem quaesiverint.

Restitutio in integrum is an extraordinary remedy of the law, by which a party grievously damaged or injured, is restored by the authority of the judge to his original condition (*in statum quo ante laesionem*).[3] The persons who are principally benefitted by this legal remedy are *minors,* and those who in law enjoy the privilege of minors, viz., ecclesiastical corporations and non-corporate juridical entities (pious foundations, religious), their heirs and successors.

The object of this remedy is to repair damage sustained by reason of a rescindible deed or act, even though this deed or act may in itself have been valid, and therefore obligatory. This return or restitution to the original condition or status (*ante petitam restitutionem*) restores all the rights acquired bona fide before the restitution was asked. Alienation furnishes an example. An administrator has alienated a piece of church property by selling it to a layman, who paid the price demanded. The *promotor iustitiae* or fiscal attorney perceives that the bargain was detrimental to the church or community and asks the ecclesiastical court for a *restitutio in integrum.* What must be done in that case? The administrator must restore the price paid for the church property and, besides, refund whatever expenses the layman may have incurred for improvements, etc.[4] Whether the layman

[3] Cfr. the commentators on X, I, 41 especially Boekhn and Reiffenstuel.

[4] C. 11, X, III, 13.

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has to restore the profit or interest received from the property after the expenses are repaid, is a controverted question, and therefore in the court of conscience the layman could hardly be held to restitution.

Attention may be drawn to the term: "*ante petitam restitutionem.*" For it is not required that restitution be already granted, because if it was asked for, the *bona fides* of the possessor could hardly be sustained.

Can. 1688 rules that restitution must be asked from the judge who is competent with regard to the one against whom the injunction is asked, whether he be plaintiff or defendant.

In regard to the *time* within which the demand for an injunction is to be made, the text distinguishes, because, as stated under can. 1687, § 2, not only minors are granted the benefit of restitution, but also those who cannot avail themselves of rescissory action or other remedies under the law, provided they can prove that they have a just cause and have sustained injury or damage beyond their own responsibility or culpability; for instance, if one was lawfully absent, or detained by hostile forces, or deceived through ignorance.[5] *Minors* in the proper sense, *i.e.*, those who have not yet completed the twenty-first year, must put in the demand for restitution within *four years* after they have completed the aforesaid age. This period of four years is here taken in the sense of *tempus continuum,* reckoning ferial days as well as days of absence, in other words, it runs continually, regardless of any obstacle that may suspend the use of time granted.

Those who are of age and all *juridical persons* have four years' time to demand an injunction, but this term runs from the moment the injury or damage was done and from the cessation of the impediment that prevented

5 Reiffenstuel, I, 41, n. 50 ff.

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them from demanding restitution. By "*dies laesionis factae*" must certainly be understood not merely the time when the damage was done, but when it was realized or perceived.[6] This interpretation seems evident from the apposition: "*cessati impedimenti,*" for one cannot realize an obstacle (for instance, absence or detention), if he does not realize or perceive the damage done.

Finally, the Code permits the judge to grant to minors and to those who enjoy the privileges of minors, the benefit of restitution also *ex officio,* upon the advice or demand of the *promotor iustitiae.* This may be favorable to religious, who in law are compared to minors; but they cannot be said to belong to those under age. When does the four years' term begin with them? Either at the same time as for those who are of age, or according to the decision of the judge.

[6] Engel I, 41, n. 11.

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CHAPTER V

COUNTER-PLEAS (ACTIONES RECONVENTIONALES)

CAN. 1690

§ 1. Actio quam reus coram eodem iudice in eodem iudicio instituit contra actorem ad submovendam vel minuendam eius petitionem, dicitur *reconventio*.

§ 2. Reconventio reconventionis non admittitur.

CAN. 1691

Actio reconventionalis locum habere potest in omnibus causis contentiosis, exceptis causis spolii; in criminalibus vero non admittitur, nisi ad normam can. 2218, § 3.

CAN. 1692

Proponenda est iudici coram quo actio principalis instituta est, licet ad unam causam dumtaxat delegato vel alioquin incompetenti, nisi sit absolute incompetens.

An action by which the defendant endeavors to stop, or at least to curtail, the plea or demand of the plaintiff, is called counter-charge or counter-plea if made before the same judge and during the same trial. Such a counter-plea cannot be upset by another counter-plea of the plaintiff; the reason probably is not to prolong the trial unduly.

A counter-plea is permitted only in *civil matters*, and

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in these to the whole extent, except in cases of disseissin. In criminal matters a counter-plea is permitted only where mutual injuries are charged, according to can. 2218.

The counter-plea is to be made before the judge before whom the main suit was brought, even though he may be delegated for one special case only and may not be fully competent, provided, however, he be at least relatively competent, *i.e.*, either by reason of the matter involved, or of the person.

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CHAPTER VI

POSSESSORY ACTIONS

CAN. 1693

Qui ad possessionem alicuius rei adipiscendam, vel ad alicuius iuris exercitium obtinendum munitur titulo legitimo, petere potest, ut in rei possessionem vel iuris exercitium immittatur.

CAN. 1694

Non solum possessio, sed etiam simplex detentio praestat, ad normam canonum qui sequuntur, actionem vel exceptionem possessoriam.

CAN. 1695

§ 1. Qui annum integrum in possessione rei vel in quasi-possessione iuris manserit, si molestiam patiatur quominus suam possessionem vel quasi-possessionem retineat, habet actionem *retinendae possessionis*.

CAN. 1696

§ 1. Etiam qui vi, clam vel precario possidet, actione *retinendae possessionis* uti potest adversus quemlibet deturbatorem: non autem contra personam a qua ipse rem vi vel clam surripuit aut precario accepit.

§ 2. In causis quae ad bonum publicum spectant, iustitiae promotori ius est opponendi vitium possessionis adversus eum qui vi, clam vel precario possidet.

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CAN. 1697

§ 1. Si inter duos controversia oriatur uter eorum possideat, ille in possessione praeferendus est qui intra annum frequentiores et potiores possessionis actus exercuit.

§ 2. In dubio iudex possessionem pro indiviso utrique parti attribuat.

§ 3. Si rei vel iuris indoles aut contentionum et rixarum periculum non patiantur ut litigantibus pro indiviso possessio interim attribuatur, iudex rem apud sequestrem deponi, aut iuris quasi-possessionem suspendi iubeat usque ad iudicii petitorii exitum.

CAN. 1698

§ 1. Qui vi aut clam quoquo modo a possessione rei vel quasi-possessione iuris deiectus est, adversus quemlibet spolii auctorem vel rei detentorem habet actionem *recuperandae possessionis* vel de spolio et spolii exceptionem.

§ 2. Haec actio non admittitur praeterlapso anno postquam spolium passus rei notitiam habuit; exceptio, contra, perpetua est.

CAN. 1699

§ 1. Spoliatus adversus spoliantem excipiens et probans spolium, non tenetur respondere, nisi prius fuerit in suam possessionem restitutus.

§ 2. Spoliatus ut in possessionem restitutatur, nil aliud probare debet, nisi spoliationem ipsam.

§ 3. Sed si in restitutione rei vel exercitii iuris aliquod occurrat periculum (ex. gr., saevitiarum, cum vir contra uxorem postulat restitutionem coniugalis

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consortii), iudex, ad instantiam partis vel promotoris iustitiae, pro diversis personarum causarumve adiunctis decernat aut restitutionem suspendi, aut rem vel personam apud sequestrem custodiri, donec causa petitorio iudicio definiatur.

Can. 1700

Iudicia possessoria absolvenda sunt, citata dumtaxat adversa parte in iudiciis retinendae vel recuperandae; citatis vero omnibus iis quorum interest, in iudiciis adipiscendae.

Possession, as distinguished from the right of property, is the holding of a thing by the concurrent operation of body, mind, and law. Hence either a real or fictitious [1] apprehension of the thing itself, or at least the aid of a law or statute, is necessary for possession. Possession presupposes a right, *i.e.*, a just cause for possessing. But one may claim possession without reference to the title upon which it is based. It is this that constitutes what is known as *actio possessoria.*

If an object is claimed by one who is not yet in possession thereof, but thinks he is entitled to it, either by a fictitious or a statutory title, we have what is called *actio rei adipiscendae.*

Our text appropriately adds: " or to obtain the exercise of certain rights," for instance, that of election or presentation; and this is called *quasi-possessio.*[2]

In order to justify the act of quasi-possession three things are said to be required: (a) the exercise of the right through certain acts indicative of the same; (b) the

1 *Fictitious* is the apprehension which by a fiction of law is considered equivalent to real possession, for instance, the delivery of a document or a key.

2 C. 3, X, II, 12.

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knowledge and forbearance of the superior or those who might otherwise claim that right; (c) the intention of the one who exercises the right to claim it as his own.[3] However, it must be added that it appears unjustifiable to demand an exercise of a right (*actus illius iuris*) in order to insure the acquisition thereof, for instance, the right of presentation. This demand seems to be based upon a confusion of exercise with prescription. Electors may claim the right of voting by belonging lawfully to a chapter. Therefore the *titulus legitimus* must be sought in the fictitious or legal title which conveys the right to possession.

But not only the possession, but also the *detention* of an object or right entitles the detainer to a possessory action or exception. The one who wishes to possess the thing or right he claims, is put into possession, the detainer is detained in its possession. The plaintiff brings suit before the judge to obtain or acquire possession of the thing or right, and the judge issues an *interdict* or decree which secures possession to the claimant,[4] at least *ad interim*.

One who is in possession of a thing or right,— for instance, a beneficiary or owner of church property,— may suffer *molestation* from another. If the holder has been in possession for one full year, he may ask the judge to issue a decree "*uti possidetis*" or "*utrobi*" for either immovable or movable property. This writ has the same effect as an *actio retinendae possessionis*. But it must be brought within one year from the beginning of the disturbance, and against the disturber, so that he may stop the vexation.

3 Reiffenstuel, II, 12, n. 151.

4 There are five *interdicti adipiscendae possessionis: interdictum quorum bonorum, interdictum quod legatorum, interdictum possessorium, interdictum sectorium, interdictum Salvianum;* Santi-Leitner, II, 12, n.

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An *actio retinendae possessionis* may also be brought by one who forcibly, stealthily, or precariously (*i.e.*, by begging), possesses a thing against the disturber, but not against the person from whom he has taken the thing in the above-named manner. This privilege was not granted formerly as an action proper, but was allowed in cases of violence or stealthy or beggarly possession. However, the legislator permits this action in order to avoid other acts of violence and fraud; but he also empowers the *promotor iustitiae* to take exception or oppose the crime of violent, stealthy, or beggarly possession against a possessor, if the public welfare demands such action.

If a controversy arises which of two possessors *actually* holds possession, that one is to be preferred who has exercised more frequent and conspicuous acts, for instance, of administration, or in acquiring a servitude or right of way.[5] If the judge is still in doubt to whom to adjudge the disputed property, he may grant it to both competitors *pro indiviso, i.e.,* to each one full possession indivisibly. If this is infeasible on account of quarrels or contentions, he may command the litigants to deposit the disputed object with a *sequester,* and suspend *quasi-possession* until the petitory cause is settled.

A third action is that of *recuperandae, i.e.,* having the possession or quasi-possession of an object adjudged to the one from whom it was forcibly or stealthily taken. To this corresponds the *edictum "unde vi"* of the judge against the author of disseissin or detainer of an object. But the latter may also put in a counter-charge of disseissin. The action proper may not be accepted after the lapse of one year, to be reckoned from the moment one has become aware of the disseissin. But the *exceptio* or counter-plea is perpetual, *i.e.,* exception can be brought

[5] Cc. 3, 9, X, II, 19.

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against it at any time. The *spoliatus* or disseissined, who puts in the counter-charge, has only to prove the fact of disseissin and is not obliged to answer any questions until he has been put in possession, and to obtain that he has only to prove the fact of possession.

Sometimes the restitution of possession or quasi-possession may be dangerous. Thus if a woman (supposed wife) or a girl engaged to one man and claimed by another would have to be delivered to the so-called husband or bridegroom there might be danger of maltreatment.[6] In this case the judge shall suspend restitution or decide that the person or object be confided to a sequester until the petitory cause is settled. Thus he may decide that the woman be kept in custody by her relatives, or that the girl claimed by two rivals go to a convent until the claims are definitively adjudged.

Possessory actions which are *retinendae* and *recuperandae* must be settled by summoning the adversary, but actions called *adipiscendae* require that all interested parties be cited, because then more proofs are demanded, and proofs are not so easily adduced.

[6] Cc. 8, 3, X, II, 13; c. 14, X, II, 19; c. 14, X, IV, 1.

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CHAPTER VII

EXTINGUISHMENT OF ACTIONS

CAN. 1701

In contentiosis actiones tum reales tum personales exstinguuntur praescriptione ad normam can. 1508–1512; actiones autem de statu personarum nunquam exstinguuntur.

CAN. 1702

Omnis criminalis actio perimitur morte rei, condonatione legitimae potestatis, et lapsu temporis utilis ad actionem criminalem proponendam.

CAN. 1703

Firmo praescripto can. 1555, § 1 de delictis Sacrae Congregationi S. Officii reservatis, tempus utile ad actionem criminalem proponendam est triennium, nisi agatur:

1.° De actione iniuriarum, quae uno anno perimitur;

2.° De actione ob delicta qualificata contra VI et VII divinum praeceptum, quae quinquennio perimitur;

3.° De actionibus ob simoniam vel homicidium, contra quae actio criminalis decennio perdurat.

CAN. 1704

Sublata per praescriptionem actione criminali:

1.° Non est hoc ipso sublata actio contentiosa, forte ex delicto orta, ad damna sarcienda;

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2.° Ordinarius remediis can. 2222, § 2 statutis uti adhuc potest.

CAN. 1701–1705

§ 1. Praescriptio in contentiosis currit ex quo actio primum potuit iure proponi; in criminalibus, a die patrati delicti.

§ 2. Si delictum habeat tractum, ut vocant, successivum, non currit praescriptio, nisi a die qua delicti tractus cessaverit.

§ 3. In delicto habituali vel continuato praescriptio non decurrit nisi post ultimum actum; et conventus ob aliquem criminosum actum non praescriptum, tenetur de antiquioribus, qui cum eodem actu connectuntur, etiamsi singulatim sumpti ob praescriptionem excluderentur.

Real as well as personal actions in *civil cases* are extinguished by prescription, as set forth under can. 1508–1512. But actions concerning the status of persons are never extinguished. An action is a demand of one's right, and a *real* action is one inherent in the thing, which it follows everywhere (*actio in rem* or *vindicatio rei*). A *personal* action (*actio in personam*) is directly aimed at a person by reason either of a contract or a crime. Although an object may be claimed, yet only the person who contracted or perpetrated a crime is responsible.[1] An example is stated in can. 1534 concerning alienation, where real action is permitted in case of an alienation that is null and void by law; and personal action in case of alienation lacking the formalities required by law.

The text adds: "*actiones autem de statu personarum*

1 Reiffenstuel, II, 3, n. 11 f. The English terminology wavers; see Stimson's *Law Dictionary*, *s. v.* "*Actio*," Action.

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nunquam exstinguuntur." The status of men in Roman law[2] was twofold: freedom and slavery. The Canon Law recognized a threefold status: that of *virgines, continentes,* and *conjugati.*[3] From this we may surmise that personal status here means walk of life, as we say the clerical state, the lay state, the religious state, the married state. Now, then, an action may always be brought by one living in a state which he has good reason to believe was forced upon him or which he thinks he did not enter in a lawful manner. Thus, for instance, a cleric may bring action to be released from the clerical state and a married man may attack the validity of his marriage. The reason for this is that the state of any person interests not only that person himself, but society as a whole. Hence, too, no transactions are allowed concerning the personal state.[4]

A *criminal action* is quashed by the death of the culprit, by his condemnation on the part of lawful authority, or by the lapse of an equitable period of time, granted by law for bringing a criminal suit. The *time* is determined in can. 1703, which says that a criminal suit can be brought within *three years.* But this rule is liable to some exceptions, namely:

(a) All cases belonging to the *Holy Office,* and which this S. Congregation takes cognizance of itself or through inferior tribunals, according to can. 1555, § 1.

(b) Actions against *iniuriae* are prescribed after *one year. Iniuriae* are offences of a contumelious character against the honor and respect due to one's fellowmen. They may be either verbal or real, *i.e.,* committed by word of mouth or by acts which are offensive, for instance, spitting in one's face or throwing mud. They

2 See Dig. I, 5, *de statu hominum.*
3 Reiffenstuel, I, 1, n. 149.
4 Wernz, *l. c.,* V, n. 41.

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may also amount to defamation or slander and affect a man's calling [5] or official standing.

(c) Actions arising from qualified crimes against the sixth and seventh commandments of God are quashed after *five years.*

The Code does not state which *delicta* of those named are *qualificata.* In the source [6] from which our text has undoubtedly been taken, *peculatus* (embezzlement) stands for the seventh commandment and *delicta carnis* for the sixth. One might be tempted to identify a qualified crime with one that is usually called indictable; yet the decree in question mentions special classes which belong hither: *raptus, stuprum per vim illatum, adulterium cum incestu coniunctum,* which, it says, require a prescription of twenty years. Hence it may be that these are the qualified crimes, which, according to the Code, require only five years, whilst all other crimes against the two commandments mentioned are actionable only within the space of three years, according to the general rule. This interpretation is certainly acceptable, although it spells a mitigation of the former practice.

(d) Criminal actions based on simony and homicide are not admitted after the lapse of ten years. Note, however, that *only criminal actions* in the strict sense, *i.e.,* such as directly aim at the punishment of the culprit and the satisfaction due to the public order, cease after the lapse of those various terms.

Civil actions brought in order to obtain indemnity or damages arising from a crime are not subject to prescription (can. 1704); for the main reason for admitting prescription against criminal action is the difficulty of

5 See Kenny, *A Selection of Cases Illustrative of the English Law of Tort,* 1904, p. 280.

6 S. C. EE. et RR., March 8, 1898 (*Coll. P. F.,* n. 1992).

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properly proving the crime and defending the accused after a long period of time. This difficulty might prove fatal to the public authority if it condemned one not guilty of crime. Besides, criminal action has another object, *viz.*, to repair scandal and to give satisfaction for a violation of the public order. This, too, seems no longer required for the benefit of society after the lapse of a considerable time.[7] The case is different with civil action, which is a more or less private affair depending upon the good pleasure of individuals. Hence one who has suffered from a crime may always bring a damage suit, though not a criminal action, against the criminal. The clergy have other remedies which the Ordinary may employ, as stated in can. 2222, § 2, such as forbidding the reception of higher orders, suspension *ex informata conscientia,* etc.

A more important question is the *starting point* from which the term of prescription may be reckoned. Can. 1705 answers this question first as to *civil actions,* the prescription of which begins to run from the moment the law permits action to be brought. In order to complete what was merely adverted to under can. 1508–1512, something may be added here concerning prescription.[8]

Prescription broadly signifies a legitimate means of acquiring a right or ridding oneself of an obligation by possession during the time and in the manner laid down by law. Here it means particularly the quashing of civil

[7] Wernz, *l. c.*, V, n. 768. Note, however, the passage in Kenny-Webb, *Outlines of Criminal Law,* 1907, p. 382: "Statutes of limitations (prescription) which bar the prosecution for certain crimes under certain circumstances, after specified periods of time have elapsed, have never been applied either in England or in the United States to the crime of murder;" instances are given where crimes were prosecuted after 30 and 35 years.

[8] Cfr. the commentators on lib. II, tit. 26 *de praescript.;* Slater-Martin, *A Manual of Moral Theology,* 1908, Vol. I, p. 376 f.

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action by the opposing term allowed by law. Thus a claim may become void if the creditor allows the term to expire before going to court. Our Code admits prescription according to the laws of different countries, but adds that the canons must be observed. Hence if the civil law should admit prescription in things excluded by the ecclesiastical law, or lay down a shorter time than the law of the Church, the civil law cannot be applied.

This premised, four conditions are necessary to render prescription lawful: prescribable matter, good faith, title, and continued possession.

(a) The *matter which cannot* be prescribed, according to the law of the Church, is determined by can. 1509.

(b) Good faith (*bona fides*) is required, because the one who holds a thing must be persuaded that he and none other is the owner thereof.[9] This is the *animi possessio* which cannot coexist with the conviction that the thing belongs to another. Ecclesiastical law[10] requires this persuasion, not only at the beginning, but as long as the period of prescription lasts.

But what if there is a *doubt* as to whether one has the right to the object? If this doubt is positive (not a mere scruple) and occurs at the beginning, the possessor has to relinquish the object, or at least investigate whether the other has a better title. If the doubt arises in the course of prescription, *regula juris 65 in 6°* may be applied: *"Melior est conditio possidentis,"* at least until a counter-plea has been made and adjudged.

What if a prelate or administrator were under the wrong impression that he was allowed to alienate church property without observing the required formalities? In

9 Cfr. c. 2, X, II, 26; Engel, II, 26, n. 13.

10 See cc. 5, 20, X, II, 26.

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this case there would be an error in law (*error iuris*), provided, of course, the law is clear and certain, and prescription would hardly be admissible because ignorance of the law cannot be effectively pleaded, and it is this ignorance of the law that proves hurtful, because who errs in regard to the law is not supposed to be in good faith.[11]

The authors solve another practical case: If a prelate of a church with a chapter is in bad faith concerning property, and nevertheless holds it; is the chapter able to prescribe? The answer is that the *mala fides* of the prelate, who is the head of the chapter, renders prescription invalid, so that the chapter cannot lawfully prescribe the property thus held.[12]

This principle is similar to that applied to *heirs* or successors in property held in bad faith by their predecessors; according to the *Regula Iuris 46 in 6°* the successor enters upon the rights and property with the same right as the predecessor.[13] However this may be, to us it seems rather queer that good faith should be denied to the successor if he has no inkling of bad faith on the part of his predecessor. Here the civil law may certainly be applied. Of course, prescription runs only from the moment of good faith.

Bona fides is also required when prescription is invoked to free one from an obligation. For instance, the Society of Jesus had a legal claim on the Olivetans of Palermo, who paid 2500 scudi interest to the Society until the latter's suppression, in 1773, and even afterwards to the *Camera Spoliorum*, until 1782, when they stopped payment. After the restoration of the Society of Jesus, in

11 Cfr. *Reg. Iuris 82 in 6°: "Iuris ignorantia in usucapione negatur prodesse, facti vero ignorantia prodesse potest"*; Engel, II, 26, nn. 79 ff.

12 Reiffenstuel, II, 26, nn. 79 ff.

13 *Ibid.*, n. 131 ff.

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1814, the payment was naturally claimed by the Jesuits, and the S. Congregation decided in their favor, although the Neapolitan laws favored the claim of the Olivetans. The reason for this decision was that the documents showed that their opponents were aware of their duty, as they mentioned it in 1796, 1818, and 1823. Hence the *bona fides* required by Canon Law could not be proved.[14]

This case illustrates what is called *positive liberation from an obligation.* There is also a *negative* one, which specially concerns servitudes (leases) and criminal actions. For the prescription of these the authors do not require good faith, saying that one is not positively held to bring criminal action against the culprit, because there is question of a mere tolerance or non-use of a right which may be claimed or discarded.[15] But it may be added that the duty of prosecution lies primarily with the authorities, and that many are either not in a condition, or not disposed, to institute a criminal action. This view forestalls hatred and fanaticism. That no obligation of denouncing transgressors exists in regard to merely penal laws goes without saying.

(c) The next requisite is a *titulus,* which is defined as "*causa de se habilis ad transferendum dominium.*" This is the legal evidence of one's right of property, or the legal claim to an acknowledged or alleged right. Such a title is any contract legally and lawfully entered. A title is called *just* if acknowledged by law; it is *true* when it is based upon the thing itself, without reference to the legal requisites; for instance, a donation or contract may have been made by two parties informally, *i.e.,* without the observance of formalities, as an informal engagement. There is

14 S. C. EE. et RR., Sept. 23, 1836 (Bizzarri p. 426).

15 Cfr. Engel, II, 26, n. 18 ff.; Santi-Leitner II, 26, n. 22.

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also a colorable or putative title (*titulus coloratus*) which is acknowledged by law, although it may be tainted with an intrinsic defect, for instance, if the person, being a minor, was incapacitated for acting, such a title is sufficient for lawful prescription. For although the title may not be true, it is just, and it is only for the sake of public tranquillity that the law requires a certain lapse of time for a colorable title to become true *and* just. Otherwise prescription would effect nothing, because where there is a true and just title from the very beginning, prescription is not needed.[16]

(d) The last requisite is *continued possession.* A real hold on the thing, either by the person himself or by another in his name, is required, because without a manifest and palpable sign of the will of possessing a thing, possession cannot exist among men.[17] But possession must also be *continued,* not interrupted. Interruption, either natural or civil, is an obstacle which stays prescription in such a way that the time elapsed is no longer reckoned. Thus if three years are required, and the impediment occurs in the course of the third year, the term must be commenced anew. *Natural* interruption may be caused by supervening bad faith or by loss of possession. *Civil* interruption is caused by civil action begun with the summons (see can. 1725). Entirely different from interruption is *suspension,* which may happen, for instance, when a church is deprived of its pastor or prelate by death or superior force. In that case the duration of the suspension is subtracted, but the preceding and following time are counted.[18]

The *time* required for prescription is defined partly by

16 Engel, II, 26, n. 22 f.; Reiffenstuel, II, 26, n. 120 ff.; Santi-Leitner, II, 26, n. 23 ff.

17 *Reg. Iuris 3 in 6°.*

18 Santi-Leitner, II, 26, n. 31 f.

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can. 1508, which admits the term acknowledged by civil law, partly by can. 1511, which establishes a period of 100 years for prescription against property and precious things belonging to the Apostolic See, and a period of 30 years with regard to ecclesiastical corporations, and partly by can. 1703, concerning criminal actions.

We proceed to can. 1705, § 1, which rules that prescription in *civil* cases runs from the moment the law permits prescription to be brought. Therefore the canons just mentioned, viz., 1508 and 1511, may be applied here, even after the time allowed by civil law for prescription has run out, except, of course, that the application of can. 1511 is a very delicate matter.[19]

Canon 1705 continues: in *criminal* cases prescription runs from the day when the crime was perpetrated, unless the crime is continuous (*habet tractum successivum;* for instance, rape or violent detention), in which case the prescription runs from the day the continuity ceases, *i.e.,* after the completion of the last of a series of acts which form a whole.

§ 3 of can. 1705 makes a special regulation concerning *habitual crimes,*[20] against which prescription runs only from the last act not followed by another of the same species. If one has been accused of a criminal act not yet prescribed, he is also held responsible for coherent acts which antedate prescription, even though these former acts could not have been prosecuted because of prescription. Take, for instance, a husband accused of violence, whose wife seeks separation; there may be other crimes connected with the one alleged, though committed years ago.[21]

19 Because of the politico-religious aspects of the so-called Roman Question; cfr. can. 2345.

20 Such would be *concubinatus,* also *non-residentia* of clergymen.

21 For instance *abortus* resulting from acts of violence.

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TITLE VI

OPENING OF THE CASE

A trial may be considered to have three stages: the opening, the defence or pleading, and the sentence with its execution.

The first stage, or opening of the case, comprises two distinct acts: the statement of the case (*libelli oblatio*) and the summons (*citatio*).

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CHAPTER I

THE BILL OF COMPLAINT

CAN. 1706

Qui aliquem convenire vult, debet libellum competenti iudici exhibere, in quo controversiae obiectum proponatur, et ministerium iudicis ad deducta iura persequenda expostuletur.

CAN. 1707

§ 1. Qui scribere nescit, aut legitime impeditur quominus libellum exhibeat, oretenus petitionem suam coram tribunali proponere potest.

§ 2. Item in causis facilioris investigationis et minoris momenti ac propterea cito expediendis, iudicis arbitrio relinquitur petitionis admissio oretenus sibi facta.

§ 3. In utroque tamen casu iudex notarium iubeat scriptis actum redigere qui actori legendus est et ab eo probandus.

CAN. 1708

Libellus quo lis introducitur debet:

1.° Exprimere coram quo iudice causa introducatur, quid petatur, et a quo petatur;

2.° Indicare, generatim saltem, quo iure innitatur actor ad comprobanda ea quae allegantur et asseruntur;

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3.° Subscribi ab actore vel eius procuratore, appositis die, mense et anno, nec non loco in quo actor vel eius procurator habitant, aut residere se dixerint actorum recipiendorum gratia.

Can. 1709

§ 1. Iudex vel tribunal, postquam viderit et rem esse suae competentiae et actori legitimam personam esse standi in iudicio, debet quantocius libellum aut admittere aut reiicere, adiectis in hoc altero casu reiectionis causis.

§ 2. Si iudicis decreto libellus reiectus fuerit ob vitia quae emendari possunt, actor novum libellum rite confectum potest eidem iudici denuo exhibere; quod si iudex emendatum libellum reiecerit, novae reiectionis rationes exponere debet.

§ 3. Adversus libelli reiectionem integrum semper est parti intra tempus utile decem dierum recursum interponere ad superius tribunal: a quo, audita parte, et promotore iustitiae aut vinculi defensore, quaestio reiectionis expeditissime definienda est.

Can. 1710

Si iudex continuo mense ab exhibito libello decretum non ediderit quo libellum admittit vel reiicit ad normam can. 1709, pars cuius interest instare potest ut iudex suo munere fungatur; quod si nihilominus iudex sileat, lapsis quinque diebus a facta instantia, poterit recursum ad Ordinarium loci, si ipse iudex non sit, vel ad superius tribunal interponere ut vel iudex ad definiendam causam adigatur vel alius in eius locum subrogetur.

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A bill of plea, or original writ,[1] is a statement of the case made to the competent judge in order to ask him to prosecute or to grant redress.

It is not *absolutely required* that this bill be *presented in writing*. It may be that the plaintiff is illiterate or unable to write on account of a lawful obstacle, such as paralysis. If so, the plea may be made *orally*. Besides, the judge is free to accept an oral plea if the case is of minor importance and easily settled, or if quick action is required.

When the bill is not presented in writing, the judge shall command the notary or clerk to put it into writing and to read it to the plaintiff, so that he may approve of it.

The *contents* of the bill are:

(a) the *name of the judge* (or at least the court) before whom the case is to be tried; because, for reasons stated above, under can. 1560–1568, it is important to know whether the judge is competent;

(b) the *object of the plea,* for instance, whether it is a civil or a criminal case; also whether possession or ownership is claimed; in matrimonial cases, whether separation or complete divorce is asked;

(c) the name of the *defendant,* or adversary, or accused party (in criminal cases), for this is necessary to summon him;

(d) the *law* or reason on which the claim is based, at least in general, because this is the directing line along which the defence shall run. Thus a clergyman who asserts that force was used in his ordination may cite can. 214; a claim against unjust alienation may be based on can. 1532–1534; a suit against division of parishes on can. 1427 f.; an invalid profession on can.

1 Plaint and original writ are not entirely identical, but depend on the amount involved; Blackstone-Cooley, III, 273.

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572, etc., etc. But this allegation is to be made only *in general terms,* because the bill should be brief and not contain proofs and documents, etc.

The bill must contain the *signature* of the plaintiff or his proctor (attorney); the date (day, month and year), the *place* where the plaintiff or his attorney live or reside, or where they will be ready to receive judicial acts. An attorney may give his office address, so also the plaintiff, if he has one, because both may refuse to accept judicial documents in their homes for various reasons.

What is the *judge* to do with such a bill? He may either accept or reject it. After inspecting the bill he shall ask himself whether he is *competent* (can. 1560–1568) to take cognizance of and decide the case and whether the plaintiff is entitled to bring suit. Concerning the latter point he should look up can. 1646–1654.

Though the judge may be competent to accept the case and the plaintiff entitled to bring suit, the judge may reject the bill, not on account of a frivolous plea of incompetence, which is forestalled by can. 1625, but by reason of *defects in the bill.* It may be that the judge, without being a stickler or bent on "red tape," finds the bill in need of correction (*ob vitia quae emendari possunt*). "Correction" here is not identical with change, because *emendatio* means correction of an accidental mistake; thus it may be that the sum demanded is not correctly stated, or the demand is made in an obscure way, or the law is not quoted properly, or the names are illegibly written. The reasons why the bill is refused must be stated by the judge, not only if the refusal is based on purely material or formal grounds, but also if the judge believes himself incompetent or deems the plaintiff incapable of bringing suit. If the *corrected bill* is again rejected, the reasons must be restated, for after the first

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refusal of the bill on account of formal defects the plaintiff may offer a new, corrected bill.

Should the bill be refused a second time, the party may, within the space of ten equitable days, *have recourse* — not appeal — to the higher court which has to settle the question of refusal as soon as possible, after having heard the party, the prosecuting attorney, and the *defensor vinculi*.

But it may be that the *judge* to whom the bill was first presented, *makes no move* either to accept or to refuse it. In that case, after the expiration of *a month* from the date when the bill was presented, the plaintiff may insist that the judge perform his duty, and if he or his attorney knows the Canon Law, they may quote can. 1625 in order to make him act. If he continues inactive, the party shall wait five more days, and then have recourse to the local Ordinary. If the Ordinary himself is the judge, the plaintiff may appeal to the higher court, asking it to compel the judge to decide the case or to substitute another judge. This privilege was granted to expedite cases as much as possible.[2]

[2] *Trid.*, Sess. 24, c. 20, *de ref.*

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CHAPTER II

SUMMONS AND INTIMATION

CAN. 1711

§ 1. Libello vel orali petitione admissa, locus est vocationi in ius seu citationi alterius partis.

§ 2. Quod si partes litigantes sponte coram iudice se sistant ad causam agendam, opus non est citatione, sed actuarius significet in actis partes sponte sua iudicio adfuisse.

CAN. 1712

§ 1. Citatio fit a iudice, et libello litis introductorio inscribitur aut adiungitur.

§ 2. Denuntiatur autem reo, et, si sint plures, singulis.

§ 3. Debet insuper actori nota fieri, ut statuta die et hora ipse quoque coram iudice se sistat.

CAN. 1713

Si lis moveatur ei qui non habet liberam administrationem rerum, de quibus disceptatur, citatio denuntianda est ei qui ipsius nomine iudicium suscipere tenetur ad normam can. 1648–1654.

CAN. 1714

Quaelibet citatio est peremptoria; nec iteretur necesse est, nisi in casu de quo in can. 1845, § 2.

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After the plaintiff has presented his bill, or stated, and the competent judge has accepted, the case, the latter shall (as formerly the proctor), summon the *defendant* to appear in court. This was and is called *in ius vocare* or the summons made by the lawful judge to the other party, either plaintiff or defendant. This is the *beginning of the judicial action*. It may be omitted if both parties appear of their own accord before the judge; but in that case the clerk must record the fact that the parties appeared spontaneously at the trial, so as to preclude a plea of dilatory exception.

The citation or summons must be issued by the *judge*, and is to be written on the bill of plea, or added to it. This, in civil cases, is done in order to give the defendant a chance to know immediately the nature of the case and to prepare his defence. In *criminal cases*, however, this insertion into, or connection with, the bill of complaint is not only not required, but generally impractical, and may therefore be omitted, according to can. 1945, § 2 n. 3.

If there are *several* defendants, the summons is issued to each, otherwise only to the one. If a corporation is the defendant in the case, the summons is issued to the lawful superior, which is entirely sufficient.[1]

Can. 1713 rules that if *minors*, or corporate persons, or non-corporate entities, such as pious foundations, are sued, the summons must be issued to the respective superiors, guardians, or administrators, in a word, to their lawful representatives.

It is also required that the *plaintiff himself be notified of the summons* as soon as it has been made, so that he, too, may present himself in court on the day and at the hour set for the case.

1 Santi-Leitner, II, 3, n. 7.

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Every summons is peremptory, *i.e.*, one citation suffices and is final and urgent, so that the defendant is held in contempt, or may at least be declared to be in contempt, if he ignores it. The only exception to this rule is when ecclesiastical censures are threatened, because in that case a second summons is required.

CONTENTS OF THE SUMMONS

CAN. 1715

§ 1. Citatio denuntietur per schedam, quae praeceptum iudicis parti conventae factum ad comparendum exprimat, idest a quo iudice, ob quam causam saltem verbis generalibus indicatam, quo actore, reus, nomine et cognomine rite designatus, conveniatur; nec non locum, et tempus, idest annum, mensem, diem et horam ad comparendum praefixam perspicue indicet.

§ 2. Citatio, sigillo tribunalis munita, subscribenda est a iudice vel ab eius auditore et a notario.

CAN. 1716

Citatio duplici scheda conficiatur, quarum altera remittatur reo convento, altera asservetur in actis.

As will be seen under can. 1723, the summons must comply with all the conditions prescribed by can. 1715. Hence it is important to explain the various elements distinctly:

1. The intimation must be made in writing (*per schedam*).

2. It must be a *command* of the judge to the defendant, and not a mere exhortation or friendly invitation.

3. The *name of the judge* must be clearly stated, so

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that the defendant may know immediately whether the judge is competent or not; if the judge is delegated, he should have his credentials or letters-patent ready to show them to the defendant. If he does not prove his delegation, the summons is void.[2]

4. The tenor of the *complaint* at least in general terms according to the bill of plea or petition.

5. The *name* and surname of the *plaintiff* and the *defendant,* so that no mistake as to persons may void the summons.

6. The *place* where and the *date* when the defendant has to appear, giving year, day, and hour, all clearly and distinctly written.

7. The summons must be *sealed* with the seal of the court, and be signed by the judge or his auditor and the notary.

These are the essential features of the summons; the *duplicates* required by can. 1716 are not essential. One copy is to be delivered to the defendant, while the other is inserted in the records or *acta* and preserved.

INTIMATION OR CONVEYANCE OF SUMMONS

CAN. 1717

§ 1. Citationis scheda, si fieri poterit, per Curiae cursorem tradenda est ipsi convento ubicunque is invenitur.

§ 2. Ad hoc cursor etiam fines alterius dioecesis ingredi potest, si iudex id expedire censuerit et eidem cursori mandaverit.

§ 3. Si cursor personam conventam non invenerit in loco ubi commoratur, relinquere poterit citatoriam schedam alicui de eius familia aut famulatu, si hic eam

[2] C. 31, X, I, 29; c. 2, X, II, 8.

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recipere paratus sit ac spondeat se reo convento quamprimum schedam acceptam traditurum; sin minus eam ad iudicem referat, ut transmittatur ad normam can. 1719, 1720.

CAN. 1718

Reus qui citatoriam schedam recipere recuset, legitime citatus habeatur.

CAN. 1719

Si ob distantiam vel aliam causam difficulter per cursorem tradi possit reo convento scheda citatoria, poterit iussu iudicis transmitti per tabellarios publicos, dummodo commendata et cum syngrapha receptionis, vel alio modo qui secundum locorum leges et conditiones tutissimus sit.

CAN. 1720

§ 1. Quoties, diligenti inquisitione peracta, adhuc ignoratur ubi commoretur reus, locus est citationi per edictum.

§ 2. Hoc autem fit affigendo per cursorem ad fores Curiae schedam citationis ad modum edicti per tempus prudenti iudicis arbitrio determinandum et in aliqua publica ephemeride eam inserendo; si vero utrumque fieri nequeat, alterutrum sufficiet.

CAN. 1721

§ 1. Cursor, cum in manu rei conventi citationis schedam relinquit, debet eam subsignare, adnotatis die et hora qua reo tradita est.

§ 2. Idem peragat si eam relinquat in manibus

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alicuius de familia aut famulatu rei conventi, addito insuper nomine personae cui schedam tradidit.

§ 3. Si citatio fiat per edictum, cursor in edicti calce signet qua die et hora edictum affixum ad fores Curiae fuerit et quandiu affixum manserit.

§ 4. Si reus receptionem schedae recuset, cursor schedam ipsam subsignatam, addita die et hora recusationis, iudici remittat.

CAN. 1722

§ 1. Cursor quae peregit ad iudicem referat in scriptis manu propria subsignatis, quae in actis serventur.

§ 2. Si per tabellariorum officium citatio transmittatur, asservatur in actis fides eiusdem officii.

A summons, as stated, is essential and must be delivered into the hands of the defendant and proof of the delivery furnished. The summons may be conveyed by a courier, or by means of a letter, or by public edict.

1. A *courier*[3] is the most reliable means of conveying an important message. He should be a trustworthy person and deliver the summons to the defendant, wherever the latter may be. For this purpose he may enter the boundaries of a strange diocese — which act is not, properly speaking, an act of jurisdictional exercise — if the judge deems it expedient and commands him to do so. After the courier has found the defendant and delivered the summons into his hands, he must sign the summons

[3] In our ecclesiastical courts, so far at least, *apparitores* were not employed; Messmer, *l. c.*, p. 62. Although the Code does not reject the contrary custom, yet where these officers can be made use of, it should be done on account of the safety of conveyance. In England, according to Blackstone (III, 279), two of the sheriff's messengers delivered the summons either to the person himself or left it at his house.

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personally with the date and hour of delivery, after the manner of a telegraphic dispatch.

If the defendant *refuses* to accept the summons, the courier shall nevertheless sign the summons, as stated above, noting the day and hour of refusal, and return it to the judge. The effect of this refusal is that the defendant is *considered as duly summoned,* and may be declared in contempt of court.[4]

If the defendant is *not at home, i.e.,* at his usual residence, office, shop, or store, when the courier arrives with the summons, the latter may leave the writ with a member of his family or one of his employees or servants, provided they are willing to accept it and promise to hand it to the defendant as soon as possible. If no such readiness is manifested, the courier must return the writ to the judge, in order that other means may be employed. But if the family or employees are willing to comply with the demand, then the courier may leave the summons in their hands, having signed it, noted the day and hour of delivery, and added the name of the person to whom the paper was delivered.

2. Another means of conveying the summons into the hands of the defendant is the *public mail service.* This may be resorted to when the distance is too great, or for other reasons, for instance, to avoid suspicion or gossip. But the letter containing the summons must be *registered,* and a return receipt must be demanded (*ricevuta di ritorno*).

3. When neither a courier nor the post office are able to locate the defendant, no other means is left than *summons by edict.* This is done by posting the summons at the outside door of the court for a period considered sufficient by the judge *and* by advertising in the public (not neces-

[4] C. 5, X, II, 6.

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sarily in the Catholic) press. If both of these expedients are impossible, one suffices. This is certainly the case if there is no proper court-room or established place for holding trials. If the edict is posted at the gate of the court-room, the officer who posts it must set down at the bottom of the edict the day and hour when he posted it, and later add the time during which it was publicly displayed. He must also make out a written report of the proceedings, and this document, properly signed, must be added to the judicial acts. If the summons was sent through the mail, the receipts must be kept in the records.

NECESSITY AND EFFECT OF SUMMONS

CAN. 1723

Si scheda citatoria non referat quae in can. 1715 praescribuntur aut non fuerit legitime intimata, nullius momenti sunt tum citatio tum acta processus.

CAN. 1724

Regulae superius statutae pro rei citatione, ceteris quoque iudicii actibus, pro diversa tamen eorum natura, accommodandae et applicandae sunt, ut decretorum vel sententiarum denuntiationi aliisque huiusmodi.

CAN. 1725

Cum citatio legitime peracta fuerit aut partes sponte in iudicium venerint:

1.° Res desinit esse integra;

2.° Causa fit propria illius iudicis aut tribunalis, coram quo actio institua est;

3.° In iudice delegato firma redditur iurisdictio ita ut non exspiret resoluto iure delegantis;

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4.° Interrumpitur praescriptio, nisi aliud cautum sit, ad normam can. 1508;

5.° Lis pendere incipit; et ideo statim locum habet principium: *"lite pendente, nihil innovetur."*

How necessary a carefully written and lawfully conveyed summons is, is apparent from can. 1723, which says that if the summons was omitted, the entire proceedings are null and void.

The rules laid down for the summons must be adapted and applied, with due consideration of their importance, to all the other *judicial acts, e.g.,* the issuance of decrees made by the tribunal, the pronouncement of the sentence, and so forth.

The *effects* of a duly issued and legally served summons or of the spontaneous appearance of the parties in court are:

1. The case has taken a legal turn (*res non amplius est integra*).

2. The judge or court before whom the action was brought becomes *competent,* and hence incompetency cannot be asserted afterwards.

3. The delegated judge is confirmed or *perpetuated,* so that his jurisdiction does not cease even if the *delegans* dies or goes out of office.

4. *Prescription* is interrupted, not merely suspended, so that *bona fides* or title cannot be pleaded (see can. 1508).

5. The *case* or suit is now *pending,* and hence the principle: *"lite pendente, inhil innovetur"* goes into effect. How this is to be understood appears from the Decretals, which mention[5] especially: (a) change of possession, which cannot be transferred to another; (b) validity of

[5] Cfr. cc. 1–4, X, II, 16; c. 17, X, I, 6; c. 9, X, III, 19.

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rescripts, which are looked upon as obreptitious or subreptitious if no mention is made of the pending suit; (c) prohibition of alienation, and (d) the restitution of things to their former condition.

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TITLE VII

ISSUE IN PLEADING (LITIS CONTESTATIO)

Originally the phrase *litis contestatio* seems to have meant merely the notice given by both parties to their witnesses to appear before the judge. Later, however, the term came to comprise the whole of the proceedings before the prætor, *i.e., in iure*.[1] Our Code first explains the term, then considers some intricate and doubtful cases, and, finally, describes the effects of *litis contestatio*.

DEFINITION AND REQUISITES

CAN. 1726

Obiectum seu materia iudicii constituitur ipsa litis contestatione, seu formali conventi contradictione petitioni actoris, facta animo litigandi coram iudice.

CAN. 1727

Ad litis contestationem nulla necessaria est sollemnitas, sed sufficit ut partibus coram iudice vel eius delegato comparentibus, in actis inseratur petitio actoris et contradictio conventi, unde constet qua de re agatur seu quinam sint controversiae termini.

It is supposed that the defendant has received the original writ or plaint, understands the reason for which suit has been brought against him, and is ready to "fight the

1 Ramsay-Lanciani, *Roman Antiquities*, 1901, p. 342 f.

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case," to use a common expression. Hence the issue in pleading is nothing else but a final denial or contradiction of the plaintiff's demand, coupled with the intention of prosecuting the case before the judge. By this general answer and denial of the defendant the matter of the trial is established. We purposely use the term "general" because it is not required that the defendant contradict every particular statement in the plea. Nor is an exception intended in the proper sense.[2] No special or set formality is required, and the issue in pleading is valid even if the words or terms or rejoinders are not pronounced or composed with technical correctness. It suffices that the plaintiff tell the judge or his delegate what the case is, and that the defendant deny the charge or refuse the demand of the plaintiff before the same judge or delegate. But both the demand and the refusal must be inserted in the records (*acta*), which must show what the points in controversy are.

INTRICATE AND DOUBTFUL CASES

CAN. 1728

In causis tamen implicatioribus, in quibus petitio actoris nec perspicua sit nec simplex vel contradictio conventi difficultatibus scateat, iudex, ex officio aut ad instantiam actoris vel conventi, partes citet ad rite definiendos controversiae articulos, idest ad causae *dubia*, ut dicitur, *concordanda*.

CAN. 1729

§ 1. Si die dubiis concordandis praestituta, pars in ius vocata non compareat nec iustam absentiae

2 C. 2, 6°, II, 3.

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excusationem alleget, contumax declaretur, et dubiorum formula statuatur ex officio, parte, quae praesens fuerit, id postulante. Parti autem contumaci statim id notum fiat ex officio ut quas velit exceptiones contra dubiorum seu articulorum formulam possit proponere et a contumacia se purgare, intra tempus quod iudici congruum videatur.

§ 2. Partibus praesentibus et in formula dubiorum seu articulorum concordibus, si iudex, quod ad se attinet, nihil excipiendum putaverit, eius rei fiat mentio in decreto quo formula firmatur.

§ 3. Si vero partes dissentiant aut earum conclusiones iudici non probentur, iudex ipse controversiam dirimat decreto.

§ 4. Dubiorum seu articulorum formula semel statuta mutari non potest, nisi novo decreto, ex gravi causa, ad instantiam partis vel promotoris iustitiae, vel defensoris vinculi, audita utraque vel altera parte eiusque rationibus perpensis.

If the petition, or writ, or plaint of the plaintiff is obscure and complicated,[3] or the denial of the defendant offers serious difficulties, either because the facts are doubtful or the law is indefinite, the judge shall, either *ex officio* or at the demand of either party, command both parties to define the points at issue more clearly (*ad concordanda dubia*). This is done by means of a formal summons, in the shape of a decree issued by the judge, in which the parties are ordered to appear on the day and hour and at the place appointed.[4]

If a *party* thus duly summoned *does not appear* in

3 The Castellani-Gould case was proposed to the Roman courts three times.

4 This is the law with the Signatura Apostolica; see *Regulae Servandae*, March 6, 1912 (*A. Ap. S.*, IV, 196 ff.).

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court on the appointed day and gives no legitimate reason for his failure, he is to be declared *in contempt,* and the party who is present may demand that the doubts or doubtful positions be formulated *ex officio.* The party declared in contempt (see can. 1842 ff.) must be at once officially notified in order to be enabled to take exception to the doubts officially formulated and to "purge" himself of contumacy. For this purpose a sufficient space of time must be granted by the judge. If both parties are *present* and agree upon the disputed points, or rather on the manner in which they have been formulated, this fact must be put on record, provided the judge on his part is satisfied. If, on the other hand, there is disagreement among the parties as to the points in question, or if the judge is not satisfied, he may settle the controverted points himself, *i.e.,* formulate them by a decree. Once the controversial points have been determined, no change is admissible, except for weighty reasons and upon the demand of the parties or of the *promotor iustitiae* or the *defensor vinculi,* after these have heard the parties or party and properly pondered the reasons proposed. But every change in the *positions* or controverted points requires a *new decree.*

EFFECTS OF THE LITIS CONTESTATIO

CAN. 1730

Antequam litis contestatio locum habuerit, iudex ad testium aliarumve probationum receptionem ne procedat, nisi in casu contumaciae, aut nisi testium depositionem recipere oporteat, ne ipsa ob probabilem testis mortem, ob discessum eiusdem vel ob aliam iustam causam recipi postea nequeat, aut difficulter possit.

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CAN. 1731

Lite contestata:

1.° Haud licet actori libellum mutare, nisi, reo consentiente, iudex, iustis de causis, censeat mutationem esse admittendam, salva semper reo compensatione damnorum et expensarum, si quae debeatur. Libellus non censetur mutatus, si coarctetur aut mutetur probationis modus; si minuantur aut petitio aut accessoria petitionis; si facti adiuncta in libello pridem posita ita illustrentur, compleantur aut emendentur, ut controversiae obiectum idem remaneat; si in locum rei petatur pretium, foenus aut aliquid aequivalens;

2.° Iudex congruum tempus partibus praestituat probationibus proponendis et explendis; quod quiden poterit, instantibus partibus, arbitrio suo prorogare, dummodo ne lis, ultra quam aequum sit, protrahatur;

3.° Possessor rei alienae desinit esse bonae fidei; qua propter damnatus rem restituere, non solum rem ipsam, sed et rei fructus a litis contestatae tempore restituere tenetur et damna praeterea sarcire, si qua secuta fuerint.

The *litis contestatio* should establish the object or character of the suit. Therefore specified charges and answers must be preferred by both parties, at least in a general way. This purpose is served by the *articuli,* or controverted points, which must therefore be settled first and are settled by the issue in pleading, which is called the foundation and beginning of the trial. Before the trial has actually begun, the judicial procedure is not determined, nor is it certain that the defendant will prosecute. Hence:

1. *Before* the *litis contestatio* has been properly made and the controverted points have been fixed, the judge

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cannot lawfully proceed to hear the witnesses or receive proofs, depositions, reports of experts, etc.

But the Code, like the old law,[5] admits *exceptions* to this rule; viz.: (a) If the defendant has been declared *in contempt,* in which case it is not required that the suit be dispatched as quickly as possible,[6] the sole fact of contumacy being sufficient; (b) If the deposition is required on account of the *condition* of the *witnesses.* A witness may be in danger of death, or advanced in age so that his memory is weak; or he may have to depart suddenly on some urgent journey; or it may be doubtful whether he will be as willing to testify later as he is now.[7]

2. *After* the *litis contestatio:* (a) It is not allowed *to change* the *original writ* (*libellus*) unless the judge, for weighty reasons, deems a change necessary and the defendant consents, provided always that the latter be indemnified, if necessary. Note well the difference between correction (*emendatio*) and change (*mutatio*). Of the former mention was made under can. 1709, § 2. Here change in the proper sense is intended. A change means a substantial alteration of the case, for instance, if a possessory is changed into a petitory cause; or in matrimonial cases, if a divorce is asked for instead of a separation, or one impediment is substituted for another; or, in ordination cases, if the invalidity of an order is pleaded instead of freedom from its obligations. But, says the text by way of example, it *is no change,* if the mode of proof is limited or altered, for instance, as to the number and quality of witnesses; if less is asked either in the substantial demand or the accessories, especially in alienation or alimony; if certain facts alleged in the writ are

5 Title VI, Book II, is complete, amounting to a law.

6 C. 5, X, II, 6: *celerem expeditionem.*

7 Cfr. cc. 2, 3, X, II, 20.

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made clearer, supplied and corrected, provided the point at issue, or *meritum causae,* remains the same; if, instead of the thing itself (for instance, a precious article which has been alienated), a certain sum, or an interest, or an equivalent is demanded. These are corrections, not changes.

(b) The judge shall *set a certain term* for proposing and completing the process or proofs. This term may, however, be prorogued at the demand of the parties, but not unduly (cfr. can. 1620, 1634).

(c) The possessor of property belonging to another ceases to be *bona fide* after the *litis contestatio,* and therefore, if he should lose his case, is bound to make restitution not only of the property or thing itself, but also of the interest or profit drawn from the moment of the *litis contestatio,* and shall also be held to indemnification, if an additional loss should occur either to the defendant or to the object.

In the Roman tribunals the sum to be deposited for the expenses is determined at this juncture.[8]

8 *Reg. Sig. Apost.,* art. 37 (*A. Ap. S.,* IV, 199).

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TITLE VIII

LITIS INSTANTIA OR PROCEEDINGS

There is no such title as this in the Decretals, nor could we find an adequate term for it in English law.[1] Perhaps *pleadings* would suit, but *proceedings,* if taken in the limited sense of judiciary acts which begin with the *litis contestatio,* conveys the idea of the title just as well. The text first defines *litis instantia,* and then explains the modes of interruption, abatement, and renunciation.

DEFINITION AND INTERRUPTION

CAN. 1732

Instantiae initium fit litis contestatione; finis autem omnibus modis, quibus iudicium terminatur, sed et antea non solum interrumpi, verum etiam finiri potest sive peremptione sive renuntiatione.

CAN. 1733

Si pars litigans moriatur aut statum mutet aut cesset ab officio cuius ratione agit:

1.° Causa nondum conclusa, instantia interrumpitur, donec heres defuncti aut successor litem instauret;

2.° Causa conclusa, instantia non interrumpitur, sed iudex procedere debet ad ulteriora, citato procuratore, si adsit, secus defuncti herede vel successore.

1 Cfr. Blackstone, III, 292 f.

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CAN. 1734

Si controvertatur cuinam ex clericis litigantibus ius sit ad beneficium, et alter, lite pendente, moriatur, aut beneficio renuntiet, instantia non interrumpitur, sed contra superstitem eam prosequitur promotor iustitiae qui pro beneficii aut ecclesiae libertate dimicet, nisi beneficium sit liberae collationis Ordinarii et hic praeferat causam ut victam superstiti adiudicare.

CAN. 1735

Procuratore aut curatore a munere cessante, tandiu interrupta manet instantia, quandiu pars aut ii ad quos pertinet novum procuratorem vel curatorem nominaverint aut per se ipsi in posterum agere se velle professi fuerint.

The *instantia litis* begins with the issue in pleading and ends with the final sentence. However, the whole proceeding may not only be interrupted, but also abated or renounced.

Interruption takes place when one of the parties dies, or changes his status, or goes out of the office in virtue of which he was a party to the case,— provided the pleadings have not yet been closed.

Statum mutare means to change from the lay to the clerical state, or from either the lay or the clerical to the religious state, because the religious form a state of their own, and, besides, are considered as minors in ecclesiastical law. This rule, however, does not apply to novices, because they still have their own free will (*velle et nolle*) and hence may stand judgment, at least by proxy.

Cessare ab officio in this case signifies giving up the

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office which involves one in the law-suit, for instance, that of administrator or ecclesiastical superior.

However, interruption lasts only until the litigant's heir or successor in office again takes up the case. If the pleadings have been closed, the proceedings are *not* interrupted, but the judge must proceed after having summoned the defendant, if alive and present, or else his heir or successor.

Can. 1734 refers to the special case of a *benefice* which is claimed by two clergymen, one of whom dies or resigns while the case is pending. To whom shall the benefice be adjudged? It is not a vacant benefice properly speaking, nor can it be resigned except in favor of the other litigant, which is not here supposed. In this case the proceedings are not interrupted, but continued by the *promotor iustitiae,* who defends the benefice or liberty of the church. This must be understood of all benefices not reserved to the Apostolic See.[2] If the benefice is of free collation, *i.e.,* one to which the Ordinary may freely appoint, the same Ordinary may confer it upon the survivor or rather declare that the survivor has won the case and adjudge the benefice to him. If the proctor (attorney) or guardian (curator) goes out of office by death, resignation, or removal, the proceedings are interrupted until a new proctor or curator is appointed by those concerned or until the latter have formally declared that they themselves will prosecute the case.

ABATEMENT OF THE INSTANTIA

CAN. 1736

Si nullus actus processualis, quin aliquod obstet impedimentum, ponatur in tribunali primae instantiae

2 Cfr. c. 1, Clem. II, 5; can. 1435, § 1, n. 2.

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per biennium aut in gradu appellationis per annum, instantia perimitur, et in altero casu sententia per appellationem oppugnata transit in rem iudicatam.

CAN. 1737

Peremptio obtinet ipso iure et adversus omnes, minores quoque aliosve minoribus aequiparatos, eaque ex officio etiam excipi debet, salvo iure regressus ad indemnitatem adversus tutores, administratores, procuratores qui culpa se caruisse non probaverint.

CAN. 1738

Peremptio exstinguit acta processus, non vero acta causae; imo haec vim habere possunt etiam in alia instantia, dummodo ea inter easdem personas et super eadem re intercedat; sed ad extraneos quod attinet, non aliam vim obtinet, nisi documentorum.

CAN. 1739

In casu peremptionis, quas quisque ex litigatoribus fecerit, has ipse ferat expensas perempti iudicii.

If, notwithstanding the fact that no lawful impediment can be alleged, no processual act has been undertaken by the first tribunal or the first instance within two years, the proceeding is abated or quashed. If the higher or second court does nothing within one year from the date of appeal, although no lawful obstacle is in the way,[8] the sentence attacked becomes *res iudicata.*

Abatement holds *ipso iure* and against all, even minors and those equal to minors under the law, and must also be made a case of exception *ex officio;* but the right of

[8] See cc. 5, 8, X, II, 28 and the canons on appeal.

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claiming indemnity against guardians, administrators, and procurators who cannot prove their innocence is reserved to all minors. This claim (*regressus*), we suppose, holds for the time during which the representatives of minors have been culpably idle. This would comprise the *lucrum cessans* as well as the *damnum emergens*.

Abatement quashes all acts of proceedings (*acta processus*), but not the acts of the case (*acta causae*), which remain effective for another instance (higher court), provided the case concerns the same persons and the same matter. For outsiders these *acta causae* have merely the value of documents (see can. 1812 ff.). In case of abatement the expenses must be shared by the litigants according to the measure in which they have incurred or made them.

RENUNCIATION

CAN. 1740

§ 1. In quolibet statu et gradu iudicii potest actor instantiae renuntiare; item tum actor tum reus possunt processus actis renuntiare sive omnibus sive nonnullis tantum.

§ 2. Renuntiatio ut valeat, peragenda est in scriptis, et a parte vel ab eius procuratore, speciali tamen mandato munito, debet subscribi, alteri parti communicari, ab eaque acceptari, vel saltem non impugnari, et a iudice admitti.

CAN. 1741

Admissa, pro actis quibus renuntiatum est, eosdem parit effectus ac peremptio instantiae: et obligat renuntiantem ad solvendas expensas actorum, quibus renuntiatum fuit.

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The plaintiff may renounce further proceedings at any stage or in any instance; and the plaintiff as well as the defendant may surrender the *acta processus* either totally or partially. Renunciation must, however, be made in *writing* and be signed by the party or his proctor acting under a special mandate. Besides, the renunciation must be communicated to, and accepted by the other party, or at least not objected to by the latter, and admitted by the judge. Valid renunciation has the same effect as abatement with regard to the acts renounced, and obliges the one who makes it to pay all the expenses thus far incurred.

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TITLE IX

QUESTIONING THE PARTIES

It is now supposed that the parties have been duly summoned or notified of the place and date of the trial, and the issue in pleading has begun. The parties may be represented by their attorneys or proctors, unless there be an injunction by the judge commanding them to be present personally according to can. 1647. The Code now proceeds to describe the questioning of the parties and the oath to be administered to them.

QUESTIONS TO BE PROPOSED

CAN. 1742

§ 1. Iudex ad eruendam veritatem facti quod publice interest ut extra dubium ponatur, debet partes interrogare.

§ 2. In aliis casibus potest unum ex contendentibus interrogare non solum ad instantiam alterius partis, sed etiam ex officio, quoties agitur de illustranda probatione adducta.

§ 3. Interrogatio partium fieri a iudice potest in quovis stadio iudicii ante conclusionem in causa; post conclusionem in causa servetur praescriptum can. 1861.

CAN. 1743

§ 1. Iudici legitime interroganti partes respondere tenentur et fateri veritatem, nisi agatur de delicto ab ipsis commisso.

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§ 2. Si pars legitime interrogata respondere recuset, quanti facienda sit haec recusatio, utrum iusta sit, an confessioni aequiparanda, necne, iudicis est aestimare.

§ 3. Pars, quae respondere debet, si illegitime respondere recusaverit aut si postquam responderit mendax reperta fuerit, puniatur, ad tempus a iudice pro rerum adiunctis definiendum remotione ab actibus legitimis ecclesiasticis; et si ante responsionem iusiurandum de veritate dicenda praestiterit, laicus interdicto personali, clericus suspensione plectatur.

The questions asked depend, of course, on the nature of the case. When the public welfare is at stake, the judge *must* question the parties concerning the facts in order that they may be ascertained. In *other cases, i.e.,* contentious or civil or private matters, the judge *may* question one party at the demand of the other, or both *ex officio,* whenever he considers it necessary to corroborate or illustrate a proof alleged. Such questioning is admissible until the proceedings are closed; but after they have been finished (*post conclusionem in causa*), questioning is allowed only under the conditions mentioned in can. 1861.

In order to produce the required effect, questioning must be followed by the answers of the parties questioned. Hence as often as the judge is entitled to interrogate the parties, these are obliged to answer according to the truth. Only the criminal is not bound to confess his own guilt, because no one is supposed to condemn himself.

But what if the *party questioned refuses to answer?* Does this refusal amount to a confession? Certainly not in the case of a criminal, because he is under no obligation to admit his guilt. Hence the text says that

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it lies with the judge who lawfully questions the party to weigh the argument of silence or refusal, whether it amounts to a confession or not, etc. It may be that the judge takes a refusal to answer as equivalent to a confession,[1] except, of course, in criminal cases.

To give greater weight to his authority and to the law the judge may *punish the party* who unlawfully refuses to answer a lawful question by denying him any legal action or, as we say, civic rights, which denial, however in this case only concerns the ecclesiastical sphere.[2] This punishment is to be administered by the judge according to the importance of the matter. The same punishment may be inflicted on one whose answer is found to be untruthful. A heavier penalty is to be inflicted upon a lay person who swears falsely: he is to be *personally interdicted*. A clergyman who perjures himself is to be suspended, *i.e.*, totally, from office as well as benefice.[3]

THE OATH

CAN. 1744

Iusiurandum de veritate dicenda in causis criminalibus nequit iudex accusato deferre; in contentiosis, quoties bonum publicum in causa est, debet illud a partibus exigere; in aliis, potest pro sua prudentia.

CAN. 1745

§ 1. Tum actor tum reus invicem, tum etiam promotor iustitiae et defensor vinculi possunt iudici exhibere articulos, seu quaesita, super quibus pars interrogetur, quaeque vulgo *positiones* dicuntur.

1 The *Regulae S. R. Rotae*, § 139, read: "*parte praecepto iudicis non obtemperante, facta habeantur uti vera et confessa.*"

2 Cfr. can. 2256, n. 2.

3 Cfr. c. 15, X, I, 11; can. 2278, § 2.

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§ 2. In positionibus exarandis, admittendis et parti proponendis regulae cum proportione serventur quae in can. 1773–1781 statutae sunt.

CAN. 1746

Ad iusiurandum praestandum vel interrogationibus respondendum partes personaliter coram iudice se sistere debent, exceptis iis de quibus in can. 1770, § 2, nn. 1, 2.

According to the Decretals [4] an oath was administered to both parties; it was called *iuramentum calumniae,* and in it the parties declared that they were prosecuting the case in good faith and merely with the intention of defending their presumptive right, without malice, vexations, or fraudulent delays. This oath was not an absolute requirement, but could be remitted by tacit renunciation. Our Code knows no such oath. The one mentioned here is an *oath* to tell the truth, and resembles that taken by the witnesses. It must not be demanded in criminal trials, lest the defendant be exposed to the danger of perjury. However, in *civil cases* which concern the *public welfare,* like matrimonial and ordination cases, the judge *must* demand this oath of the parties. Culpable or negligent omission of this requirement does not, however, affect the validity of the acts. In other cases the judge may demand this oath whenever he deems it necessary.

In order to facilitate and systematize the proceedings, the questions to be proposed should be formulated or specified; and in that form are called *positiones.* These *positiones* are to be drawn up, admitted, and presented

[4] Lib. II, tit. 7, *de iuramento calumniae.*

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to the parties in approximately the same way as the questions put to the witnesses (can. 1773–1781).

To give oath and to answer the questions thus formulated, the *parties must present* themselves *personally* before the judge. This rule applies to all except cardinals, bishops, illustrious personages (can. 1770, § 2, n. 1) and those who are prevented from coming to court personally by sickness or their state of life.

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TITLE X

PROOFS

This title is one of the most important in legal procedure, because the issue of the trial naturally depends on the validity of the evidence.

The Code first mentions three kinds of facts which need no proof; then it states who has the duty of proving, and finally regulates the delay of proofs.

PRELIMINARY RULES

CAN. 1747

Non indigent probatione:

1.° Facta notoria, ad normam can. 2197, nn. 2, 3;

2.° Quae ab ipsa lege praesumuntur;

3.° Facta ab uno ex contendentibus asserta et ab altero admissa, nisi a iure vel a iudice probatio nihilominus exigatur.

CAN. 1748

§ 1. Onus probandi incumbit ei qui asserit.

§ 2. Actore non probante, reus absolvitur.

CAN. 1749

Probationes quae ad moras iudicio nectandas postulari videntur, ceu examen testis longe dissiti, aut cuius domicilium nescitur, vel cognitio documenti

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quod cito haberi non potest, iudex ne admittat, nisi hae probationes necessariae videantur quia ceterae deficiant aut satis non sint.

A proof is the judicial demonstration of the truth of a disputed assertion or fact.[1] It is not concerned with texts, for these are supposed to be safe and evident, but turns about a controversial point or criminal fact which must be proved to have happened and in the manner it is alleged to have happened. Evidence and proof are not identical, for there may be evidence without proof, but there is no proof without evidence.[2]

In regard to the *weight of proof* the Code speaks of *plena* and *semiplena probatio,* or *plenam* and *semiplenam fidem facere.* Full proof is one which convinces the judge and prompts him to give sentence without further investigation. A *probatio semiplena* or half-proof is one that leaves room for reasonable doubt. In a wavering state of mind no one should pronounce judgment.

That even full proofs may differ as to degree, is clear from such terms as *probationes apertissimae, plenissimae, luce clariores, praesumptivae,* etc., used in canon law. Psychologically speaking, a full proof always excludes the contradictory proposition and therefore must be called sufficient in any case; what is full in its kind cannot be fuller. But it remains true that different *kinds of proof* carry unequal weight and may produce various states of mind, from mere presumption to absolute certainty. This truth is illustrated by the following verses:

"*Aspectus, sculptum, testis, notoria, scriptum,*
Iurans, confessus, praesumptio, fama probavit."

1 See the commentators on lib. II, tit. 19 *Decretal.*, especially Reiffenstuel, Santi-Leitner, and Wernz (*Ius Decret.*), Vol. V.

2 Messmer, *l. c.*, p. 91 f.

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Of these nine kinds of evidence the Code mentions some explicitly, whereas others are implied under other species. *Confessus* or confession occurs in chapter I of this title; *iurans* (oath), *testis* (witness), and *fama* (rumor) are treated in chapter II, on witnesses;[3] *aspectus* doubtless refers to experts and ocular inspection; *sculptum, i.e.,* monumentary proof, must be combined with *scriptum* or documentary proof. *Praesumptio* is treated in ch. VI; *notorietas* is mentioned in can. 1747.

Of *notorious facts,* provided they be such as defined in can. 2197, n. 2, 3, the text says that they *need no proof.* Notoriety may be either of *law* or of *fact.* The former arises from adjudged matter and confession; the latter from that kind of publicity which no artifice can hide or law protect.[4]

No *proof* is required, secondly, for *facts which are presumed by the law;* see chapter VI, on presumptions.

Finally, proof is superseded by *judicial confession;* see chapter I of this title.

The next question that arises is: *Who is obliged to furnish proof?* It is the one who asserts a right or fact, not the one who denies it. For a mere denial is no proof.[5] Since the *plaintiff* generally is the one who asserts a right or fact, he must furnish proof, as in petitory and possessory trials.[6] However, if the *defendant* sets up an exception or makes a counter-charge, and thereby becomes a plaintiff (*reus excipiendo fit actor*), he must furnish proof of his exception or counter-charge. Those, for instance, who oppose the excommunication of witnesses, or of parties, or of the judge, must prove

3 The oath refers to witnesses; see ch. VII.

4 Cfr. cc. 8, 10, X, III, 2; c. 23, X, I, 6.

5 See l. 2, Dig. 22, 3; c. 23, X, I, 6; c. 5, X, I, 9: "*negantis factum, per rerum naturam, nulla est directa probatio.*"

6 C. 3, X, II, 12.

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that it was inflicted.[7] Those who oppose prescription must prove the title, if the law is against them as in case of titles; those who pretend exemption must prove the privilege by showing or proving prescription.[8]

If the *plaintiff fails to furnish proof, the defendant goes free.* By proof is here understood full proof (*plena probatio*), for, as will be seen from can. 1829 ff., a half-proof may be supplied by an oath. Besides, the proof must concern the action intended; for instance, if the plaintiff brings suit against disseissin, and proves only possession and disseissin, but not ownership (*petitorium*), he is victorious in the former two points, but not as to the latter.[9] The merit of the cause must be proved. Thus if a donation is attacked, the instrument of donation, or the proof that the donation has been made, is the point at issue, not some attached condition, which has perhaps been verified in the meanwhile.[10] Therefore the principle asserted in can. 1748, § 2 must be understood in this sense, that the defendant is absolved to the extent that the plaintiff fails to furnish proof (*in hac parte*).[11] Only if the plaintiff fails entirely in furnishing proof for his accusations is the defendant fully free, even though he made no use of counter-defence.[12] But a mere assertion or confession of the plaintiff, even though it may reflect on his character, is not sufficient to equal full proof. Thus if one confessed adultery with his brother's wife, and then (after her husband's death) married her, but wished to have the marriage dissolved, his confession would not be sufficient.[13]

Can. 1749 is intended to expedite trials, *i.e.*, to finish them as quickly as the case permits. Hence it ordains

7 C. 1, 6°, II, 12; c. 2, 6°, V, 11.
8 C. 1, 6, II, 13; c. 7, 6°, V, 7.
9 C. 3, X, II, 12; c. 3, X, II, 19.
10 C. 3, 6°, II, 14.
11 C. 15, X, II, 1.
12 C. 36, X, II, 24.
13 C. 3, I, X, IV, 13.

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that the judge *should not admit evidence* that is apparently demanded for no other purpose than to delay the sentence, unless such evidence is required because of the lack or insufficiency of the other proofs. Proofs which have this dilatory effect are the testimony of a witness who lives far away from the court or whose domicile is unknown, and the examination of a document which cannot be easily and quickly obtained. There is always room for the suspicion that such witnesses and documents are demanded with a sinister intention or frivolously, and they are therefore sometimes called *futilia documenta,* which the *ponens* may and should reject.[14]

The Code then proceeds to describe the different means of obtaining evidence. They are: confession, the testimony of witnesses, the declarations of experts, judicial inspection, documents, presumptions, and oaths.

[14] Cfr. c. 5, X, II, 14; *Lex propria S. R. Rotae,* can. 27, § 3 (*A. Ap. S.,* I, 27).

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CHAPTER I

CONFESSION

CAN. 1750

Assertio de aliquo facto, in scriptis aut oretenus ab una parte contra se et pro adversario coram iudice, sive sponte, sive iudice interrogante peracta, dicitur confessio iudicialis.

CAN. 1751

Si agatur de negotio aliquo privato et in causa non sit bonum publicum, confessio iudicialis unius partis, dummodo libere et considerate facta, relevat alteram ab onere probandi.

CAN. 1752

Pars, aliquid confessa in iudicio, non potest contra confessionem suam venire, nisi aut in continenti hoc faciat, aut probet confessionem ipsam vel carere conditionibus in can. 1750 expressis vel errori facti esse adscribendam.

CAN. 1753

Confessio sive scriptis, sive oretenus, ipsimet adversario aut aliis extra iudicium facta, dicitur extraiudicialis: eaque in iudicium deducta, iudicis est,

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perpensis omnibus rerum adiunctis, aestimare quanti facienda sit.

Confession is here understood in the judicial, not in the sacramental sense. It is called judicial because given *before* the judge sitting in tribunal. If the judge delegates a notary or an auditor to receive a confession, it is nevertheless judicial, because the notary acts in the name of the judge.[1] But a confession made before a lay judge cannot be accepted as such by an ecclesiastical judge, and the latter may not pronounce sentence on the strength of it.[2]

Confession, therefore, may be defined as a statement, oral or written, made before the ecclesiastical judge by one party against itself and in favor of the other, spontaneously or upon the demand of the judge. The text allows not only spontaneous, but also elicited confession. That one may confess a deed of his own accord is evident. But fraud, deceit, or captious words are not admitted in a spontaneous confession. On the other hand, the judge may *solicit* a confession; but he must proceed lawfully, and lawful proceeding requires that the party to be questioned is under his jurisdiction, and that, in a criminal case a denunciation at least, if not a formal inquisition, was previously made. Besides, the judge is not free to act like a shrewd lawyer, extorting a confession by misleading or suggestive questions, by cross-examination, by captious and ensnaring remarks, unworthy trickery, etc.[3]

The judge being entitled to solicit a confession, it follows that the *party* is *obliged* to answer truthfully, because right and duty are correlative. Besides every one is obliged to obey his superior when he lawfully

1 Reiffenstuel, II, 18, n. 9.
2 C. 4, X, II, 1.
3 Cfr. Messmer, *l. c.*, p. 97; Santi-Leitner, II, 18, n. 15.

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commands, and the judge is supposed to proceed lawfully.[4]

The plea of "not guilty," with the mental restriction, "because not convicted" or the like, is not admitted by Canon Law.

Entirely different from this is the question whether the defendant is in conscience bound to confess in reply to a true question which would condemn him in the external forum, although in the court of conscience he could not be condemned. Let us give an instance. James feigned a promise of marriage to Gemma (*ficte promisit matrimonium*), and now, at the trial, he is asked by the judge: Did you promise to marry Gemma? What is his duty? The more probable answer to this question is that James may deny the proposition, *i.e.*, he may answer negatively, because in doing so he does not tell an objective untruth, since not the material words are to be considered, but the intention, and he never intended to marry Gemma, but feigned the promise. Of course, we suppose that the judge was under the impression of a false presumption when he asked the question.[5]

Another question: Is the *proctor* allowed to make a confession for his client? Although the text mentions only the party himself, yet if the proctor would confess in the presence of his client, and the latter would not contradict him, or if the proctor had a special mandate to that effect, his confession could not be rejected.[6]

The *effect* of a judicial confession, made freely and deliberately, is very moderately stated in can 1751: "*it frees the other party from the burden of proof.*" Hence,

4 Messmer, *l. c.*, p. 101.

5 Cfr. c. 11, C. 22, q. 5; Reiffenstuel, II, 18, n. 171 ff., who could quote Sanchez, Lugo, and others in favor of this view.

6 Cfr. C. 28, Dig. 2, 14; C. 6, § 4, Dig. 42, 2.

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if the defendant confesses his obligation or guilt, the plaintiff has won the case, and, in civil or private matters (*"in negotio privato"*) the judge may proceed to pronounce sentence.[7] In cases affecting the public welfare, such as matrimonial and criminal cases, the confession of the party does not produce full proof.[8]

Another effect of confession is stated in can. 1752, namely, the party who has confessed something at the trial, *is not allowed to retract his confession.* The reason is because a confession is supposed to be made deliberately and with due reflection, and without any intention of deriding the judge. However, there are exceptions to this rule. A confession may be retracted:

1. *In continenti, i.e.,* immediately after the confession has been made, and before it is taken down in writing, or before leaving the court, if the judge is willing. In this case it is not necessary to prove the mistake, but it is sufficient simply to recall the previous statement or to correct the error.[9]

2. If the party who confessed can prove that the confession was not made legitimately, according to can. 1750, for instance, that the judge proceeded unlawfully.

3. If an error in fact (*error facti*)—not in law—is proved, for instance, if an administrator or procurator momentarily forgot the exact sum or date.[10]

Can. 1753 mentions *extrajudicial confession, i.e.,* confession made privately to one's adversary or to others, say the judge or notary, or an attorney outside the court or tribunal. The proof that such a confession was made could be furnished by the free admission in court that it had been made, or by two witnesses who heard it.[11]

7 C. 10, X, I, 36; c. 6, X, I, 9.
8 C. 5, X, IV, 13; c. 5, X, V, 1.
9 See c. 7, X, II, 21; Reiffenstuel, II, 18, n. 77 f.
10 C. 4, X, II, 18.
11 C. 23, X, II, 20; Santi-Leitner, II, 18, n. 7.

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The value or *effect* of such an extrajudicial confession is not judical *per se,* because it is at the most only half-proof, which does not free the plaintiff from the burden of supplying the remaining half by other means. It rests with the judge to weigh the value of such a confession, and in doing so, he shall consider all the circumstances of the case. Circumstantial evidence may often be helpful. For instance, if a boy was for a long time called the child of a certain man and acknowledged as such by the putative father, even though the latter did so only upon the insistence of the mother, the presumption is in favor of his paternity, even if the mother afterwards denies it under oath.[12]

[12] C. 10, X, II, 19.

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CHAPTER II

WITNESSES AND TESTIMONY

As in the Roman,[1] so in Canon Law, witnesses have always played a conspicuous part. The *contestatio litis* already introduced witnesses, and in the course of the trial, their testimony was instrumental in deciding the case.

A *witness* is a person who has seen or knows a fact about another person, and is therefore competent to give evidence concerning the same. A testimony (*attestatio*) is a more or less solemn statement, made in court, concerning a fact seen or known by another, for no one can be a witness in his own case. Our Code in two preliminary canons regulates the admission of witnesses and defines their obligation.

ADMISSION AND OBLIGATION OF WITNESSES

CAN. 1754

Probatio per testes in quibuslibet causis admittitur, sub iudicis tamen moderatione, secundum modum praefinitum in canonibus qui sequuntur.

CAN. 1755

§ 1. Testes iudici legitime interroganti respondere et veritatem fateri debent.

1 See Dig. 22, 5; Cod., IV, 20.

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§ 2. Salvo praescripto can. 1757, § 3, n. 2, ab hāc obligatione eximuntur:

1.° Parochi aliique sacerdotes quod attinet ad ea quae ipsis manifestata sunt ratione sacri ministerii extra sacramentalem confessionem; civitatum magistratus, medici, obstetrices, advocati, notarii aliique qui ad secretum officii etiam ratione praestiti consilii tenentur, quod attinet ad negotia huic secreto obnoxia;

2.° Qui ex testificatione sua sibi vel consanguineis vel affinibus in quolibet gradu lineae rectae et in primo gradu alineae collateralis infamiam, periculosas vexationes, aliave mala valde gravia obventura timent.

§ 3. Testes iudici legitime interroganti scienter falsum affirmantes aut verum occultantes puniantur ad normam can. 1743, § 3; eademque poena mulctentur omnes, qui testem vel peritum donis, pollicitationibus aut alio quovis modo inducere praesumpserint ad falsum testimonium dicendum aut ad veritatem occultandam.

Canon 1754 repeats the old saying of Arcadius[2] that witnesses may be admitted in all trials, whether criminal or civil. The same jurisconsult adds that the judge should control the witness-stand and admit only as many witnesses as are necessary to bring out the truth. This is here expressed by the phrase "*sub iudicis moderatione,*" and the mode or manner is governed by the following canons.

Witnesses, when called upon legitimately by the judge, are *obliged to answer and to speak the truth.* For the office of witness is one of public interest and affects the public welfare. Therefore the ecclesiastical law per-

2 L. 1, Dig. 22, 5; cfr. c. 13, X, II, 19. Some canonists denied that witnesses could be compelled to give testimony in criminal cases; see Reiffenstuel, II, 21, n. 18 ff.

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mits the judge to employ penalties in order to compel persons to act as witnesses. But they must be warned before penalties are inflicted.[3] Besides, the judge must *question them lawfully, i.e.,* he must be competent and summon them according to the rules which follow.

Not all persons who are otherwise qualified, are to be *compelled to take the witness stand.* The following are excepted:

1. *Confessors,* who, according to can. 1757, § 3, n. 2, are incapable of giving testimony in regard to matters learned through sacramental confession.

2. All persons whose *knowledge is privileged,* or who are bound by official secrecy, even though this be imposed only by reason of advice. This includes *pastors* and priests who have knowledge of the matter in question only by reason of, and in connection with, their sacred ministry, even though such knowledge was gained extra-sacramentally; also civil magistrates, physicians, midwives, lawyers (attorneys), notaries, and other persons bound by official secrecy.[4] This law was made to safeguard public trust and confidence in public or semi-public persons.

3. All who *would sustain damage* if forced to give testimony. Hence all persons who reasonably fear that their testimony will render themselves or their relatives, either by consanguinity or affinity in every degree of the direct line and up to the first degree of the collateral line, *infamous,* or cause themselves or the aforesaid relatives dangerous *vexations* or other probable disadvantage, cannot be forced to give evidence. As to infamy,

[3] C. 1–5, X, II, 21.

[4] This also in English law, according to Blackstone, *Comment.,* III, 370; *Ibid.,* note 24, Cooley adds: "In several of the U. S. statutes have been passed extending similar protection to the communications made to physicians and clergymen."

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it is certain that no man can be compelled to prove his own infamy or to answer any questions which may tend to incriminate himself, or render him liable to punishment.[5] Such vexations and evil may be of the moral or the material order.

The question may arise: Is a witness, who is otherwise capable and not excused, bound to speak the truth, if he has sworn to keep it secret (*secretum commissum et iuramento firmatum*)? The answer is, yes, because such an oath was either rash or illicit, and therefore contrary to good morals. If the oath is publicly known, the judge may publicly declare it null and void, in order to prevent danger of scandal arising from presumptive perjury.[6]

§ 3 of can. 1755 establishes the *penal sanction* against *perfidious witnesses.* The judge who proceeds lawfully in questioning witnesses, may inflict upon those *who knowingly tell an untruth,* or conceal the truth, the same penalties as are threatened in can. 1743, § 3, against the parties who tell a lie. But the untruthfulness of the testimony must be either notorious or juridically proved.[7]

The same penalty may be meted out under the same condition to those who *bribe* witnesses or experts with gifts and promises, or in any other way (for instance, by threats or fear) endeavor to induce them to make a false statement or to hide the truth. Thus in the case of a divorce obtained by perjury or false testimony, the bribed witnesses had to do penance and were no longer admitted as witnesses.[8] This, we are sorry to say, still happens in connection with affidavits and other testimony. Severe punishments were formerly visited

5 Reiffenstuel, II, 20, n. 22 ff.; see also Blackstone-Cooley, *l. c.*

6 Reiffenstuel, II, 21, n. 43 ff.; Santi-Leitner, II, 21, n. 7.

7 C. 17, X, I, 11.

8 C. 9, X, II, 20.

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upon higher and lower clerics who perjured themselves: they were deposed, relegated to a monastery, or reduced to the lay state.[9] Perjurers were excommunicated, or declared infamous, and their testimony rejected.[10] This was done to safeguard the public welfare and the dignity and authority of the courts.

Art. I

WHO MAY BE WITNESSES

Can. 1756

Omnes possunt esse testes, nisi expresse a iure repellantur vel in totum vel ex parte.

Can. 1757

§ 1. Ut non idonei repelluntur a testimonio ferendo impuberes et mente debiles.

§ 2. Ut suspecti:

1.° Excommunicati, periuri, infames, post sententiam declaratoriam vel condemnatoriam;

2.° Qui ita abiectis sunt moribus ut fide digni non habeantur;

3.° Publici gravesque partis inimici.

§ 3. Ut incapaces:

1.° Qui partes sunt in causa, aut partium vice funguntur, veluti tutor in causa pupilli, Superior aut administrator in causa suae communitatis aut piae causae, cuius nomine in iudicio consistit, iudex eiusve assistentes, advocatus aliique qui partibus in eadem causa assistunt vel astiterunt;

2.° Sacerdotes, quod attinet ad ea omnia quae ipsis

[9] C. 7, Dist. 50.
[10] C. 9, C. 3, q. 3; c. 20, C. 24, q. 3.

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ex confessione sacramentali innotuerunt, etsi a vinculo sigilli soluti sint; imo audita a quovis et quoquo modo occasione confessionis ne ut indicium quidem veritatis recipi possunt;

3.° Coniux in causa sui coniugis, consanguineus et affinis in causa consanguinei vel affinis, in quolibet gradu lineae rectae et in primo gradu collateralis, nisi agatur de causis quae ad statum civilem aut religiosum personae spectant, cuius notitia aliunde haberi nequeat, et bonum publicum exigat ut habeatur.

CAN. 1758

Non idonei et suspecti audiri poterunt ex decreto iudicis, quo id expedire declaretur; sed eorum testimonium valebit tantummodo ut indicium et probationis adminiculum, et generatim iniurati audiantur.

The general rule is that all whom the law does not debar, either entirely or partially, may be witnesses. The law always supposes two qualities in a witness, *viz.*, first, *knowledge* of the facts to which he was to bear witness, and, secondly, probity or *uprightness* of character.

The Code distinguishes a threefold class of persons who are, or may be, excluded from the witness-stand; they are the unfit, the suspected, and the incapable. The former two classes may be said to constitute the *relatively unfit,* and the last the absolutely unfit witnesses; or, as the Code says, *ex parte* and *in totum.*

The difference is explained in can. 1758, which declares that the *relatively unfit, i.e.*, the unfit and suspected, may be admitted as witnesses if the judge considers that for one reason or another they are necessary. However, their testimony has no value except as an indi-

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cation or a sign which may eventually lead to the establishment of complete evidence and to strengthen the proof by corroborating the testimony of other witnesses. Relatively unfit witnesses should, as a rule, be heard without being put under oath (*iniurati audiantur*). Thus in the case of procedure against presumptive heretics witnesses are admitted who are or were the companions and friends of the accused.[11] Thus, also, perjurers are admitted as witnesses by the S. Roman Rota, but their testimony is treated as a mere *indicium*, more especially *in causis spiritualibus*.[12] Conspirators in the same case are generally repelled.[13]

1. Unfit (*non-idonei*) to act as witnesses are boys who have not yet completed the fourteenth, and girls who have not yet completed the twelfth year of age (*impuberes*). Also the feeble-minded (*mente debiles*). To this class belong idiots, mentally deranged persons, and those who are under the influence of magic, or hypnotism, or drugs, or intoxicating liquor. Those who are merely defective in hearing, sight, or speech, are not excluded, provided that the mental condition of this class of *non-idonei* was defective at the time the fact occurred or the act was committed, regarding which they would testify.[14] That they must be mentally normal when they are called upon to give testimony goes without saying.

2. *Suspected* witnesses are:

a) All excommunicated and infamous persons as well

11 Cfr. cc. 5, 8, 6°, V, 2.

12 *Reg. Servandae*, Aug. 4, 1910, § 114, n. 1 (*A. Ap. S.*, II, 820).

13 C. 22, X, II, 27.

14 A loose statement is that of Santi-Leitner, II, 20, n. 15: "*quando autem testis adducitur ad probandum actum, eius idoneitas requiritur tempore probationis.*" Does that *probatio* go back to the time the act was committed? If so, all right; but if *probatio* is taken to mean the witness-stand, the statement is ambiguous; for if he was not fit to witness the act, he cannot testify regarding it.

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as perjurers against whom a declaratory or condemnatory sentence has been duly pronounced. Note that *vitandi* and *tolerati are equally included* under *excommunicati,* and the Constitution of Martin V (" *Ad evitanda,*" 1418) cannot be applied in this case. As to *perjurers,* a special penalty may be meted out to those who perjure themselves outside of a trial court by the Ordinary,[15] who can deprive them of the right and capacity to give testimony if he sees fit. In our case, either the Ordinary or the judge would have to issue a declaration to the effect that perjury was committed, and that the perjurer will not be admitted as a witness; the law permits the issuance of such a sentence.[16]

Concerning *infamous* persons observe that the infamy implied is infamy in law as well as in fact, but the persons in question must have sustained a condemnatory or declaratory sentence to that effect according to the penal code (can. 2293) of the Church. If the civil authorities have pronounced sentence of infamy, the sentence is valid under the ecclesiastical law if the Ordinary approves it.[17]

A special class of infamous persons (*infames infamia iuris*) are those who fight a duel and their seconds.

In all the above-mentioned cases mere notoriety is not sufficient, but a formal sentence, either declaratory or condemnatory, is required.[18]

b) Another class of "suspected" persons debarred from testifying at ecclesiastical trials are those whose *character* is such as to render them untrustworthy. This

15 Can. 2323.

16 Cfr. c. 9, C. 3, q. 5; c. 9, X, II, 20.

17 Cfr. c. 17, C. 6, q. 1; can. 2293, § 3.

18 S. C. C., Aug. 9, 1890 (*A. S. S.*, XXIII, 234 f.); but compare can. 2351, § 2; when this canon is verified, the so-called *Mensuren* of the Austrian and German students render the participants infamous.

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is a rather vague rule, the application of which is left to the judge. It appears to comprise the two classes formerly [19] known as *criminosi* and *personae viles sive pauperes*. Criminals are here understood, not such as are infamous in fact,[20] because these are comprised under the preceding number. However, as long as no declaratory or condemnatory sentence has been issued, even those stained with *infamia facti* may reasonably be included here. Hence all persons who have lost the esteem and respect of their fellowmen, and have not amended their lives, are included in the phrase: "*qui ita abiectis sunt moribus,*" etc., also the class formerly styled *personae pauperes et viles,* because, as the Roman law [21] says, paupers and persons of low condition are apt to commit a crime for filthy lucre's sake, or, in other words, are more easily bribed than others. Yet this statement needs some modification, for a poor man may be as honest as a rich man, and if there is no proof of his having been bribed on former occasions, he cannot justly be excluded. It must not be forgotten that the Christian religion has raised the lowly (slaves, serfs, and villains) to a higher moral standard than the Roman law could reasonably assume. But proved bribery would certainly be sufficient to exclude one from the witness-stand.[22]

c) Still another class of persons excluded from testifying at ecclesiastical trials consists of those who have *publicly fostered hatred and enmity against the party* against whom they are called to testify. This exclusion is based on common sense and has been generally adopted by civil codes. This class of witnesses was not admitted even in exceptional judgments, either civil or criminal, and was excluded also in inquisitorial proceedings.[23]

19 C. 54, X, II, 20; c. 3, C. 4, q. 2 et 3; see l. 3, Dig. 22, 5.
20 Reiffenstuel, II, 20, n. 55.
21 L. 3, Dig. 22, 5.
22 C. 9, X, II, 20.
23 C. 32, X, V, 3.

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But there are three limitations established by the Code:

1) The enmity must be *public, i.e.,* divulged, or at least easily and readily known from the circumstances of the case.[24] Thus a former lawsuit or the threat of bodily violence, blackmail, serious quarrels or fights would be indicative of an existing enmity. This enmity must furthermore be

(2) *Deadly or grievous,* which means that the enemy would inflict a grievous mental, spiritual or physical evil on his adversary if it were in his power to do so.

(3) The enmity must finally be limited to *one of the litigant parties, viz.,* the one against whom testimony is to be given. For if the witness would be an enemy to both the plaintiff and the defendant, his testimony could not be rejected.[25]

3. The following are also *incapable* of being witnesses:

a) Those *who are parties to the same cause or act in the name of the litigant parties;* such as tutors in the case of their wards, superiors or administrators in the case of their communities or pious foundations, judges and their assessors, attorneys and others who assist or have assisted their clients in the same case. All these are presumed to be engaged in a common cause, and therefore to be personally interested. Hence the maxim: "No one may be plaintiff and witness or judge and witness"[26] at the same time and in the same case. However, this, too, must be taken with a grain of salt. For a prelate, either secular or regular, may testify in the case of his own church or community, as long as he is not plaintiff, defendant, or proctor; canons and capitulars may testify in civil matters concerning their chapters, provided only the chapter as such, and no personal in-

24 See can. 2197, n. 1.
25 Reiffenstuel, II, 20, n. 132 f.
26 Cfr. c. 6, X, II, 20; Santi-Leitner, II, 20, n. 9.

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terests, are involved.[27] This applies to all instances (first, second, last), through which the case may run.

b) *Priests* are rejected as witnesses in *whatever concerns knowledge gained through sacramental confession,* even though the parties have given them permission to speak. This principle applies to anyone who, whether cleric or layman, has in any way acquired knowledge through sacramental confession; the testimony of such a one cannot be accepted even as a presumptive indication of truth. Thus bystanders at the confessional or chance hearers of a sacramental confession cannot be admitted as witnesses to a fact thus perceived or learnt.

c) By reason of *natural affection,* which may influence the judgment, the following are excluded: the husband in case of his wife and *vice versa,* those who are related to one another by consanguinity and affinity in every degree of the direct line and in the first degree of the collateral line, *i.e.,* brothers and sisters, brothers-in-law and sisters-in-law, whenever their relatives are concerned.[28]

Yet even these are not entirely and in every case rejected; for if relatives wish to testify to the civil or religious state of the defendant, they may be admitted, provided the required testimony cannot be obtained otherwise and the public weal demands that it be obtained. Thus parents may testify to the baptism, or to the legitimacy, or to the clerical, religious or married state, or to the age of their children; spouses are also admitted, for they are supposed to know their pedigree better than outsiders.[29] However, no full proof could be construed from the deposition of such witnesses,[30] unless no other

27 Reiffenstuel, II, 20, 197 ff.
28 Cfr. c. 3, C. 4, q. 2 et 3; c. 78, C. 11, q. 3.
29 C. 5, X, II, 20; c. 3, X, IV, 18.
30 Reiffenstuel, II, 20, n. 119.

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proof were available and the public welfare required that proof be secured.

ART. II

BY WHOM, HOW, AND HOW MANY WITNESSES ARE TO BE INTRODUCED, AND WHO ARE TO BE REJECTED

CAN. 1759

§ 1. Testes a partibus inducuntur.

§ 2. Possunt quoque induci a promotore iustitiae et defensore vinculi, si id ad causam intersit.

§ 3. Sed ipse iudex, quoties agatur de minoribus aliisve qui minoribus aequiparantur, et generatim quoties publicum bonum id exigat, potest testes ex officio inducere.

§ 4. Pars, quae testem induxit, potest eius examini renunciare; sed adversarius postulare potest ut, hac non obstante denuntiatione, testis examini subiiciatur.

CAN. 1760

§ 1. Si quis sponte compareat testimonii reddendi gratia, iudex poterit eius testimonium admittere vel repellere prout expedire censuerit.

§ 2. Debet autem testem, qui se sponte obtulerit, repellere cum comparere sibi videatur moras iudicio nectendi causa vel iustitiae et veritati quoquo modo officiendi.

This whole article might be simply inscribed: "*De Productione Testium,*" which is nothing else but a petition offered to the judge to admit witnesses of the party who wishes to prove an action or exception.

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1. The *parties may* introduce witnesses, who are received after the issue in pleading.[31]

2. The *promotor iustitiae* and the *defensor vinculi* may also call in witnesses if they deem them necessary.

3. The judge, too, may demand witnesses, if minors and such as are compared to minors in law are concerned in the trial, or whenever the public welfare requires witnesses, as in matrimonial cases.

4. The party who produces a witness may forego the privilege of examining him, although this does not affect the right of the opponent to do so.

It may happen (can. 1760) that some one offers himself as a witness of his own accord. But since there is room for suspicion as to the motives of such a *testis ultroneus,* the judge is free either to admit or to reject him. He *must* reject him if it becomes apparent that the object of the spontaneous witness is simply to delay the trial or to obstruct justice.

HOW WITNESSES ARE PRODUCED

CAN. 1761

§ 1. Cum probatio per testes postulatur, eorum nomina et domicilium tribunali indicentur; praeterea exhibeantur positiones seu articuli argumentorum super quibus testes sint interrogandi.

§ 2. Si ne intra diem quidem peremptorium a iudice praestitutum, obtemperatum fuerit, postulatio deserta censetur.

If witnesses are demanded, their name and domicile must be indicated and the questions or points upon which they are to be examined must be handed to the tribunal.

31 Cfr. X, II, 6: *"Ut lite non contestata non procedatur ad testium receptionem;"* see can. 1730.

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The obligation of making known these things, *viz.*, the names and points, lies with those who demand witnesses, either the party, or others.[82] If this obligation has not been complied with within the time set by the judge, the demand is quashed.

The litigant parties must make known to each other the names of their respective witnesses before these are examined; if this would prove a great inconvenience, the manifestation may be made before the testimonies are published (can. 1763).

The summoning of witnesses is done by the judge, who issues a decree to that effect. The summons must be served like the citation of the parties, as stated in canons 1725 sqq. When duly served, it entails the obligation of appearing in court (can. 1766); in case of inability, the judge must be informed of the reason. This rule must be understood in the light of can. 1755, § 2.

That there is a *strict obligation* cannot be denied, since the law provides a punishment for refusal. § 2 of can. 1766 states that if a witness proves recalcitrant or disobedient to the summons duly served, and fails to appear in court without a lawful reason, the judge may inflict a suitable punishment and fine him for the amount of damage caused to the parties by his unreasonable conduct. The same penalty may be inflicted upon those who appear in court but refuse to answer lawful questions put to them, or to take the oath, or to sign the witness papers.

No distinction is made on this head between clergymen and laymen. Clergymen, when summoned to the ecclesiastical court, should set an example of obedience to laymen.

82 *Regulae S. R. Rotae*, Aug. 4, 1910, § 114, n. 3 (*A. Ap. S.*, II, 821).

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A written excuse should be sent in if the witness summoned is unfit, suspected, or incapable of testifying, so that the judge may take note thereof in the acts.[33]

THE NUMBER OF WITNESSES

CAN. 1762

Iudici ius et obligatio est nimiam multitudinem testium refrenandi.

CAN. 1763

Partes debent sibi invicem nota facere testium nomina antequam eorum examen inchoetur, aut, si id, prudenti iudicis existimatione, fieri sine gravi difficultate nequeat, saltem ante testificationum publicationem.

In order that the trial be not unnecessarily prolonged, the judge is empowered and obliged to restrict the number of witnesses (can. 1762). The admissible number was fixed in one Decretal as fourty for each party.[34] However, the text may have another meaning, *viz.*, as regulating the number of times a witness may be produced. An ancient law says that a witness may be produced only three times and that a special solemnity is required for the fourth time.[35] But this Decretal would rather seem to refer to the examination of witnesses. That is now regulated by can. 1781. Our text probably refers to the number of witnesses, which is left to the judge to fix, except when there is question of "seven

33 It is quite true (see Messmer, *l. c.*, p. 112) that certain witnesses should not be called, but courtesy as well as despatch would seem to counsel the interpretation given in the text.

34 C. 37, X, II, 20.

35 C. 36, X, II, 20.

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hand" testimony in case of non-consummation of marriage; this the judge is not at liberty to curtail.[36]

WHICH WITNESSES ARE TO BE EXCLUDED

CAN. 1764

§ 1. Testes debent ex officio excludi, si iudici liquido constet eos a testimonio ferendo prohiberi, salvo praescripto can. 1758.

§ 2. Ast etiam, postulante adversario, testes excludendi sunt, si iusta exclusionis causa demonstretur, quae exclusio dicitur *reprobatio personae testis.*

§ 3. Pars nequit reprobare personam testis quem ipsa induxit, nisi nova reprobationis causa supervenerit, quamvis possit eius dicta reprobare.

§ 4. Reprobatio testis fieri debet intra triduum postquam testium nomina cum parte communicata fuerunt, nec postea facta admittatur, nisi a parte demonstretur vel saltem iuramento affirmetur defectum testis antea sibi notum non fuisse.

§ 5. Iudex autem reprobationis discussionem in finem litis reservet, nisi contra testem stet praesumptio iuris, aut defectus sit notorius vel statim ac facile probari possit vel postea probari nequeat.

CAN. 1765

Citatio testium fit ministerio iudicis, decreto interveniente, et intimanda est testibus ad normam can. 1715–1723.

1. The judge must *ex officio* exclude from the witness-stand all *incompetent witnesses,* those entirely incapable,

[36] See cc. 5, 7, X, IV, 15; can. 1975.

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and the unfit and suspected, who may, however, be admitted to give presumptive evidence (can. 1758).

2. No witnesses may be admitted to whom the opponent reasonably takes exception. The *reprobatio personae testis* is a kind of exception, but neither dilatory nor peremptory in the proper sense, for it may be made at any time before the publication of the testimonies or depositions. But it properly turns about the person of the witness whose unfitness, incapacity, etc., may be objected to, according to can. 1757.

3. However, if a party has introduced a witness to testify for himself, he cannot reject that witness, because the very fact of his producing him argues that he is willing to accept him and approves of his qualifications. Only if a reason to object to the witness developed after he was summoned, would the party who produced him be allowed to put up an exception.[87] Thus if a witness called and proposed by a party should become that party's bitter enemy, or perjure himself, or become infamous, the party could take exception to him. Besides, although a witness was introduced by the party himself, and no new reason for his rejection has arisen, the producing party may contradict or reprove anything the witness may say against him, because, although the party may know the person, he may not know his intentions or what he is going to say.

4. However, the *rejection of a witness* or exception to the same must be made *within three days* after the names of the witnesses have been communicated by the parties to each other and cannot be admitted afterwards unless the party can prove, or at least affirms under oath, that some defect in the witness, *i.e.*, unfitness, incapacity, etc., was unknown to him before.

87 C. 31, X, II, 20.

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5. The *judge* may put off the discussion of exceptions taken to witnesses to the end of the trial. This is the rule, which, however, must not be applied to certain exceptional cases, namely:

a) If the *presumption of the law* is against the witness; this would be the case if a witness were unfit, as defined in can. 1757, § 3;

b) If the *defect* in a witness is notorious and could easily and immediately be proved, for instance, by producing the sentence of excommunication issued against a *vitandus;*

c) If the defect could not be proved afterwards, *i.e.*, after some delay, for instance, if the witness were dangerously ill or about to depart for a distant country.[38]

Art. III

THE OATH TAKEN BY WITNESSES

Can. 1767

§ 1. Testis, antequam testimonium edat, iusiurandum praestare debet de tota ac sola veritate dicenda, salvo praescripto can. 1758.

§ 2. Partes earumve procuratores praestationi iurisiurandi testium assistere possunt, salvo praescripto can. 1763.

§ 3. Testibus, si de iure partium mere privato agatur, poterit iusiurandum, utraque parte consentiente, remitti.

§ 4. Sed etiam cum iusiurandum a teste non exigitur, iudex testem commonefaciat gravis obligationis, qua semper tenetur, veritatem dicendi.

38 Reiffenstuel, II, 20, n. 546 ff.

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CAN. 1768

Testes, tametsi iusiurandum praestiterint de veritate dicenda, poterunt nihilominus pro prudenti iudicis arbitrio, absoluto examine, adigi ad iusiurandum de *veritate dictorum* sive circa omnes positionum articulos sive circa aliquos tantum, quoties gravitas negotii et editae testificationis adiuncta id postulare videantur.

CAN. 1769

Testes adigi etiam iureiurando possunt ad secretum servandum circa propositas interrogationes dataque interrogationibus responsa, usque dum acta et allegata publici iuris fiant; imo etiam perpetuo ad normam can. 1623, § 3.

1. All witnesses, except the unfit and suspected, must swear that they will tell the whole truth and nothing but the truth. This so-called *iuramentum veritatis* was always considered so necessary that the saying is: "A witness not sworn proves nothing."[39] The oath is to be administered before the examination, generally by the judge or his auditor.[40]

If the litigants or their proctors wish to be present at the ceremony, they are at liberty to do so, provided they come before the examination begins. But no plea of exception can be construed from their voluntary or involuntary absence.

The phrase: "*de tota ac sola veritate,*" must be understood in the sense that they bind themselves to answer truthfully the questions proposed, concealing nothing and asserting no falsehood. But they are not bound to say more than the questions imply. At least this is the pres-

39 Cfr. cc. 10, 39, 51, X, II, 20. 40 Cfr. Messmer, *l. c.*, p. 116.

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ent practice of courts.[41] But the oath includes another element, *viz.*, that they speak the truth for motives of truthfulness, that they harbor no sinister intention, and that they have not been bribed.[42]

Both parties consenting, this *oath may be omitted* in all private trials where the public weal is not at stake. The oath is administered in favor of both parties, and hence may be remitted, without the intervention of the judge, by both. However, the text clearly states that this may be done only when private interests are at stake. In matrimonial cases, therefore, when the validity of a marriage is threatened, and in criminal and beneficiary matters the oath may never be omitted.[43] When the oath is not administered to a witness, the judge shall not omit to warn him of the grave obligation incumbent upon him to tell the truth.

Concerning the formalities of the oath see can. 1621.

2. There is, as can. 1768 points out, another oath, called *de veritate dictorum,* which is administered after the examination, even in cases where the oath *de veritate dicenda* has already been taken. This oath refers either to all the answers that have been given to the questions proposed, or only to certain important questions. The judge may demand the *iusiurandum de veritate dictorum* whenever, according to his prudence and practical insight, the importance of the matter or the circumstances of the testimony require it. This is a new regulation in ecclesiastical jurisprudence,[44] which was made necessary by intricate cases and to control the testimony of witnesses who vacillate under cross-examination.

41 Reiffenstuel, II, 20, n. 466.

42 C. 47, X, II, 20.

43 C. 39, X, II, 20; Reiffenstuel, II, 20, n. 485 f.

44 C. 5, X, II, 20 mentions two oaths, which, however, were comprised in one, *de veritate dicenda;* but the *Regulae S. R. R.* enumerate these two oaths; Aug. 4, 1910, § 114, n. 2 (*A. Ap. S.*, II, 820).

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3. The witnesses may be *bound by oath to keep secret* the questions proposed and the answers given, until the whole proceedings are published, or forever, if the good name of others is endangered or quarrels and scandals are to be feared from a divulgation (can. 1623, § 3), as is generally the case in criminal procedure and where persons of the "weaker sex" are concerned.[45]

ART. IV

THE EXAMINATION OF WITNESSES

The Code now proceeds to lay down the rules for the examination of witnesses: where and in whose presence they must be examined, the character and substance of the interrogations and answers, how they must be taken down by the clerk, and, finally, repeated questioning.

THE PLACE OF EXAMINATION

CAN. 1770

§ 1. Testes sunt examini subiiciendi in ipsa tribunalis sede.

§ 2. Ab hac generali regula excipiuntur:

1.° S. R. E. Cardinales, Episcopi et personae illustres quae suae civitatis iure eximuntur ab obligatione comparendi coram iudice testificandi causa: ii omnes eligere ipsi possunt locum ubi testificentur, de quo iudicem certiorem facere debent;

2.° Qui morbo aliove corporis vel animi impedimento aut conditione vitae, uti moniales, tribunalis sedem adire nequeunt; ii domi audiendi sunt;

3.° Qui extra dioecesim degentes, in dioecesim reverti et ad tribunalis sedem accedere sine gravi in-

[45] Messmer, *l. c.*, p. 116.

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commodo nequeunt; ii audiendi sunt a tribunali loci in quo commorantur ad normam can. 1570, § 2, secundum interrogationes et instructiones a causae iudice transmissas;

4.° Qui in dioecesi quidem commorantur, sed in locis ita dissitis a tribunalis sede, ut sine gravibus impensis neque ipsi iudicem adire, neque a iudice adiri possint. Hoc in casu iudex debet propiorem aliquem sacerdotem dignum et idoneum deputare, ut cum assistentia alicuius, qui actuarii munere fungatur, examen horum testium perficiat, transmissis pariter eidem interrogationibus faciendis, datisque opportunis instructionibus.

The general rule is that witnesses must be examined *in court, i.e.,* on the witness-stand. From this rule the legislator *exempts the following persons:*

1.° Cardinals, bishops and illustrious personages,[46] who, by virtue of their civic prerogatives, are exempt from appearing in court; all these may choose a place convenient to them for giving testimony, but should inform the judge to that effect.

2.° All those who are detained from personally appearing by sickness or any other physical or mental impediment, or by their state of life (for instance, cloistered nuns and the inmates of state asylums). These may give testimony at their respective residences, and the judge may send the notary or auditor or two deputies to receive their deposition.[47]

3.° Those who dwell outside the diocese and cannot conveniently return and appear in court. Their deposi-

46 The *illustres* held first place in the official hierarchy of the (reorganized) Roman empire, which was composed of *illustres* or Right Honorable, of *spectabiles* or Honorable, and of *clarissimi* or Worshipful gentlemen. To the class of *illustres* belonged the thirteen cabinet ministers of the West; see Hodgkin, *Italy and her Invaders,* 1892, 2nd ed., Vol. I, p. 603 f.

47 Reiffenstuel, II, 20, n. 506.

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tions, according to can. 1570, § 2, must be received by the local tribunal in accordance with the formulary of interrogation and the instructions sent to it by the judge in case.

4.° Those who live in the diocese, but so far away from the court that it would be expensive for them to come to court, or for the judge to reach them. In such cases the judge shall appoint a worthy and fit priest who lives near the place, to take the testimony with the help of another person, who may act as clerk. To that priest must be forwarded the interrogatories and such instructions as may be deemed necessary.

IN WHOSE PRESENCE THE WITNESSES ARE TO BE EXAMINED

CAN. 1771

Examini testium partes assistere nequeunt, nisi iudex eas admittendas censuerit.

CAN. 1772

§ 1. Testes seorsim singuli examinandi sunt.

§ 2. Prudenti tamen iudicis arbitrio relinquitur post edita testimonia testes inter se aut cum parte conferre, seu, vulgo, *confrontare*.

§ 3. Id autem fieri poterit si haec omnia simul concurrant, scilicet:

1.° Si testes inter se aut cum parte in re gravi et causae substantiam attingente dissentiant;

2.° Si nulla alia facilior ad veritatem detegendam suppetat via;

3.° Si scandali vel dissidiorum periculum non sit ex collatione pertimescendum.

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CAN. 1773

§ 1. Examen fit a iudice, vel ab eius delegato aut auditore, cui assistat oportet notarius.

§ 2. In examine interrogationes non ab alio quam a iudice vel ab eo qui iudicis locum tenet, testibus deferendae sunt. Quapropter si partes, vel promotor iustitiae, vel defensor vinculi examini intersint et novas interrogationes testi faciendas habeant, has non testi, sed iudici vel eius locum tenenti proponere debent, ut eas ipse deferat.

1. The *parties to the trial are not allowed* to be present when the witnesses are examined, in order that they may not be influenced or disturbed. However, the judge may give them permission to assist, especially if only questions of patrimony or money are at issue.[48]

2. *Each witness must be examined separately.* This rule must not be interpreted so strictly as if the validity of the examination were impaired in case of its non-observance.[49] If the judge deems it prudent, the witnesses may be confronted one with another and with the parties, to compare their statements. But such confrontation is permitted only when the following conditions concur:

a) If the witnesses disagree among themselves, or with the party they testify for, in a serious and substantial point;

b) If, in the opinion of the judge, no better expedient can be found to discover the truth;

c) If no danger of scandal or quarrel is likely to arise from the comparison of the various statements.

48 *Reg. S. R. Rotae,* Aug. 4, 1910, § 114, n. 6 (*A. Ap. S.,* II, 821).

49 Instructio S. C. EE. et RR., June 11, 1880, n. 17; Messmer, *l. c.,* p. 117.

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3. The examination of witnesses must be performed by the *judge* or his delegate or auditor, assisted by the *notary.*

Here it may not be amiss to repeat what the Holy Office [50] enjoined concerning the examination of women who have been "*sollicitatae in confessione.*" They may be heard in the sacristy or in some other unsuspected place, in the presence of the appointed judge and a clerk (both ecclesiastics). Each *sollicitata* must be examined cautiously and separately, not in company with others, because the secret is inviolable.

The *interrogatories* or *questions* are to be put to the witnesses by the judge or his *locum tenens.* If the parties, or the *promotor iustitiae,* or the *defensor vinculi* should wish to ask other questions, these questions must be proposed to the witness through the judge or his delegate, not directly.

NATURE OF THE INTERROGATORIES AND ANSWERS

CAN. 1774

Testis primo interrogari debet non modo de generalibus personae adiunctis, hoc est, de nomine, cognomine, origine, aetate, religione, conditione, domicilio, sed etiam quae ipsi cum partibus in causa sit necessitudo; deinde deferendae sunt interrogationes quae causam ipsam respiciunt et sciscitandum unde et quomodo ea quae asserit, habeat cognita.

CAN. 1775

Interrogationes breves sunto, non plura simul complectentes, non captiosae, non subdolae, non sug-

[50] S. O., July 20, 1890 (*Coll. P. F.*, n. 1732).

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gerentes responsionem, remotae a cuiusvis offensione et pertinentes ad causam quae agitur.

CAN. 1776

§ 1. Interrogationes non sunt cum testibus antea communicandae.

§ 2. Attamen si ea quae testificanda sunt ita a memoria sint remota, ut nisi prius recolantur, certo affirmari nequeant, poterit iudex nonnulla testem praemonere, si id sine periculo fieri posse censeat.

CAN. 1777

Testes oretenus testimonium dicant, et scriptum ne legant, nisi de calculo et rationibus agatur; tunc enim adnotationes, quas secum attulerunt, poterunt consulere.

1. The questions to be proposed are partly general and partly special.

a) Of a *general* character are the preliminary inquiries regarding the personal circumstances of the witness. Hence, as in our courts, he must be asked his full name (*nomen et cognomen*), parentage, age, religion, condition or profession, domicile or residence, and also about his connection with the parties in the case.

This latter question will lead to the discovery of blood relationship or any interest the witness may have in the case. Hence the witness must be asked: Do you know the parties? If so, how long? What is your connection with them? etc.

b) The *special questions* touch the merits of the case. The first is as to the source of knowledge (*unde*) and how it was obtained. The judge is entitled to know the

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source of one's knowledge, and if he demands it, the witness is bound to answer.[51] Then the judge shall ask the witness whether he has *direct knowledge* of the fact he is to testify to. If he answers yes, he must be looked upon as a first-class witness, or a witness *de scientia*, who has witnessed the fact or perceived it immediately through his senses, for instance, if he has seen homicide or adultery committed.

If the witness has no immediate or direct knowledge, then he is only an *indirect* witness, and the question *quomodo* (how he has obtained his knowledge) must be put.

a) He may say: "This is my opinion," and therefore testify *de sua credulitate*, or what he believes to be a fact or a conclusion from conjectures and circumstantial evidence, the weight of which is enhanced by presumption.[52]

b) Or he may say that he had heard a report of the fact or incident from trustworthy persons. Witnesses of this class are called *testes de auditu* and much depends on from how many they heard the report; for if the report or story was spread by one and the same person, this amounts only to one witness, even though forty others repeat it from hearsay. Witnesses *de auditu* can be admitted only if the original reporter or narrator is dead, absent, or not to be found.[53]

c) Finally there are witnesses who can only testify that a rumor was spread and is believed by the people; these are *testes de fama*. Rumor itself merely creates presumption if it is spread by and among sober and

51 Reiffenstuel, II, 20, n. 511 f.

52 Cfr. c. 12, X, II, 23; see this *Commentary*, Vol. V, p. 371.

53 Cfr. c. 47, X, II, 20; see the case stated under Title XXXI, where eighty witnesses testified against a pastor, but all had heard the story from an old woman; the pastor was declared innocent.

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prudent men. Therefore the origin of the rumor has to be inquired into, and if its authors cannot be found out, the rumor must be rejected. The *vox populi* sometimes is, not *vox Dei*, but *faex populi*.

2. The questions asked must be *brief* and *simple, i.e.*, not combining many things in one. The judge is not allowed to make use of *captious, cunning or suggestive questions*, to ensnare or compel the witness to answer according to a preconceived idea. This would embarrass the witness and curtail his freedom. Besides the judge must abstain from *offensive questions* and from asking questions which have nothing to do with the case.

3. The *questions* on which a witness is to be cross-examined *must not be communicated to him beforehand, i.e.*, before he has been sworn and put on the witness-stand; for this might lead to collusion and also to mental restrictions when giving oath. However, the judge may intimate beforehand some questions which depend on the memory and could not easily and truthfully be answered without due preparation, because the facts happened a long time ago, and so forth. But the danger of fraud or collusion must always be avoided as effectively as possible.

4. The answers or statements of the witnesses must be made *orally*, not read off a paper. Yet if numbers or dates or calculations of a mathematical nature are involved, the witness may make use of notes.

ANSWERS TO BE PUT IN WRITING AND READ

CAN. 1778

Responsio ex continenti redigenda est scripto ab actuario non solum quod attinet ad substantiam, sed

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etiam ad ipsa editi testimonii verba, nisi iudex, attenta causae exiguitate, satis habeat unam depositionis substantiam referri.

CAN. 1779

Actuarius in actis mentionem faciat de praestito, remisso aut recusato iureiurando, de partium aliorumque praesentia, de interrogationibus ex officio additis et generatim de omnibus memoria dignis quae forte acciderint, cum testes excutiebantur.

CAN. 1780

§ 1. Testi, antequam ab auditorio discedat, debent legi quae actuarius de iis quae ipse viva voce testatus est, scripto redegit, data eidem testi facultate addendi, supprimendi, corrigendi, variandi.

§ 2. Denique actui subscribere debent testis, iudex et notarius.

1. All answers must be *immediately* set down in writing by the clerk, not only substantially, but verbally, as given, unless in the view of the judge the matter is of small importance, in which case a summary note would suffice.

2. The same clerk (*actuarius*) must also state in the minutes whether the oath was taken, refused by, or remitted to, the witness, whether the parties were present, whether other questions had been officially asked, and, generally, everything that is worth putting on record, as uttered during the examination of the witness.

3. Before the witness leaves the stand the minutes of his testimony ***must be read to him,*** and he may, if he chooses, add, suppress, correct, or change any statement

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he has made. Afterwards this is no longer permitted. Then the witness must *sign* his name to his deposition as recorded by the clerk, and the judge and notary should also sign their names, after that of the witness.

REPEATED EXAMINATIONS

CAN. 1781

Testes, quamvis iam excussi, poterunt, parte postulante aut ex officio, antequam acta seu testificationes publici iuris fiant, denuo ad examen vocari, si iudex id necessarium vel utile ducat, dummodo tamen omnis collusionis vel corruptelae adsit periculum.

Under can. 1762 it was remarked that repeated examinations of the same witnesses are permissible. The old law [54] permitted a *tertia* and *quarta productio testium,* but no more. The Code fixes no limit. Therefore, if one of the parties insists, or the judge deems it necessary or useful, a witness may be examined repeatedly, provided no collusion or bribery is to be feared. However, in order not to prolong the trial, such repetition should be permitted only before the testimonies have been officially made known (*antequam acta seu testificationes publici iuris fiant*).

ART. V

PUBLICATION OF TESTIMONIES AND THEIR REJECTION

As soon as the witnesses in a case have been heard, or the parties concerned have declared that they have no more witnesses to produce, the testimonies may be published. This means that the answers or depositions of

[54] C. 37, X, II, 20.

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the witnesses given to the questions proposed may be publicly read. When this is to be done and what effect it produces, especially as to exceptions and the calling-in of witnesses, is the subject of Article V.

WHEN THE TESTIMONY MAY BE PUBLISHED

CAN. 1782

§ 1. Cum partes aut earum procuratores examini non interfuerunt, testimonia statim post absolutum omnium testium examen poterunt, decreto iudicis, evulgari.

§ 2. Sed poterit iudex differre testimoniorum evulgationem in tempus quo cetera probationum capitula fuerint absoluta, si id e re existimet.

1. If the parties or their proctors (attorneys) were not present at the examination, publication of the testimony may be made immediately after all the depositions have been taken down. It makes no difference whether the absence was voluntary or *per contumaciam*. In any case, for contempt virtually equals presence, the publication may be insisted upon by the other party, or by the judge, who should advise the litigants to renounce further examination if the points have been sufficiently cleared up. The judge must issue a *formal decree ordering the depositions published*. He himself or a notary shall read them to the parties present. However, two things must be observed:

1. This publication is not essential to the validity of the acts, hence our text simply says: "*poterunt evulgari*," they may be published;

2. The judge may, if he thinks it advantageous, delay the publication until all the proofs have been gathered.

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EXCEPTION TO DEPOSITIONS

CAN. 1783

Post testificationum evulgationem:

1.° Cessat facultas reprobandi testis personam, excepto casu de quo in can. 1764, § 4;

2.° Sed est ius reprobandi testes sive quod attinet ad modum examinis, cum scilicet obiiciuntur regulae iuris in examine peragendo neglectae, sive quod attinet ad testificationes ipsas, cum nempe testimonia impugnantur de falso aut de variatione, contradictione, obscuritate, defectu scientiae et similibus.

CAN. 1784

Reprobationem iudex decreto suo reiiciat, si eam futili inniti fundamento aut ad retardandum iudicium factam animadvertat.

CAN. 1785

Si iudicium reprobationis admittatur, iudex brevem terminum parti postulanti praestituat ad probandam reprobationem, et deinde procedat uti in aliis incidentibus causis.

1. One of the effects of the publication of the testimony is that neither party can any longer object to the witnesses except in the case mentioned under can. 1764, § 4. However, although the witnesses cannot be rejected, their depositions may be attacked for two reasons:

a) That the examination was not conducted legally;

b) That the testimony contains falsehoods, contradictions, obscurities, etc., or betrays a change or defect of knowledge. Concerning this second point more will be

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said under Art. VII. As to the first point, the exceptions may be based on the assertion that the judge was not competent, or on any point laid down in Art. IV.

2. However, if the judge is aware that these exceptions are futile or only intended to protract the trial, he may issue a *decree* rejecting the exceptions.

3. If, on the other hand, exceptions are admitted, the judge shall set a brief term for proving them and in the meanwhile proceed as in other incidental questions.

REPEATED CALLING OF WITNESSES

CAN. 1786

Post evulgatas testificationes, testes iam auditi denuo super iisdem articulis ne interrogentur, neque novi testes admittantur, nisi caute et ex gravi ratione in causis quae nunquam transeunt in rem iudicatam; ex gravissima ratione in ceteris; et in quolibet casu omni fraudis et subornationis periculo remoto, altera parte audita, et requisito voto promotoris iustitiae vel defensoris vinculi, si hi iudicio intersint; quae omnia iudex decreto suo definiat.

The *general rule* is that after the publication of the testimony the witnesses should not again be asked the same questions which they have already answered,[55] and that no new witnesses should be introduced. By consenting to the publication the witnesses are supposed to have renounced further examination. Note well that the same questions only are forbidden. If a new and necessary question would occur, for instance, concerning a baptismal record which could not be obtained before, or a lately found privilege,[56] this rule would not apply.

55 Cc. 19, 25, X, II, 20.

56 Cc. 19, 42, X, II, 20.

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There are two exceptions to the rule just stated:

1. In cases which never pass into the adjudged stage, witnesses already examined and new ones may be introduced cautiously and for a grave reason. Matrimonial, clerical, and religious trials never become *res iudicatae,*[57] and in all such cases a *grave reason* is all that is required to admit of repeated examination. Such a reason would be if testimonies had been lost,[58] or also, as stated above, if new proofs could be furnished, or by the common consent of the litigants.

2. In certain other cases, *e.g.,* if the reason is *gravissima,* as, for instance, if malice or negligence on the part of the judge prevented a full examination, or if one of the witnesses was convicted of perjury.[59]

But it is required that everything be done cautiously, so that no danger of fraud or subornation enters the new hearing. Besides, the other party must be heard, and the *promotor iustitiae* and *defensor vinculi* must be asked for their opinion, if they are present; and, finally, the judge must issue a decree to that effect, mentioning all important details.

Art. VI

COMPENSATION OF WITNESSES

Can. 1787

§ 1. Testis ius habet ad petendam compensationem impensarum, quas sustinuerit ratione itineris et commorationis in loco iudicii, et ad congruam indemnitatem pro interruptione sui negotii vel operis.

§ 2. Iudicis est, auditis parte ac teste, et, si opus sit,

57 See can. 1902 f.
58 C. 15, X, II, 19.
59 See cc. 9, 48, X, II, 20; Reiffenstuel, II, 20, n. 156 f.

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etiam peritis, taxare indemnitatem et impensas testi solvendas.

CAN. 1788

Si intra peremptorium terminum a iudice praestitutum congrua pecuniae quantitas de qua in can. 1909, § 2, ab eo qui testes inducere vult deposita non sit, is testium examini renuntiasse censeatur.

The Roman as well as ecclesiastical law,[60] from which modern civil codes hardly differ in this matter, demand that witnesses be proportionately recompensed for the expenses incurred.

In reckoning the sum, the distance from which they came (mileage), living expenses, and indemnity for interrupted business or work must be considered. The judge shall adjudge the expenses and indemnities. He should, however, hear the parties and witnesses, and may also, if necessary, consult experts as to the amount to be allowed. The judge may also demand that the sum for all these expenses be deposited with the clerk or that security (bail) be given guaranteeing payment.[61] If the parties refuse to comply with this demand within the term peremptorily assigned, they are supposed to have renounced the examination of the respective witnesses.

WEIGHT OF TESTIMONIES

CAN. 1789

In aestimandis testimoniis iudex prae oculis habeat:

1.° Quae conditio sit personae, quaeve honestas et an aliqua dignitate testis praefulgeat;

60 Cfr. c. 3, C. 4, q. 2 et 3. 61 Can. 1909, § 2.

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2.° Utrum de scientia propria, praesertim de visu et auditu proprio testificetur, an de credulitate, de fama, aut de auditu ab aliis;

3.° Utrum testis constans sit et firmiter sibi cohaereat, an varius, incertus, vel vacillans;

4.° Denique utrum testimonii contestes habeat, an sit singularis.

CAN. 1790

Si testes inter se discrepent, iudex perpendat utrum edita ab eis testimonia sibi invicem adversentur, an sint dumtaxat diversa vel adminiculativa.

CAN. 1791

§ 1. Unius testis depositio plenam fidem non facit, nisi sit testis qualificatus qui deponat de rebus ex officio gestis.

§ 2. Si sub iuramenti fide duae vel tres personae, omni exceptione maiores, sibi firmiter cohaerentes, de aliqua re vel facto in iudicio testificentur de scientia propria, sufficiens probatio habetur; nisi in aliqua causa iudex ob maximam negotii gravitatem, vel ob indicia quae aliquod dubium de veritate rei assertae ingerunt, necessariam censeat pleniorem probationem.

Now the legislator proceeds to weigh the testimonies and to state the effect of the evidence after it has been duly pondered. Let it be said right in the beginning, however, that these criteria are tentative or relative rather than absolute and not entirely conclusive in every instance. Besides these characteristics cannot be overlooked by the judge, because they are based on common and long-standing practice. The criteria or momenta by which the weight of evidence is measured, may be

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reduced to four: moral, mental, material, and numerical.

1. The *moral* weight refers to the *person* of the witness; hence the text says that his condition, character, and dignity should be considered. *Conditio* here means status, ecclesiastical or lay, and, in a layman, vocation.[62] But it also includes character as a witness (cfr. can. 1757, § 1, § 3). *Honestas* refers properly to the moral quality of the person, as stated in can. 1757, § 2. The testimony of a citizen whose moral reputation is beyond suspicion and that of one who has a bad name, are manifestly of unequal value.

Dignitas refers,[63] not only to ecclesiastical, but also to civic dignity. The assumption is that dignitaries are less likely to perjure themselves than ordinary mortals.

2. *Mental* or intellectual weight must be measured according to can. 1774. For *direct* witnesses, who testify to what they have personally seen or heard — also called eye-witnesses — are certainly to be preferred to *indirect* witnesses, who merely express their opinion or repeat what they have learned from hearsay or rumor.

3. The *material* weight of the testimony lies in the mode in which it is produced. Much depends on whether a witness is steady and consistent, or wavering and contradictory. A *testis varius* is one who makes different statements on the same subject in different stages or instances of a trial. A *testis incertus,* also called *contrarius,* is one who makes contradictory answers in the same instance or stage of trial. *Vacillans* may refer to the wavering, uncertain mode of answering, which seems to indicate some doubt or unbelief. Such a testimony should not be accepted at all.[64] If, how-

62 The testimony of slaves was formerly admitted only if given under torture; c. 7, C. 2, q. 1: *corporali discussione.*

63 C. 3, C. 4, q. 2 et 3: *utrum decurio an plebeius sit.*

64 Reiffenstuel, II, 20, n. 317.

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ever, trembling or sweating is a mere concomitant or sign of a nervous disposition, and does not create a positive doubt, the testimony may be accepted, if fortified by conjectures or other proofs. A testimony called contrary, *i.e.*, one which contradicts another statement of the same witness, cannot be admitted, unless it admits of correction. Of two contradictory answers given to the same question it must be held that, as a rule, the first stands, unless the error is immediately corrected and recalled, and the second appears more probable.[65]

4. The *numerical weight* of a testimony depends on whether several witnesses agree in their depositions or whether they differ from one another. Witnesses whose testimony differs one from another, are called *singulares*. If testimonies agree, their weight must be judged according to can. 1791, § 2. The depositions of single witnesses are to be weighed according to can. 1790, to wit:

a) If they conflict with one other, the general rule must be applied that they prove nothing; because a single witness is but one witness, and in the case of conflict one excludes the other; this is called *singularitas obstativa*.[66]

b) If the witnesses testify to facts or circumstances which, though true themselves, have no connection with one other, their testimony is called diverse (*singularitas diversificativa*). However, it is evident that they must bear on the case on trial, otherwise they would be irrelevant. Thus, for instance, the case of *sollicitatio* mentioned in the Constitution of Gregory XV, is referred to one and the same priest, whom diverse persons

65 *Ibid.*, 2, 326 f.
66 C. 9, X, II, 19; Santi-Leitner, II, 20, n. 21; Messmer, *l. c.*, p. 106 f.

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accuse of different crimes.[67] Such testimonies are accepted, if circumstantial evidence corroborates the depositions.

c) If the witnesses testify to facts or circumstances which bear on one another, like cause and effect, their testimony is called adminicular (*singularitas adminiculativa*). This is the weightier, the more witnesses report the same fact or circumstance, and may be admitted as full proof, at least in civil matters (in criminal cases it would not be accepted fully).[68]

The numerical weight of witnesses whose evidence is concordant, neither varied nor wavering, is stated in can. 1791, according to the old rules, thus:

a) *One witness alone does not afford full proof,* because even an upright witness may err in regard to facts and be prompted by personal motives. There is, however, an exception to the rule stated in our text: *one qualified witness* may furnish full proof when he makes deposition concerning acts which he himself performed *ex officio*. This is called *qualification.* Thus experts, as described in the following chapter, official couriers, public notaries, court clerks, are qualified witnesses, whose testimony concerning their official acts is accepted as full proof.[69]

b) The *testimonies of two or three persons is considered full or sufficient proof,*

a) If they have been duly sworn;

b) If they are beyond suspicion and exception;

c) If their testimony is consistent, and

d) If they make judicial (not extrajudicial) deposi-

67 "*Universi Dominici,*" Aug. 30, 1622, § 5.

68 C. 9, X, II, 19; Santi-Leitner, II, 20, n. 22 f.

69 See cc. 10, 23, X, II, 20; c. 13, X, II, 26.

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tion concerning a thing or fact which they themselves have witnessed (*de scientia propria*).

Yet it may happen that the matter is of exceptional importance, or that the judge has reason to doubt the truth of such testimony; in that case he may demand fuller proof.

Concerning matrimonial cases of non-consummation, the seven-hand testimony remains. On the other hand, the greater number of witnesses required by the former law against bishops and clerics [70] is no longer demanded by the Code.[71]

70 See cc. 2, 3, C. 2, q. 4, where more than three against a clergyman, and seventy-two against a bishop are required; see also c. 19, C. 2, q. 5.

71 Santi-Leitner, II, 20, n. 17; Messmer, *l. c.*, p. 106.

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CHAPTER III

EXPERTS

That experts, or specialists, *i.e.*, persons learned or skilled in their own science or profession, especially midwives in cases of non-consummated marriage, were not wholly unknown to the Decretals,[1] appears from the fact that proof from such persons was admitted. Now-a-days their part in settling litigation has become even more conspicuous and frequent. The Code on this head adopts most of the rules laid down for the S. Romana Rota.[2]

WHEN, BY WHOM AND FOR WHAT PURPOSE EXPERTS ARE CHOSEN

CAN. 1792

Peritorum opera utendum est quoties ex iuris vel iudicis praescripto eorum examen et votum requiritur ad factum aliquod comprobandum vel ad veram alicuius rei naturam dignoscendam.

CAN. 1793

§ 1. Iudicis est peritos eligere vel designare.

§ 2. Hanc designationem in causis mere privatis iudex facere potest rogatu utriusque partis vel etiam alterutrius, altera tamen consentiente; in causis vero bonum publicum respicientibus, audito promotore iustitiae aut vinculi defensore.

1 C. 14, X, II, 19.
2 *A. Ap. S.*, II, 822–826; § 120–136.

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§ 3. Prudenti iudicis arbitrio relinquitur unum pluresve peritos eligere pro causae natura et rei difficultate, nisi lex ipsa numerum peritorum praefiniat.

CAN. 1794

Peritorum est peritiam suam ad veritatis et iustitiae leges exigere, neque falsum affirmando neque verum occultando; in quo si deliquerint, puniantur ad normam can. 1743, § 3.

Experts are selected as often as the law (for instance, in matrimonial cases),[8] or the judge demands them, in order to prove a fact or to establish the true nature of a thing, as in the matter of reading a difficult document. Their *office and duty,* therefore, consists in applying their skill or science to the subject in dispute, according to the rules of truth and justice. Hence scientific equipment is the first qualification of an expert. From a physician, *e.g.,* we demand above all medical knowledge and experience. This, however, does not exclude, but rather implies, honesty and conscientiousness.

Experts are witnesses in the true sense of the word, and hence, if they are untruthful, may be punished like witnesses or delinquents, according to can. 1743, § 3.

WHO MAY BE CHOSEN

CAN. 1795

§ 1. Ad periti munus, ceteris paribus, deligantur, qui competentis magistratus auctoritate idonei fuerint comprobati.

§ 2. Qui a testimonio ferendo excluduntur ad

8 Cfr. can. 1976 ff.

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normam can. 1757, ne ad peritorum quidem officium assumi possunt.

CAN. 1796

§ 1. Easdem ob causa quibus testes, possunt et periti recusari.

§ 2. Iudex suo decreto edicat utrum sit admittenda recusatio, necne, et, recusatione admissa, in locum periti recusati alium sufficiat.

All other things being equal, those should be chosen as experts who hold a certificate or diploma as to their fitness from a competent public authority. For, generally speaking — except where the evil of "graft" is deeply rooted and widely spread, and where bigotry is rampant — diplomas are a safe indication of one's skill and experience. The phrase "*ceteris paribus*" means that a Catholic who is an acknowledged authority in his branch may be chosen, even though the judge does not "favor" him.

One who is not qualified to be a witness, according to can. 1757, cannot be called in as an expert, and the parties may, therefore, *take exception;* but no exception is admissible on the one sole plea that a man has no public certificate. If an expert is lawfully refused, it becomes the duty of the judge to *issue a decree* substituting another one in his place.

DUTIES OF EXPERTS TOWARDS JUDGE AND PARTIES

CAN. 1797

§ 1. Periti demandatum munus suscipere censentur praestatione iurisiurandi de munere fideliter implendo.

§ 2. Partes non solum interesse possunt iurisiurandi praestationi, sed etiam exsecutioni muneris perito

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demandati, nisi aliud rei natura vel honestas exigat aut lex vel iudex statuat.

CAN. 1798

Post iusiurandum praestitum, si periti intra praefinitum tempus mandato non paruerint aut sine iusta causa exsecutionem defugiant, tenentur damnorum.

CAN. 1799

§ 1. Iudex, attentis iis quae a litigantibus forte deducantur, omnia et singula capita decreto suo definiat circa quae periti opera versari debeat.

§ 2. Tempus intra quod examen perficiendum est et votum proferendum, si necessarium vel opportunum iudici videatur, potest ab ipso iudice praefiniri et etiam, auditis partibus, prorogari.

An expert is supposed to assume his office by taking the oath to perform his duties conscientiously.

The litigant *parties* may assist not only at the ceremony of administering the oath, but also when the expert performs his duty. However, there are delicate cases, especially of a criminal nature or demanding ocular inspection, which make the presence of the parties undesirable. Hence the law itself, as, for instance, in the case of non-consummation (can. 1979) or solicitation, forbids their presence, and the judge may positively exclude them.

The judge should *define* as nearly and as clearly as possible the exact purpose for which the aid of the expert is asked; and in so doing he should take into consideration the suggestions made by the parties.

The *time* within which the examination must be made

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and the report handed in, may be fixed by the judge, who, after hearing the parties, may also prorogue the term.

If the expert, after having taken the oath, does not go to work within the time established, or fails to perform his duty without reason, he is obliged to make good the loss that may be caused by his neglect or delay.

CRITICAL INVESTIGATION OF PAPERS

CAN. 1800

§ 1. Si dubitetur quis scriptum aliquod exaraverit, iudex praeter scripturam quaestioni obnoxiam assignet peritis, proponentibus partibus, scripturas cum quibus illa comparari et conferri debeat.

§ 2. Si de scripturis, quae sint inter se comparandae, partes dissentiant, iudex seligat, comparationis gratia, eas, quas pars ipsa alias recognovit, aut quas qui accusatur auctor scripturae controversae, scripsit ut persona publica et in archivis aut alio publico tabulario custodiuntur; aut eius subscriptiones quas ex fide notarii vel personae publicae constet coram ipsis fuisse exaratas.

§ 3. Quod si scripturae a partibus et a iudice pro comparatione designatae, peritorum iudicio, investigationi non sufficiant, et is cui scriptura controversa tribuitur, in vivis sit, iudex ad instantiam partis aut etiam ex officio eum citet, ut manu propria coram iudice vel eius delegato scribat quidquid periti, iudex ipse, eiusve delegatus dictaturi sint.

§ 4. Recusatio scribendi, non probata legitima recusationis causa, habetur ut confessio genuinitatis scripturae controversae in praeiudicium recusantis.

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In deeds, last wills, and other documents, in fact in every kind of writing, there may be *calligraphic or palaeographic* difficulties which create doubt in the mind of the judge as to the original writer. If that be the case, the judge may command the parties to submit the doubtful writing to experts for examination.

Suppose there is a last will written in the hand of John, who is supposed to have drawn it up. The specimens of John's handwriting produced by the parties differ among themselves, the *g* or *h* or other letters not being written in the same way as in the document attacked by one of the parties. What is to be done? In that case: (a) papers which are recognized by the defendant as in the genuine handwriting of John, or (b) papers which John certainly wrote in an official capacity and which are kept on file in public places, or (c) signatures which are officially acknowledged as in John's own writing should serve as means of comparison. If the experts declare that the writings thus submitted for comparison are not sufficient to form an opinion, the judge shall, either *ex officio* or at the demand of the parties, summon the supposed author of the disputed document and command him to write in presence of the judge or his delegate, whatever the experts, the judge himself, or his delegate, shall dictate. If he refuses to write without good reason, his very refusal must be taken as a confession that the disputed writing is not genuine.

REPORTS OF THE EXPERTS AND NON-EXPERTS

CAN. 1801

§ 1. Periti votum suum vel in scriptis proferre possunt, vel oretenus coram iudice; sed si ore

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proferatur, statim in scriptis redigi debet a notario et a peritis subscribi.

§ 2. Peritus autem, praesertim si sententiam suam in scriptis protulerit, accersiri potest a iudice ut explicationes, quae ulterius necessariae videantur, suppeditet.

§ 3. Periti debent indicare perspicue qua via et ratione processerint in explendo munere sibi demandato et quibus potissimum argumentis sententia ab ipsis prolata nitatur.

Can. 1802

Periti suam quisque relationem a ceteris distinctam conficiant, nisi, lege non contradicente, iudex unam a singulis subscribendam fieri iubeat; quod si fiat, sententiarum discrimina, si qua fuerint, diligenter adnotentur.

Can. 1803

§ 1. Si periti inter se discrepant, licet iudici aut peritioris suffragium super relatis a primis peritis exquirere aut novos de integro peritos adhibere.

§ 2. Eadem facultas iudici est quoties periti post electionem in suspicionem inciderint vel impares atque non idonei muneri perspecti fuerint.

Can. 1804

§ 1. Iudex non peritorum tantum conclusiones, etsi concordes, sed cetera quoque causae adiuncta attente perpendat.

§ 2. Cum reddit rationes decidendi, exprimere debet quibus motus argumentis peritorum conclusiones aut admiserit aut reiecerit.

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Experts must, as a rule, make their *report in writing*. If it is made orally to the judge, it should be immediately put into writing by the notary, and signed by the expert.

The latter may, however, especially after having made a written report, be called upon by the judge to give further explanations which may appear necessary.

The report shall contain an account of how the experts proceeded, what system or method they employed, and also give their reasons (*i.e.*, scientific or professional reasons) for adopting the view expressed in their report.

Each expert must write out his own report, unless, the law permitting, the judge demands one report to be made by several; in which case all experts engaged in the matter must sign this one report and, besides, carefully state wherein their views differ.

If the experts differ, the judge may ask another more skilled expert for his opinion on the report submitted, or call in an entirely new set of experts.

He has the same power whenever the experts have become suspected or rendered themselves unfit for the work in hand.

The judge shall carefully ponder, not only the conclusions of the experts, but also the other circumstances of the case. He is not, however, bound to accept the experts' view. If he decides to give the reasons for his decision (which, however, he is not bound to do, because the text only says, *cum reddit, when* or *if* he does), he should explain why he admitted or rejected the conclusions of the experts.

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EXPENSES OF EXPERTS

CAN. 1805

Peritorum expensas et honoraria iudex, receptam uniuscuiusque loci consuetudinem prae oculis habens, ex bono et aequo taxare debet, salvo iure recursus ad normam can. 1913, § 1.

The expenses and salaries of experts should be fairly and squarely fixed by the judge, in conformity with local custom. Recourse, but no appeal, is permitted to the parties within ten days after the sentence has been pronounced.

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CHAPTER IV

ACCESSUS AND RECOGNITIO

LOCAL INSPECTION

CAN. 1806

Si ad controversiae locum iudex accedere atque ipsam rem controversam inspicere necessarium existimet, decreto id praestituat, quo ea quae in accessu praestanda sint, auditis partibus, summatim describat.

CAN. 1807

Iudex recognitionem peragere potest vel ipse per se vel per auditorem aut iudicem delegatum.

CAN. 1808

§ 1. Iudex, rem vel locum recognoscens, peritos adhibere potest, si ipsorum opera necessaria vel utilis videatur.

§ 2. Si periti adhibeantur, serventur, quantum fieri potest, quae praescripta sunt can. 1793–1805.

CAN. 1809

Si iurgii vel perturbationis periculum pertimescendum iudici videatur, poterit ipse prohibere ne partes vel earum advocati iudiciali recognitioni intersint.

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CAN. 1810

Iudex testes, vel ex officio accitos vel a partibus ante recognitionem rite productos, potest in ipso iudiciali accessu examini subiicere, si id expedire videatur ad pleniorem probationem aut ad removenda dubia ob quae recognitio decerni debuit.

CAN. 1811

§ 1. Notarius diligenter curet ut constet ex actis qua die et hora recognitio facta sit, quae personae interfuerint, quae, recognitione durante, aut dicta aut peracta aut a iudice decreta sint.

§ 2. Peractae recognitionis instrumenta tum iudex tum notarius subscribant.

Cases[1] have occurred and still occur which require a personal and local inspection. Hence our Code lays down rules for this judicial procedure.

1. If the judge deems local inspection necessary, he must issue a decree to that effect in which he summarily states the points to be examined. This he does after having heard the parties.

2. The judge may hold this inspection himself or entrust it to his udiator or a delegate. Besides, he may, if he deems it necessary or useful, employ experts, concerning whom the rules laid down in the preceding chapter must be observed as strictly as feasible.

3. However, if the judge should apprehend any quarrel or disturbance between the parties, he may forbid them or their attorneys to be present at the local inspection.

4. If the judge deems it expedient for fuller proof

1 Cfr. c. 9, X, II, 26: *agrimen-sores* or surveyors.

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and for the dispersion of doubts, he may examine the official witnesses and the other witnesses produced by the parties on the spot where the judicial inspection is held.

5. The *notary* shall keep a careful record of the day and hour when the inspection was held, stating who was present, what was done or said during the process, and what was decreed by the judge. This record must be signed by the judge — or, we presume, by the auditor or legate, if these take the judge's place — and the notary.

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CHAPTER V

DOCUMENTARY PROOF

Besides the oral evidence of witnesses there is another class of evidence recognized by law, namely, *written evidence,* which the Decretals (II, 22) treat under the title "*De fide instrumentorum.*"

ART. I

NATURE OF DOCUMENTS

CAN. 1812

In quolibet iudicii genere admittitur probatio per documenta tum publica tum privata.

CAN. 1813

§ 1. Praecipua documenta publica ecclesiastica haec sunt:

1.° Acta Summi Pontificis et Curiae Romanae et Ordinariorum in exercitio suorum munerum authentica forma exarata, itemque attestationes authenticae de iisdem actibus datae ab illis vel eorum notariis;

2.° Instrumenta a notariis ecclesiasticis confecta.

3.° Acta iudicialia ecclesiastica;

4.° Inscriptiones baptismi, confirmationis, ordinationis, professionis religiosae, matrimonii, mortis, quae habentur in regestis Curiae vel paroeciae, vel religionis, et attestationes scriptae ex iisdem desumptae

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et a parochis, vel Ordinariis, vel notariis ecclesiasticis confectae aut earum exemplaria authentica.

§ 2. Documenta publica civilia ea sunt quae secundum uniuscuiusque loci leges talia iure censentur.

§ 3. Litterae, contractus, testamenta et scripta quaelibet a privatis confecta, privatorum documentorum numero habentur.

The title of this chapter is: *De Probatione per Instrumenta,* which might apply to oral as well as written evidence. But the Code plainly intends written proofs only. Hence can. 1812 simply states that proofs by documents are admitted in all kinds of trials, both civil and criminal, and that these documents may be either public or private.

A *public document* is one composed by an official in his official capacity, with due observance of the prescribed formalities, or at least in official style.[1] The official style requires the signature of an officially acknowledged person, his seal or at least that of the office (for instance, the diocesan or episcopal seal, the parish seal, the monastery seal, etc.), and the date and place of issuance.

A *private* document is a writing executed by private persons or by officials in their private capacity only. Thus a pastor or notary public may give a receipt (*apocha*), or make a bilateral contract (*syngraphum*), or write a letter, which are entirely private.

There occur in this chapter two terms which have been variously explained for various purposes; they are: *authentic* and *genuine*. *Authentic*[2] here generally oc-

1 If it is stated that among the solemnities required are the invocation of the Divinity, the signature of at least three witnesses, etc. (Santi-Leitner II, 20, n. 2), this cannot be applied now-a-days in ecclesiastical courts.

2 *Authentic* is derived from *αὐθέντης* or *αὐτὸ εἶς, ἐς,* the archaic form for *esse,* to be; hence *eum qui ipse est vel agit,* the one who has written the document. Thus by an authentic gospel we mean a gospel attributed to one of

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curs in the phrase, "*forma authentica,*" and therefore can only mean that the legal form in the execution of a document was duly observed. *Genuine,* on the other hand, refers to the origin or authorship of a writing, although we candidly admit that "genuine" in can. 1814 could just as well be taken for "authentic."

So far as the *juridical effects* are concerned, there is no difference between a public and an authentic document, because every public document is authentic, but not conversely.[3] Private documents may also be authentic, and if they are, they produce the same juridical effect as public documents.

It may be worth while to state some of the marks which render private documents authentic. A private document may become authentic by the signature of one's own hand, together with the signature of three living witnesses, or by affixing to it the official seal of a public (ecclesiastical or civil) magistrate, by being found in the public archives, by long-standing recognition, or by custom.[4]

This premised, let us hear what can. 1813 has to say about the chief *public ecclesiastical documents;* these are:

1.° *The acts of the Sovereign Pontiff, of the Roman Court,* and of *the Ordinaries,* when issued in authentic form in the exercise of their office; also authentic attestations or copies of such acts given by themselves or their notaries.

A perusal of the *Acta Apostolicae Sedis* shows how authentic Roman documents look. They are signed by the head of the Congregation and its Secretary with the L(oco) S(igilli), place and date of issuance. An epis-

the four evangelists. A *genuine* writing is not necessarily the work of a certain author (Epistle of Barnabas), but only one belonging to a certai · age or century.

3 Reiffenstuel, II, 22, n. 14 f.

4 *Ibid.,* II, 20, n. 143 f.

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copal document should be issued in the same way, signed with the bishop's name.

"*Attestationes*" may be either identic copies of the original text, or extracts therefrom. They, too, must be *authenticated* by being signed and sealed by the respective officials or their notaries.

2.° *Documents issued by ecclesiastical notaries.* Concerning these the commentators[5] are rather lavish in their demands, which may be briefly reduced to the following:

a) The *document* itself must contain the date and place of issuance according to the customary manner. The year must be reckoned not from the Incarnation, but according to the civil calendar.[6] The seal of the notary must be affixed if he has a special seal; otherwise his personal signature will suffice.

b) The *notary* must be lawfully appointed, not removed from office,[7] and should sign his name always in the same way for the sake of comparison. The notaries of exempt clerical institutes are entitled to issue authentic documents concerning their orders.[8]

3. *Judicial ecclesiastical acts,* because they possess all the requisites of authentic documents.

4. The original *records* of baptism, confirmation, ordination, religious profession, matrimony, and death, which are kept on file in the ecclesiastical courts, in the archives of parishes and religious institutes; also the *testimonies* or certificates taken from these original registers and issued by pastors, Ordinaries, or ecclesiastical notaries, as well as *copies* of these attestations; but the latter must be *authenticated,* as explained above, *i.e.,* they must

5 Cfr. Engel, II, 20; Reiffenstuel, II, 20 ff.

6 Pius X, "*Sapienti consilio,*" June 29, 1908, III, 5 (*A. Ap. S.,* I, 17).

7 Can. 372 f.

8 Can. 503.

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contain date and place of issuance as well as the official seal.

A doubt may naturally arise as to our *assistants or curates,*— whether they may issue authentic certificates of baptism or marriage, etc., because the text only mentions the pastors. To answer this question is not as simple as it would appear, and therefore we state our personal opinion only. An assistant or a curate who takes the place of his pastor (*e.g.,* during a vacation) is certainly entitled to issue such a certificate. But a merely casual or accidental absence of the pastor would not render the assistant a *locum tenens.* An assistant cannot *per se* issue a certificate, because the Decretals [9] as well as our text exclude him,— a curate not being an official in such matters. However the law [10] admits *exemplaria* or copies (certificates) made by the authority of the judge or his delegate, provided there be a just reason and at least one of the parties asks for it. Besides, as the Gloss says,[11] it is not necessary that the copy or certificate be made by a public person, if only the official seal is appended. From this, then, and considering the rules of delegation, we conclude that an assistant may in urgent cases be delegated, and even presume delegation, provided he uses the parish seal and issues such papers in the name of the pastor.[12]

We believe that if the local Ordinary or the diocesan court would call upon an assistant to issue a certificate, the latter would act officially and could therefore freely use the parish seal.

§ 2 of can. 1813 then mentions *civil public documents* which must be accepted as authentic if issued according

9 C. 16, X, II, 22.

10 *Ibid.*

11 Ad c. 16, *l. c.;* Reiffenstuel, II, 22, n. 60.

12 Of course, the assistant should also put down his own name: *v. g.,* J. J. Murphy, Pastor, per J. J. Hogan, Assistant.

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to the laws of the respective country. In the U. S., as also in England, *affidavits* are frequently used as public and legal evidence. An affidavit is a written declaration or statement, made before a magistrate or other person legally authorized to administer an oath, the truth of which statement is confirmed either by an oath or a solemn affirmation. Such affidavits, and certified copies thereof, constitute *prima facie* evidence in most matters before the civil courts.

Besides, the Revised Statutes of some States, *e.g.*, Missouri, admit the registers of religious societies as evidence.[13]

§ 3 of can. 1813 states that *letters, contracts, last wills and all other writings* which are written or drawn up by private persons, as such, must be regarded as *private documents*. To this class belong the private letters written by persons in public office. *Last wills* may be drawn up by private persons, but if they are made before a notary public and two witnesses, all of whom sign their names, they are public documents.

13 Rev. Stat. Mo., 1899, Sect. 3102: "When, by the ordinance or custom of any religious society or congregation in this state a register is required to be kept of marriages, births, baptisms, deaths or interments, such registers shall be admitted as evidence." Sec. 3103: "Copies of the register referred to in the preceding section, certified by the pastor or other head of any such society or congregation, or by the clerk or other keeper of such register, and verified by his affidavit in writing, shall be received in evidence." From this law we may deduce a corollary concerning copies or certificates of baptismal registers issued by *ministers of non-Catholic denominations*. They are admitted as evidence by the civil court if issued under affidavit. Therefore they may lawfully be compared to, and treated as, civil documents, in spite of the sad fact, which a *defensor vinculi* once deplored, that the parties sometimes are not at all conscientious in stating the facts and often deceive their ministers.

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AUTHORITY OF DOCUMENTS

CAN. 1814

Documenta publica sive ecclesiastica sive civilia genuina praesumuntur, donec contrarium evidentibus argumentis evincatur.

CAN. 1815

Recognitio aut impugnatio scripturae proponi potest in iudicio tum incidenter, tum ad instar causae principalis.

CAN. 1816

Documenta publica fidem faciunt de iis quae directe et principaliter in eisdem affirmantur.

CAN. 1817

Documentum privatum, sive agnitum a parte sive recognitum a iudice, probat adversus auctorem vel subscriptorem et causam ab eis habentes, perinde ac confessio extra iudicium facta; sed per se non habet vim probandi adversus extraneos.

CAN. 1818

Si abrasa, correcta, interpolata aliove vitio documenta infecta demonstrentur, iudicis est aestimare an et quanti huiusmodi documenta facienda sint.

Public documents, ecclesiastical as well as civil, are presumed to be genuine as long as the contrary is not evidently proved. They *prove* what is directly and principally affirmed in them. In other words, such documents afford *prima facie* evidence. The phrase, "*quae*

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directe et principaliter in eisdem affirmantur," must be understood of the intention of the plaintiff or the direct object of the action to be proved by a document. For instance, a baptismal record proves that baptism has been conferred, but it does not prove the validity of the baptism, and a marriage certificate issued by a recorder proves that the parties have gone through the ceremony required by civil law, but it does not prove the validity of the marriage from the ecclesiastical point of view.

Even a public document, may, however, be attacked. Can. 1815 says: A document may be acknowledged or attacked at a trial, either incidentally, or as the principal action. It is a mere *incidental* or side issue if it only leads to establishing the main question or *meritum causae;* it is the *principal* issue, if the whole trial revolves around it. Thus a last will depends chiefly on the document, although perhaps later on the plaintiff may attack either the mental or the juridical capacity of the testator.[14]

The attack may be made on different grounds, either because the writer was not an official person, or was no longer in office when the document was drawn up; or because of a lack of the required formalities, or because the document was made fraudulently.[15]

But to prove the spuriousness or falsity of a document at least two classical witnesses (*omni exceptione maiores*) are required. These witnesses may be either instrumental or extraneous; they are *instrumental* if they are mentioned in the document as witnesses or if they assisted at the drafting of the paper or signed it. *Extraneous* witnesses are such as are mentioned in the document but did not sign it. Two witnesses, either instru-

14 We know of a lawsuit that lasted twelve years and depended on a last will; after the will was declared authentic, the capacity of testating and accepting the legacy was attacked.

15 Cfr. Santi-Leitner, II, 22, n. 19 f.

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mental or extraneous, if they have the necessary qualities, are sufficient to render a document useless for proof. Of course, if two witnesses would testify in favor of the validity of a document, and two against it, these depositions would not affect the weight of a public or authentic document.

Since the *seal* is a strict requisite of an authentic document, this, too, may be the object of rebuttal. For the seal must be genuine, *i.e.*, it must be that of the official who is supposed to have impressed it on the paper. The inscription of the seal, or the letters around it, must be legible and as clearly expressed as possible. The seal should not be torn or broken.[16]

Private documents, says can. 1817, whether acknowledged by the party or accepted by the judge, have the weight or value of an *extrajudicial confession,*[17] which may or may not be admitted by the judge against the plaintiff, or against the signatory, or against those whose cause is bound up with that of the plaintiff and the signatory. Thus one who has gone security or furnished bail is bound up with the person in whose favor he has done so.

Can. 1818 mentions *defective documents,* viz., such as bear the signs of erasure, interpolation or correction. It is left to the judge whether and how far to accept such documents.

The *erasure,* to render a document defective, must occur in a notable or substantial place, as in the date or place when and where it was drawn up, in the name of the drafter, or in a dispositive part of the document itself. However, if it can be proved that the notary himself caused the erasure, the authenticity of the document can not be doubted.

16 Reiffenstuel, II, 22, n. 72 f. 17 Cfr. can. 1753.

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Interpolation means the insertion by another than the authorized hand, of matter or names foreign to a document. This defect, too, must be judged according to what was said of erasure.

The same applies to *corrections,* whether in date, place, names, or matter. All three of these processes render a document somewhat suspect, until the doubt has been cleared away by experts or by comparison, according to can. 1800.

Art. II

EXHIBITION OF DOCUMENTS AND CLAIM THERETO

The first three canons of this Article regulate the shape and form in which the documents must be "shown," whilst the following three determine the claim and duty to exhibit them. The title of the Article styles the latter *actio ad exhibendum,* because a refusal to exhibit document may call for a judiciary settlement, which may amount to an action.

ORIGINAL AND AUTHENTICATED DOCUMENTS

Can. 1819

Documenta vim probandi in iudicio non habent, nisi originalia sint aut in exemplari authentico exhibita et penes tribunalis cancellariam deposita, exceptis documentis quae publici iuris sunt, ceu leges rite promulgatae.

Can. 1820

Documenta in forma authentica sunt exhibenda et in iudicio deponenda, ut a iudice et ab adversario examinari possint.

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CAN. 1821

§ 1. Si dubium excitetur utrum fideliter exscriptum sit exemplar, an non, iudex ad instantiam partis vel etiam ex officio decernere potest, ut ipsum documentum exhibeatur, unde exemplar est desumptum.

§ 2. Si id fieri aut minime aut valde difficulter possit, iudex potest auditorem delegare aut loci Ordinarium rogare pro examine et collatione documenti, praescribens quibus de articulis et quemadmodum fieri debeat collatio; collationi vero utraque pars assistere potest.

Documents furnish judicial proof only if they are exhibited in their original form, or in an authentic copy, and are deposited with the chancery of the tribunal. An authentic copy is one made by a notary public and sealed with his official seal.[18] The *visum* of an official is sufficient if that official has personally inspected the original and compared the copy with it.[19] But even in this case his official signature and his seal would be required, testifying to the conformity of the copy with the original document; because signature and seal are the usual signs of an official certificate. For affidavits an oath would be necessary.

Such formalities, says the text, are not required if the documents have been published (*quae publici iuris sunt*) and therefore made the common property of all, as is the case, *e. g.*, with laws when they are promulgated. By-laws, statutes, charters, also decisions and documents published in the *Acta Apostolicae Sedis,* and official

18 C. 2, X, II, 22: the fact alone that it is made by a public person *or* has the authentic seal; we joined both by the particle *and*, because the official seal can be validly attached only by an official person, or at least with his consent or by his command.

19 C. 16, X, II, 22.

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civil publications, are public documents which require neither to be authenticated nor to be deposited with the tribunal, although the latter may demand a copy of civil publications. The *Acta Apostolicae Sedis* may be supposed to be on file in every ecclesiastical court.

Documents, says can. 1820, must be exhibited in an *authentic* form and deposited in court, so that they may be inspected by the judge and the other party. This is the case also with privileges and indulgences which exempt religious may oppose to Ordinaries.[20]

If the *judge has a doubt* as to the correctness and trustworthiness of a copy exhibited in court, he may, either officially, or upon the demand of the other party, decree that the original document be produced from which the copy (*exemplar*) was made. However, if there may be great inconvenience in complying with this demand (because the original writ will not stand being exposed to the light, or because it is so frail and delicate that transportation would injure it), or if the civil authorities forbid the removal of original documents from their places (this would be a case of impossibility), the judge may delegate his auditor or ask the local Ordinary to have the document examined and collated with the copy presented in court.

¶ ACTIO AD EXHIBENDUM

CAN. 1822

Documenta communia quaeve de communi agunt negotio, ut testamenta et instrumenta quae respiciunt successiones, bonorum partitiones, contractus aliaque huiusmodi de quibus lis est inter partes, quilibet ex

20 C. 7, 6°, V, 7.

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litigantibus potest postulare ut in iure exhibeantur ab ea parte quae illa possidere dicitur.

CAN. 1823

§ 1. Nemo tamen exhibere tenetur documenta, etsi communia, quae communicari nequeunt sine periculo damni ad normam can. 1755, § 2, n. 2 aut sine periculo violationis secreti servandi.

§ 2. Attamen si qua saltem documenti particula, quam produci intersit, describi possit, et in exemplari exhiberi sine memoratis incommodis, iudex decernere potest ut eadem exhibeatur.

CAN. 1824

§1. Si pars exhibere recuset documentum de iure producendum, quod ipsa fertur possidere, iudex, altera parte postulante, auditoque, si opus sit, promotore iustitiae vel vinculi defensore, interlocutoria sententia statuat, an et quomodo eiusdem documenti exhibitio facienda sit.

§ 2. Parte parere recusante, iudicis est aestimare quanti haec recusatio facienda sit.

§3. Quod si pars documentum apud se esse neget, iudex poterit eam examini subiicere et ad iusiurandum de ea re praestandum adigere.

The question arises whether there is any obligation to exhibit or produce documents which are necessary to settle a disputed point in court. And here a distinction is drawn, not between public and private documents as such, but between the contents of such documents and the parties' mutual claim on them.

Can. 1822 mentions *documenta communia, i.e.,* docu-

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ments which are the common property of both litigants. This condition may be achieved by mutual agreement or the common payment of the expenses incurred for drawing up a paper, for instance, by each party paying its share to the notary public.

Documents may also be common by reason of the common interest both parties have in them, as is usually the case in legacies, last wills, and contracts. Common documents, lastly, are such as are drafted by official persons, such as judicial acts or official documents drawn up by notaries public which concern the two parties, also the account-books kept by administrators of minors or corporations.[21] All such documents, not being exclusively private property or involving a criminal or incriminating action, are common to both parties and must, therefore, be produced at the trial by the party who happens to be in possession of them.

Aside from this *no one is bound to exhibit a document* which may place him or his nearest relatives (can. 1755, § 2, n. 2) in danger of infamy, or cause him or them great trouble and vexation. Neither is there any obligation of producing such documents, even though they be common, if there be danger of violating a secret imposed either by the natural law or by one's office.

But the judge may decree that, if these inconveniences are not to be feared, parts at least of the documents, which are important, be copied, and the copy presented at the trial.

Should a party refuse to show a document in his possession, the judge shall decide whether and how the document must be exhibited, provided the other party insists on its exhibition. In that case, therefore, the judge issues an interlocutory decree, after having consulted,

21 Cfr. Reiffenstuel, II, 22, n. 246 ff.

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if necessary, the *promotor iustitiae* and the *defensor vinculi*. A refusal by the party in possession of the document must be weighed by the judge as to its juridical value. If the party denies possession of the document, he may be cross-examined under oath.

A word concerning the *account-books* of ecclesiastical corporations. These furnish proof, not in favor of, but against these corporations,[22] unless they have been *audited* by a public auditor, in which case they deserve great credit and constitute circumstantial evidence.[23] It may be added that the fiscus is entitled to inspect these account-books and also all common documents produced at trials.[24]

22 C. un. Clem. V, 5.
23 Santi-Leitner, II, 22, n. 10.
24 Reiffenstuel, II, 22, n. 251 f.

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CHAPTER VI

DE PRAESUMPTIONIBUS, OR CIRCUMSTANTIAL EVIDENCE

CAN. 1825

§ 1. Praesumptio est rei incertae probabilis coniectura; eaque alia est iuris, quae ab ipsa lege statuitur; alia hominis, quae a iudice coniicitur.

§ 2. Praesumptio iuris alia est iuris simpliciter, alia iuris et de iure.

CAN. 1826

Contra praesumptionem iuris simpliciter admittitur probatio tum directa tum indirecta; contra praesumptionem iuris et de iure, tantum indirecta, hoc est contra factum quod est praesumptionis fundamentum.

CAN. 1827

Qui habet pro se iuris praesumptionem, liberatur ab onere probandi, quod recidit in partem adversam; qua non probante, sententia ferri debet in favorem partis pro qua stat praesumptio.

CAN. 1828

Praesumptiones, quae non statuuntur a iure, iudex ne coniiciat, nisi ex facto certo et determinato, quod cum eo, de quo controversia est, directe cohaereat.

Next in value to positive proofs is presumption or circumstantial evidence, which is here (can. 1825) de-

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fined as a probable conjecture concerning an uncertain fact or thing. From circumstances which either necessarily or usually attend a fact we conclude to the existence of the fact itself. The conclusion is, therefore, based on certain *indicia,* or signs, indications or circumstances which influence the judge's mind either for or against the party who brought suit. A presumption is called legal (*a lege*), if expressed in and admitted by law; it is called made by the judge or jury (*ab homine*), if it arises from the mental operation of the judge, but is not especially pointed out in law. It is natural for any man, and especially for a judge, to form a judgment from usual occurrences. This presumption is called natural, although it might just as well be styled ethical, whilst the *praesumptio a lege* might be named juridical or legal presumption.

Legal presumption is twofold: *iuris,* simply, when introduced and admitted and expressed as such by law; *iuris et de iure,* when not only expressed and acknowledged by law, but when the law is based upon the presumption. The legislator, perceiving that certain circumstances tend to prove an event or fact, often uses this fact as a basis for the law. There are in our Code two canons which establish a *praesumptio iuris et de iure, viz.,* can. 1904, a matter adjudged, and can. 1972, concerning a marriage not disputed during life. The *praesumptio iuris tantum* is treated in three canons, *viz.,* can. 1015, § 2, which presumes the consummation of a marriage duly celebrated, with the added clause: "until the contrary has been proved;" can. 1086, § 1, where the internal consent to marriage is presumed in conformity with the external manifestation; and can. 1814, which presumes ecclesiastical and civil public documents to be genuine.

Can. 1826 determines the *weight of legal presumption,* stating that against a *praesumptio iuris simpliciter* direct

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as well as indirect proofs are admissible; whilst against a *praesumptio iuris et de iure* direct evidence only may be admitted, *i.e.*, a proof overthrowing the fact upon which the presumption is based. The Code does not define the different species of direct and indirect proofs, nor do the commentators [1] offer any light on this subject. Hence it appears rather risky to venture upon an adequate discrimination. However, some examples may illustrate the distinction. Take can. 1972, concerning a marriage not disputed, which creates a *praesumptio iuris et de iure*. What is to be done in that case? The legitimacy of the children is involved directly, whilst the validity of the marriage can be attacked only indirectly. But the question will necessarily turn about an existing impediment. For although the presumption for the validity of a marriage which has not been disputed by both or one of the parties during their lifetime is so strong that the tie cannot be directly impugned, yet if the legitimacy of a child is in question, for instance, on account of an inheritance or title, the question of validity will naturally enter the fact at issue (*factum probandum*). Therefore, the plaintiff, who attacks the legitimacy of a child on the ground that the marriage from which this child was born was invalid, must prove that either before or during the marriage there existed a diriment impediment which had never been removed.[2] Hence we may say that *direct* evidence is evidence admitted by reason of the contrary evidence which is produced against the merits of the case itself; whereas *indirect* evidence is admitted only by rea-

1 They generally distinguish between *iudicialis* and *extra-iudicialis, plena* and *semi-plena, naturalis* and *artificialis, simplex* and *mixta, probatio* and *reprobatio;* cfr. Wernz, V, n. 594, p. 450 ff. Of all these divisions the last-named would come nearest to direct and indirect.

2 Concerning a title-case see Kenny-Webb, *Outlines of Criminal Law*, 1907, p. 325 ff.

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son of the case being connected with another. Another difference can hardly be established. For it is customary to classify evidence according to the differences in its logical bearing upon the question to be decided, and from this point of view all evidence is either direct or indirect. Direct evidence is testimonial evidence to one or more of the *facta probanda, i.e.,* those facts which, if all of them are proved, legally necessitate a decision favorable to the person producing them. All other evidence is circumstantial, which includes real as well as personal evidence.[3] From this it will be readily perceived that the *directa* and *indirecta probatio* of our text has nothing in common with this division. For the fact to be proved against a violent presumption may be produced directly as well as indirectly.

Can. 1827 lays down the *effects* of legal presumption. And if we say legal presumption, we include, because the text draws no distinction, the *praesumptio iuris tantum* as well as the *praesumptio iuris et de iure*. Legal presumption frees the party from the burden of proof, which is thus devolved on the adversary. Thus the presumption of receiving tithes is in favor of the pastor against strangers who claim the tithe in the parish subject to that pastor, for it is very unlikely (*inverisimile*) that strangers in a parish [4] are entitled to the tithes of the same. Thus also the presumption is in favor of the bishop's right to appoint to benefices in his diocese, until the contrary is proved.[5] Consequently, if either party, plaintiff or defendant, has not proved his intention against the rival, the judge must pronounce in favor of the one for whom the legal presumption stands, because the law is in his favor and as long as the contrary is not evident, the law

3 Kenny-Webb, *l. c.*, p. 322 f.
4 C. 2, 6°, II, 5; c. 16, X, II, 23.
5 See can. 1432, § 1.

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must be upheld. But the judge must act altogether differently when *natural* or ethical evidence, not expressed in law, is to determine or influence his decision. For such a presumption can only be gathered from certain and determined facts which directly bear upon the *factum probandum.* This is expressed by a learned modern writer thus: The jury or judge has to depend on the cohesion of each circumstance in the evidence with the rest of the chain of circumstances of which it forms a part.[6]

Here is introduced the *praesumptio hominis,* which has been divided into three classes: *levis, gravis, violenta* or *gravissima.* Light presumption is based on indications which seldom or hardly ever permit us to conclude that a fact really happened; for instance, if one would surmise evil by seeing a clergyman talking with a woman. Such a presumption is frivolous and must be discarded. It should rather be called rash judgment. The *praesumptio gravis* occurs when the indications or circumstances are of such a nature that they permit us to infer a usual and ordinary occurrence. A case of this kind is mentioned in the Decretals.[7] A young man was seen in frequent company with a girl, "*per plana et nemora, vias et invia, pluries convagantes.*" A *violent* presumption is one which, though not expressed, creates such a firm conviction in the mind that it cannot be resisted, although perhaps a slim evasion may be possible.[8]

These evidences, then, must be weighed and compared with the fact at issue. The rule advanced by barristers, that no conviction is allowed unless the fact in question

6 Kenny-Webb, *l. c.,* p. 324.

7 C. 13, X, II, 23; but both swore *se carnaliter cognovisse,* therefore a case of the former illicit affinity.

8 An example in c. 12, X, II, 23; concerning adultery: *solum cum sola, nudum cum nuda in eodem lecto.*

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has been fully proved,[9] may safely be accepted by the ecclesiastical court.

Here we will add some rules concerning the prevalence and weight of circumstantial evidence, as laid down by canonists.[10]

a) Legal presumptions are weightier than natural ones, and must therefore be preferred.

b) A special circumstance connected with the fact at issue has more value than a general presumption, according to *reg. juris 34 in 6°*: *"Generi per speciem derogatur."*

c) Presumptions which are in favor of the established laws of nature and society and conformable to natural tendencies, must be preferred, as a rule, to circumstances which indicate unnatural excess; thus temperate habits in youth and manhood create a favorable presumption for old age, provided all other things are equal.

d) Presumptions in favor of the validity of an act already posted are weightier than those in favor of its invalidity. Hence the axiom: *"Baptismus valide censendus in ordine ad matrimonium."* A violent presumption of this kind is mentioned in the Decretals,[11] where Innocent III decided that Baptism may be *violenter* presumed in one who was born of Christian parents and lived faithfully among Christians; although in case he was not baptized, he was not ordained validly.

e) Where the evidence is equally compatible with either view, the judge is not competent to leave the matter to the jury,[12] or to decide the case. For equal presumptions, like equal proofs, kill each other, and a judge cannot decide whilst he is in a doubtful frame of mind.

9 Kenny-Webb, *l. c.*, p. 329.

10 Cfr. Reiffenstuel, II, 23, 73 ff.; Santi-Leitner, II, 23, n. 13; Messmer, *l. c.*, p. 126 f.

11 C. 3, X, III, 43.

12 Cfr. Kenny, *A Selection of Cases Illustrative of the English Law of Tort*, 1904, p. 548.

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CHAPTER VII

THE OATH OF THE PARTIES

The last means of proof is the oath or invocation of the Divine Name in testimony of the truth. The Code distinguishes three kinds of oaths: the supplementary, the estimatory, and the decisive oath.

THE SUPPLEMENTARY OATH

CAN. 1829

Si habeatur semiplena tantum probatio nec alia probationis adiumenta iam supersint et iudex aut iubeat aut admittat iusiurandum ad probationes supplendas, hoc iusiurandum dicitur *suppletorium*.

CAN. 1830

§ 1. Huic iuriiurando vel maxime locus est cum adiuncta, quae civilem vel religiosum personae statum respiciunt, aliter comperiri nequeunt.

§ 2. Sed eodem abstineat iudex tum in causis criminalibus, tum in contentiosis, si de iure vel re magni pretii agatur aut de facto nimii momenti, aut si ius, res, factum non sit proprium personae cui iusiurandum esset deferendum.

§ 3. Deferri autem hoc iusiurandum potest sive ex officio, sive ad instantiam alterius partis, vel promotoris iustitiae, vel defensoris vinculi, si iudicio intersint.

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§ 4. Regulariter deferatur ei qui planiores habet probationes.

§ 5. Iudicis tamen est decreto definire an et quando adiuncta concurrant, cur iusiurandum suppletorium deferri debeat.

CAN. 1831

§ 1. Pars cui iusiurandum suppletorium defertur in rebus quae ad eius statum civilem vel religiosum non pertinent, potest ex iusta causa illud recusare vel in adversarium referre.

§ 2. Quanti autem haec recusatio facienda sit, utrum iusta sit, an potius confessioni aequiparanda, iudicis est aestimare.

§ 3. Iusiurandum suppletorium, ab una parte praestitum, potest ab altera impugnari.

The supplementary oath supplies a missing proof and therefore takes the place of a witness or other instrument of evidence. It may be that the plaintiff has produced one witness who was not rejected, but has none other at his disposal to prove his contention. Or the parties may grow weary of a protracted trial, and therefore resort to this last expedient. The judge, too, may have exhausted all the means of evidence. In this case he may permit, nay even command, the oath to be taken in order to supply the wanted evidence.

The *cases in which this oath may or may not be administered* are the following:

1. When the personal status of a person, either civil or religious, cannot otherwise be determined, *i.e.*, whether one is a layman, legitimate or illegitimate, a clergyman or a religious, married or unmarried, free or slave, possessed of a title or not. This is rather new legislation,

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for the commentators [18] generally contended that the supplementary oath could not be administered in cases concerning the personal status, although in matrimonial cases they limited this exception to a marriage to be solved. Our text admits the oath even in these cases, provided no other evidence can be obtained.

2. In *criminal cases* the judge shall *not* admit the oath. Among these the authors also reckon the so-called *causa famosa,* which involved infamy by law.[14] The judge shall furthermore abstain from demanding this oath in *civil matters* if:

a) the right or thing involved is of great value, or the fact, *i.e.,* the case itself, is of great importance; or if

b) the right, object or case concerns, not the party to whom the oath should be administered, but another. As to a) there can hardly be any doubt that matrimonial cases fall under this heading, because of their importance; besides *magni pretii* applies to alienations, which substantially change the condition of a church or corporation. And the latter case should also be applied to b) because it concerns administrators and guardians.

3. This oath may be administered either *ex officio* or *upon the demand* of the other party, or of the *promotor iustitiae* or the *defensor vinculi,* if present at the trial.

4. As a rule this oath is administered to *the party who has furnished fuller or better proofs.* The reason for this ruling is that the oath is privileged evidence, but supplementary only. Hence on one side some proofs are required, because if no proofs at all are given, the defendant must be absolved; and on the other, even semi-proofs, which ordinarily would justify the administration of the oath, may be shaky or weakened by contrary evi-

18 Cfr. Reiffenstuel, II, 24, n. 219; Santi-Leitner, II, 24, n. 27.

14 Reiffenstuel, II, 24, n. 217.

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dence. It does not matter whether the plaintiff or the defendant has furnished the better evidence.

5. The judge must *decide by a formal decree* whether and when the circumstances are such as to admit a supplementary oath. A slight presumption will not move a conscientious judge, who may, however, proceed according to the rules of probabilism, provided he takes into account the preceding canons. Strong evidence, and especially a violent presumption in favor of this privileged proof, would certainly suffice.[15] The next question, according to can. 1831, is the acceptance or refusal of the oath and the weight of a refusal.

The party to whom the oath is to be administered, *may refuse* to accept and rebut it, if there is a just reason, and the oath does not concern the civil or religious status of the person. Omitting this last clause concerning the status of a person, concerning which the legislator does not admit a refusal, there may be good *reasons for refusal.* Such a reason would be if the party had sufficiently proved the action or exception, or if nothing had been proved against him, or if the oath would refer to matters unknown by personal experience (*de scientia propria*) because the oath, being an accessory testimony, must have reference to one's own knowledge (*de proprio auditu aut visu*); or if one of the reasons for the matter itself, as stated in can. 1830, § 2, would exist.[16]

How *much weight* should be attributed to such a refusal, is the reason just, and may the refusal be equal to self-confession? are questions which depend on the judge.

The oath given by one party may *be attacked* by the other, for the very same reasons which prompted refusal. Besides, since this oath supplies the deficiency of wit-

15 Reiffenstuel, II, 24, nn. 174 ff. 16 Santi-Leitner, II, 24, n. 31.

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nesses, the qualifications of a witness may here be brought into play.

IURAMENTUM AESTIMATORIUM

CAN. 1832

Si de iure ad damni reparationem constet, sed quantitas damni aestimari certe non possit, iudex potest parti quae damnum passa est, iusiurandum deferre, quod *aestimatorium* dicitur.

CAN. 1833

In deferendo iureiurando aestimatorio:

1.° Iudex a parte, quae damnum passa est, petat ut sub iurisiurandi sanctitate designet res sibi ablatas vel dolo perditas, earumque pretium et valorem secundum probabilem suam aestimationem exprimat;

2.° Si taxatio iudici nimia videatur, eam ad aequitatem reducat, prae oculis habens omnia indicia et argumenta usu comprobata, adhibitis etiam, si opus sit, peritis, quo magis veritati et iustitiae consulatur.

If the right to indemnity is established, but the amount of the damage cannot be ascertained, the judge may demand an oath of the injured party. This oath is called *estimatory*. The party who suffered the damage swears as to what has been taken from him either by violence [17] or fraud and states the price and value of these things according to the best of his knowledge.

If the estimate is deemed excessive by the judge, he shall reduce it according to the most probable indications and customary methods of appraising; he may also employ experts in order to find out the truth and be just to both parties.

17 Cfr. c. 7, X, I, 40; c. 32, X, II, 24 (usury).

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IURAMENTUM DECISORIUM

CAN 1834

§ 1. Non solum ante initam litem partes convenire possunt ut controversia per iusiurandum ab alterutra praestandum transigendo dirimatur, sed pendente quoque lite et in quolibet eius momento et statu, altera pars potest, iudice probante, alteri iusiurandum deferre, ea conditione ut quaestio, sive principalis sive incidens, secundum iusiurandum decisa habeatur.

§ 2. Iusiurandum huiusmodi dicitur *decisorium*.

CAN. 1835

Decisorium iusiurandum deferri nequit, nisi:

1.° De re, in qua cessio et transactio admittitur, et quae pro litigantium personis non sit nimii momenti seu pretii;

2.° Ab eo qui cedere aut transigere potest;

3.° Ei, qui cedere vel transigere valet, quique pariter pro se non habeat plenam probationem;

4.° De mera notitia facti aut de facto, quod proprium sit illius, cui iusiurandum defertur.

CAN. 1836

§ 1. Hoc iusiurandum potest a parte, a qua delatum est, revocari quousque praestitum non fuerit, et ab altera parte acceptari et praestari, vel minus, aut referri in adversarium.

§ 2. Praestito iureiurando, quaestio secundum iuratam formulam finita est, perinde ac si cessio aut transactio iudicialis intercessisset.

§ 3. Si iusiurandum recusetur nec referatur in

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adversarium, iudicis est aestimare quanti facienda sit recusatio, utrum iustis innitatur causis an potius confessioni sit aequiparanda.

§ 4. Si in adversarium referatur, hic debet illud praestare, secus causa cadit.

§ 5. Ut iusiurandum in adversarium referri possit, eaedem illae concurrant conditiones necesse est, quae ad illud deferendum requiruntur, atque idem intercedat iudicis ministerium.

This oath is called decisive because it decides between victory and defeat and its effect consists in settling the trial or controversy. It may concern the principal issue or merit of the cause (*causa principalis*) or it may refer only to an incidental matter related to the point at issue. But it rests upon a mutual agreement between the parties. If the parties agree to settle their *dispute by this oath before the trial* has begun, the settlement resembles a *transactio,* on which see can. 1925 ff. If the oath is demanded *during the trial,* it can be demanded of the other party only with the approval of the judge, but may be interposed at any moment or stage of the trial.

The decisive oath *can be taken only* in the following cases:

1. In *matters* admitting cession and transaction, provided they are not of too great importance or value for the litigants. The reason is the danger of perjury.

2. When the parties are capable of making cession and transaction, they may demand and give the oath, provided full proof has not been furnished.

3. Concerning knowledge of the fact, or concerning a fact connected with the party who has to swear; because this oath is one of truth, and not of credibility. Therefore they are supposed to swear *de propria scientia.*

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This oath may be *revoked* by the party who demanded it, as long as it has not been taken; it may also be accepted or rejected, given or not given by the other party, or reversed by one party upon the other.

After the oath has been given, the case is settled according to the tenor of the formula, just as if cession or transaction had taken place. If the oath is refused — it may be refused for the reasons stated above — and not retorted upon the adversary, the judge should deliberate how much weight is to be attributed to this refusal, whether it was just or amounted to a confession of guilt.

Should the competitor upon whom the oath was retorted refuse to swear, he is defeated.

An oath may be retorted upon the adversary for the same reasons for which it may be demanded.

For the rest, this oath is to be treated in much the same way as the supplementary oath.

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TITLE XI

INCIDENTAL QUESTIONS

Either at the beginning or in the process of a trial there may arise questions which have either a remote or proximate bearing upon the issue. Thus at the very *beginning* exception may be taken against an incompetent or suspected judge, or against the right of the other party to go to court, or against their attorney and counsel, or against the validity of the summons, and all these matters must be decided before the trial can proceed. In the course of the trial questions may arise concerning bail and sequestration, or the admission of evidence.[1] Hence this title is logically inserted after the different kinds of evidence have been set forth.

There are certain incidental questions which are common to all trials; these concern contempt and attempts, which are comprised under the present title.

DEFINITION, PROPOSAL AND ACCEPTANCE

CAN. 1837

Causa incidens habetur, quoties, incepto saltem per citationem iudicio, ab una ex partibus aut a promotore iustitiae vel vinculi defensore, si iudicio intersint, quaestio proponitur quae, tametsi libello, quo lis introducitur, non contineatur expresse, nihilominus ita

1 Cfr. Lega, *Compendium de Iudiciis Eccl.*, 1906 n. 419 ff., p. 220 f. Incidental questions might also be called side issues or special demurrers; see Blackstone, III, § 313 ff.

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ad causam pertinet ut resolvi plerumque debeat ante quaestionem principalem.

CAN. 1838

Causa incidens proponitur vel oretenus vel per libellum, indicato nexu qui intercedit inter ipsam et causam principalem, et servatis, quoad eius fieri poterit, regulis can. 1706–1725 statutis.

CAN. 1839

Iudex, libello vel petitione verbali receptis, auditis partibus, et, si opus sit, promotore iustitiae, vel vinculi defensore, secum deliberet num proposita incidens quaestio futilis sit et ad retardandum principale iudicium unice excitata; itemque num causa incidens talis sit naturae et tali nexu cum causa principali cohaereat, ut ante eam resolvi debeat. Si ita se res habeat, libellum vel instantiam admittat; aliter decreto suo eam reiiciat.

1. An *incidental* question is one which, though not expressly contained in the introductory bill, is so intimately conected with the point at issue that it must be settled before the principal controversy is defined, for instance, the competency of the judge. Every such question must be proposed after the trial has begun, *i.e.*, after the summons was duly made, and it may be introduced by the party himself or by the *promotor iustitiae*, or by the *defensor vinculi*, if these officials are present.

2. A side-issue may be proposed either orally or in writing. But its connection with the main issue must be pointed out and the question raised must be in keeping with the rules laid down for the bill and the summons,

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as stated in can. 1706–1725. If there are several incidental questions, the *ordo cognitionum,* as set forth in can. 1627–1635, must be observed.

3. After having received the oral or written petition for a hearing of incidental questions, the judge shall first invite the parties and, if necessary, also the *promotor iustitiae* and the *defensor vinculi,* to hear their opinion. Then he shall deliberate with himself whether the side-issue raised has any solid foundation, or is futile, or only raised in order to delay the settlement of the main issue. He shall also carefully consider whether the incidental question is of such a nature and so connected with the main issue that it requires preliminary settlement. If this is the case, he shall *admit* the petition; otherwise he shall issue a *decree* rejecting it.

FORM OF SETTLING INCIDENTAL QUESTIONS

CAN. 1840

§ 1. Utrum incidens quae excitetur questio, definienda sit iudicii forma servata, an mero decreto, iudex, attenta rei qualitate et gravitate, aestimet.

§ 2. Si causa incidens sit iudicialiter definienda, regulae, quoad eius fieri poterit, servandae sunt, quae in ordinariis iudiciis obtinent; curet tamen iudex ut dilationum termini sint quam maxime breves.

§ 3. Iudex in decreto quo, non servata iudicii forma, vel reiicit vel definit quaestionem incidentem, rationes quibus innititur, in iure et in facto breviter exponat.

CAN. 1841

Antequam finiatur causa principalis, iudex interlocutoriam sententiam potest, iusta intercedente causa,

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corrigere aut revocare sive ex se, auditis partibus, sive ad instantiam unius partis audita altera parte, et requisito semper voto promotoris iustitiae aut defensoris vinculi, si adsint.

If the judge refuses to admit the incidental question by a formal decree, no appeal from this decision is permitted, unless — which, however, is hardly imaginable — his decision should forestall, or amount to, a final sentence.[2] But if he admits the incidental question, there are, according to our Code, which introduces new regulations in this matter, *two ways* open to settle the side-issue:

a) A mere formal decree may be issued by the judge, with due regard to the character and weight of the side-issue, or

b) The matter may be settled in judiciary form.

If the settlement is made by decree of the judge, who has either refused to admit the incidental question or solved it without the formality of a judiciary trial, he must briefly state the reasons of law and fact for his decree. The reason of *law,* or special demurrer, may be based on the lack of a formal rule which the law would otherwise prescribe. A reason of *fact* would be if the fact itself were denied or disputed, for instance, the enmity of the judge towards the other party.

If the judge, after due deliberation, has decided to settle the incidental question in *judiciary form,* he must, as far as possible, proceed along the lines prescribed for ordinary trials, but should take special care that the dilatory term be shortened as much as possible.

The text undoubtedly refers to the ordinary method

2 *Trid.*, Sess. 13, c. 1; Sess. 24, cc. 10, 20, *de ref.*; Lega, *l. c.*, n. 426, p. 221.

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of procedure, *i.e.*, the *observatio solemnis ordinis iudiciarii*, to the apparent exclusion of summary proceedings. It was generally admitted before the promulgation of the Code that, in settling incidental controversies, a summary procedure was sufficient. Our text seems positively to exclude it. The reason is not far to seek. The judge is ordinarily permitted to settle such issues by a formal decree, but if the matter is of great importance, the regular judiciary way should be adopted. Yet the text seems covertly to admit summary procedure, because it adds: "*quoad eius fieri poterit.*"

The *essential requisites for a summary procedure* are the following:

1. The petition or bill containing the controversy, as stated in can. 1706 ff., but no *solemnis libelli oblatio.*[3]

2. The *summons*, as described in can. 1711 ff.

3. The *means of evidence*, to which belong the questioning of the parties and all kinds of evidence; but the oath of the witnesses[4] and the *iuramentum calumniae* are not essential.

4. The *grant of dilatory terms and exceptions*, which, however, according to our Code, must be reduced to the shortest possible time, in order not to delay the final sentence unnecessarily; but no solemn closing of the procedure is required.

5. The *interlocutory sentence*, according to can. 1868 ff., which, though void of accidental solemnities, must be given in writing.

This last named *sentence*, according to can. 1841, proffered before the main issue is settled, *may be corrected or revoked* by the judge for any just reason, be-

3 Cfr. Lega, *l. c.*, n. 457 f.; Messmer, *l. c.*, p. 88 f.

4 See can. 1767, § 3. On the *iuramentum calumniae* the Code is silent.

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cause it does not terminate the office of either the delegated or the ordinary judge. For this reason the judge shall hear the parties in order to learn, whether they think themselves injured or curtailed in their rights by the interlocutory sentence. If one party insists upon a change or correction in the interlocutory sentence, the other party, too, must be heard. If the *promotor iustitiae* or the *defensor vinculi* are present, their opinion must also be asked.

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CHAPTER I

CONTUMACY OR CONTEMPT OF COURT

As stated above, there are incidental questions common to all trials. One of these is contumacy, or grave disobedience shown to the ecclesiastical judge who has legitimately summoned one to appear in court. In criminal cases contumacy is generally called *contempt of court,* and in the civil law it creates a presumption of guilt. In civil cases it is simply styled *default to appear or plead in court,* which follows the presumption that the plaintiff has renounced the right to prosecute. Contumacy may be shown by the defendant as well as by the plaintiff.

CONTUMACY OF THE DEFENDANT

CAN. 1842

Reus citatus qui sine iusta causa nec ipse per se nec per procuratorem comparet, contumax declarari potest.

CAN. 1843

§ 1. Non potest iudex reum contumacem declarare nisi prius constiterit:

1.° Citationem, legitime factam, tempore utili ad rei notitiam pervenisse aut saltem pervenire debuisse;

2.° Reum absentiae excusationem afferre neglexisse aut non iustam attulisse.

§ 2. Haec comprobari possunt sive per novam cita-

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tionem reo factam ut contumaciam suam, si possit, excuset, sive alio modo.

Can. 1844

§ 1. Ad instantiam partis vel promotoris iustitiae vel vinculi defensoris, si iudicio intersint, iudex rei contumaciam declarare potest, eaque declarata, procedere, servatis servandis, usque ad sententiam definitivam eiusque exsecutionem.

§ 2. Si procedatur ad sententiam definitivam, lite non contestata, sententia respicere tantum debet petita in libello; si lite contestata, ipsum contestationis obiectum.

Can. 1845

§ 1. Sed potest quoque iudex ad frangendam rei contumaciam comminari ecclesiasticas poenas.

§ 2. Quod si facere velit, iteranda est rei citatio, cum comminatione poenarum; nec iam tunc licet aut contumaciam declarare aut, ea declarata, poenas irrogare, nisi probetur hanc quoque secundam citationem suo effectu caruisse.

1. A defendant who has been duly summoned, and does not appear in court either personally or by proxy, *may be declared to be in contempt:* (a) if the *summons,* as described in can. 1711 ff., was lawfully issued and reached or at least might have reached the defendant within a reasonable time; (b) if the defendant failed to excuse himself, or offered no legitimate reason for his non-appearance in court.

To prove contumacy, a *second summons* may be issued, in order to give the defendant time to excuse his non-appearance. But if the judge deems it more expedient,

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another course may be taken. If two witnesses testify that the summons was duly served and received by the defendant, the judge may proceed as stated in can. 1844, because in that case he is certain of his ground and he who is certain need not strive for greater certainty.[1] But if he issues a new summons, a term must be set for appearance, and only after this term has expired, may contumacy be declared.[2]

2. But the necessary declaration may also be made upon the demand of the other party, or of the fiscal promotor or defender, if present at the trial. As soon as contumacy has been declared, the judge may proceed to the final sentence and its execution, provided he observes the rest of the rules prescribed (*servatis servandis*). This means that the proceeding is regular and conducted along the general rules governing trials, with the sole omission of the parts which the defendant would play if he were present; therefore the interrogatories, the confrontation, and the self-defence are omitted; but the controversial points should be communicated to the defendant if he can be reached.[3]

If no *contestatio litis* has as yet taken place, the sentence can only be directed to the object or petition contained in the bill of complaint; *i.e.*, only so much can be granted as was asked for in the petition offered to the judge, and no more. On the other hand, if contumacy has been declared *after* the issue in pleading, the sentence shall cover all that the plaintiff pleaded for and the defendant denied, because the latter is supposed to have been present at that moment.

Can. 1845 permits the threat of *ecclesiastical penalties* in order to force a stubborn recusant or *contumax* to be

1 Reg. juris 31 in 6°.
2 *Regulae S. R. R.*, Aug. 4, 1910, § 26 (*A. Ap. S.* II, 792).
3 *Reg. S. RR.*, Aug. 4, 1910, § 126, n. 6 (*A. Ap. S.*, II, 793).

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obedient, not merely, as the Tridentine Council admitted,[4] in order to make him accept the sentence and its execution. But if the judge wishes to make use of this juridico-ecclesiastical weapon, he must issue a *second summons* in which this threat is directly mentioned. However, even after the second summons, contumacy may be declared and the penalty inflicted only when proof has been given that this second summons, like the first, was ineffective or unheeded. The proof can be furnished as stated above, or by public courier.

DESISTING FROM CONTUMACY

CAN. 1846

Rei a contumacia recedentis seque in iudicio sistentis ante causae definitionem, conclusiones probationesque, si quas afferat, admittantur; caveat autem iudex ne mala fide in longiores et non necessarias moras iudicium protrahatur.

CAN. 1847

Post latam vero sententiam, contumax beneficium restitutionis in integrum ad appellandum ab ipso iudice qui eam tulit, petere potest, non ultra tamen trimestre ab ipsius sententiae intimatione, nisi agatur de causis quae non transeunt in rem iudicatam.

CAN. 1848

Regulis superius traditis etiam tum locus est cum reus, etsi primae citationi obtemperaverit, fit tamen postea, progressu iudicii, contumax.

4 Sess. 15, c. 3, *de ref.*; Messmer, p. 137.

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If the contumacious defendant appears in court before the final sentence, his claims and proofs, if he has any, must be admitted; but the judge must assure himself that the defendant's motive in postponing his appearance was not to prolong the trial unnecessarily, or to wear out the judge and the plaintiff.

If the defendant appears in court after the final sentence has been given in his case, the only mode of appeal open to him is by *restitutio in integrum*, which he must ask for within three months from the date of the sentence. A longer term is admissible only in matters which never become *res iudicatae*, as, for instance, matrimonial cases.

The rules so far laid down also hold in case the defendant, after having obeyed the first summons, becomes contumacious in the course of the trial.

CONTUMACY OF THE PLAINTIFF

CAN. 1849

Si die et hora, qua reus secundum citationis praescriptum coram iudice primum se sistit, actor non adsit, nullamque vel insufficientem absentiae excusationem attulerit, iudex eum ad instantiam rei conventi citet iterum; et si actor novae citationi non paruerit vel postea iudicium inchoare vel inchoatum prosequi neglexerit, instante reo convento vel promotore iustitiae aut defensore vinculi, contumax a iudice declaretur, iisdem servatis regulis quae supra traditae sunt pro rei contumacia.

The Code has combined two apparently contradictory Decretals[5] in such a way that no collision is possible.

[5] C. 3, X, II, 14; c. 1, 6°, II, 6.

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Suppose the summons was duly issued and the defendant appears in court on the appointed day and hour, but the *plaintiff* demurs. This seems to be a grievous offence, because it was the plaintiff who caused the summons to be issued and who is bound to prosecute the case. Therefore it might naturally be expected that the judge would be stricter in case of contumacy towards the plaintiff than towards the defendant, and a second summons would be regarded as unnecessary.[6] But the Code leans towards a more equitable treatment and orders another summons to be issued, even if the defendant demands it, and the plaintiff had no excuse, or at least no sufficient reason, for not appearing in court. And if this second summons is unheeded by the plaintiff, or if he does not begin or pursue his case in court, *he is declared in contempt*, provided either the defendant or the fiscal promoter or defender insist upon such a declaration. For the rest, the rules laid down for the defendant in contempt cases must be applied.

EFFECT OF CONTUMACY

CAN. 1850

§ 1. Actoris contumacia a iudice declarata perimit eiusdem actoris ius ad suam instantiam prosequendam.

§ 2. Permittitur tamen promotori iustitiae vel vinculi defensori instantiam facere suam eamque prosequi, quoties publicum bonum id postulare videatur.

§ 3. Reus autem exinde ius habet petendi ut vel libere possit a iudicio abire, vel nulla habeantur omnia eo usque gesta, vel definitive ipse absolvatur a petitione

6 Thus in c. 1, 6°, II, 6, whilst c. 3, X, II, 14 seems to admit omission of summons to plaintiff; see Santi-Leitner, II, 14, n. 6 f.; Lega, *l. c.*, n. 436.

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actoris, vel iudicium, absente quoque actore, ad finem adducatur.

CAN. 1851

§ 1. Qui contumax declaratus contumaciam suam non purgaverit, sive actor sit sive reus, condemnetur tum ad litis expensas, quae ob suam contumaciam factae sunt, tum etiam, si opus sit, ad indemnitatem alteri parti praestandam.

§ 2. Si tum actor tum reus sint contumaces, ad expensas litis tenentur in solidum.

If the *plaintiff* has been declared contumacious, he *forfeits* the right of prosecuting the case, because he is supposed to have renounced that right. However, if the case concerns the public welfare, as, for instance, in criminal, ordinational, and matrimonial matters, either the *promotor iustitiae* or the *defensor vinculi* may continue the prosecution in his own name.

The counter effect of a declaration of contempt against the plaintiff is that the *defendant* may demand his discharge, or that all the proceedings so far have to be considered null and void, or that he be definitely freed from the claims of the plaintiff, or that the trial be brought to a close even during the absence of the plaintiff.

If either the *plaintiff or the defendant* has been declared *contumax* and has not purged himself of this stain, he must be condemned to bear the expenses caused by his contumacy, and if necessary, also to indemnify the other party. If both, plaintiff and defendant, have been contumacious, they are bound to defray the expenses thus far incurred *in solidum, i.e.,* each one the whole expense if either should be insolvent or beyond reach.

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CHAPTER II

INTERVENTION OF A THIRD PERSON

CAN. 1852

§ 1. Is cuius interest, admitti potest ad interveniendum in causa in qualibet litis instantia.

§ 2. Sed ut admittatur, debet ante conclusionem in causa libellum iudici exhibere, in quo breviter de iure interveniendi ipsum edoceat.

§ 3. Qui intervenit in causa, admittendus est in eo statu in quo causa reperitur, assignato eidem brevi ac peremptorio termino ad probationes suas exhibendas, si causa ad periodum probatoriam pervenerit.

CAN. 1853

Si tertii interventus appareat necessarius, iudex ad instantiam partis vel etiam ex officio debet interventum in causa iubere.

Intervention is perhaps best known from international law, where it means interference by one state in affairs pending between two or more other states that have either gone to war or reached a degree of tension clearly threatening war. The interest of the intervening state as well as that of international society justifies such interference.[1] Similarly, not only the plaintiff and defendant, but a third person, too, may be concerned in the issue of

1 Westlake, *International Law*, P. I, Peace; 1910, p. 317.

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a trial, for instance, a legacy or a matrimonial case involving legitimacy.

Hence our text admits intervention by interested persons in any case and at any stage. However, in order to be admitted, the third party must, before the *conclusio in causa,* present a bill briefly stating the claim on which he bases his intervention. As intervention is permitted at any stage or instance of the trial, the judge who has been chosen by the plaintiff, either in the first instance or the court of appeal,[2] may take cognizance of and admit the intervention. The one who intervenes must be admitted only at the stage or instance which the trial had reached when he came in, for instance, after the *litis contestatio,* or at the defence of the parties, or at the *conclusio in causa,* or, finally, in the instance of appeal. And from that point onward the third party may be present at all the acts. But the text adds that brief and peremptory terms should be assigned to the third party for his evidence if the trial is near the point where the evidence is gathered in.

Can. 1853 mentions *necessary intervention,* undoubtedly to distinguish it from another, which is called *voluntary.* The latter is intervention spontaneously offered by a third person in order to help either of the litigants; whereas necessary intervention is commanded by the judge, either at the demand of a party, or *ex officio.* In the latter case the *promotor iustitiae* should, or at least may, be notified.[3]

2 C. 38, X, II, 20; cfr. Wernz, *l. c.,* V, n. 177 f., p. 156 f.

3 *Regulae S. R. R.* Aug. 4, 1910, § 97, n. 2 (*A. Ap. S.,* II, 815).

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CHAPTER III

ATTEMPTS PENDING THE TRIAL

CAN. 1854

Attentatum est quidquid, lite pendente, aut altera pars adversus alteram aut ipse iudex adversus alterutram vel utramque partem innovat, parte dissentiente et in eius praeiudicium; sive innovatio respiciat litis materiam, salvo tamen praescripto can. 1672, 1673, sive respiciat terminos partibus a iure vel a iudice assignatos ad ponendos certos actus iudiciales.

CAN. 1855

§ 1. Attentata sunt ipso iure nulla.

§ 2. Idcirco parti ex attentato laesae competit actio ad obtinendam declarationem nullitatis.

§ 3. Actio haec instituenda est coram ipso iudice causae principalis; quod si ob attentatum pars laesa iudicem suspectum habeat, exceptionem suspicionis potest opponere, in qua procedendum est ad norman can. 1615.

CAN. 1856

§ 1. Pendente quaestione de attentato, cursus causae principalis regulariter suspenditur, sed si iudici opportunius videatur, quaestio de attentato potest una cum causa principali pertractari et resolvi.

§ 2. Quaestiones de attentatis expeditissime sunt per-

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tractandae et decreto iudicis definiendae, auditis partibus et promotore iustitiae vel defensore vinculi, si hi iudicio intersint.

CAN. 1857

§ 1. Demonstrato attentato, iudex decernere debet eius revocationem seu purgationem.

§ 2. Quod si attentatum vi vel dolo patratum sit, qui illud commisit, tenetur etiam de damnis erga partem laesam.

The trial, according to can. 1725, 5°, becomes *pending* after the summons has been duly served or the parties have appeared in court of their own accord. The object of the quarrel is then litigious (*res litigiosa*),[1] and any change of, or any act against, that object is called an attempt (*attentatum*), provided it is prejudicial or detrimental to one of the parties concerned.[2]

It is also called an *innovation* because it alters the judicial status of the object. Every "attempt" is against the inhibition of the law (*inhibitio iuris*), because, as stated above, the Code forbids any innovation while the trial is pending. To this general inhibition must also be referred the terms set up by law, as, for instance, for appeals, in can. 1634.

The judge himself may fix definite terms for certain judicial acts, for instance, for the experts (can. 1799, § 2). These are *inhibitiones hominis* or *iudicis*.[3] Hence our Code calls an *attentatum* whatever savors of innovation attempted by one party against the other, or by the judge against one or both parties, provided it is made (a) pending the trial, (b) against the will of the other

1 C. 50, C. 11, q. 1.
2 C. 3, X, II, 16.
3 Lega, *l. c.*, n. 429.

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party, and (c) to the detriment or prejudice of the other party.

The *object of an innovation* may be:

a) the subject of the trial (*materia litis*), or

b) the *terms* assigned either by law or by the judge.

The object may concern real as well as personal action. Thus *innovatio* is forbidden in *matrimonial cases* which are pending on the score of a diriment impediment, and the parties must not be separated, or be denied their marital rights until the case is settled.

However, this applies only to the court decision; the party who is absolutely certain of the existence of a diriment impediment would not be allowed either to ask for, or render, the *debitum.*[4] Other litigious matter which may occur in ecclesiastical courts are church property, benefices, and provisions or appointments. The Code makes an exception from can. 1672 f., which refer to sequestration of a litigious object and bailment or security, as these are not considered attempts, being permitted by law.

The *effect,* negative and positive, is stated in canon 1855, which decides (thereby settling a controversy) that *all attempts are null and void ipso iure,* and not merely rescindible.[5]

However, the term *ipso iure* is to some extent modified; for the injured party is granted the right to a *legal action* in order to obtain a *declaration of nullity of the attempt.* Therefore, if the party should take no action with regard to the attempt, we hardly believe that the judge would have to interfere. At least there is no hint that the judge

4 Reiffenstuel, II, 16, n. 11 f. The reader of Vol. V of our Comm., p. 327, line 10 from below, will please change the word *certain* into *uncertain,* the former being a misprint.

5 Concerning alienation of a litigious matter the authors were not agreed; some held that it was rescindible only. Reiffenstuel, II, 16, n. 20; Lega, *l. c.,* n. 430.

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would have to proceed *ex officio*. On the other hand, it would hardly be advisable for the judge not to proceed *ex officio* in beneficiary cases, on account of can. 1447.

The *action* against attempts must be brought before the *judge* who is competent in regard to the main issue. However, if exception should be taken to the judge, because of suspicion, this must first be solved according to can. 1615.

Another effect of the *attentatum* is mentioned in can. 1856, which is modelled upon the civil code issued for the Papal States by Gregory XVI.[6] It says that the course of the main trial is, as a rule, suspended, unless the judge deems it expedient to treat and solve the incidental question concerning the attempt together with the main issue.

At any rate questions of attempt should be treated and settled as quickly as possible by a decree of the judge, who shall for this purpose hear the parties and also the fiscal promoter and the defender if they are present.

If the attempt has been proved, the judge must decree its revocation or purgation, which consists in the rescinding of all acts that have been performed during the inhibition, either of law or of the judge, with regard to this one incidental question.[7] Besides, if the attempt was made by violence or fraud, the perpetrators are bound to indemnify the injured party to an amount corresponding with the period beginning at the time when the action was brought up to the moment of its settlement.[8] This indemnification includes expenses as well as the revenues received or gain made during this time.

6 *Regolamento legislativo e giudiziario per gli affari civili*, Nov. 10, 1834, art. 880, 884, 886.

7 *Ibid.*, art. 881; cfr. c. 4, X, II, 13.

8 C. 2, X, II, 14; c. 1, X, II, 17; Lega, *l. c.*, n. 433.

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TITLE XII

PUBLICATION OF THE PROCESS, CLOSING OF THE EVIDENCE, PLEADING OF THE CASE

After all the incidental questions have been settled, or, if no such questions arose, after all the evidence has been produced, the pleading proper or defence might commence, were it not for two acts, one of which requires a formal decree. They are the publication of the process and the closing of the evidence.

THE PUBLICATION OF THE PROCESS

CAN. 1858

Ante causae discussionem et sententiam omnes probationes quae sunt in actis et quae adhuc secretae permanserunt, sunt publicandae.

CAN. 1859

Concessa partibus earumque advocatis facultate acta processualia inspiciendi petendique eorum exemplar, intelligitur facta publicatio processus.

Before the defence is put up and the sentence is pronounced, all the *evidence* contained in the acts or records (minutes) and that which has so far been kept secret, must be *published*. This is done in order to give an opportunity to the parties to defend themselves. Therefore they or their attorneys are permitted to inspect the

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acts of the process thus far conducted, and to obtain a copy thereof. This grant is called publication of the process (*publicatio processus*), but it is not required for the validity of the trial, nor does it necessitate a formal decree of the judge.

CLOSING OF THE EVIDENCE

CAN. 1860

§ 1. Expletis omnibus quae ad probationes producendas pertinent, *ad conclusionem in causa* deveniendum est.

§ 2. Haec conclusio habetur quoties aut partes a iudice interrogatae declarent se nihil aliud deducendum habere, aut utile proponendis probationibus tempus a iudice praestitutum elapsum sit, aut iudex declaret se satis instructam causam habere.

§ 3. De peracta conclusione in causa, quocunque modo ea acciderit, iudex decretum ferat.

CAN. 1861

§ 1. Post conclusionem in causa novae probationes inhibentur, nisi agatur de causis quae nunquam transeunt in rem iudicatam aut de documentis nunc primum repertis, aut de testibus qui antea ob legitimum impedimentum tempore utili induci non potuerunt.

§ 2. Si novas probationes admittendas censeat, id decernat iudex, audita altera parte, cui congruum tempus concedat ut novas probationes cognoscere et se defendere possit; aliter iudicium nullius est momenti.

The so-called *conclusio in causa* is nothing else but a formal declaration that the evidence is exhausted. It requires a *decree* of the judge, which may be brought

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about in three ways: (a) The judge may ask the parties to declare that they have no further evidence to produce, or (b) the term fixed by the judge for producing evidence may have expired, or (c) the judge may declare himself to be sufficiently informed.

The *conclusio in causa,* as a rule, forbids the bringing forth of new evidence; otherwise there might be no limit to the trial and the door would be opened to undue protraction. However, there are cases which admit exceptions, to wit:

1.° when the matter is such that it can never become *res iudicata,* as in matrimonial cases;

2.° when new documents have come to light;

3.° when witnesses are lawfully prevented from giving testimony within the term assigned.

In all these cases the judge must deliberate whether the new evidence is to be admitted or not, and if he decides to admit it, he must issue a *decree* to that effect, after having heard the other party, *viz.,* the one who has not produced new evidence. This same party must then, *under penalty of nullity of the trial,* be given sufficient time to take cognizance of the new evidence and to prepare his defence.

DEFENCE OR DISCUSSION OF THE CASE

CAN. 1862

§ 1. Facta conclusione in causa, iudex, pro suo prudenti arbitrio, partibus congruum temporis spatium praestituat ad defensiones suas seu allegationes sive per se sive per advocatum exhibendas.

§ 2. Hic terminus prorogari a iudice potest instante una parte, audita altera; vel etiam coarctari, utraque consentiente.

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CAN. 1863

§ 1. Defensio in scriptis est conficienda, et regulariter tot exemplaribus conscribenda quot sunt iudices, ut singula singulis iudicibus possint exemplaria distribui.

§ 2. Sed etiam promotori iustitiae et defensori vinculi, si iudicio intersint, debet exemplar tradi; praeterea partes inter se exemplaria commutare debent.

§ 3. Tribunalis praeses, quoties pro suo prudenti arbitrio necessarium censeat, et sine nimio partium gravamine fieri animadvertat, mandare potest ut defensio typis imprimatur una cum documentis principalibus in fasciculo coniungendis, qui actorum et documentorum summarium continet.

§ 4. Quo in casu iubeat ne quidquam imprimatur, nisi prius exhibito manuscripto et venia illud publicandi obtenta; praeterea sedulo caveat de secreto, si quod sit in causa servandum.

CAN. 1864

Iudicis et in tribunali collegiali praesidis est moderari, pro sua prudentia, nimiam defensionum extensionem, nisi de hoc peculiari tribunalis lege sit cautum.

CAN. 1865

§ 1. Communicatis vicissim inter partes defensionum scripturis, utrique parti responsiones exhibere liceat, intra breve tempus a iudice praestitutum, et servatis regulis et cautelis de quibus in can. 1863, 1864.

§ 2. Hoc ius partibus semel tantum esto, nisi iudici gravi ex causa iterum videatur concedendum; tunc autem concessio, uni parti facta, alteri quoque data censeatur.

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CAN. 1866

§ 1. *Informationes*, uti vocant, *orales*, quibus videlicet advocati iudicem de adiunctis iuris et facti causam respicientibus instruere satagunt, prohibentur.

§ 2. Admittitur tamen moderata disputatio coram iudice pro tribunali sedente ad aliquid illustrandum, si, alterutra vel utraque parte postulante, iudex eam utilem censeat atque admittat.

§ 3. Ad disputationem obtinendam partes exhibere debent in scriptis quaestionum capita cum altera parte discutienda, paucis verbis expressa; iudicis autem est ea cum partibus hinc inde communicare, ac diem et horam disputationi assignare et disputationem ipsam moderari.

§ 4. Disputationi assistat unus ex notariis tribunalis ad hoc ut, si iudex praecipiat aut pars postulet et iudex consentiat, possit de disceptatis, confessis aut conclusis, scripto ad tramitem iuris ex continenti referre.

CAN. 1867

In causis contentiosis, si partes parare sibi tempore utili defensionem negligant, aut se remittant iudicis scientiae et conscientiae, iudex, si ex actis et probatis rem habeat plane perspectam, poterit statim sententiam pronuntiare.

The law laid down in these canons is entirely modern, based on the practice of the S. Rom. Rota,[1] and it would be vain to look for precedents in the Decretals.

The *chief points* with regard to the defence are:

1 *Lex Propria S. R. R.*, June 29, 1908, can. 25 ff.; *Regulae Servandae*, Aug. 4, 1910, § 44 ff. (*A. Ap. S.*, I, 26 f.; II, 799 ff.); some old canonists mention "*de allegationibus*"; see Wernz, V, n. 661 p. 498.

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1.° A *time* is to be fixed by the judge for the defence, and it may be prolonged or restricted.

2.° The defence is to be made *in writing,* and if so demanded by the judge,— who also gives the permission, — it must be printed. Each judge as well as the fiscal promoter and the defender is entitled to a copy, and the parties must exchange their defence.

3.° The *judge* or the president of the board of judges shall *direct* the defence so that it may not be unduly protracted.

4.° After the *parties* have exchanged their written defence, they shall *prepare the answers* within the time assigned by the judge. But answers are allowed *only once,* unless for weighty reasons the judge grants a *second chance for pleading.* However, both parties must be treated equally, *i.e.,* if one party is allowed a second pleading, the other must be offered the same opportunity.

The answers are to be in writing and, according to the practice of the S. R. Rota, should be ready twenty days after the written or printed defence has been distributed and exchanged.[2]

5.° Whilst *oral information* (by which attorneys try to explain circumstances of law and fact to the judge, who may thus be unduly influenced by a one-sided presentation of the case) is forbidden, a moderate oral discussion or *pleading is permitted,* if necessary to throw light on the subject. However, it is required:

a) That this pleading be made *before the court,* that it be requested by one or both of the parties, and that the judge give his consent or deem it useful;

b) That the permission be given only after the *points*

2 *Lex Propria S. R. R.*, c. 27, n. 3; *Regulae S. R. R.*, Aug. 4, 1910, § 50 (*A. Ap. S.*, I, 27; II, 801).

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to be discussed have been briefly stated by the parties in writing;

c) That the judge *communicate* these points to both parties;

d) That he *set the day and hour* for the discussion of them and direct the discussion himself;

e) That a *notary* immediately take down the minutes of the discussion, including admissions and conclusions, as often as the judge commands or either party, with the consent of the judge, demands it.

6.° In *private civil matters,* if the parties do not present their defence within the time prescribed, or commit their case to the knowledge and conscience of the judge, the *latter may immediately pronounce sentence,* provided the acts and the evidence are so plain as to permit him to do so.

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TITLE XIII

THE SENTENCE

After the pleading is ended by the defence, either because nothing more can be said or because the judge deems the evidence sufficient, the sentence must be pronounced. The Code first defines the sentence, then states the rules to be followed by the judge, and, finally, defines the contents of the sentence and prescribes the manner of its publication.

DEFINITION AND INTRINSIC CONDITIONS OF THE SENTENCE

CAN. 1868

§ 1. Legitima pronuntiatio qua iudex causam a litigantibus propositam et iudiciali modo pertractatam definit, sententia est: eaque *interlocutoria* dicitur, si dirimat incidentem causam; *definitiva,* si principalem.

§ 2. Ceterae iudicis pronuntiationes *decreta* vocantur.

CAN. 1869

§ 1. Ad pronuntiationem cuiuslibet sententiae requiritur in iudicis animo moralis certitudo circa rem sententia definiendam.

§ 2. Hanc certitudinem iudex haurire debet ex actis et probatis.

§ 3. Probationes autem aestimare iudex debet ex sua

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conscientia, nisi lex aliquid expresse statuat de efficacia alicuius probationis.

§ 4. Iudex qui eam certitudinem efformare sibi non potuit, pronuntiet non constare de iure actoris et reum dimittat, nisi agatur de causa favorabili, quo in casu pro ipsa pronuntiandum est, et salvo praescripto can. 1697, § 2.

CAN. 1870

Sententia ferri a iudice debet, expleta causae disceptatione; et si causa sit implicatior et contentionum vel documentorum mole difficilior, interponi potest congruum temporis intervallum.

1. A *sentence* is the legitimate pronouncement of a judge, by which a case proposed by the litigants and judicially tried, is settled. It is called *interlocutory* if it settles an incidental question, *definitive* if it settles the main issue. All other settlements or pronunciamentos of the judge are called *decrees*.[1]

2. The *intrinsic requisites* for a sentence are the following:

a) The judge must have *moral certitude* concerning the case he settles by his sentence. Moral certitude requires sufficient proof to convince the judge of the righteousness of the cause.

b) The proofs may not be sought outside of the acts and allegations of the trial (*acta et probata*), because it is not as a private citizen, but as a judge, that he must give sentence. Hence privately gained knowledge should not influence the decision.[2]

1 See Appendix, pp. 485 sqq.

2 A theological question here arises: Is the judge so bound by the *acta et probata* that he would have to decide against his own private conscience. *Three* opinions are proposed; the first simply affirms, the second flatly denies, and the third, which to us appears more probable, distinguishes: in civil (to

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c) Yet the judge *must weigh the evidence according to his own conscience.* He must know the law and acquaint himself fully with the evidence. The rule is that all other things being equal or the testimony being equally strong on both sides, the decision should be in favor of the possesser, *because melior est conditio possidentis.*[3] Hence our text adds the clause: *unless the law itself should state something definite concerning the weight of evidence.* Every sentence opposed to a clear and express law text would be *ipso iure* null and void, for the judge has not to reverse, but to uphold the law.[4]

d) From this naturally follows the corollary set forth in can. 1869, § 4: If no certainty can be had, the *judge must pronounce in favor of the defendant and dismiss him;* unless the case is one of possession or contains or turns about a favor, in which hypothesis, although the law is more favorable to absolution or freedom, the favor should be upheld.

e) The *sentence must be given after the pleading has been completed.* This means immediately or soon after the defence has exhausted its arguments. However, there are *intricate cases,* rendered so by reason of the many papers or documents that must be pondered before the judge has a clear vision of the case, and the decision of these may *be delayed* for a time.

which they also belong matrimonial) cases, and in minor criminal cases, the judge is obliged to decide according to the *acta et probata,* but not in important criminal cases; see Bouix, *De Iudicis Eccl.,* I, p. 140.

3 Cfr. c. 27, X, II, 20; c. 3, X, II, 19.

4 C. 1, X, II, 27; c. 1, X, I, 2; c. 1, 6°, II, 14.

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HOW A BOARD OF JUDGES OR ONE JUDGE PRONOUNCES SENTENCE

CAN. 1871

§ 1. In tribunali collegiali, qua die et hora iudices ad deliberandum conveniant, collegii praeses constituat; et nisi peculiaris causa aliud suadeat, in ipsa tribunalis sede conventus habeatur.

§ 2. Assignata conventui die, singuli iudices scriptas afferent conclusiones suas in merito causae, et rationes tam in facto quam in iure, quibus ad conclusionem suam venerint: quae conclusiones actis causae adiungantur, secreto servandae.

§ 3. Prolatis ex ordine, secundum praecedentiam, ita tamen ut semper a causae ponente seu relatore initium fiat, singulorum conclusionibus, habeatur moderata discussio sub tribunalis praesidis ductu, praesertim ut constabiliatur quid statuendum sit in parte dispositiva sententiae.

§ 4. In discussione autem fas unicuique est a pristina sua conclusione recedere.

§ 5. Quod si iudices in prima discussione ad hanc sententiam devenire aut nolint aut nequeant, differri poterit decisio ad novum conventum; qui tamen ultra hebdomadam comperendinari non debet.

CAN. 1872

Si unicus sit iudex, ipsius tantum est sententiam exarare; in tribunali vero collegiali servetur praescriptum can. 1584.

1. When a *board of judges* has to pronounce sentence, the procedure is as follows:

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a) The presiding officer determines the *day* and the *hour* when the judges shall meet for deliberation. The *place* for the meeting is the *courtroom,* unless circumstances make it advisable to choose another locality.

b) On the day appointed each judge shall bring with him the *conclusions* he has arrived at in the case together with a statement of the motives that prompt them.

All this must be done in writing and inserted in the acts of the trial, but kept secret. The *reasons for his opinion* or conclusions each judge must state *in facto et iure.* The phrase *in facto* means that the conclusions must remain within the writ of complaint, or concern precisely this case and no other; the reasons *de iure* may be applied to the law in general as well as to any specific right on which the plaintiff based his claim; this is also called *in causa et actione.* Hence the sentence must, as the canonists say, conform to the *libellus* and to the law in general.[5]

c) After the conclusions of each judge have been read by the *ponens* or referee, and then by the judges, according to precedence, a *moderate discussion* shall take place under the supervision of the presiding judge, in order to determine the dispositive part of the sentence more accurately.

d) Each judge is permitted to change his conclusion in the course of this discussion, because the discussion may convince him that he made an error, either *in facto* or *in iure.*

e) If the judges are unwilling or unable to arrive at a definite sentence, another discussion may be held, but not later than eight days after the first.

2. If but *one* judge is sitting in tribunal, he must work out the sentence for himself; but in a board the presi-

5 Reiffenstuel, II, 27, n. 70 ff.; Santi-Leitner, II, 27, n. 8.

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dent may entrust one of the judges with the office of *ponens*, to draft the sentence in writing (can. 1584).

CONTENTS OF THE SENTENCE

CAN. 1873

§ 1. Sententia debet:

1.° Definire controversiam coram tribunali agitatam; hoc est reum absolvere vel condemnare quod attinet ad petitiones vel accusationes adversus eum prolatas, data singulis dubiis, seu controversiae articulis, congrua responsione;

2.° Determinare (saltem quatenus fas sit et materia patiatur), quid pars damnata dare, facere, praestare, aut pati debeat, aut a quo abstinere; itemque quo modo, loco vel tempore obligatio implenda sit;

3.° Continere rationes seu *motiva* quae dicuntur, tam in facto quam in iure, quibus dispositiva sententiae pars innititur;

4.° Statuere de litis expensis.

§ 2. In tribunali collegiali motiva ab extensore desumantur ex iis quae singuli iudices in discussione attulerunt, nisi ab ipsa iudicum maiore parte praefinitum fuerit quaenam sint motiva proferenda.

The sentence must be drafted in such a way:

1.° That it *settles* the controversy at issue, that is, it must be either absolutory or condemnatory concerning the question contained in the writ of complaint (*libellus*), and offer suitable answers to each disputed point.

2.° That, as far as the case permits, the *penalty of the guilty party is determined*. Hence the sentence should clearly and precisely state what the condemned party has to give, do, perform, or from what to abstain; also the

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manner, place, and time for fulfilling the obligation imposed. This is called *sententia certa*. A conditional sentence, as a rule, is invalid,[6] because a trial is supposed to settle the quarrel.

3.° That it *contain the reasons*[7] *in facto et iure*, as stated above, upon which the dispositive part of the sentence is based. The *dispositive part* is that which contains the absolutory or condemnatory sentence. Hence neither the *arenga*, nor the *narratio propria*, nor the *conclusio* are here concerned.

4.° That it state the amount of expenses incurred. The *extensor*, who is no one else but the *ponens* or referee, *i.e.*, one of the judges, may make a summary (*ristretto*) of the motives or reasons given by the judges, unless the majority has specifically determined which motives are to be advanced.

EXTRINSIC FORMALITIES

CAN. 1874

§ 1. Sententia ferri debet, divino Nomine ab initio semper invocato.

§ 2. Dein exprimat oportet ex ordine qui sit iudex aut tribunal; qui sit actor, reus, procurator, nominibus et domicilio rite designatis, promotor iustitiae, defensor vinculi, si partem in iudicio habuerint.

§ 3. Referre postea debet breviter facti speciem cum partium conclusionibus.

§ 4. Hisce subsequatur pars dispositiva sententiae, praemissis rationibus quibus innititur.

§ 5. Claudatur cum indicatione diei et loci in quibus

6 Reiffenstuel, II, 27, n. 87 ff.

7 The *Regulae S. R. Rotae*, Aug. 4, 1910, § 182 (*A. Ap. S.*, II, 836) state that if these reasons are not given, the sentence is invalid.

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exarata est et cum subscriptione iudicis vel omnium iudicum, si plures fuerint, et notarii.

Can. 1875

Regulae superius positae locum habent potissimum in proferenda sententia definitiva; sed applicantur etiam, quantum diversa res patitur, in proferenda interlocutoria.

1. The sentence must contain an invocation of the Divinity.[8]

2. The *following names* must be set down in order: the names of the judge or tribunal, *i.e.*, the board of judges; of the plaintiff, defendant, proctor, together with their domiciles, of the fiscal promoter and the defender, provided they took part in the trial.

2. It must contain a brief *statement of the case* together with the arguments or conclusions of the parties.

4. Then follows the *dispositive part* of the sentence, preceded by a statement of the motives which prompted it.

5. At the bottom or end of all these statements follow the *day* and the *place* when and where the sentence was drafted, and the signatures of the judge or judges and the notary.

All these rules, says can. 1875, apply chiefly to *definitive sentences,* but they should be observed also with regard to *interlocutory* sentences, if the nature of the incidental question calls for or permits it.

8 Examples are plentiful in the decisions of the S. R. Rota, for instance: "*Christi nomine invocato, solumque Deum prae oculis habentes,*" etc.

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PUBLICATION OF THE SENTENCE

CAN. 1876

Sententia, hac ratione redacta, quamprimum publicetur.

CAN. 1877

Publicatio sententiae fieri potest tribus modis, vel citando partes ad audiendam sententiae lectionem sollemniter factam a iudice pro tribunali sedente; vel partibus denuntiando sententiam esse penes cancellariam tribunalis, unaque facultatem ipsis fieri eandem legendi et eiusdem exemplar petendi; vel tandem, ubi usus viget, sententiae exemplar transmittendo ad partes per publicos tabellarios ad norman can. 1719.

The sentence thus drafted should be *published as soon as possible*. How soon, is not expressly stated; but the phrase generally means after an interval of not more than three or eight days.

The *manner* in which the sentence may be published is threefold:

1. By summoning the parties to hear the sentence solemnly pronounced by the judge sitting[9] in court;

2. By notifying the parties that the sentence is ready at the chancery of the court and leave is granted to read it and have a copy made;

3. By sending a copy of the sentence to the parties through the public carrier, where this is customary.

[9] Whether this attitude of sitting is required for the validity of the sentence cannot positively be proved from the text, especially since a threefold mode of publication is admitted; therefore we would rather say that it belongs to the decorum or dignity of the judge to observe a sitting posture.

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TITLE XIV

LEGAL REDRESS AGAINST THE SENTENCE

CAN. 1878

§ 1. Si agatur de errore materiali qui inciderit vel in transcribenda parte dispositiva sententiae vel in referendis factis aut partium petitionibus aut in ponendis calculis, errorem corrigere valet ipse iudex.

§ 2. Iudex ad hanc correctionem deveniat edito decreto ad instantiam partis, nisi pars altera refragetur.

§ 3. Si altera pars refragetur, quaestio, incidens ad normam can. 1840, § 3 decreto definiatur; et decretum ad calcem sententiae correctae referatur.

After the sentence has been pronounced, execution should follow. However the party condemned may find it too hard or unjust and therefore claim a *gravamen.* This would justify an appeal. But before the Code treats of appeals, it considers the possibility of a *merely material error,* which may have crept into the copy of the dispositive part of the sentence. A mistake may also have been made in the narration of facts, or in the writ of complaint, or in the reckoning of accounts. Such an error should be corrected by the judge himself, who shall *issue* a decree to that effect upon demand of one party, provided the other is satisfied. But if the other party refuses to accept the correction, the question must be treated as an *incidental* one, summarily disposed of according to can. 1840, § 3, and notice be given at the bottom of the sentence thus corrected.

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CHAPTER I

APPEALS

CAN. 1879

Pars quae aliqua sententia se gravatam putat, itemque promotor iustitiae et defensor vinculi in causis in quibus interfuerunt, ius habent a sententia appellandi, idest provocandi ab inferiore iudice qui sententiam tulit, ad superiorem, salvo praescripto can. 1880.

Appeal is here taken in the strictly judicial sense, requiring a preceding judicial sentence. Hence it is a complaint brought from an inferior judge, who pronounced a sentence, to a higher judge. The intention or purpose is to seek redress. This, of course, chiefly concerns the *party* who believes himself injured or hurt by the former sentence.

But the *promotor iustitiae,* too, as well as the *defensor vinculi,* may have a just complaint against the former sentence, not indeed personally, but officially, because they are under the impression that the public welfare has been injured. These, too, therefore, may appeal. As a rule, an appeal is permissible in all cases of grievance, except those expressly exempted by law.

WHEN AN APPEAL IS FORBIDDEN

CAN. 1880

Non est locus appellationi:

1.° A sententia ipsius Summi Pontificis vel Signaturae Apostolicae;

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2.° A sententia iudicis qui a Sancta Sede delegatus est ad videndam causam cum clausula "*appellatione remota*";

3.° A sententia vitio nullitatis infecta;

4.° A sententia quae in rem iudicatam transiit;

5.° A definitiva quae iureiurando litis decisorio innixa est;

6.° A iudicis decreto vel a sententia interlocutoria, quae non habeat vim definitivae, nisi cumuletur cum appellatione a sententia definitiva;

7.° A sententia in causa pro qua ius cavet expeditissime rem esse definiendam;

8.° A sententia contra contumacem, qui a contumacia se non purgaverit;

9.° A sententia lata contra eum qui in scriptis expresse professus est se appellationi renuntiare.

The Code forbids appeal in nine cases, two of which affect the person of the judge, one (n. 3) the form of the sentence, and the rest its matter. An appeal is inadmissible, therefore,

1.° *From a sentence of the Supreme Pontiff or the Signatura Apostolica.* The Roman Pontiff is the highest judge of the universal Church, and therefore an appeal from his sentence is impossible. Appeal from the *Signatura Apostolica* is impossible because of its office and power.[2] An appeal in the proper sense is inadmissible also from a sentence of any of the Roman Congregations, which, however, decide, not judiciary but disciplinary matters, and hence are not especially mentioned.[3]

2.° From the sentence of a judge who took cognizance of the case in virtue of *papal delegation* with the clause,

2 Cfr. can. 259; can. 1603. 3 Santi-Leitner, II, 28, n. 6.

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"appellatione remota." For this clause forbids an appeal.

In these two cases only one remedy is open, namely, the *restitutio in integrum* (see can. 1905–1907).

Here may be mentioned the penalty incurred by those who appeal from a sentence of the Roman Pontiff to a general council: it is excommunication *speciali modo* reserved to the Holy See.[4]

3.° *From a sentence which is null and void,* as may be seen in can. 1892 f.; because an invalid sentence is no sentence at all, and an appeal always presupposes a valid sentence.

4.° From a *sentence which has passed into a res iudicata,* as seen in can. 1902 f., unless the sentence has been executed with excessive rigor.[5]

5.° From a *definitive sentence* which has been pronounced in virtue of a *decisive oath,* because of the sacredness of the oath and on account of a species of contract.[6]

6.° From a *decree or interlocutory sentence of the judge,* which is not definitive, unless coupled with an appeal from a definitive sentence, when an appeal is permitted by reason of the connection. Otherwise not, *ne procedatur in infinitum.*

7.° From a sentence pronounced in a matter for which the law provides a speedy settlement, as against non-resident clerics,[7] or in case of appointment to offices.

8.° From a *sentence against a contumacious person* who has not purged himself of his contumacy, according to can. 1842 ff. (*"quia contumax non appellat."*)[8]

9.° From a sentence pronounced against one who has

4 Cfr. can. 2332.
5 Cfr. c. 15, X, II, 27; c. 33, X, II, 28.
6 Cfr. c. 54, X, II, 28; c. 20, X, I, 29; Santi-Leitner, II, 28, n. 12.
7 C. 4, X, III, 4.
8 Reiffenstuel, II, 28, n. 303.

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given a *written declaration that he will not appeal,* because this declaration is equal to a contract.[9]

With these exceptions, appeals are admitted in every case, whether important or insignificant. But there are certain formalities to be observed regarding the judges from, and those to whom, an appeal is made.

THE JUDGE A QUO

CAN. 1881

Appellatio interponi debet coram iudice *a quo* sententia prolata est intra decem dies a notitia publicationis sententiae.

CAN. 1882

§ 1. Appellatio fieri potest oretenus coram iudice pro tribunali sedente, si publice sententia legatur, statimque ab actuario scriptis redigenda est.

§ 2. Aliter facienda est in scriptis, salvo casu de quo in can. 1707.

An appeal must be brought before the *judge who pronounced the sentence,* within *ten days* from the time the sentence became known. If the judge is still sitting in court, and the sentence was publicly read, the appeal may be made there and then; but the clerk must put it down in writing. Otherwise the party may, within ten days, put in the appeal in writing and offer it to the judge; or employ a notary public (of the ecclesiastical court) to draw it up for him. A notary public is also required if the appeal is made orally before the judge, because then the judge shall order the notary to put it down in

[9] Cfr. c. 54, X, II, 28; c. 25, X, II, 24.

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writing. But the appeal must by all means be presented to the judge who passed the sentence, otherwise it is invalid.[10]

THE JUDGE AD QUEM

CAN. 1883

Appellatio prosequenda est coram iudice *ad quem* dirigitur intra mensem ab eius interpositione, nisi iudex *a quo* longius tempus ad eam prosequendam parti praestituerit.

CAN. 1884

§ 1. Ad prosequendam appellationem requiritur et sufficit ut pars ministerium invocet iudicis superioris ad impugnatae sententiae emendationem, adiuncto exemplari huius sententiae et libelli appellatorii quem iudici inferiori exhibuerat.

§ 2. Quod si pars exemplar impugnatae sententiae intra utile tempus a tribunali *a quo* obtinere nequeat, interim termini non decurrunt et impedimentum significandum est iudici appellationis, qui iudicem *a quo* praecepto obstringat officio suo quamprimum satisfaciendi.

CAN. 1885

§ 1. Si casus de quo in can. 1733 contigerit intra terminum ad appellandum utilem sed antequam appellatio interposita sit, sententia debet iis quorum interest denuntiari eisque concessi intelliguntur termini a iure statuti a die denuntiationis computandi.

§2. Si contigerit postquam fuerit appellatum, appellatio interposita eisdem denuntietur, in quorum fa-

10 C. 59, X, II, 28.

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vorem a die denuntiationis denuo currere incipit tempus utile ad appellationem prosequendam.

The appeal must be prosecuted *before the judge to whom* it was directed, *within a month* from the date when it was lodged.

But the judge from whom the appeal was made, may fix a longer term for the prosecution of the case appealed. The judge *ad quem* is not determined here, but the rule is that he should be the one immediately superior. Hence from the diocesan court appeal should be taken to the metropolitan court. However, this latter may lawfully be omitted if an appeal is addressed to Rome. From the vicar general to the bishop no appeal is possible.[11]

In order to prosecute the appeal it is *required and suffices* that the higher court be implored to change the obnoxious sentence. A copy of the first sentence and the writ of appeal presented to the inferior court must be sent to the higher court. In case the party cannot obtain a copy of the sentence from the judge *a quo,* the time "does not run," *i.e.,* the lapse of one month must not be reckoned as fatal. But the obstacle must be reported to the court of appeal, who shall send peremptory notice to the lower court, admonishing it of its duty. If the appellant should die, or change his personal status, or go out of office (see can. 1733) within the term (of ten days) granted for putting in the appeal, but before the appeal was actually made, the sentence must be notified to those concerned, and the term for appeal runs from the day of the notice. If the case, as stated above, occurs after the appeal has already been made, the appeal must be made known to the parties concerned, and the

11 Cfr. cc. 4, 6, C. 2, q. 6; c. 1, 6°, I, 4: the vicar general and the bishop form *one* tribunal.

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term (of ten days) runs from the days of the notice given (and, we suppose, received).

LAPSE OF TERM

CAN. 1886

Inutiliter elapsis fatalibus appellatoriis sive coram iudice *a quo*, sive coram iudice *ad quem*, deserta censetur appellatio.

If the parties permit the term granted for appeal (*i.e.*, ten days for putting in the appeal before the judge *a quo*, and a month or thirty days for prosecuting the appeal before the appellate court), to expire, the appeal is supposed to have been dropped. These terms are called *fatalia*, because they prove fatal to a cause if not observed.[12]

EFFECT OF APPEALS

CAN. 1887

§ 1. Appellatio facta ab actore prodest etiam reo, et vicissim.

§ 2. Si interponatur ab una parte super aliquo sententiae capite, pars adversa, etsi fatalia appellationis fuerint transacta, potest super aliis capitibus incidenter appellare; idque facere potest etiam sub conditione recedendi, si prior pars ab instantia recesserit.

§ 3. Si sententia plura capita contineat, et appellans quaedam tantummodo capita impugnet, cetera capita exclusa habeantur; si nullum determinavit caput, appellatio praesumitur facta contra omnia capita.

12 Cfr. c. 28, C. 2, q. 6; c. 2, Clem. II, 12.

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CAN. 1888

Si unus ex pluribus correis aut actoribus sententiam impugnet, impugnatio censetur ab omnibus facta, quoties res petita sit individua aut obligatio solidalis; expensas vero iudiciales ille tantum sustinere debet qui appellavit, si iudex appellationis primam sententiam confirmaverit.

CAN. 1889

§ 1. Appellatio in suspensivo exsecutionem appellatae sententiae suspendit ac propterea in suo robore permanet principium: *"lite pendente nihil innovetur":* appellatio autem in devolutivo tantum, non suspendit exsecutionem sententiae, licet lis adhuc pendeat circa meritum causae.

§ 2. Omnis appellatio est in suspensivo, nisi aliud in iure expresse caveatur, firmo praescripto can. 1917, § 2.

Since the cause binds plaintiff and defendant, the right of appeal benefits both. Thus, if one party appeals within the proper time concerning one point of the sentence, say in a possessory cause, the other may appeal on another point of the same sentence, say in a petitory cause, even after the lapse of the "fatal" time. And this may be done conditionally, *e.g.,* if John recedes from his appeal, Joseph shall also withdraw. The writ of appeal shall state precisely what is intended. If no special point is mentioned, the appeal is supposed to be directed against the entire sentence. Therefore, if only one article of the sentence is attacked, this fact must be properly stated in the writ.

It may also be that there are several *plaintiffs or defendants* who oppose the sentence. In this case the ap-

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peal is supposed to be made by all, provided the litigious object is indivisible or the obligation binds *in solidum*. But the expenses are to be borne by the one who appealed, provided the second sentence ratifies the first.

The proper *effect* of an appeal is twofold, *viz.*, suspensive or devolutive. The *suspensive* effect of an appeal consists in stopping the execution of the sentence or suspending its effect. It is, therefore, not a quashing of the sentence, but merely a putting off. Hence whatever is attempted against or during a suspensive appeal, is revocable and considered as *attentatum*, wherefore the axiom must be applied: "*Lite pendente nihil innovetur.*" The regular or usual *effect* of each and every appeal is *suspensive*, unless the law states the contrary, and with due regard to can. 1917, § 2.

The *devolutive* effect of an appeal consists in this, that the superior judge draws the whole case before his court and first decides whether or not the appeal is to be admitted, but the sentence takes effect or is carried out, even though the merit of the issue is still pending. An example may be taken from the division of parishes.[18]

SECOND INSTANCE OR COURT OF APPEAL

CAN. 1890

Interposita appellatione tribunal *a quo* debet ad iudicem *ad quem* actorum causae authenticum exemplar vel ipsamet originalia acta causae transmittere ad norman can. 1644.

18 For cases *in devolutivo* see canons 345; 513, § 2; 1340, § 3; 1395; 1428, § 3; 2243, § 1.

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CAN. 1891

§ 1. In gradu appellationis non potest admitti nova petendi causa, ne per modum quidem utilis *cumulationis;* ideoque litis contestatio in eo tantum versari potest ut prior sententia vel confirmetur, vel reformetur sive ex toto sive ex parte.

§ 2. Sed novis exhibitis documentis et novis probationibus poterit causa instrui, servatis regulis traditis in can. 1786, 1861.

After an appeal has been properly lodged, the court from which (*a quo*) the appeal was made must forward to the court of appeal (*ad quem*) either the original acts of the trial or a copy thereof, as stated in can. 1644.

In the second instance no *new complaint or new doubts concerning the merit of the cause* may be admitted, even if the new complaint were brought by way of valid bulking of several actions (*utilis cumulationis*).[14] Wherefore the *litis contestatio,* or issue in pleading at the court of appeal, consists either in the ratification or the partial or total change of the former sentence.[15] On the other hand, if new documents and new evidence have been found which for any good reason and without fraud were not available in the first instance, the case may be prepared or brought up, provided canons 1786 and 1861 are duly observed. Thus the *instructor causae* of the court of appeal may have to insert the new findings in the acts of the lower court.

14 Because the judge would overstep his limits as appellate judge if he were to decide an action not yet taken cognizance of by the lower court; Lega, *l. c.,* n. 509.

15 Hence the formula: "*an sententia in casu sit confirmanda an infirmanda?*"

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CHAPTER II

COMPLAINT OF NULLITY OF SENTENCE

CAN. 1892

Sententia vitio insanabilis nullitatis laborat, quando:

1.° Lata est a iudice absolute incompetente vel in tribunali collegiali a non legitimo iudicum numero contra praescriptum can. 1576, § 1;

2.° Lata est inter partes, quarum altera saltem non habet personam standi in iudicio;

3.° Quis nomine alterius egit sine legitimo mandato.

CAN. 1893

Nullitas de qua in can. 1892 proponi potest per modum exceptionis in perpetuum, per modum vero actionis coram iudice qui sententiam tulit intra triginta annos a die publicationis senteniae.

CAN. 1894

Sententia vitio sanabilis nullitatis laborat, quando:

1.° Legitima defuit citatio;

2.° Motivis seu rationibus decidendi est destituta, salvo praescripto can. 1605;

3.° Subscriptionibus caret iure praescriptis;

4.° Non refert indicationem anni, mensis, diei et loci quo prolata fuit.

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CAN. 1895

Querela nullitatis in casibus de quibus in can. 1894, proponi potest vel una cum appellatione intra decendium, vel seorsim et unice qua querela intra tres menses a die publicationis sententiae coram iudice qui sententiam tulit.

CAN. 1896

Si pars vereatur ne iudex, qui sententiam, querela nullitatis impugnatam, tulit, praeoccupatum animum habeat et proinde eum suspectum merito existimet, exigere potest ut alius iudex, sed in eadem iudicii sede, in eius locum subrogetur ad norman can. 1615.

CAN. 1897

§ 1. Querelam nullitatis interponere possunt nedum partes, quae se gravatas putant, sed etiam promotor iustitiae aut defensor vinculi, quoties iudicio interfuerunt.

§ 2. Imo ipse iudex potest ex officio sententiam nullam a se latam retractare et emendare intra terminos ad agendum supra statutos.

This means of redressing a grievance against a sentence was looked upon as *extraordinary*.[1] However we hardly believe that it could now be so called, for it has entered the list of regular remedies of redress.[2] The text distinguishes *two kinds of nullity* that may upset a sentence or at least retard its execution: one is a curable and the other an incurable defect.

The sentence is *incurably null* in the following cases:

1. When it has been rendered by an *incompetent judge,*

1 Lega, *l. c.*, n. 477.

2 See can. 1905, which corroborates our opinion.

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or, if there was a board of judges, by a number less than that prescribed by law. And here it must be borne in mind and emphatically stated that according to can. 1576 *three judges* are required for ordination and matrimonial cases, and for some criminal cases of removal or excommunication; whilst *five* judges must pronounce sentence in important criminal cases of deposition and degradation.[2] The consequences involved are too serious to overlook this ruling; for a sentence in matrimonial cases may be upset by the lack of the number of judges required by law.

2. When the sentence has been pronounced on parties one of whom was not entitled to bring suit in an ecclesiastical court (*"Non habet personam standi in iudicio"*; see can. 1646–1654).

3. When one has prosecuted a case in another one's name without being commissioned to do so (*sine legitimo mandato*). Hence a proctor, counsel, or administrator (cfr. can. 1520) cannot prosecute validly without a special commission.

The *mode* by which a complaint of nullity may be interposed is by way of a perpetual exception, which amounts to a peremptory exception when the judge is opposed and stopped in the execution of the sentence, or the party is stopped in vindicating a sentence pronounced in his favor; or by way of *action,* when the judge who pronounced the sentence is petitioned to declare his own sentence null and void.[4]

A sentence has a *curable defect:*

1. If the legitimate summons was omitted;

2. If it does not contain the reasons or motives that prompted the judge; exempt from this rule are sentences given by the Signatura Apostolica;[5]

2 The Directory of 1920 does not prove the adoption of this necessary requisite in all American dioceses.

4 Lega, *l. c.*, n. 510.

5 Can. 1605.

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3. If the necessary signatures are wanting;

4. If the date and place are wanting; as to date, the year, month, and day are required.

Now the question naturally arises, who is the judge before whom this complaint of nullity must be lodged; for it appears that the *querela nullitatis* should be exclusively proposed to the judge who gave sentence (*iudici a quo*). First, it must be observed that a complaint against an incurable sentence can be counteracted only by way of a *restitutio in integrum*, according to can. 1905; because can. 1895 refers only to a sentence with a curable defect. Hence it states that a complaint against a curably defective sentence may be lodged either together with the *appeal*, within ten days from date of the sentence intimated,—and in this case the complaint must certainly be placed before the appellate judge—(*ad quem*)—or the complaint may be separately and solely brought before the judge who pronounced the sentence. For this complaint a term of *three months* is granted from the time the sentence was published.

If the complaint is made not by way of appeal, but separately before the judge who gave sentence, and *this judge* is *suspected* by the party of favoritism, said party may demand that another judge be substituted. However, since there is no appeal proper and the case remains in the same stage or instance, it is plain that a judge of the same instance must be substituted.

The complaint of nullity may be brought by the aggrieved parties as well as by the fiscal promoter or the defender, if they took part in the trial. The judge may *ex officio* retract or correct his own sentence within the time stated above, *i.e.*, within ten days by way of appeal, or within three months in case of a complaint of nullity.

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CHAPTER III

INTERFERENCE OF A THIRD PERSON

CAN. 1898

Si sententiae definitivae praescriptum iura aliorum offendat, hi habent remedium extraordinarium quod *oppositio tertii* dicitur, vi cuius qui ex sententia suorum iurium laesionem verentur, possunt sententiam ipsam ante eius exsecutionem impugnare eique se opponere.

CAN. 1899

§ 1. Oppositio fieri potest ad recurrentis arbitrium sive postulando revisionem sententiae ab iudice qui eam tulit, sive appellando ad iudicem superiorem.

§ 2. In utroque casu oppositor probare debet ius suum revera esse laesum aut probabiliter laedendum.

§ 3. Laesio autem oriri debet ex ipsa sententia quatenus aut ipsa sit causa laesionis, aut, si exsecutioni mandetur, oppositorem gravi praeiudicio sit affectura.

§ 4. Si neutrum probetur, iudex, non obstante tertii oppositione, sententiae exsecutionem decernat.

CAN. 1900

Admissa instantia, si oppositor agere velit in gradu appellationis, tenetur legibus pro appellatione statutis; si coram ipso iudice qui sententiam tulit, regulae servandae sunt pro causis incidentibus datae.

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CAN. 1901

Causa ab oppositore victa, sententia antea lata mutanda est a iudice, secundum oppositoris instantiam.

If a third person believes himself injured or hurt by a judicial sentence, he may lodge a complaint and oppose the execution of the sentence. This is an *extraordinary means* of *redressing a grievance*. The opposition or interference may be brought before the court that gave the sentence and a revision demanded of the same; or by way of an appeal to a higher court. But in any case the opposer must prove that his right has been curtailed or will probably suffer damage in future. For instance, a bishop may suffer in the case of a monastery or convent which is declared dependent on another bishop.[1] But it may also happen, in the case of nullity of a marriage, because of the attendant legitimacy.

The damage may arise from the sentence itself or from its execution, as, for instance, in the case just mentioned of legitimacy. If no proof is given, the judge must issue a decree of execution of the sentence.

If the complaint is admitted and the opponent proceeds by way of appeal, the *rules for appeal* must be observed. If he lodges the complaint with the judge who rendered the sentence, the question must be settled as an *incidental one*. If the opponent *wins the case*, the former sentence must be changed according to the wording of the complaint lodged by the opponent.

1 C. 17, X, II, 27.

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TITLE XV

RES IUDICATA AND RESTITUTIO IN INTEGRUM

A *res iudicata,* or adjudged matter, has the same effect as a definitive sentence, because it is supposed that no appeal was made or no complaint lodged against the sentence, and that no third person interfered or opposed the same. Besides, there are sentences against which no appeal is admitted, and which, therefore, should be carried into effect. However, there is an extraordinary means even against such a sentence, *viz.,* the so-called *restitutio in integrum.*

RES IUDICATA

CAN. 1902

Res iudicata habetur:

1.° Duplici sententia conformi;

2.° Sententia intra utile tempus non appellata; aut quae, licet appellata coram iudice *a quo,* deserta fuit coram iudice *ad quem;*

3.° Sententia definitiva unica, a qua non datur appellatio ad normam can. 1880.

CAN. 1903

Nunquam transeunt in rem iudicatam causae de statu personarum; sed ex duplici sententia conformi in his

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causis consequitur, ut ulterior propositio non debeat admitti, nisi novis prolatis iisdemque gravibus argumentis vel documentis.

CAN. 1904

§ 1. Res iudicata praesumptione iuris et de iure habetur vera et iusta nec impugnari directe potest.

§ 2. Facit ius inter partes et dat exceptionem ad impediendam novam eiusdem causae introductionem.

The Code determines very clearly when a *res* becomes *iudicata,* namely:

1.° After *two uniform sentences* have been pronounced on the same case, *i.e.,* in the first and second instance, or in the second and third instance.

2.° After a *sentence which has not been appealed* within the time granted by law. The same holds good when a sentence, though appealed to the judge who pronounced it, was not prosecuted at the court of appeals.

3.° After *one sentence* in cases in which no appeal is admitted, according to can. 1880. Certain cases never pass into the stage of adjudged matter because they affect the public welfare, which can. 1903 connects with the *status personarum,* or the personal state of the litigants, which certainly affects the clerical, religious, and married state. Therefore sentences passed on the validity of ordination, of religious profession, and of marriage do not become *res iudicatae,* even though the requisites of can. 1902 are verified.[1] Yet even these cases, if a double uniform sentence was pronounced, cannot again be proposed unless new and weighty evidence or documents are

1 We hardly think that other cases, such as beneficiary or sentences of excommunication (Bouix, *l. c.,* II, p. 284 f.) would now be considered; concerning criminal cases, see can. 1701–1705.

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produced, because judicial sentences are safeguards of public tranquillity and must be respected.

Can. 1904 enumerates the *effect of a res iudicata,* which are:

1. That it *creates a true and just praesumptio iuris et de iure* which can be attacked or upset only indirectly. This, of course, must be understood in the light of what was said on presumption (can. 1825 sqq.). A *res iudicata* is taken for a true and just sentence because the party accepts it, and the trial must be supposed to have been conducted properly.[2] Yet if the victorious party would admit the iniquity of a sentence, or if ocular inspection would prove that it was wrong, the sentence could be impugned, although only indirectly, *i.e.,* by the *querela nullitatis* or the *restitutio in integrum.*[3]

2. The second effect is that the *res iudicata establishes right* between the litigant parties, so that they are entitled to bring action for the execution of the sentence; that furthermore the parties obtain thereby the right of opposing the *exception* of *res iudicata* to any future action brought against them in the same matter.

RESTITUTIO IN INTEGRUM

CAN. 1905

§ 1. Adversus sententiam contra quam non suppetat ordinarium remedium appellationis aut querelae nullitatis, datur remedium extraordinarium restitutionis in integrum intra fines can. 1687, 1688, dummodo de evidenti iniustitia rei iudicatae manifesto conste.

2 Canonists used to say: "*Sententia illa quae in rem transiit iudicatam tantae est auctoritatis, ut de ente faciat non ens, et de falso verum, et de albo nigrum.*" Reiffenstuel II, 27, n. 106.

3 Reiffenstuel, II, 27, n. 128 ff.

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§ 2. De iniustitia autem manifesto constare non censetur, nisi:

1.° Sententia documentis innitatur, quae postea fuerint falsa deprehensa;

2.° Postea detecta fuerint documenta, quae facta nova et contrariam decisionem exigentia peremptorie probent;

3.° Sententia ex dolo partis prolata fuerit in damnum alterius;

4.° Legis praescriptum evidenter neglectum fuerit.

CAN. 1906

Ad restitutionem in integrum concedendam competens est iudex qui sententiam tulit, nisi ea petatur ex neglecto a iudice praescripto legis; quo in casu eam concedit tribunal appellationis.

CAN. 1907

§ 1. Petitio restitutionis in integrum sententiae executionem nondum inceptam suspendit.

§ 2. Si tamen suspicio sit ex probabilibus indiciis petitionem factam esse ad moras exsecutioni nectendas, iudex decernere potest ut sententia exsecutioni demandetur, assignata tamen restitutionem petenti idonea cautione ut, si restituatur in integrum, indemnis fiat.

This remedy of redressing an evident injustice is called an extraordinary one and means a re-instatement or return of the case to the state in which it was prior to the sentence. Therefore it should be employed not as a rule, but only in case the *injustice is manifest.* This can be proved:

1.° By showing that the sentence was based on docu-

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ments which were later found to be false or forged, as may happen in last wills and in baptismal or marriage certificates;

2.° By producing documents which peremptorily establish new facts that were formerly unknown and require an entirely contrary decision;

3.° By showing that the sentence was procured in favor of one party by the artifice or deceit of the other; but since deceit must be strictly proved, this process would require at least two trustworthy witnesses;

4.° By showing that the rules prescribed by law were set aside.

The *competent judge* for granting the *restitutio* is the one who pronounced the sentence, except in cases where the regulations prescribed by law have been neglected, when the court of appeal is competent to grant it.

A re-instatement suspends the execution of the sentence, if it has not already begun. But if the judge surmises that the *restitutio* was asked for merely to delay execution, he may *issue a decree* to the effect that the execution take place, but in that case bail must be given to the party demanding the restitution in order to safeguard indemnification.

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TITLE XVI

TRIAL EXPENSES AND GRATUITOUS DEFENCE

This title is divided into two chapters, of which the first treats of the expenses of a trial conducted for such as are able to defray them, while the other sets forth the rules for gratuitous trials.

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CHAPTER I

REGULAR EXPENSES

CAN. 1908

In causis contentiosis possunt partes adigi ad aliquid solvendum, titulo expensarum iudicialium, nisi ab hoc onere eximantur ad norman can. 1914–1916.

CAN. 1909

§ 1. Concilii provincialis, vel conventus Episcoporum est taxarum notulam ac regulam statuere in qua praefiniatur quid partes debeant pro expensis iudicialibus; quae sit retributio pro advocatorum et procuratorum opera a partibus solvenda; quae mercedis mensura pro versionibus et transcriptionibus; pro his examinandis et fide facienda de earum fidelitate; itemque pro exscribendis ex archivo documentis.

§ 2. Potest autem iudex pro suo prudenti arbitrio exigere ut pecunia pro iudicialibus expensis, pro indemnitate testium, pro honorariis peritorum debita a parte quae petit vel, si iudex ex officio agat, ab actore, antea deponatur penes tribunalis cancellariam aut saltem congrua cautio praestetur pecuniam deinde solutum iri.

CAN. 1910

§ 1. Victus victori iudiciales expensas regulariter reficere tenetur tum in causa principali tum in incidenti.

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§ 2. Si actor vel reus temere litigaverit, etiam ad damnorum refectionem damnari debet.

Can. 1911

Si actor vel reus partialiter tantum succubuerit, aut lis agitata fuerit inter consanguineos vel affines, aut de quaestione valde ardua actum fuerit, aut quacunque alia iusta et gravi de causa, poterit iudex pro suo prudenti arbitrio ex toto vel ex parte inter litigantes expensas compensare; idque debet exprimere in ipso sententiae tenore.

Can. 1912

Si plures sint in causa qui condemnationem ad expensas mereantur, iudex eos damnet in solidum, si agatur de obligatione solidali; aliter pro rata.

Can. 1913

§ 1. A pronuntiatione circa expensas non datur appellatio; sed pars quae se gravatam putat, oppositionem intra decem dies facere potest coram eodem iudice: qui de hac re cognoscere denuo poterit, et taxationem emendare ac moderari.

§ 2. Appellatio a sententia circa causam principalem secumfert appellationem a pronuntiatione circa expensas.

Unless the parties are paupers, or quasi-paupers, they are to bear the expenses of *civil trials*. The charges to be made by diocesan courts should be established at a provincial council or meeting of the bishops, who should prescribe regular fees:

a) for the counsel and proctor;

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b) for translations and copies of documents;

c) for the examination and verification of documents;

d) for the copying of certificates or documents from the archives.

The *sum to cover the judicial expenses* must be deposited with the court chancery, if the judge deems it appropriate, or be demanded in the form of bond or bail, either by the party who asks for a *deposition*, or by the plaintiff, if the judge orders a deposition. This sum should include the expenses of the trial for witness fees and the honorarium to be paid to the experts.

The loser must, as a rule, pay the expenses of the trial in the main as well as in incidental issues to the winner. Rash trials, *i.e.*, such commenced and prosecuted without a semblance of justice, entail indemnification to be paid by him who caused the trial, be he plaintiff or defendant.

The judge may, if he deems it prudent, *distribute the expenses* among both parties, in the following cases:

1) If the victory of either party is only partial;

2) If the parties are related to each other by consanguinity or affinity;

3) If the case was a very difficult one, or

4) For any other just and reasonable cause.

However, this sharing of costs must be properly mentioned in the sentence.

If those condemned to pay the expenses are several, and had a common cause, the judge must condemn each for the whole (*in solidum*), otherwise, *i.e.*, if they were only co-partners without a common obligation, each has to pay his share.

Appeal from the sentence condemning one to pay the expenses of a trial cannot be made separately or distinctly from the main appeal; but the party who believes

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himself aggrieved may oppose the sentence within ten days before the same judge, who shall reconsider his sentence and either change or modify the tax imposed. But an appeal against the sentence in the main issue also implies an appeal from the sentence condemning the party in question to pay the expenses.

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CHAPTER II

GRATUITOUS DEFENCE

CAN. 1914

Pauperes, si in totum impares sint expensis iudicialibus sustinendis, ius habent ad gratuitum patrocinium; si ex parte tantum, ad expensarum deminutionem.

CAN. 1915

§1. Qui exemptionem ab expensis vel earum deminutionem assequi vult, eam a iudice postulare debet, dato supplici libello, allatisque documentis quibus quae conditio sit postulantis quaeve eius rei familiaris copia demonstret; praeterea probare debet se non futilem neque temerariam causam agere.

§ 2. Iudex postulationem nec admittat nec reiiciat, nisi requisitis, si opus sit, notitiis etiam secretis quibus statum rei familiaris ipsius postulantis compertum habere possit auditoque promotore iustitiae; imo concessam potest etiam revocare, si in decursu processus assertam paupertatem non adesse compertum habuerit.

CAN. 1916

§ 1. Ad gratuitum pauperum patrocinium iudex in singulis causis eligat aliquem ex advocatis in suo foro approbatum, qui ab hoc munere explendo, nisi ex causa iudici probata, sese subducere nequit, secus a iudice congrua poena, etiam suspensionis ab officio, plecti potest.

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§ 2. Deficientibus advocatis, iudex Ordinarium loci roget ut aliam idoneam personam, si opus sit, designet ad pauperis patrocinium suscipiendum.

Paupers who are entirely unable to defray the expenses of a trial are entitled to gratuitous defence; quasi-paupers, *i.e.*, such as are able to pay something, may have the expenses lowered. But those who claim either total or partial exemption from the payment of judiciary expenses, must submit a petition to the judge, in which they prove by documents that their financial condition entitles them to this privilege and, besides, that the reason for which they are going to law is solid and not rash. The judge shall neither admit nor reject the petition before he has ascertained (by secret information if necessary) the financial status of the petitioner, and heard the advice of the fiscal promoter. He may revoke the grant if he finds out afterwards that the poverty of the petitioner was a pretence.

After granting the petition, the judge shall, in each case, choose an *approved attorney* or counsel for the defence. This lawyer is not allowed to shirk the duty unless for a reason accepted by the judge. If he attempts to evade his duty, he may be punished by the judge, even to privation from his office of court attorney. If there are no attorneys, the judge may ask the Ordinary to appoint some other capable person to assume the defence.

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TITLE XVII

EXECUTION OF THE SENTENCE

The text first considers when a sentence is ready for execution, then the duties of the executor, and, lastly, the manner or mode of execution.

THE TIME OF EXECUTION

CAN. 1917

§ 1. Sententia quae transiit in rem iudicatam, exsecutioni mandari potest.

§ 2. Iudex tamen potest sententiae, quae nondum transiit in rem iudicatam, provisoriam exsecutionem iubere:

1.° Si agatur de provisionibus seu praestationibus ad necessariam sustentationem ordinatis;

2.° Si alia gravis urgeat necessitas, ita tamen ut, concessa provisoria exsecutione, per cautiones, fideiiussiones aut pignora satis consultum sit indemnitati alterius partis casu quo exsecutio revocanda sit.

CAN. 1918

Non antea exsecutioni locus esse poterit, quam exsecutorium iudicis decretum habeatur, quo scilicet edicatur sententiam ipsam exsecutioni mandari debere; quod decretum pro diversa causarum natura vel in ipso sententiae tenore includatur vel separatim edatur.

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CAN. 1919

Si sententiae exsecutio praeviam rationum redditionem exigat, causa incidens habetur, ab illo ipso iudice, servatis de iure servandis, decidenda, qui tulit sententiam exsecutioni mandandam.

Since the *res iudicata* establishes a (subjective) right and precludes appeal, a sentence may be executed *after the matter has been adjudged.*

However, the judge may command *provisional execution* even before the sentence has become *res iudicata,* if

a) The execution concerns payments or warrants necessary for support, as in the case of alimony;

b) For other urgent reasons. However, every provisional execution pre-supposes a guarantee for the other party's indemnification in case the execution has to be repealed. This is done by bail, bonds, or securities. In order to proceed legitimately to execution, a *decree* by the judge ordering execution is required. This decree may be either inserted in the writ of the sentence itself, or published separately.

Should the execution of the sentence require the *rendering of accounts,* as in cases of alienation or benefices, an *incidental question* arises, which is to be settled by the judge who pronounced the sentence of execution.

THE EXECUTOR

CAN. 1920

§ 1. Sententiam exsecutioni mandare debet per se vel per alium Ordinarius loci in quo sententia primi gradus lata est.

§ 2. Quod si hic renuat vel negligat, parte cuius in-

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terest instante vel etiam ex officio, exsecutio spectat ad iudicem appellationis.

§ 3. Inter religiosos exsecutio sententiae spectat ad Superiorem, qui definitivam sententiam tulit aut iudicem delegavit.

CAN. 1921

§ 1. Exsecutor, nisi quid eius arbitrio in ipso sententiae tenore fuerit permissum, debet sententiam ipsam, secundum obvium verborum sensum, exsecutioni mandare.

§ 2. Licet ei videre de exceptionibus circa modum et vim exsecutionis, non autem de merito causae; quod si habeat aliunde compertum sententiam esse manifeste iniustam, abstineat ab exsecutione, et partem ad eum qui exsecutionem commisit, remittat.

The executor has to put the sentence into effect. He may be a *merus executor* or a *mixtus*. If he is a "mere executor," like a bailiff or a constable, he simply reads the tenor of the decree of execution and carries it out literally. But if he is a *mixtus* — which must be ascertained from the wording of the decree — he may take cognizance of eventual exceptions or objections made by the losing party concerning the mode and efficacy of the execution, and if convinced that the sentence is unjust, must refrain from execution and direct the party to the judge or whoever commanded the execution.

The execution should be carried out, either personally or through a delegate, by the *local Ordinary* of the diocese in which the trial was prosecuted in the first instance. If he refuses or neglects to put the sentence into effect, the interested party may demand execution from the court of appeal, who may execute the sentence *ex officio* in case of refusal or neglect of the lower court.

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Concerning *religious*, the executor is the superior who pronounced the definitive sentence or delegated the judge.

MODE OF EXECUTION

CAN. 1922

§ 1. Quod attinet ad reales actiones, adiudicata actori re aliqua, haec actori tradenda est statim ac res iudicata habetur.

§ 2. Quod vero attinet ad actiones personales, cum reus damnatus est ad rem mobilem praestandam, vel ad solvendam pecuniam, vel ad aliud dandum aut faciendum, quadrimestre conceditur pro implenda obligatione.

§ 3. Iudex potest terminum praescriptum vel reducere vel protrahere, ita tamen ut neque infra bimestre coarctetur, neque semestre excedat.

CAN. 1923

§ 1. In exsecutione peragenda exsecutor caveat ut quam minimum damnato noceatur, eaque de causa incipiat exsecutionem a distrahendis rebus quae minus ei necessariae sunt, salvis semper quae eius victui vel industriae deserviunt; et si agatur de clerico, salva honesta eiusdem sustentatione ad norman can. 122.

§ 2. Ad exsecutionem privationis beneficii iudex ne procedat contra clericum qui Sanctam Sedem adierit; sed si agatur de beneficio, cui adnexa sit animarum cura, Ordinarius provideat per designationem vicarii substituti.

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CAN. 1924

Exsecutor utatur prius monitis et praeceptis erga reluctantem; ad poenas autem spirituales et ad censuras ne deveniat, nisi ex necessitate et gradatim.

An object gained by *real action* and adjudged to the plaintiff must be delivered to the latter immediately after the *res* has become *iudicata*. But in *personal actions*[1] a term of four months is granted to the one who is condemned to hand over a movable object, or to pay a certain sum, or to give or do something. However, the judge may reduce this term to two months or prolong it to six months, neither less nor more.

In executing the sentence, care must be taken that no unnecessary damage is inflicted. Therefore, the less necessary things must be taken first, but enough must be left for a man's support and the exercise of his profession or trade. In the case of clerics the *beneficium competentiae* must be applied.[2] No cleric may be deprived of his benefice by way of execution, if he has had recourse to the Holy See. If the benefice is one to which the care of souls is attached, the Ordinary shall appoint a temporary substitute.

The executor shall *first admonish and urge,* and proceed to spiritual penalties and censures only by degrees and in case of necessity.

1 See can. 1701.
2 See can. 122, Vol. II, of our Commentary, p. 67 f.

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SECTION II

SPECIAL RULES FOR CERTAIN TRIALS

TITLE XVIII

WAYS OF AVOIDING TRIALS

Christians should avoid quarrels and their evil consequences, trials.[1] Therefore the legislator exhorts disputants to compose their differences peacefully. This may be done by compromise or by arbitration.

1 Cfr. I Cor. 6, 1 ff.

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CHAPTER I

COMPROMISE

A compromise may be defined as the surrender of a supposed legal claim by peaceful settlement and for a consideration.[1] The effect of this is called composition or concord. This means should always be recommended by the judge when he is approached. A compromise may be offered before the party appears in court or when the parties have appeared, or at any other time that may be propitious for such an agreement. But the proposal should be made, not by the judge himself, to safeguard his authority, but by an intermediary person, especially a priest or synodal judge.

As to the rules to be followed, the *civil law* of each country must be obeyed, provided it does not clash with the divine and ecclesiastical law. Besides, the following rules must be observed:

1. *No compromise* is admissible (a) in criminal cases, (b) in civil cases which concern the solution of a marriage, (c) in beneficiary matters when the possessory title is involved, without the intervention of the ecclesiastical authority, (d) in spiritual things, as often as the payment of temporal goods is concerned, because of the danger of simony.

2. A *compromise is permitted*, (a) if merely temporal ecclesiastical property is concerned, (b) if spiritual things are involved, but can be dealt with separately, as, for in-

1 See Harriman, *The Law of Contracts*, 1901, § 112.

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stance, burial ground. But in those two cases the formalities prescribed for alienation must be observed, if the matter requires it, as stated in can. 1530 ff.

The *effect* of a compromise is called composition or concord.

The *expenses* must be shared equally by the parties, unless otherwise stated in the compromise.

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CHAPTER II

COMPROMISE BY ARBITRATION

If the parties, in order to avoid a trial, agree to commit the settlement of their dispute to one or more persons, there is a *compromise by arbitration*. This is twofold, according as the *compromissarii* proceed under the *strict rules* of the law, in which case they are called arbiters (*arbitri*), or proceed according to the *rules of equity*, in which case they are known as arbitrators (*arbitratores*). But both kinds of *compromissarii* must observe the rules laid down in can. 1926 and 1927.

No one who has been under a declaratory or condemnatory sentence of excommunication or infamy may validly act as an *arbiter* (though he may be an *arbitrator*). Religious need the permission of their superiors to act as *arbitri*.

If neither compromise nor arbitration brings about the desired settlement, the dispute must be decided according to the rules laid down in section one of this Book.

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TITLE XIX

CRIMINAL TRIALS

CAN. 1933

§ 1. Delicta quae cadunt sub criminali iudicio sunt delicta publica.

§ 2. Excipiuntur delicta plectenda sanctionibus poenalibus de quibus in can. 2168–2194.

§ 3. In delictis mixti fori Ordinarii regulariter ne procedant cum reus laicus est et civilis magistratus, in reum animadvertens, publico bono satis consulit.

§ 4. Poenitentia, remedium poenale, excommunicatio, suspensio, interdictum, dummodo delictum certum sit, infligi possunt etiam per modum praecepti extra iudicium.

The Church, being endowed with judiciary power over her members, has the right to take cognizance of, and to punish, crimes committed in defiance of her laws. However, in matter of fact, as our canon explicitly acknowledges (§ 3), criminal trials are now-a-days almost exclusively reserved for clerical offenders.

Can. 120 lays down the rules to be observed when a cleric is to be summoned by a civil or lay court: if the accused is of high rank (cardinal, bishop or prelate *nullius*), the permission of the Holy See is required; if he is of inferior rank (abbot,[1] priest, cleric, religious)

1 Concerning an abbot we have our doubts whether the local Ordinary is competent to give permission; but can. 120 only mentions abbot *nullius* as requiring the consent of the Holy See if he is not

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the Ordinary in whose diocese the trial is to be held, must give permission, or at least be informed. But official procedure against clerics is to be conducted before the ecclesiastical court.

It is scarcely necessary to add that the rules set forth in this title are *law everywhere,* and that no particular regulations opposed to these can be safely followed in criminal prosecution. The instructions of the various S. Congregations, including that of the S. C. EE. et RR., of June 11, 1880, are no longer in force for criminal procedure.[2] This fact should be carefully noted to avoid mistakes in conducting a trial and thereby, perhaps, exposing the procedure to the danger of nullity.

1. The *crimes* subject to criminal procedure must be *public*. A crime is defined in can. 2195 as an external and a morally imputable violation of the law, to which is attached a canonical sanction or penalty, at least undetermined. The crime is *public* if it is already divulged or has been committed under circumstances which make it liable to be divulged (can. 2197, n. 1).

2. *Exempted from criminal procedure* are the cases for which other penalties are sanctioned in law. These are:

a) Procedure against non-resident clergymen; can. 2168–2175.

b) Procedure against *concubinarii clerici;* can. 2176–2181.

c) Procedure against pastors who neglect their pastoral duties; can. 2182–2185.

ordinarius proprius of a religious plaintiff. The proper way would be to apply to the next highest superior of exempt religious, *viz.*, the abbot president, and, if the accused is a provincial, to the superior general.

2 This applies also to Benedict XIV's, "*Ad militantis,*" March 30, 1742; the Instruction quoted above see *Coll. P. F.*, Vol. II, p. 134, n. 1534, also Messmer, *Canonical Procedure,* 1897, Appendix. One accustomed to the old procedure is likely to make mistakes.

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d) The procedure called *ex informata conscientia;* can. 2186–2194.

These cases then are not to be prosecuted in criminal form, but in the manner established by the respective canons.

3. Against crimes which may be prosecuted either in the civil or in the ecclesiastical court (*mixti fori*) Ordinaries, should, as a rule, not proceed if the accused is a layman and the civil authority is already prosecuting him, thus safeguarding the public welfare.

Mixed crimes are such as principally offend against religion, but also concern the public welfare. Such are sacrilege, perjury, blasphemy (even though not heretical), theft of ecclesiastical property, incestuous concubinage, clandestine marriage, bigamy.[3]

Note well the conditions for proceeding: the criminal must be a layman, and the public order in need of being restored. But one essential element of criminal procedure as we regard it is the restoration of the public order (see Book V). The Church, being the divinely appointed custodian of public morality, is entitled to prosecute such cases if the civil authority fails to perform its duty. Hence the ecclesiastical authority cannot be lawfully rejected as accuser before the lay criminal court, if the public welfare is involved and the civil law provides no punishment for such crimes. Spiritism in all its forms should receive more attention from our criminal courts.[4]

4. Penances and penal remedies (can. 2306–2313) excommunication, suspension, interdict, may be inflicted by *way of a precept,* without a trial, whenever the delinquency is fully proved. This is new law, except in so

[3] Cfr. Wernz, *Ius Decretalium,* Vol. V, P. II, n. 805, p. 44.

[4] The State should provide special asylums for demented subjects, where they can be treated individually.

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far as the *suspensio ex informata conscientia* is concerned. Formerly censures, being looked upon as severe punishments, were held to require an ecclesiastical trial.

How the precept is to be observed, is stated in can. 2310.

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CHAPTER I

CRIMINAL ACTION AND DENUNCIATION

CAN. 1934

Actio seu accusatio criminalis uni promotori iustitiae, ceteris omnibus exclusis, reservatur.

CAN. 1935

§ 1. Quilibet tamen fidelium semper potest delictum alterius denuntiare ad satisfactionem petendam vel damnum sibi resarciendum, vel etiam studio iustitiae ad alicuius scandali vel mali reparationem.

§ 2. Imo obligatio denuntiationis urget quotiescumque ad id quis adigitur sive lege vel peculiari legitimo praecepto, sive ex ipsa naturali lege ob fidei vel religionis periculum vel aliud imminens publicum malum.

CAN. 1936

Denuntiatio scriptis a denuntiante subsignatis vel oretenus fieri debet loci Ordinario, vel cancellario Curiae vel vicariis foraneis vel parochis, a quibus tamen, si viva voce facta fuerit, scriptis est consignanda et statim ad Ordinarium deferenda.

CAN. 1937

Qui delictum denuntiat debet promotori iustitiae adiumenta suppeditare ad eiusdem delicti probationem.

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CAN. 1938

§ 1. In causa iniuriarum aut diffamationis, ut actio criminalis instituatur, requiritur praevia denuntiatio aut querela partis laesae.

§ 2. Sed si agatur de iniuria aut diffamatione gravi, clerico vel religioso, praesertim in dignitate constituto, illata, aut quam clericus vel religiosus alii intulerit, actio criminalis institui potest etiam ex officio.

Every criminal procedure involves three essential points — the accusation, the trial, and the sentence. Without any one of these the whole procedure would be null and void.

The first and most necessary step is the *accusation,* for, "where there is no accuser, there is no accused." But there is a noticeable distinction between judicial accusation and simple accusation, which is more properly styled denunciation.[1] The judicial accusation may be most properly called an *indictment,* which ensures legal action or procedure, and is (can. 1934) reserved to the *fiscal promotor,* to the exclusion of all other persons, even the local Ordinary. Hence the judicial accusation can be lodged only by an official who is the *promotor iustitiae.*

This official character of the accusation is apparent in the older Roman Law, which permitted only a magistrate to act as accuser when a criminal case was tried before the *comitia.* However, after the standing commissions

1 The English terms: indictment, presentment, warrant, do not accurately convey the Latin terms. *Indictment* comes nearest to official accusation, which is preferred to, and presented upon oath by, a grand jury. A *presentment* is the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them. A *warrant* is an official precept authorizing arrest, distress or search, under the seal of a justice or court, but solicited by private persons. Blackstone, *l. c.,* IV, 289, 301 f.

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(*quaestiones perpetuae*) had been introduced, about 149 B. C., the so-called *delatores* sprang up like mushrooms. Any Roman citizen could come forward and prefer a charge.[2] The ecclesiastical law, being, as to formalities, largely modelled upon the Roman law, admitted as real and formal accusers all those not expressly prohibited by law. This is noticeable in Gratian's Decree. However, heretical tendencies made a partial departure from the old methods necessary and gave rise to *inquisitorial proceedings,* especially in heresy cases. In order that these inquisitors may not act as *judges and accusers,* at least one of them should be a promoter.[3]

The medieval inquisitors, taken mainly from the Friars Preachers, acted in the name of the Apostolic See. Besides these, the Ordinaries or Bishops were regarded as *inquisitores nati,* each for his own diocese, and the provincial councils, which had to be held every year, were also charged with the duty of watching over the faith.[4]

This, broadly speaking, was the status up to the publication of the Instruction of 1880. For, although a summary proceeding had been introduced by the Clementine Decretals and the *suspensio ex informata conscientia* by the Council of Trent, yet the handling of criminal cases remained stationary and was somewhat neglected. The S. C. of Bishops and Regulars, by issuing the above mentioned Instruction, which in fact was nothing else but a compendium of former decisions, gave a new impetus to criminal procedure. The Instruction states the reason why the summary procedure was promoted, namely, because the Church was hindered on every side in the exercise of her judiciary action. It named the

2 Ramsay-Lanciani, *Roman Antiquities,* 1900, p. 332, p. 334.
3 Wernz, *l. c.,* p. 55, n. 817.
4 Bouix, *De Iudiciis Eccl.,* II, p. 365 ff.

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diocesan court, *viz.*, the bishop, the vicar-general, and the *processus instructor*, as the chief factors in criminal procedure and required the co-operation of the fiscal promoter.

Now this *promotor iustitiae* has become so important that he alone is entitled to bring criminal action against offenders. This process, as stated, corresponds to our civil *indictment*.

Different from the indictment is *simple denunciation*, or, as we may call it for brevity's sake, the *warrant*. Canon 1935 defines the right and obligation of denunciation as follows:

1. Every Catholic has the right to denounce the crime of another, either (a) to demand satisfaction or indemnity, or (b) for the sake of justice, *i.e.*, that scandal may be repaired or evil counteracted. In the first case the motive is *personal interest*, and the case should therefore be classified among torts (such as libel and damage suits). In the second case the intention of the accuser is the restoration of justice, which suffers through any crime.

"*Quilibet fidelis*" must be understood in the light of the following considerations: (a) It is a mere denunciation; (b) where private interests only are involved, every believing person, *i.e.*, every Catholic, may be admitted, though formerly laymen were not permitted to act as accusers against clergymen;[5] (c) when the public welfare is concerned, as in cases of simony and others mentioned in § 2, can. 1934, anyone is admitted as accuser,[6] but with due regard to can. 1942, § 2, which says that

[5] C. 14, X, II, 20.

[6] Cc. 3, 7, X, V, 3. Practically it is true what Wernz (*l. c.*, P. II, n. 835) says, that *criminosi, excommunicati, inimici, infames, anonymi, plane ignoti* are not admitted as accusers, because their denunciation is worth nothing; but theoretically our text does not discriminate against them, except as stated above.

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denunciation by manifest enemies and by mean and unworthy persons should be counted as nothing.

2. The *obligation* of denouncing another becomes urgent when (a) one is obliged to do so by law, or (b) by a special precept, or (c) in virtue of the natural law, which dictates that every danger to faith and religion and every menace of public evil should be averted.

Ad a) The *common law* makes denunciation imperative:

1.° Against *confessarii sollicitantes ad turpia* (can. 904; 2368, n. 2);

2.° When one knows of impediments to the reception of holy orders (can. 999);

3.° Or of the existence of matrimonial impediments (can. 1027);

4.° Or of the circulation of dangerous books (can. 1397);

5.° Or of clergymen and religious being members of Masonic sects (can. 2336).

Ad b) By *special precept* Ordinaries and religious superiors may command their subjects to denounce certain crimes or persons suspected of wrongdoing; this, however, greatly depends on the constitution of each respective congregation or order.

Ad c) In *virtue of the natural law* theologians and canonists, though with some shades of variance, hold denunciation (judicial, not evangelical) to be obligatory on

a) One who knows of a crime that is very detrimental to the *community* and has no other means to prevent the evil arising therefrom than denunciation. Such a one is obliged to denounce the crime, even though the act will cause him inconvenience.

b) One who knows of a crime that is hurtful or de-

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trimental to a *third person*. In this case the duty of denunciation binds only if it entails no inconvenience to the denouncer.

c) One who knows of a crime that is hurtful *only to the perpetrator* himself, is under no obligation to denounce it.[7] Sacramental knowledge and professional secrecy always excuse from the duty of denunciation.

Can. 1936 describes the *mode of denunciation*. The accusation should be made in writing and signed by the accuser, or *orally* to the local Ordinary, the diocesan chancellor, or the rural dean or pastor (assistants or curates are not mentioned, and therefore can not lawfully accept a denunciation).

If a denunciation is lodged orally, it must be put in writing by the persons to whom it is made and *immediately forwarded to the Ordinary*. The latter clause has special significance, for it means that the ecclesiastics mentioned in the text as competent to receive denunciations, are not allowed to make investigation, summon witnesses or conduct a quasi-trial. Religious superiors must keep their hands off all matters pertaining to the Holy Office. If a subject is guilty of such a violation, the religious superior must denounce him, either directly to the Holy Office, or to the local Ordinary.[8]

Since the denouncer forms, as it were, one person with the fiscal promoter, the latter is entitled to demand all the evidence and the assistance of the accuser, in order to prove the crime (can. 1937).[9]

A damage or libel suit, which is of a personal or *private character*, necessarily requires a previous warrant or complaint by the party who believes himself injured; other-

7 Cfr. Bouix, *De Iud. Eccl.*, II, p. 51; Sabetti-Barrett, *Theol. Moral.*, ed. 27, 1919, p. 180, n. 181.

8 S. O., May 15, 1901 (*Coll. P. F.*, n. 2112); our Commentary, Vol. III, p. 110; can. 501, § 2.

9 *Regulae S. R. R.*, Aug. 4, 1910, § 41 n. 1 (*A. Ap. S.*, II, 799).

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wise no criminal action can follow. This is the practice in every civilized court, based on the assumption that the damage or defamation concerns private interests only. However, since the *clerical or religious state* is a privileged one in the Catholic Church, and injury or defamation brought upon any one of its members affects the whole state, especially if the injured member holds some rank or dignity, like prelates, it is but logical that only *official criminal action* may be brought against the delinquent. This rule applies also to cases where a clergyman or religious has defamed or injured another of his class (can. 1938). Here the *percussio clericorum* might enter, provided the offence was public and perpetrated in a scandalous manner.

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CHAPTER II

INQUEST

To justify the term *inquest* for *inquisitio,* we refer to can. 1954, for *inquisitio* forms part and parcel of the inquisitorial acts to be delivered to the fiscal promoter. Hence the term is here to be taken for *judicial inquiry,* which is a preliminary and an absolutely essential part of criminal procedure.[1] There is an inquiry mentioned in can. 1939, but this is of a general character, and therefore may be called extra-judicial. Here the Code intends *judicial inquiry,* defining when and by whom it is to be made, how it should be conducted, and what follows when it is completed.

INQUEST — WHEN AND BY WHOM TO BE MADE

CAN. 1939

§ 1. Si delictum nec notorium sit nec omnino certum, sed innotuerit sive ex rumore et publica fama, sive ex denuntiatione, sive ex querela damni, sive ex inquisitione generali ab Ordinario facta, sive alia quavis ratione, antequam quis citetur ad respondendum de delicto, inquisitio specialis est praemittenda ut constet an et quo fundamento innitatur imputatio.

§ 2. Huic regulae locus est sive agatur de irroganda poena vindicativa vel censura, sive de ferenda sententia

1 This process was formerly called *inquisitio pro informando iudice* or simply *processus;* S. C. EE. et RR., June 11, 1880, n. 10; S. O., Aug. 6, 1897, n. 3 (*Coll. P. F.,* nn. 1534, 1977); Messmer, *l. c.,* p. 53.

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declaratoria poenae vel censurae in quam quis inciderit.

CAN. 1940

Haec inquisitio, quamvis ab ipso loci Ordinario peragi possit, ex generali tamen regula committenda est alicui ex iudicibus synodalibus, nisi eidem Ordinario ex peculiari ratione alii committenda videatur.

CAN. 1941

§ 1. Inquisitor delegetur non ad universitatem causarum, sed toties quoties et ad unam causam.

§ 2. Inquisitor tenetur iisdem obligationibus quibus iudices ordinarii, ac praesertim praestare debet iusiurandum de secreto servando deque officio fideliter implendo et abstinere ab accipiendis muneribus ad normam can. 1621–1624.

§ 3. Inquisitor nequit in eadem causa iudicem agere.

CAN. 1942

§ 1. Prudenti Ordinarii iudicio committitur statuere quandonam ea, quae praesto sunt argumenta, sufficiant ad inquisitionem instituendam.

§ 2. Nihili faciendae sunt denuntiationes quae ab inimico manifesto, aut ab homine vili et indigno proveniunt, vel anonymae iis adiunctis iisque aliis elementis carentes, quae accusationem forte probabilem reddant.

1. A special inquest is required in cases (a) where the crime is neither notorious nor entirely certain, *viz.*, uncertain as to the fact or its imputability to the person denounced, but known only (b) through rumor and

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hearsay,[2] or (c) by semi-official information, *viz.*, denunciation, complaint of damage, general inquiry made by the Ordinary, or in any other strictly extra-judicial way.

2. The *time* for the inquest to be held is *before* one is summoned or judicially cited.

3. The purpose of the inquest is to ascertain whether and on what ground the crime may be imputed.[3]

4. With *regard to the penalty* § 2 of can. 1939 states that an inquest must be held whenever a vindictive penalty or censure is to be inflicted — *ab homine* — or only a declaration of sentence is required, *viz.*, a declaration that the penalty or censure has been incurred. Comparing this text with can. 1933, § 4 it might seem that there is a contradiction, but this is not the case. For canon 1933 supposes the certainty of the crime. Besides, this inquest, as stated, has already given a legal turn to the procedure, and therefore legal means are required for inflicting the penalty.

The next question is, *Who* may act as *inquisitor?* Answer: The local Ordinary, *i.e.*, the bishop or his vicar-general, may personally conduct the inquest. The law is permissive rather than preceptive in this case, but it adds that as a rule the business of holding the inquest should be committed to one of the *synodal judges.* But the Ordinary may, for special reasons, *choose another,* who, according to the instructions of the Roman Congregations, should be a learned, righteous, and capable priest, or at least a cleric.[4]

The inquisitor is a *delegate,* and hence does not remain in office permanently, but is chosen for each single

2 Cfr. can. 2197; S. C. EE. et S. O., Aug. 6, 1897, n. 6; S. C. EE. et RR., June 11, 1880, n. 12.

3 On imputability, see can. 2199 ff.

4 S. O., Aug. 6, 1897, n. 6; S. C. EE. et RR., June 11, 1880, n. 12.

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case (*ad hoc*) and needs special delegation for each. The conclusion: "N. has been delegated for this case, hence he may act also in the next case," would, therefore, be entirely wrong and would nullify the whole procedure.[5]

The inquisitor is *under the same obligations* as the judge in ordinary, and must therefore give oath that he will keep the secret, conscientiously discharge his duties, and accept no donations or bribes.

The inquisitor *cannot validly act as judge* in the same case. The consequence is that a synodal judge chosen as inquisitor cannot *pro hac vice* also act as judge.

It is hardly necessary to add that the delegation must be given expressly, since the office of inquisitor is not attached to any particular judiciary office, either that of synodal judge, or of counsel, or of auditor and that the delegate must adhere strictly to his commission or mandate, the limits of which he may not exceed, if any are drawn in the writ.

The inquisitor should not proceed with the inquest until the Ordinary has prudently judged or decided that the evidence so far obtained is sufficient to institute a formal inquest. Hence it lies *with the Ordinary to give orders for the inquest.* What if the Ordinary doubts the sufficiency of the materials thus far collected? He may order other secret information to be gathered and call in witnesses who know the incriminated person and the accusers, and make them respond under oath to the questions put to them.[6] These depositions, of course, must be diligently kept, for they may be of service in the trial.

Can. 1942, § 2 proceeds to determine negatively the sufficiency of evidence, thus: *Denunciations should be counted for nothing* if: (a) they are made by manifest

[5] S. O., *l. c.*

[6] S. O., Aug. 6, 1897, nn. 3, 5.

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enemies or by mean and unworthy persons; or if they are (b) anonymous and lack the necessary details to render the accusation at least probable.

"*Homines viles et indigni*" are persons of ill fame,[7] and, *a fortiori,* all who are infamous in fact or by law. But *vilis* may have another meaning, *viz.,* a low character. This would be the case if the accusation were prompted by a bribe or human respect.[8] *Enemies* are those who wish one ill and are ready to injure one, materially or spiritually. The word *manifest* implies that a considerable part of a community must know of this enmity of the accuser toward the accused.[9] The word *anonymous* is here used in a somewhat restricted sense, for anonymous properly means nameless, and nameless letters should, as a rule, not be accepted. Still the text does not reject them absolutely. It may be that a person does not wish to be drawn into a trial, and yet has strong evidence against another. The details demanded are circumstances of time (day, month, year, hour), of place and person (where, when, by and with whom the crime was committed), etc. No vague and general statements or flippant assertions made in anonymous letters can be accepted.

No other persons are excluded from the right of making denunciation. All that is required is that they be *Catholics.* Hence neither excommunication, nor the interdict, nor suspension debar one,[10] provided he possesses the qualities negatively stated in can. 1942, § 2.

7 *Ibid.,* n. 1.
8 *Ibid.,*
9 C. 10, X, V, 1; Engel, *h. t.,* n. 9.
10 Consequently the old view of canonists can no longer be held as to the class mentioned in the text.

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MODE OF CONDUCTING THE INQUEST

CAN. 1943

Inquisitio secreta semper esse debet, et cautissime ducenda, ne rumor delicti diffundatur, neve bonum cuiusquam nomen in discrimen vocetur.

CAN. 1944

§ 1. Ad finem suum assequendum potest inquisitor aliquos, quos de re edoctos censeat, ad se accire et interrogare sub iureiurando veritatis dicendae et secreti servandi.

§ 2. In eorum examine servet inquisitor, quantum fieri potest et natura inquisitionis patitur, regulas statutas in can. 1770–1781.

CAN. 1945

Inquisitor, antequam inquisitionem claudat, potest promotoris iustitiae consilium exquirere quoties in aliquam difficultatem inciderit, et cum eo acta communicare.

After the inquisitor has been appointed and informed that the evidence at hand is sufficient, the *inquest may begin.* But it must always be conducted so *secretly* and *cautiously* that no rumor of the crime is allowed to get abroad, and the good name of no one, delinquent, accomplice, or any other person involved, is jeopardized (can. 1944). This, of course, implies *strict secrecy,* not only on the part of the inquisitor himself, as stated under can. 1941, § 2, but also on the part of all those whose assistance he may require for conducting the inquest.

The inquisitor may call in persons who are acquainted

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with the accused, or with the accusers, or with the case in general. The number of the persons that may be summoned is not determined. Those who appear may and must be put under oath to speak the truth and, as stated, to keep the whole thing secret. The *procedure* for examining these persons is much the same as that prescribed for the examination of witnesses (can. 1770–1781).

Our text says, "*quantum fieri potest et natura inquisitionis patitur.*" Hence it would hardly be advisable to confront the witnesses.

The place of the judge is taken by the inquisitor.

No solemn or public summons is required.

If the inquisitor deems it prudent to repair to the domicile of the witness, the law does not forbid him.

In cases of *sollicitatio,* women may be heard in the sacristy or some other unsuspected place.

If the inquisitor should meet with difficulties, says can. 1945, he may *counsel with the fiscal promoter* and communicate to him what has been done. But all this must be done before the acts of inquisition are formally closed. The *closing of the inquisitorial acts is required* in order to mark a stage in the procedure. It is, however, left to the inquisitor to decide when the acts of judicial inquiry are completed, or when the *conclusio in causa* (can. 1860) is brought about; although no special decree to that effect need be issued.

WHAT IS TO BE DONE AFTER THE INQUEST IS COMPLETED

CAN. 1946

§ 1. Expleta inquisitione, inquisitor, addito suffragio suo, omnia referat ad Ordinarium.

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§ 2. Ordinarius vel de eius speciali mandato officialis suo decreto iubeat ut:

1.° Si appareat denuntiationem solido fundamento esse destitutam, id declaretur in actis et acta ipsa in secreto Curiae archivo reponantur;

2.° Si indicia criminis habeantur, sed nondum sufficientia ad accusatoriam actionem instituendam, acta in eodem archivo serventur et invigiletur interim moribus imputati, qui pro prudenti Ordinarii iudicio erit opportune super re audiendus, et, si casus ferat, monendus ad normam can. 2307;

3.° Si denique certa vel saltem probabilia et sufficientia ad accusationem instituendam argumenta praesto sint, citetur reus ad comparendum et procedatur ad ulteriora ad normam canonum qui sequuntur.

After the acts of inquisition are closed, or the finding is complete in the judgment of the inquisitor, because the evidence is exhausted, he shall formulate his opinion, which is generally styled *votum,* but is here called *suffragium.* This *votum* should, we suppose, be put into writing, although the text does not expressly say so. Together with this statement the inquisitor shall submit his findings to the Ordinary, who has to read the acts carefully in order to come to a conclusion in the three possible hypotheses with which he may now be confronted.

The Ordinary (either the bishop or his vicar-general) may entrust the *officialis* (see can. 1573) with the inspection of the acts, but it requires a *special mandate* for each and every case. The Ordinary, then, or the *officialis,* shall issue a *decree* adapted to the conclusion resulting from the inspection of the acts:

1.° If the denunciation appears *groundless,* the decree

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must so declare and be incorporated with the acts, which are then to be placed in the secret diocesan archives.

2.° If the *evidence* is *insufficient* to justify criminal prosecution, the acts must also be deposited in the secret archives of the diocese and the denounced person watched as to his conduct, asked concerning his behavior, and, if necessary, be served an admonition, according to can. 2307.

3.° If the evidence is *conclusive,* or at least *probable and sufficient* for criminal prosecution, the delinquent must be summoned to appear in court and proceeded against according to the rules that follow. The sufficiency of the evidence must be judged according to can. 1789–1791 and can. 1812–1818; self-confession according to can. 1750–1753.

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CHAPTER III

REBUKE OF THE DELINQUENT

CAN. 1947

Si reus interrogatus delictum confiteatur, Ordinarius, loco criminalis iudicii, utatur correptione iudiciali si eidem locus sit.

CAN. 1948

Correptio iudicialis locum habere nequit:

1.° In delictis quae poenam secumferunt excommunicationis specialissimo vel speciali modo Sedi Apostolicae reservatae, aut privationis beneficii, infamiae, depositionis aut degradationis;

2.° Quando agitur de ferenda sententia declaratoria poenae vindicativae vel censurae in quam quis inciderit;

3.° Quando Ordinarius existimet eam non sufficere reparationi scandali et restutitioni iustitiae.

CAN. 1949

§ 1. Correptioni locus esse potest semel et iterum, non autem tertio contra eundem reum.

§ 2. Quare si post alteram correptionem reus idem delictum commiserit, criminale iudicium instrui aut inceptum continuari debet ad normam can. 1954 seqq.

CAN. 1950

Intra fines can. 1947, 1948 potest correptio ab Ordinario adhiberi non solum antequam gradus fiat ad

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formale iudicium, sed etiam eo incepto ante conclusionem in causa; ac tunc quidem iudicium suspenditur, nisi tamen prosequendum idcirco sit quia correptio in irritum cesserit.

CAN. 1951

§ 1. Correptio adhiberi etiam potest, cum interposita fuit querela damni ex delicto.

§ 2. Quo in casu Ordinarius potest de bono et aequo, partibus consentientibus, videre et dirimere quaestionem de damno.

§ 3. Sed si censuerit quaestionem de damno difficulter de bono et aequo posse definiri, licet ipsi, remissa ordini iudiciario solutione huius quaestionis, per correptionem consulere reparationi scandali et emendationi delinquentis.

CAN. 1952

§ 1. Correptio iudicialis, praeter monita salutaria, debet plerumque coniuncta habere quaedam opportuna remedia, aut poenitentiarum vel piorum operum praescriptionem, quae valeant ad publicam reparationem laesae iustitiae aut scandali.

§ 2. Salutaria remedia, poenitentiae, pia opera reo praescribenda, mitiora et leviora esse debent iis, quae in criminali iudicio per sententiam condemnatoriam ipsi infligi possent et deberent.

CAN. 1953

Correptio censetur inutiliter adhibita, si reus remedia, poenitentias et pia opera sibi praescripta non acceptat aut acceptata non exsequatur.

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Since the summons can be issued upon certain, or at least probable and sufficient evidence, it is plain that by *confession* here is meant a *judicial confession, i.e.,* one made in court. The Ordinary, therefore, should ask the person summoned: "You are accused of such a crime; do you plead guilty?" He may insinuate, in general terms, that proofs are available, in order to solicit a true answer. The question then naturally arises: *Is the defendant obliged to confess his guilt,* if he is guilty and is duly questioned by the Ordinary or his official? A probable opinion obliges the defendant to confess his guilt.[11] However, some authors deny this obligation if the punishment to be expected is very severe and there is hope of escaping it.[12] It is undeniable that the confession would simplify the procedure and also lessen the punishment.

We may add that the question must be put lawfully and that the answer must be given "freely and considerately," according to can. 1751. There is also in lay criminal practice a requisite stated which to us seems very reasonable: confession should not be admitted if made in consequence of any inducement of a temporal character, connected with the accusation, held out to the accused by a person who had some authority over the accusation.[13] For the voluntary character needed for confession would certainly be diminished under these circumstances.

We said that confession would lessen the measure of punishment. This is clearly stated in can. 1947, which

11 S. Thom., II-II, q. 69, art. 1; Messmer, *l. c.*, p. 101, answers "in the affirmative without exception," upon the authority of Konings, *Theol. Moral.*, n. 1072.

12 Thus Lessius, De Lugo, etc. — weighty authorities — quoted by Reiffenstuel, II, 18, n. 163 ff.; the consequence is that the confessor could not refuse absolution *in casu, viz.*, though the penitent refused to confess the guilt judicially.

13 Kenny-Webb, *Outlines of Criminal Law*, 1907, p. 375.

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says that, after the confession or admission is made, the Ordinary may administer *judicial correction* or rebuke which is not identical with judicial penalty.

But there are *exceptions* to the employment of this expedient, and these are stated in can. 1948, which *excludes judicial correction.*

1. In all crimes, even though confessed, which are punishable by *excommunication* most especially or especially reserved to the Holy See, or which are punishable in law by privation of benefice, infamy, deposition or degradation (see Book V);

2. In all crimes which require only a *declaratory sentence* for incurring a vindictive penalty or censure, because *de facto* already incurred;

3. Whenever the Ordinary deems a *judicial correction insufficient* to repair the scandal given and to restore justice. This is left to the judgment of the Ordinary.

Aside from these cases the judicial correction may be administered *twice*, but not oftener. If the second correction has proved fruitless or ineffective to restrain the delinquent from committing the same crime again, criminal procedure must be applied or continued according to can. 1954 ff. If the text uses the term "*inceptum continuari,*" it is because correction may be employed not only before the trial has begun, but at any time during the trial, until the *conclusio in causa, i.e.,* before the whole material is gathered and the acts are closed.

When correction is applied, the trial is *suspended,* provided the correction was effective, *i.e.,* the corrected person behaves himself (can. 1950).

Correction may also be employed in *criminal damage suits,* in which the Ordinary may, if the parties consent, settle the question of damages according to the rules of equity. If, however, the difficulty of an equitable settle-

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ment proves too great, the Ordinary may refer the matter to the civil court and in the mean while, by judicial correction, repair the scandal and endeavor to correct the delinquent (can. 1951).

Can. 1952 tells us in what *judicial correction consists, viz.,* in wholesome *admonitions,* combined with appropriate remedies, such as penances and good works, applied to the delinquent in order that he may publicly repair the disturbed order of justice and the scandal given. Of these penances mention is made in can. 2313, where special prayers, pilgrimages, fasts, alms, and retreats are recommended.

However, these remedies do not bear the character of a judicial punishment because the criminal trial has not yet begun, and hence they should be milder than those meted out after a condemnatory sentence.

From this it is apparent that the *monita salutaria* spoken of in our text must not be taken in the sense of a canonical or judicial admonition, equal to a triple or one peremptory admonition.[14] They are simply wholesome admonitions, but should not be made light of, because can. 1953 shows that, if spurned, they will pave the way for a criminal trial. Hence this canon states that if the delinquent refuses to accept or to use these remedies (penances and pious works imposed upon him) the *correction must be looked upon as ineffective* and the trial is to proceed.

[14] See Messmer, *l. c.*, p. 145, note 3.

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CHAPTER IV

CRIMINAL PROCEDURE AND HEARING OF THE DELINQUENT

CAN. 1954

Si correptio iudicialis vel insufficiens sit ad reparationem scandali et restitutionem iustitiae, vel adhiberi nequeat quia reus delictum denegat, vel inutiliter adhibita fuerit, Episcopus, aut officialis, de eius speciali mandato, praecipiat ut acta inquisitionis tradantur promotori iustitiae.

CAN. 1955

Promotor statim conficiat accusationis libellum eumque exhibeat iudici secundum normas in Sectione Prima statutas.

CAN. 1956

In delictis gravioribus, si Ordinarius censeat cum fidelium offensione imputatum ministrare sacris aut officio aliquo spirituali ecclesiastico vel pio fungi aut ad sacram Synaxim publice accedere, potest, audito promotore iustitiae, eum a sacro ministerio, ab illorum officiorum exercitio, vel etiam a publica sacrae Synaxis participatione prohibere ad normam can. 2222, § 2.

CAN. 1957

Pariter si iudex censeat accusatum posse testibus timorem incutere aut eos subornare, aut alio modo

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iustitiae cursum impedire, potest, audito promotore iustitiae, decreto suo mandare, ut ille ad tempus deserat oppidum vel paroeciam quandam, vel etiam ut secedat in praefinitum locum ibique sub peculari vigilantia maneat.

CAN. 1958

Decreta de quibus in can. 1956, 1957 ferri nequeunt, nisi reo citato et comparente vel contumace, sive post primam eius auditionem seu constitutum, sive postea in decursu processus; et contra eadem non datur iuris remedium.

CAN. 1959

In reliquis serventur regulae in Sectione Prima huius Libri traditae et in inflictione poenarum sanctiones in Libro Quinto statutae.

The Bishop or his *officialis,* provided the latter has obtained a special mandate to this effect, shall command that the *inquisitorial acts be handed to the fiscal promoter in the following cases:*

1. If judicial correction was considered insufficient to repair the scandal or to restore justice (can. 1948);

2. If the defendant denies the crimes imputed to him, in which case the judicial correction may not be employed;

3. If judicial correction was ineffective, according to can. 1953.

When any one of these three cases is verified, the fiscal promoter must immediately draw up a bill of complaint or accusation and present it to the judge according to the rules laid down in the first section of this Book (IV).

It will not have escaped the attentive reader that, in chapter III, on correction, there is not one word that

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would insinuate any special formalities, such as writing or decrees, of which we hear so often in civil procedure, or even of keeping a record of the judicial correction and its effect. Neither do we read of any formal canonical injunction after the admonitions have proved fruitless.[1] Are all these formalities to be omitted? It must be remembered that a trial is based on an inquisition, either by denunciation or formal complaint or by a general and special inquiry. The records of these proceedings must certainly be kept on file for further procedure. In addition to this we believe that the judicial correction must be so administered that it can be proved at the trial. For the defence is undoubtedly entitled to ask whether and how the judicial correction was made use of. Besides, the fiscal promoter, who receives the inquisitorial acts and an abstract thereof, needs an official statement that the judicial correction was duly served.[2] Hence we conclude that the Ordinary or his *officialis* must put the fact that judicial correction was made, on record, or give a written statement why, in virtue of can. 1948, it has been omitted. If the correction has proved fruitless, according to can. 1953, there is some similarity between the former injunction and our admonitions. As the violation of injunctions was proved by simply producing the writ and the record of its having been served, so may the violation or non-acceptance of correction be proved. But this requires either a written document or two witnesses, ecclesiastics or laymen, because at least moral certainty is required.[3]

The text says that the writ of complaint or accusation must be exhibited according to the rules for procedure

1 *Instructio S. C. EE. et RR.*, June 11, 1880, nn. 6–8; Messmer, *l. c.*, p. 144 f.

2 *Instructio cit.*, n. 32 f.

3 *Ibid.*, nn. 15, 16, 8.

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in general. These rules are contained in canons 1706–1710.

Here we may also draw attention to the fact that the term *judge* occurring in the singular by no means excludes what can. 1576 establishes concerning a board of judges, either three or five, as the nature of the case requires. For there can be no doubt that, if the case requires a collegiate body of judges, the whole trial would be null and void were this rule set aside.

After the bill of complaint has been presented, the *next step is properly and legally to summon* the accused or defendant. Here, again, canons 1711–1725 must be recalled. The accused, when duly summoned, will either appear or not appear. In the latter case he must be declared in contempt, according to can. 1842–1851. If he appears, he shall be granted a first hearing, as stated under can. 1742–1746, but the oath cannot lawfully be demanded of him. For the rest, says can. 1959, the rules laid down in the first section of this book, and for inflicting penalties the canons of the fifth book, must be observed.

There are two canons, one of which provides for the dignity of the sacred ministry and the other for a just procedure. If the *crime is of a very serious nature*, and the Ordinary is of the opinion that the faithful would be scandalized if the incriminated cleric should exercise the sacred ministry or perform spiritual functions or pious exercises or publicly receive holy Communion, he may, after having heard the promoter's advice, forbid the exercise of the sacred ministry or of spiritual ecclesiastical functions, and the public reception of Communion. This is a kind of suspension, but without penal character,[4] and therefore irregularity would not follow its

4 See can. 2222, § 2.

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violation. Note the terms, *spiritual* functions and *public* reception, which indicate that neither temporalities nor secret reception are forbidden.

Justice and safety require that witnesses be not intimidated or bribed. Hence if the judge fears that this is being done, he may consult with the fiscal promoter, and then issue *a decree* commanding the defendant for the time being to leave the town or parish or to repair to a place assigned to him, and there remain under suspension. In the meantime, of course, if the defendant should be a pastor, a substitute must be furnished at his expense.

Title XX, On Matrimonial Trials, has been treated in Vol. V of this Commentary, pp. 400–439.

Title XXI, On Ordination Trials, has been explained in Vol. IV, pp. 550–557.

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PART II

THE PROCESSES OF BEATIFICATION AND CANONIZATION

INTRODUCTION

Since these processes are exclusively reserved to the Holy See and are conducted by the S. Congregation of Rites, which alone is competent in this important matter, it would be presumptuous to comment on these canons.[1] Therefore, a brief summary must suffice. The canons referring to *the ordinary power* of the *local Ordinary* will be pointed out as they occur. The *Vicar-General needs a special mandate* (can. 2002) for each and every case.

Canonization is an act by which the Sovereign Pontiff definitely and, we may add, infallibly declares an individual who died in communion with the Church to be a Saint and deserving of the veneration of the universal body of the faithful.

Beatification is a preliminary step to this solemn act and localizes, as it were, the veneration to the individual who is declared *beatus.*

The *mode* of *procedure* in both cases is twofold: *viz.: per viam ordinariam non cultus* or *per viam extraordinariam casus excepti seu cultus,*— the difference being that the *ordinary* method presupposes, before any discussion on the heroic virtues is admitted, that no veneration has been

1 Neither do we desire to copy the classical work of Benedict XIV, *De Servorum Dei Beatificatione et Beatorum Canonizatione,* 4 Vols.

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given to the person in question, or, if such was given *per abusum,* that it has been lawfully abolished. The *extraordinary* process consists in proving the existence of a standing public and ecclesiastical cult bestowed upon the person or persons in question. But each individual case must be individually examined, unless martyrs are under discussion who suffered in the same persecution and at the same place. An instance are our English martyrs, some of whom were put to death at the same time and in the same place.[2]

Historically the earliest was, of course, the veneration of the martyrs, two classes of whom are already mentioned in the fourth century: *martyres vindicati et non vindicati,* according as they were recognized or not by the ecclesiastical authority. St. Augustine briefly describes[3] the process of recognition. The bishop in whose diocese a martyr died, began the investigation by collecting the documents and forwarding them to the primate or metropolitan. The latter took cognizance of the acts, heard the bishop's view, and, after due deliberation, declared his own opinion as to whether or not the martyr should be publicly honored. It goes without saying that the veneration of martyrs as well as the celebration of their anniversaries were at first purely local festivals. But soon one church adopted the commemorations of another, and thus the festivals of the most distinguished saints came to be celebrated outside their own dioceses.[4] An investigation was required, so that the honors due to Saints were not given to heretics and schismatics.

In course of time there came to be associated with the martyrs certain *holy confessors,* that is, *ascetae* or

2 Cfr. Bede Camm., O.S.B., *The English Martyrs.*

3 *Breviculus Collationis cum Donatistis,* l. III, n. 11 ff. (Migne, *P. L.,* 43, 629 ff).

4 Duchesne-McClure, *Christian Worship,* 1903, p. 284.

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solitary monks, whose life was regarded as a continuous martyrdom (St. Martin of Tours, St. Antony the Great, St. Simeon Stylites, etc.).[5] Whether this custom of venerating confessors was prevalent already in the fourth century or arose only in the eight, as some believe, is immaterial for our purpose.[6]

From the tenth century onward canonization came to be reserved to the Apostolic See, although some bishops continued to "canonize" until the pontificate of Alexander III (1159–1181), who issued the well-known Decretal on the Relics and Veneration of the Saints,[7] summarized in the words: "Without the permission of the Pope no one may be venerated as a Saint." Ever since this has been law in the Church, and subsequent papal constitutions[8] merely determined the method of procedure, which is now cast into legal form. We will give a brief conspectus:

4. Extraordinary trial *per viam cultus* or *causus excepti.*

5. Trial of Canonization.

From this sketch it will be seen that the activity of the Ordinaries is limited to the preliminaries of the ordinary trial.

The *persons* who hold special offices are (1) the *actor,* or petitioner, who may be any faithful Catholic or congregation (women must be represented by proxy); (2) the *postulator,* who promotes and treats the case at the competent tribunal; he must be a priest, either secular or religious, and have his residence in Rome; (3) vice-postulators are admitted, but require a special mandate.

One of the Cardinal-consultors of the S. Congregation of Rites, designated by the Pope, acts as *cardinal relator.*

5 *Ibidem,* and *Le Ceremonie della Canonizzazione,* Rome, 1897, p. 11 ff.

6 See *Cath. Encycl.,* Vol. II, 365.

7 C. 1, X, III, 45.

8 Especially Urban VIII, "*Coelestis Hierusalem,*" July 5, 1634; Bened. XIV, "*Ad sepulchra,*" Nov. 23, 1741; also S. Rit. C., *Instructio,* 1878.

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1. Persons at the Trial { Petitioners, Postulators, Cardinal Relator, Promotor fidei, Subpromotores, Notary, Secretary, Advocates

2. Evidence Required { Evidence in General, Witnesses and Experts, Documents.

3. Ordinary Trial of Beatification {
- a) Process to be instituted by the Ordinary *iure proprio*.
  - Inquiry into the writings,
  - Informative process
  - Inquest into non-cultus
  - Transmission of the acts.
- b) Introduction of the trial at the S. Congregation.
  - Revision of the writings
  - Discussion of the informative process
  - Discussion of the non-cultus
- c) Apostolic trial.
  - *Instructio Processus*
  - Validity of the Apostolic process
  - Heroic virtues or martyrdom, miracles.

The *fidei promotor* is appointed to defend the law and must always be summoned. The one employed by the S. Congregation is appointed by the Roman Pontiff, goes by the name of *promotor generalis fidei*, and is assisted by

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the assessor of the S. Congregation; he is called *sub-promotor generalis fidei.* But a *promotor fidei* may also be appointed by the Ordinary.

Besides these persons, a *notary* must be appointed from among the protonotaries apostolic for trials at the S. Congregation, and a diocesan notary for the inquiries to be made by the diocesan court. *Religious* cannot be notaries except in case of necessity, and in trials concerning their own order they cannot be notaries at all.

A secretary or *cancellarius, advocates* (counsels), and *proctors* must or may also be employed, but the latter two must be doctors in Canon Law and at least licentiates in theology.

The next title of the Code treats of *evidence;* first in general. The proofs must be full (*plenae*) and no others are admitted. Four *witnesses* are required to establish the fact that no worship was paid to the Servant of God; at least eight are necessary to prove the fame of his virtue, his martyrdom and his miracles. To give evidence of virtue and martyrdom eye-witnesses are required, and historical documents are admitted only as aids. However, in ordinary trials concerning ancient cases, and in extraordinary trials, hearsay and public rumor are admitted together with authentic contemporary documents.

Any one who was acquainted or familiar with the Servant of God, also his relatives and servants, including non-Catholics and infidels, may be admitted as witnesses; but the confessor, the postulator, the *advocatus,* and the judge are excluded.

All the faithful are obliged to submit whatever evidence they may have against the virtues, miracles, and martyrdom. *Religious* of both sexes must forward such information under seal directly to the Ordinary, and their

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superiors are not allowed to inspect such letters. The superiors should take care that their subjects present themselves for deposition, but should not compel them to testify favorably or unfavorably.

Experts are principally the physicians who examine miraculous cures; they must submit a written report under oath.

The *documents* demanded by the postulator must be presented in full and must contain a declaration as to their origin and authenticity. Extra-judicial documents furnish no proof of sanctity or martyrdom; neither do eulogies and funeral sermons, and much less testimonies solicited by the friends of the Servant of God, even though given by illustrious persons. Neither are historical accounts sufficient proof, *per se,* unless inserted in the acts proper.

Title XXIV details the *process of beatification per viam non-cultus.* The preliminary requisite is that of *giving oath.* This must be administered to the local Ordinary as well as to the Apostolic delegate, also to the judges, the *promotor fidei,* the notary, the secretary, and to the witnesses, experts, translators, and interpreters. The object of this oath is to insure strict secrecy and to induce all participants to do their duty conscientiously.

The *postulator* and *vice-postulator* must swear that they will tell the whole truth and employ no fraudulent means. The formula for this oath is a special one, prescribed by the S. Congregation of Rites.[9]

[9] S. Rit. C., Oct. 5, 1678, § 1, n. 3.

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CHAPTER I

THE DUTIES OF THE LOCAL ORDINARY

Chapter I of this title (canons 2038–2064) refer particularly to the *duties of the local Ordinary.*

The *petition* for introducing a cause of beatification must be directed to the Apostolic See. But before it is admitted, the truth must be juridically established concerning the purity of doctrine of the deceased Servant of God, the fame of his sanctity, the virtues and miracles he wrought, the fact of martyrdom, and the absence of any peremptory obstacle; finally concerning the fact that no public worship has been paid to him. Hence the *postulator* must petition the Ordinary: 1. To see to it that the *writings* of the Servant of God be requisitioned, *i.e.,* seized and examined; 2. To arrange the formal inquiry (*processus informativus*), into his fame of sanctity, his virtues in general, or his martyrdom, the cause of his martyrdom, and his miracles; 3. To institute an inquiry as to the *non-cultus.*

The competent Ordinary in this matter is he in whose diocese the Servant of God died, or in whose diocese the miracles have happened. If the Ordinary himself is related to the Servant of God, he shall delegate another to conduct the trial.

If an inquiry was instituted within the past thirty years into the fame of sanctity or martyrdom of the Servant of God, but was interrupted before the case was introduced at Rome, the Ordinary or his successor must inquire into the continuation of the fame.

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The *judge* is the Ordinary himself, or a priest delegated by him. If a delegate conducts the trial, two other judges, taken from the college of synodal judges, must be chosen by the Ordinary. All this must be done by a formal *decree.*

The *acts* must be closed and sealed after every session.

ART. I

INQUIRY INTO THE WRITINGS OF THE SERVANT OF GOD

1. The term "writings" comprises all published and unpublished works, sermons, letters, diaries, autobiographies and manuscripts of every kind left by the Servant of God.

2. The *faithful* must be publicly exhorted to deliver up all his writings which they may have in their possession. If a religious is concerned this publication must be made in every religious house, and the superiors are obliged to see to it that it is properly done.

The *promotor fidei* shall see to it that the publication is also made in other places, where any writings may be found.

3. The Ordinary, urged by the *promotor fidei,* shall *officially search* for all such writings. If writings of the Servant of God are likely to be found in *another diocese,* he shall ask the Ordinary of that diocese to do the same, according to law (especially can. 2043) and forward anything he may find.

4. Those who wish to *retain autographs* of the Servant of God must allow the notary to take an authentic copy thereof, to be sent to the S. Congregation. Writings found in *libraries or archives,* whence they cannot be withdrawn, should be faithfully copied or photographed,

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and authenticated by the notary; if no copy can be obtained, the matter must be referred to the S. Congregation.

5. The notary must carefully describe the *number and quality* of the writings, and the acts must be *signed* by the Ordinary or his delegate, and the *promotor fidei,* and *sealed* with the Ordinary's seal.

6. The *postulator* must give oath that he will make a careful requisition. If the Servant of God is a *religious* of a female institute, the Mother General must give the same oath and testify that all the writings of the Servant of God have been delivered up by her and her subjects.

7. In case of a *martyr,* the requisition may be made after the commission has been appointed by the S. Congregation.

Art. II

THE INFORMATION PROCESS

1. The *processus informativus* is to be instituted by the *Ordinary.* If it was not begun until thirty years after death of the Servant of God, no further procedure is allowed except after proof is furnished that the delay was not due to fraud, deceit, or culpable negligence.

2. The *witnesses* to be examined (can. 2019 f.) concerning the fame of sanctity, martyrdom, or miracles, are not required to testify specifically, but general testimony as to the growth and existence of the rumor among honest and serious persons is sufficient.

The witnesses are to be queried by the judge as to their knowledge of the life, virtues, miracles, and martyrdom of the deceased, how they obtained their knowledge, and whether it is of the nature of public rumor.

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Then they must answer to the questions put by the promoter of faith.

3. The acts of the inquiry may not be closed before all the letters and papers of the faithful and the friends and acquaintances of the deceased (see can. 2023–2025) have been inspected by the *promotor fidei.* After all the testimony has been gathered the tribunal shall, upon having heard the *promotor fidei,* give notice to the postulator to bring forward whatever he has within a fixed term.

4. The *judge,* then, if the *promotor fidei* is satisfied, shall command the notary to publish the acts of the inquiry, which shall be copied by a clerk designated by the tribunal. The copy shall be in hand-writing (typewriting forbidden). It is to be collated with the original in the presence of one of the judges and of the *promotor fidei,* and then signed by the notary, the judge, and the promotor, and sealed.

After the collation, the *original* acts are closed and sealed, and placed in the diocesan archives, never to be opened without the permission of the Apostolic See. The *abstract* is closed and sealed with the seal of the Ordinary. The notary shall make two copies of it, one of which is to be forwarded to Rome, the other to be kept in the diocesan archives.

Art. III

INQUIRY INTO THE NON-CULTUS

Besides the two witnesses produced by the postulator, the tribunal shall introduce two more, who shall testify whether or not the Servant of God ever received a *public worship.* Besides, the tribunal shall carefully inspect his grave, the place (or house) where he lived and died,

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and other places where indications of a cult may be suspected.

If the inquiry brings to light indications which show that public worship was paid, the *promotor fidei* must insist upon further investigation and the tribunal *must give sentence* as to the existence of such worship.

Art. IV

TRANSMISSION OF THE ACTS TO ROME

1. As soon as the Ordinary has obtained the *writings,* he must *forward them to Rome,* together with a judicial report as to the care with which the requisition was conducted. If other writings are found while the trial is going on in Rome, they must be immediately forwarded and inspected there before any further progress can be made.

2. The *abstract of the informative process* must be delivered by the Ordinary to the postulator, who shall send it to the S. Congregation. At the same time he (the postulator) shall forward *letters from the judges* addressed to the S. Congregation, and *letters of the* (*diocesan*) *promotor fidei* to the promotor general of faith, in order that the S. Congregation may be informed of the trustworthiness of the witnesses and the legal formalities of the acts. For this purpose the Ordinary shall also send a description or copy of the seal with which the abstract was sealed.

3. Finally the Ordinary shall have the postulator to send the complete result of the inquiry into the fact of *non-cultus* to the S. Congregation.

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CHAPTER II

INTRODUCTION OF THE CASE AT ROME

1. The *first* investigation to be made is the *revision of the writings* of the Servant of God. The *revisors,* chosen by the *Cardinalis ponens,* must be priests and doctors of divinity, and must give their opinion in writing. This examination is made to ascertain the purity of doctrine with regard to faith and morals and the virtues or defects that may be gathered from these writings. The final judgment, whether further procedure is permitted, lies with the Supreme Pontiff.

2. The second investigation concerns the *processus informativus* sent by the Ordinary through the postulator. The papers are to be examined materially and formally, and objections brought up by the *promotor fidei generalis* to be answered. The final judgment is pronounced at a congress of Cardinals, by the *Cardinalis ponens,* in the form of a doubt: "*An signanda sit commissio introductionis causae in casu et ad effectum de quo agitur.*" If the answer of the Cardinals is favorable, a commission for the introduction of the case is appointed. After that the *local Ordinaries* can do nothing more without the permission of the S. Congregation, and it is *strictly forbidden* to call the Servant of God whose case has been introduced, "*Venerable.*"

3. The third investigation regards the *non-cultus,*— whether the sentence of the diocesan court is to be ratified or not. If traces of worship have been found, the case is suspended until every vestige has been removed.

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CHAPTER III

APOSTOLIC TRIALS

If a decree of *non-cultus* has been issued, the *Sovereign Pontiff* is asked for the *litterae remissoriales,* which are given by the Cardinal Prefect and permit the trial to be instituted.

ART. I

INSTITUTION OF THE TRIAL

Two *distinct trials* are to be arranged: one concerning the *fame* of sanctity, miracles, or martyrdom; the other concerning the *virtues and miracles* in particular, or concerning the *martyrdom.* The first trial may be omitted if the Cardinal Prefect and the *promotor fidei generalis* deem it superfluous or inexpedient to inquire anew into the continued fame of sanctity.

Here the services of the *Ordinary* may again be required. If important eye-witnesses are in danger of death, or cannot be obtained at the time the trial concerning the virtues and miracles or the martyrdom is to be conducted, so-called *litterae remissoriales* are sent out to at least five judges (if possible, dignitaries), one of whom is the Ordinary, who shall act as presiding officer — now no longer *iure ordinario,* but *delegato.*

In the trial concerning the miracles an expert must be chosen. Besides the *promotor fidei generalis* shall by letters patent choose *two subpromotors* and send the interrogatories to these, who, however, shall not open the

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envelope until the examination begins. The delegated judge must present their credentials to the Ordinary.

After all these preliminaries are completed, the presiding officer shall convoke the tribunal within at least three months after notice was received, and the trial should be finished within two years. Before it is closed, the remains of the deceased Servant of God must be juridicially examined. The acts must then be forwarded to Rome.

Art. II

JUDGMENT OF THE VALIDITY OF THE TRIAL

After these acts have been forwarded to Rome, the S. Congregation shall judge of the validity of the procedure, hear the promoter general, and finally give judgment. This is done in the presence of the Cardinal Prefect, the *Cardinalis ponens,* and three other Cardinals of the same Congregation, the Secretary, the protonotary apostolic, the promoter general, and the subpromoter.

Art. III

JUDGMENT ON THE HEROIC VIRTUES

The discussion of the virtues cannot be begun before *fifty years have elapsed since the death of the Servant of God.* The discussion concerns his practice of the theological virtues and of the four cardinal virtues (prudence, justice, temperance, fortitude), especially whether he possessed them in a heroic degree.

In the case of *martyrs,* the question is concerning the cause of their martyrdom, and the signs and miracles wrought. Difficulties are raised by the promoter general and answered by the advocates. Everything has to be taken down in writing. The Supreme Pontiff is informed

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of the result of the discussion, and afterwards a general congregation is held by the Cardinals of the S. Congregation, its prelates, officials, and consultors. The judgment whether the heroic degree of these virtues is verified, remains with the Pope, who commands the Secretary of the S. Congregation to issue a decree if the judgment was favorable. After the issuance of this decree the Servant of God may be called *Venerable*.

Art. IV

JUDGMENT ON THE MIRACLES

1. Besides heroic virtues or martyrdom, *miracles* wrought through the intercession of the Servant of God are required. As a rule *two* suffice, if testified to by eye-witnesses at the informative as well as at the Apostolic process. *Three* are demanded if eye-witnesses testify only at the informative trial, whilst at the Apostolic trial only hearsay evidence is presented; *four* are demanded if at both trials only hearsay witnesses and documents are produced.

2. Since *miraculous cures* are under discussion, two medical and surgical experts, who enjoy a good name and fame in their profession, must be consulted.

3. The discussion takes place at *three distinct congregations*, the last of which is a general one, held in the presence of the Sovereign Pontiff. After the miracles have been acknowledged, the doubt is formulated as follows: "*An tuto procedi possit ad beatificationem Servi Dei.*" If the answer of the consultors and Cardinals is favorable, the Pope issues a decree to that effect.

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TITLE XXV

EXTRAORDINARY TRIAL PER VIAM NON-CULTUS OR CASUS EXCEPTI

1. A positive approbation of the Roman Pontiff may be asked for the cult bestowed on Servants of God who enjoyed a tolerated cultus after the pontificate of Alexander III (1159–1181) and before the time determined by the decrees of Urban VIII (1623–1644). It may be recalled that Urban VIII strictly forbade any authorization of public worship to be granted to anyone except such whose veneration had been established from time immemorial or at least a hundred years previous to the publication of the Constitution "*Coelestis Hierusalem*" (July 5, 1634), with the knowledge and approbation of the Apostolic See or the local Ordinary. The same constitution admitted as lawful a veneration of such *Beati* or Saints based upon a special indult or decree of the S. Congregation of Rites, or the writings of the Holy Fathers and other holy men.[1] Now Can. 2125 rules that, in order to obtain the approbation of the Roman Pontiff, a trial (*processus*)[2] is required. The regulations for this trial are laid down in the following canons. The competent Ordinary for conducting the inquiry is he in whose diocese the cultus was given, or the documents were found, or who has the right of preoccupation if several Ordinaries are concerned. There-

1 Cfr. *Coll. P. F.*, n. 77.

2 We suppose, however, that the necessity of this trial must be understood in the light of the Const. of Urban VIII.

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fore the Ordinary who first summons witnesses is entitled to complete the preliminary trial.

2. The *postulator* then demands of the Ordinary:

a) to requisition the writings of the Servant of God, and

b) to institute an inquiry concerning the fame of sanctity and virtues, or martyrdom and miracles. This is required in order to answer the following questions: Whether there was in the place a constant and general fame and persuasion of the saintly life of the Servant of God, or of his martyrdom, and the reason thereof, also of the miracles wrought by his intercession; and whether this veneration still exists at present and in what manner it asserts itself.

3. Then the acts and results of the inquiry are sent to the S. Congregation, where the *dubium* is proposed: "*An signanda sit commissio introductionis causae.*"

4. After this the *litterae remissoriales* are dispatched to the diocesan judges, in order to arrange for the (delegated) apostolic process on the *casus exceptus,* the result of which is again forwarded to Rome, where the final sentence is given, investigation into the virtues or martyrdom ordered, and finally, the so-called decree of equivalent beatification (*aequipollens beatificatio*) is issued.[3]

[3] Cfr. can. 1277.

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TITLE XXVI

THE PROCESS OF CANONIZATION

1. A document establishing formal or equivalent beatification is required to introduce the process of canonization, or else an inquiry must be made as to the positive permission of the cult on the part of the Roman Pontiff.

2. To proceed to the canonization of a formally beatified Servant of God, *two miracles* wrought through his intercession after beatification, and *three* miracles in case the beatification was *aequipollens,* are required. The discussion of these miracles takes place as stated under beatification (can. 2116–2124).

3. Then the Roman Pontiff issues a decree of solemn canonization, the ceremonies and solemnities of which are those approved by the Roman Court.[1]

1 Booklets are generally distributed on such occasions, which give all the information as to the solemnities; these require costly preparation and for those admitted to witness them — *experientiâ loquimur* — a good dose of patience.

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PART III

MODE OF PROCEDURE IN CERTAIN CASES AND THE APPLICATION OF PENALTIES

This last part of the Book on Ecclesiastical Procedure treats of seven particular cases which apparently call for a formal trial (*strepitus iudicii*) but in course of time have been made the object of special legislation, and hence are considered separately.

The legislator first lays down certain general rules, which apply equally to all seven cases, unless expressly modified, and then proceeds to determine each case in particular.

GENERAL RULES

CAN. 2142

In processibus de quibus infra, adhibeatur semper notarius, qui scripto consignet acta quae ab omnibus subscribi debent et in archivo servari.

CAN. 2143

§ 1. Quoties monitiones praescribuntur, hae fieri debent vel oretenus coram cancellario aliove officiali Curiae aut duobus testibus, vel per epistolam ad normam can. 1719.

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§ 2. Peractae monitionis eiusque tenoris documentum authenticum in actis servetur.

§ 3. Qui impedit quominus monitio ad se perveniat, habeatur pro monito.

CAN. 2144

§ 1. Examinatores et consultores ac notarius debent, interposito ab initio processus iureiurando, servare secretum circa omnia quae ratione sui muneris noverint ac praesertim circa documenta occulta, disceptationes in consilio habitas, suffragiorum numerum ac motiva.

§ 2. Si huic praescripto minime paruerint, non solum a munere amoveri debent, sed alia etiam condigna poena ab Ordinario, servatis servandis, plecti poterunt; ac praeterea damna, si qua inde secuta sint, sarcire tenentur.

CAN. 2145

§ 1. In iis processibus summarie procedendum est; at duo vel tres testes sive ex officio arcessiti sive a parte inducti audiri non prohibentur, nisi Ordinarius, auditis parochis consultoribus seu examinatoribus, existimaverit partes eos inducere ad moras nectendas.

§ 2. Testes et periti, nisi iurati, ne admittantur.

CAN. 2146

§ 1. A definitivo decreto unicum datur iuris remedium, idest recursus ad Sedem Apostolicam.

§ 2. Quo in casu ad Sanctam Sedem omnia acta processus transmittenda sunt.

§ 3. Pendente recursu, Ordinarius paroeciam vel beneficium quo clericus privatus sit, alii stabiliter conferre valide nequit.

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1. In all these trials a *notary* should be employed. He should put the acts in writing and see to it that they are signed by all concerned and preserved in the archives. Although the text commands the participation of a notary, we hardly believe that the absence of a notary would invalidate the procedure. For the chief and essential point is the writing, which, as the "*Maxima cura*" clearly states, can be done by a clerk, called *actuarius*.[1] Those who have to sign their name to the documents or acts before they are filed away in the archives, are all who took an active or passive part in the trial.

2. *Admonitions,* if necessary, may be made orally or in writing. If they are administered *orally,* this must be done by the Ordinary in the presence of the chancellor, or some other official of the diocesan court, or two witnesses. If by *letter,* the latter should be registered and receipted for by the post office.[2]

Here the question arises whether the notary mentioned in can. 2142 is required. It appears to us that his presence is superfluous. For, as § 2 of canon 2143 states, the main point is to have a document to the effect that the admonition or warning was duly administered. This can be drawn up and filed equally well by the chancellor. If the notary were absent and inconveniences might follow, it would certainly be advisable and permissible to have the diocesan chancellor act as notary (can 372, § 3).

Whoever prevents the admonition from reaching him is regarded as having been admonished. Thus one who would refuse to accept a registered letter, of which the postmaster must have a receipt from the addressee, would be considered as having received it. The same is true

1 Pius X, Motu proprio of Aug. 20, 1910, § 10, n. 1 (*A. Ap. S.*, II, 641).

2 See can. 1719.

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if he would not open the letter or destroy it unread.

3. *Examiners, consultors,* and the *notary* must at the very beginning of the trial promise under oath to keep the secret.[3]

This *secret* comprises all the knowledge gained in virtue of their office, especially secret papers, the debates or discussions held at the meetings, the number of the votes, etc. If any of these officials violate the law of secrecy, they *must* be removed from office. The Ordinary *may* also, *servatis servandis,* mete out other suitable or proportionate punishments. Besides these officials are bound to restitution if any damage results from the revelation of a secret.

The *oath,* says the text, must be given *ab initio processus,* which has been declared [4] to be the first session or meeting held for each and every case (but not every session of the same case). However, since the notary appears to act at the admonition in his official capacity for this whole procedure,[5] it would be more logical to refer the beginning of the trial to the administration of the canonical warning, at least for the notary. Of course, for a merely paternal admonition this oath is not required. The *secret* is the official one, or *secretum commissum,*

3 The *formula* for taking this oath (published in the *A. Ap. S.,* IV, 142) is as follows: "*Ego N. N. examinator (vel parochus consultor) synodalis (vel pro-synodalis) spondeo, voveo ac iuro munus et officium mihi demandatum me fideliter, quacumque humana affectione postposita, et sincere, quantum in me est, executurum: secretum officii circa omnia quae ratione mei muneris noverim, et maxime circa documenta secreta, disceptationes in consilio habitas, suffragiorum numerum et rationes religiose servaturum; nec quidquam prorsus, occasione huius officii, etiam sub specie doni, oblatum, nec ante nec post, recepturum. Sic me Deus adiuvet et haec sancta Dei Evangelia, quae meis manibus tango.*"

4 S. C. Consist., Feb. 15, 1912 (*A. Ap. S.,* IV, 141): "*singulis vicibus, in prima sessione, sub poena nullitatis actorum.*"

5 *Maxima cura,* can. 1, says: "*Monitio . . . ut peremptoria sit et proximae amotionis praenuntia, fieri ab Ordinario debet, non paterno dumtaxat more, verbotenus et clam omnibus; sed ita ut de eadem in actis Curiae legitime constet.*"

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which is based upon an explicit or implied contract, and may safely be styled "privileged knowledge." Therefore, *in general,* it comprises every kind of knowledge gained in virtue of that office; *especially,* as the text says, all that proximately concerns the case under discussion.

That the obligation is a grave one (*sub gravi*) is evident not only from the importance of the official secret itself, but also from the *penalties threatened to violators.*

1.° The Ordinaries are commanded to punish and therefore are not at liberty to apply or not to apply this penal sanction. They must (*debent*) *remove the transgressors.* But when? As soon as the violation is proved, or as soon as the bishop is morally certain that an examiner or consultor or notary has revealed a secret. No formal procedure is required,[6] otherwise an indefinite proceeding would ensue.

2.° Other penalties *may* be inflicted. Here no obligation is stated, but it is left to the prudent judgment of the Ordinary. In case he should decree further penalties, besides removal, he is bound by the conditions of common law required for inflicting certain punishments.[7] This is the meaning of *servatis servandis.*

3.° There is a *moral* obligation to *indemnify the injured party.* If we say moral obligation, we do not mean to exclude justice, nor to deny that juridical means could be employed, but use the phrase in order to convey the idea that conscience itself dictates the obligation. The amount of indemnification is guaged by the damage done. The manner of indemnification depends on the circumstances of each case. Broadly it may be said that the Ordinary should decide upon the measure and mode of

6 F. Cappello, *De Administrativa Amotione Parochorum,* 1911, p. 86 f.

7 Cfr. can. 2222 f.; also 2291, 2297.

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indemnification. If a criminal case ensues, it must be determined according to can. 1935 ff. All of which goes to show that officials should keep the secret strictly, in order not to injure anyone's good name, and avoid being impeached.

4.° Can. 2145 rules that ***summary proceedings*** should be employed in the trials now under discussion. However, two or three witnesses, either called officially or by the party, may be admitted, unless the Ordinary, upon consultation with the consultors or the examiners, should come to the conclusion that these witnesses are simply brought to delay the trial.

What summary proceeding involves is indicated in can. 1840 f. It is evident that, though it is a summary trial, the following canons must be followed. ***Witnesses and experts must all be sworn in,*** otherwise they cannot be admitted. It is not stated what kind of witnesses are to be called. Therefore can. 1756–1758 should be consulted. It is but natural that the witnesses mentioned in can. 2143, § 1, should be of clerical rank, although laymen (*sexus virilis*) are not debarred, provided they are trustworthy and of good reputation.

5.° No appeal, but only a ***recourse*** to the Holy See (S.C. Concilii) is open from a definitive sentence in any of these trials. If recourse is had, all the documents must be forwarded to Rome. This recourse must be treated like an appeal, of which can. 1881 says that it should be made within ten days by notifying the judge who has given the sentence. Pending the recourse, the Ordinary ***cannot validly*** confer the parish or benefice of which the clergyman has been deprived on another, except temporarily. Therefore no permanent appointment can validly be made pending a recourse. This follows from the very nature of the case.

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TITLE XXVII

PROCEEDINGS FOR THE REMOVAL OF IRREMOVABLE PASTORS

Our text is part of the well-known decree "*Maxima cura,*" which was issued by the S. Consistorial Congregation, Aug. 20, 1910, at the special request of Pius X. The full title of said decree is: "*Decretum S. C. Consistorialis de amotione administrativa ab officio et beneficio curato.*"[1] The formal law established by this decree changed the former procedure in removing pastors from their parishes. The intention of the lawgiver was, on the one hand, to formulate more accurately the already existing but scattered decisions which in the course of a century had emanated from the Roman Court for a more expedient and less obnoxious removal of inefficient pastors, and, on the other hand, to safeguard and promote the welfare of the Church (*salus reipublicae suprema lex est*).[2] There is no doubt that the so-called *desservants,* who were introduced by the organic articles of Napoleon I, influenced the ecclesiastical legislation in changing the application of former laws. For these were based on the old view of the beneficiary system, which regarded a pastor as so closely connected with the benefice itself, that it seemed a hazardous task to remove him. It is quite true that some allusions to a change or transfer

1 Cfr. *A. Ap. S.*, II, 636 ff.
2 See the preface to the decree; also Hilling, *Die Amtsenthebung der Pfarrer im Verwaltungswege,* Mainz, 1911, p. 2 ff.

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from one place to another are found in the Decretals; but a permanent removal, such as the "*Maxima cura*" and our Code contemplate, cannot be discovered in the old law.[3]

This is quite intelligible if we recall that canonists established two kinds of perpetuity: one called *objectiva*, attached to the benefice, and the other one styled *subjectiva*, following the person of the holder. This double perpetuity and the feudal idea of a benefice rendered a pastor irremovable, unless criminal procedure or privation of benefice was set in motion.

A decisive step, which paved the way for the present discipline, was taken by the Council of Trent, when it established a kind of temporary removal by giving the bishops power to appoint vicars or coadjutors to illiterate and inexperienced pastors.[4] A further development was brought about in the nineteenth century, in consequence of the appointment, in France and Belgium, of *desservants*, who were pastors according to ecclesiastical law, but according to the Napoleonic Code mere ministers dependent on the civil prefects. It cannot be denied that conditions have changed decidedly and that the "*salus reipublicae*" really requires a more up-to-date method of providing competent and efficient pastors, making the office more prominent than the benefice. Hence it is not surprising that the German Bishops prepared a *postulatum* at the Vatican Council, asking for an involuntary transfer of pastors, or a dismissal with a sufficient pension, if the pro-synodal examiners pronounced a sen-

3 C. 5, X, III, 19. Card. Gennari (*Sulla privazione del beneficio e sul processo criminale dei chierici*, 1905, p. 215 f.) thinks he has found allusions to administrative removal, but the decisions of the S. C. C. up to the middle of last century only mention transfer or privation (see Richter, *Trid.*, p. 119). "*Potuit prius inveniri*," a famous Roman theologian would say.

4 Sess. 21, c. 6, *de Ref.*

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tence of unfitness against them.[5] Although this *postulatum* could not be acted upon on account of the troublesome events in Rome, the Codification Commission in 1904 took up the subject. The result of its debates was laid down in the "*Maxima Cura*," a part of which has entered the Code. The decree also applied to the United States, as was formally declared to the late Apostolic Delegate, Msgr. Falconio, on March 13, 1911, by the Consistorial Congregation.[6]

It is not necessary to defend this new legislation. Only one remark may be added. The pastors have no reason to complain of the change, because the law guarantees orderly procedure and requires canonical reasons, which the bishops are not allowed to overlook or stretch beyond due limits, thereby binding the Ordinaries to the common law and protecting the pastors against arbitrary removal. The bishops cannot complain, because they have the law on their side and are sustained in the exercise of their pastoral right. The faithful have no grounds for complaint because the supreme law, namely, their own welfare, is fully safeguarded and promoted.

Note that this removal must not be confused with privation from office or benefice, because privation is strictly an ecclesiastical penalty, which requires the formalities of criminal procedure, and therefore presupposes a crime in the proper sense of the word, proved and declared.

REASONS FOR REMOVAL

CAN. 2147

§ 1. Parochus inamovibilis a sua paroecia amoveri potest ob causam, quae ipsius ministerium, etiam citra

5 *Coll. Lac.* V, II, 875; Granderath-Kirch, *Geschichte des Vatik. Konzils*, 1903, I, 444.

6 *Eccl. Review*, Vol. 44, 590.

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gravem suam culpam, noxium aut saltem inefficax reddit.

§ 2. Hae causae sunt praesertim quae sequuntur:

1.° Imperitia vel permanens infirmitas mentis aut corporis, quae parochum suis muneribus rite obeundis imparem reddit, si, iudicio Ordinarii, per vicarium adiutorem bono animarum provideri nequeat ad normam can. 475;

2.° Odium plebis, quamvis iniustum et non universale, dummodo tale sit, quod utile parochi ministerium impediat, nec brevi cessaturum praevideatur;

3.° Bonae existimationis amissio penes probos et graves viros, sive haec oriatur ex levi vivendi ratione parochi, sive ex antiquo eius crimine quod nuper detectum eximatur iam poena ob praescriptionem, sive ex facto familiarium et consanguineorum quibuscum parochus vivit nisi per eorum discessum bonae parochi famae sit satis provisum;

4.° Probabile crimen occultum, parocho imputatum, ex quo Ordinarius prudenter praevidet magnam in posterum oriri posse fidelium offensionem;

5.° Mala rerum temporalium administratio cum gravi ecclesiae aut beneficii damno, quoties huic malo remedium afferri nequeat sive auferendo administrationem parocho, sive alio modo, quamvis aliunde parochus spirituale ministerium utiliter exerceat.

An irremovable pastor may be removed from his parish for any reason which renders his ministry harmful, or at least inefficient, even though there be no grievous fault implied on his part.

What an irremovable pastor is has been stated in can. 454, to which we may add the decree of the S. C. Con-

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sistorialis, Aug. 1, 1919, where it is stated that three things are required to establish a parish: (a) a decree or order of the Ordinary assigning the boundaries, (b) a parochial residence, and (c) a sufficient endowment for the maintenance of the pastor and of divine worship. But to make a parish irremovable, it is furthermore required that a declaration be made to that effect, at least negatively; for the Ordinary may, for just reasons, declare it to be a *removable* parish. This declaration is absolutely necessary, because otherwise, according to can. 454, § 3, the parish is presumed to be an irremovable one.[7] We do not, however, wish to deny that a former declaration made according to the IIId Plenary Council of Baltimore (n. 32 ff.) would be sufficient.[8] Hence where there are irremovable pastors to the amount of one-tenth of all the pastors of the diocese, this custom may be followed, unless the Ordinary wishes to declare still other parishes as irremovable, which he may do without asking the Holy See.

The text says that the removal may be made for reasons which do not imply grievous guilt (*citra culpam gravem*). Guilt presupposes a transgression, and grievous guilt a violation of a serious law, and, since we are speaking of the law, it means an external violation, no matter what the theological guilt may be. Here the difference between removal and privation as stated above becomes clearly manifest. All the five reasons stated under § 2, really may involve either no guilt at all or only a slight fault, although some may entail grievous guilt.

However, these reasons must bear upon the *sacred ministry*, or rather, they must affect it in such a way that

[7] *A. Ap. S.*, XI, 346.
[8] See Vol. II, p. 519 f. of this Commentary.

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its exercise becomes either hurtful or ineffective (*noxium vel saltem inefficax*). These two adjectives, which substantially occur in the "*Maxima Cura,*" are a general indication of the five following reasons. "Hurtful" involves more of personal cooperation, whilst "inefficient" or "ineffective" points to facts over which the pastor has no control, or in regard to which he might plead "not guilty."

§ 2 of can. 2147 then enumerates (not *taxative,* but *demonstrative*), five reasons which chiefly (*praesertim*) may necessitate a removal. That the enumeration is to be taken *demonstrative* only, *i.e.,* as a proximate, not exclusive enumeration, the word *praesertim* sufficiently proves.[9] These reasons are:

1. *Inexperience or permanent mental or bodily infirmity which render the pastor incapable of discharging his obligations properly,* provided, however, that the Ordinary is convinced that the welfare of the souls in his charge cannot be provided for by the appointment of a coadjutor, according to can. 475.

This reason comprises the first three of the "*Maxima cura,*" which document is, therefore, helpful for the interpretation of the Code.

a) *Imperitia* is not identical with ignorance, for the latter signifies defect or lack of knowledge, whilst inexperience rather means incapacity for, or inability to exercise, the sacred ministry. A priest may be a good theologian, but a poor manager. Ignorance is now-a-days hardly conceivable among those who have passed "*laudabiliter*" through a regular seminary course. Hence *imperitia* rather concerns the method of handling a parish; lack of tact and awkwardness in the confessional or pulpit, in dealing with the parish officials, etc. This

[9] The reasons in "*Maxima Cura*" were understood *taxative.*

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greatly depends on the place and surroundings.[10] A boorish priest may be a scandal to city people, but create little disturbance in a distant country place. To inexperience, of course, belong ignorance of the language of the country, and an offensive lack of familiarity with pastoral and moral theology.

b) *Mental infirmity* here comprises all kinds or forms of *insanity,* which is described in "*Maxima cura*" as incurable, or, at least, of the kind which is always apt to recur, and which causes loss of esteem and authority even after the recovery of the pastor. Serious fatuity, stupidity, or weakmindedness, also belong hither.

c) *Bodily infirmity* includes all diseases which are of a serious and lasting character. Just how long an infirmity, either mental or bodily, has to last in order to render one unfit for the sacred ministry, is not stated in our text, except by the word *permanens,*[11] which may be rendered by habitual, durable, or incurable. A physician's verdict is required, but we do not, of course, exclude a miraculous cure.

Very noticeable is the *clause* added to all three reasons: *if a coadjutor should not be able to provide for the welfare of the souls.* An accurate rule that would tell us when the weal of the parish requires the appointment of a new pastor *in casu,* cannot be established. For much depends upon the qualities of the coadjutor and the condition and attitude of the parish. At any rate, since the clause sets up this condition, the Ordinary must try a coadjutor.

2. The second reason is *popular hatred, even though unjust and not general,* provided it is such as to prove

10 Hilling, *l. c.,* p. 12.

11 Can. 155 and 465 prescribe a six months' term for provision, which, however, may be prolonged in case of pastors.

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an obstacle to the pastor's useful ministry and is not likely to cease within a short time. *Odium* is more than aversion, and must manifest itself by outward signs, for instance, insults, demonstrations, injuries done to parish property. Serious and prolonged newspaper attacks may also betray a sufficient degree of hatred. Such hatred is *unjust* if the pastor has given no plausible or solid reason for it; it is *just,* if the pastor has caused the hatred, either by imprudence or imputable sinful provocation. The text admits any kind of hatred. It is *not universal* if only a portion of the parish is hostile. One or two families, or a few individuals should not cause alarm if the parish is of any size. However, one influential family with a widespread relationship may create a rather extensive hatred. In that case the condition added in our paragraph would solve the question.[12] For this hatred is supposed to impede the useful exercise of the sacred ministry and to be of some duration. The sacred ministry *would be impeded* if the reception of the sacraments and attendance at divine service would decrease considerably, if the financial condition of the parish would be seriously imperilled and factions would arise. The *duration* would be of from six months to a year. It may be added that the hatred must be directed against the *person of the pastor,* not against religion as such.

3. The third reason is *loss of esteem among righteous and serious-minded men.* Esteem is paid to the office and authority of the pastor, and the loss of it necessarily renders the exercise of the sacred ministry ineffective, if not detrimental. The persons whose esteem the pastor has lost must be *men of character,* not garrulous women, even though of the "upper" class.

12 Cappello, *l. c.,* p. 37.

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The text then states how this loss may be brought about.

a) It may arise from the pastor's conduct. The phrase, "*ex levi vivendi ratione parochi,*" is wider than the corresponding passage of the "*Maxima cura,*" which reads: "*sive haec procedat ex inhonesta aut suspecta vivendi ratione parochi.*" The Code simply speaks of levity of conduct, which must be interpreted in the light of canons 138, 140, and 142.[13] Custom and actual conditions should also be taken into consideration.

b) The loss of esteem may be caused by the belated *discovery of a former crime which is no longer punishable by reason of prescription.*[14] Concerning prescription of crimes and criminal action see can. 1703–1705. The civil-criminal law, too, must be consulted; for the priest's good name is here concerned.

c) Lastly, a pastor may lose the esteem of his people through the conduct of his *dependents and blood relations who live with him.* This is a rather obscure text. The reading itself is not quite certain, whether *familiarium* or *familiarum;* the edition of Gasparri reads *familiarium,*[15] which includes servants who live in the parsonage. *Consanguinei* here includes blood relations and *affines.* Therefore if a *factum* — which is a very wide term — of a scandalous nature has been perpetrated by one of these persons, which would compromise the pastor, the obnoxious person or persons should be dismissed from his service or household. But it may be

13 See Vol. II, p. 86 ff. of this Commentary.

14 Whether this goes back to the time before ordination is not clearly stated, but seems implied, because the loss of esteem may follow even such crimes as were committed before ordination if the pastor is well known in the place.

15 There seems little doubt that the correct reading is *familiares,* not *familiae,* because the latter are included in the term *consanguinei.*

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that dismissal would cause greater disturbance, in which case removal might be decreed.

4. The fourth reason is a *probable crime imputed to the pastor, which, though secret, in the bishop's judgment may create great scandal among the faithful.* On crime and its public or occult nature see can. 2195–2197. The text adds "*probabile,*" a probable crime, *i.e.,* one that has at least the semblance of having been committed by the pastor and must be imputed to him. A great deal depends on the persons who know about the crime. Then the offence the people would take at such a discovery must be really great, and not be limited to the one or other fanatic or puritan. Some people have a very strange idea of the Decalogue. But where honesty and justice are involved, people are justly sensitive. The judgment must be left with the bishop.

5. The fifth reason *is faulty administration of the temporalities, to the great damage of the church or benefice.* This is *culpable* if it involves a misappropriation or embezzlement of public funds, *i.e.,* funds belonging to the church or diocese, diocesan collections, etc., or risky speculations, which are a sort of illegal gambling. It may not involve moral fault, but simply result from *financial incapacity* or inability to keep books and collect the revenues of the church or benefice. The faultiness of the administration is to be reckoned according to the gross amount of the revenues involved and the amount lost, for the text says, "*cum gravi damno.*"

But this reason is a limited one, as removal is indicated only *if no other remedy is left to counteract the evil and the temporal administration cannot be taken away from the pastor in some other way.* Hence the bishop may entrust the administration of the temporalities of the parish to the trustees, or to the curates or

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assistants or *alio modo,* by giving the delinquent pastor practical lessons in administration or sending him an auditor once in a while, teach him the necessity of keeping his books properly. All these means are applicable even in cases where the pastor *performs his spiritual duties properly.* For temporal loss often entails spiritual disadvantages, since it may burden the church or even bring law suits upon the pastor, the trustees, or the diocese.

INVITATION TO RESIGN

Can. 2148

§ 1. Quoties, prudenti Ordinarii iudicio, in unam ex causis de quibus in can. 2147 parochus incidisse videatur, ipsemet Ordinarius, auditis duobus examinatoribus et veritate gravitateque causae cum eis discussa, parochum scripto vel oretenus ad paroeciae renuntiationem intra certum tempus faciendam invitet, nisi agatur de parocho vitio mentis laborante.

§ 2. Invitatio, ut acta valeant, continere debet causam quae Ordinarium movet et argumenta quibus ipsa innititur.

Can. 2149

§ 1. Si parochus intra praestitutos dies nec renuntiet nec dilationem postulet neque causas ad amotionem invocatas oppugnet, Ordinarius, postquam constiterit et invitationem ad renuntiandum, rite factam, parocho innotuisse et ipsum quominus responderet legitime impeditum non fuisse, eum statim a paroecia amoveat, quin teneatur praescripto can. 2154.

§ 2. Quod si non constet de superius indicatis duobus adiunctis, Ordinarius opportune provideat aut iterando invitationem ad renuntiandum aut prorogando tempus utile ad respondendum.

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After setting forth the reasons which may advise a removal, the Ordinary is told how to proceed. First he shall invite the delinquent pastor to resign. This invitation may produce no effect, because the pastor does not answer, or it may produce the desired effect, *i.e.*, cause him to resign.

If the pastor refuses to resign and offers reasons for his refusal, the way is opened to legal procedure proper, as seen in can. 2151 ff.

1. Whenever the Ordinary is convinced that a pastor is guilty of mismanagement for one of the reasons stated in the preceding canon, then he himself, or his Vicar-General,[16] must proceed as follows:

a) He must *call in two of the examiners,* either synodal or pro-synodal, and hear their *advice,* though he is not bound by their consent (can. 105, n. 1.°).

b) With these two examiners he should *discuss* the truth and seriousness of the charges made against the pastor, because discussion may remove doubts and clear up the case.

c) After the discussion he shall *invite the pastor to resign.* This invitation may be made orally or in writing, but should always be accompanied by the indication of the term within which the resignation is expected. Although our text does not prescribe that the *oral invitation* be made in the presence of the chancellor, or of some other diocesan official, or of two witnesses, yet, since it amounts to an admonition, it seems to us that can. 2143, § 1, 2 must be applied.[17] A *written* invitation to resign must be sent by registered mail.

d) This invitation may be *omitted* only in case the

16 According to the "*Maxima cura,*" can. 32, the Vicar General needed a special mandate; but the Code omits this condition.

17 "*Maxima cura,*" can. 10, § 1, strictly required it.

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pastor suffers from a mental defect which in the "*Maxima cura*" (can. 9) is simply styled "insanity." But the term *vitium mentis* is somewhat broader than insanity. It may include habitual melancholia (this is now regarded by scientists as a form of insanity) and even the so-called *determinatio ad unum,* which is a mental attitude rendering the person incapable of reasoning in any other way than along the lines of a certain preconceived idea. However we believe that the legislator means insanity in all its species. Of course the Ordinary may not presume that such a condition exists, but must have definite proof, either in the form of a medical certificate or from trustworthy witnesses.

e) In order to render not only the invitation itself, but all the following acts, juridically *valid,* the Ordinary is bound to state in the invitation the *reason* that prompted him to issue the invitation and the *evidence* which supports the reason.

The "*Maxima cura*" contains some more elaborate instructions, which, though omitted in our text, do not militate against it, and may, therefore, find a place here; with due regard to the fact, however, that they do not affect the validity of the proceedings. If the crime that prompted the invitation is secret (*crimen occultum*), and the invitation is in writing, the reason for the invitation is to be stated only in general terms,[18] for instance (can. 2147, § 2), that the respective pastor has exercised the sacred ministry less effectively and usefully than was expected. Then when the pastor appears personally, the specific reason and the evidence may be communicated to him orally, in the presence of one examiner, who at

[18] The reason for this general statement is to keep the crime secret and to prevent the impeached pastor from devising excuses or destroying evidence; Hilling, *l. c.*, p. 23.

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the same time acts as secretary, and takes down the minutes. In communicating the evidence orally, great care must be taken to keep secret the names of the accusers and witnesses, especially if these persons demand secrecy, or if circumstances are such that they have reason to expect vexations. Papers referring to the crime should not be communicated in writing whenever their communication is apt to cause scandal to the faithful, or breed quarrels and contentions because other persons are involved.

But even the oral communication of such papers must be made very cautiously if inconvenience is to be feared.

As may be seen, these observations of the "*Maxima Cura*" are intended to safeguard the good name of others and to avoid unnecessary publicity.

2. If the *pastor ignores the bishop's invitation* to resign within the appointed time,[19] *i.e.*, if he neither resigns, nor asks for delay or dilatory terms, nor rebuts the reasons alleged,— what is the Ordinary to do? He must make *two inquiries,* one touching the juridical formalities, and the other concerning a mere fact; to wit, he must inquire whether, and be morally certain that,

a) The invitation to resign has been properly made and reached the pastor and that

b) The pastor had no lawful excuse for not answering the same.

As to a), it is evident that if the oral invitation was made according to can. 2143, § 1, 2, there is no difficulty to prove the juridical fact and formality; the same is true if it was made in writing, *i.e.*, by registered letter with return receipt. Therefore we believe that what was said above, under can. 2148, should be adhered to.

19 "*Maxima cura,*" can. 10, § 4, grants ten days; but the Code leaves it to the Ordinary to fix the time.

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As to b), a legitimate excuse for not answering might be advanced, for instance, absence, sickness, or ignorance of the invitation. However, the last-named reason could hardly be accepted in case of a registered letter.[20] Neither should the bishop be too hasty in refusing plausible excuses, for accidents sometimes happen over which individuals have no control. But if the bishop is really satisfied in conscience that the invitation was duly made and reached its destiny, and that no legitimate excuse was offered for not answering it, he may *immediately proceed to remove the pastor,* and if he does so (can. 2152, § 2), should inform him of his decision. The *pastor* on his part, because of his contempt or stubbornness, *forfeits* the *prerogatives* granted in can. 1254.

If, on the other hand, either the formal invitation was defective, or the pastor advanced a lawful excuse for not answering it, the Ordinary shall make *opportune provisions.* These consist in either repeating the invitation to resign or prolonging the time for answering the charges or reasons given in the invitation, either orally or in writing.

RESIGNATION ACCEPTED

CAN. 2150

§ 1. Si parochus paroeciae renuntiet, Ordinarius paroeciam ex renuntiatione vacantem declaret.

§ 2. Potest vero parochus, loco causae ab Ordinario invocatae, aliam ad renuntiandum afferre sibi minus molestam vel minus gravem, dummodo vera et honesta sit, ex. gr., ut obsequatur Ordinarii desideriis.

§ 3. Renuntiatio fieri potest non solum pure et

20 Though it may happen that interested persons in the household of the pastor signed the receipt and kept or destroyed the letter.

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simpliciter, sed etiam sub conditione, dummodo haec ab Ordinario legitime acceptari possit et reapse acceptetur, et firmo praescripto can. 186.

If the pastor resigns his parish, the Ordinary shall declare the same *vacant by resignation.* This fact must be expressly mentioned because of the formalities required for the bestowal of the vacant parish on another, according to can. 184–187, and also on account of can. 1485. Formerly no office or benefice made vacant by resignation could be bestowed on relations of the *resignans;* [21] but the Code is silent on this condition.

A pastor who is asked to resign, may do so for another reason than that set forth by the Ordinary; this reason may be less offensive or irksome or aggravating, but it must be true and honest. Such a reason is, "to obey the wishes of the Ordinary." He may also simply say: "For reasons of my own," or "For the welfare of the parish," etc.

The *resignation may be made purely and simply, or conditionally,* provided the Ordinary is entitled to accept, and does accept, the conditions. A resignation is *pure and simple* if no simoniacal or other condition enters into the transaction; *conditional,* if a clause is attached in the act of resignation. Such a condition would be present if the pastor resigned in favor of a certain priest, which is inadmissible.[22] Neither can any resignation be admitted on the condition of *regressus, ingressus, or aggressus* (see can. 1486). Hence there remains only exchange (*causa permutationis*). A resignation conditioned upon this clause is called *resignatio sub pensione.*

Both kinds are tacitly admitted in this case by reason

21 Wernz, *Ius Decret.*, II, n. 499.

22 See the commentators on lib. , tit. 9, *Decretal., v. g.*, Reiffenstuel, Wernz, *l. c.*, II, n. 493 ff.

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of can. 2154 and under the conditions set forth in this title. What other conditions might enter it is hard to say, except they be temporary, for instance, to leave the pastor in his place for a certain time. But the Code has touched even this possibility in can. 2156.

Resignation, lastly, to be valid, must be made according to can. 186, *i.e.*, either in writing or orally, in the presence of two witnesses, and be accepted by the Ordinary.

REBUTTAL OF THE PASTOR

CAN. 2151

Parochus, si oppugnare velit causam adductam in invitatione, potest dilationem ad probationes afferendas postulare, quam Ordinarius pro suo prudenti arbitrio concedere potest, dummodo ne sit cessura in detrimentum animarum.

The pastor may *oppose the reason* alleged in the invitation if he is convinced that it has no foundation except gossip. In that case he is entitled to demand *dilatory terms* — the extent of which is not determined in the Code [28] — in order to prepare his defence. Whether and how long delay may be granted depends on the Ordinary's judgment, which, however, should be guided not only by charity towards the pastor, but also and chiefly by consideration for the *bonum commune*.

PROCEEDING OF THE ORDINARY

CAN. 2152

§ 1. Rationes a parocho contra invitationem adductas Ordinarius, ut valide agat, auditis iisdem

28 "*Maxima cura*," can. 12, allowed from 10 to 20 days.

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examinatoribus de quibus in can. 2148, § 1, perpendat, approbet aut reiiciat.

§ 2. Decisio, sive affirmativa fuerit sive negativa, parocho significetur decreto.

CAN. 2153

§ 1. Contra decretum amotionis potest parochus intra decem dies recursum interponere apud eundem Ordinarium, qui, ne invalide agat, debet, auditis duobus parochis consultoribus, novas allegationes ab eodem parocho intra decem dies ab interposito recursu producendas, simul cum rationibus primo allatis, examinare, approbare aut reiicere.

§ 2. Parochus potest eos testes inducere ad normam can. 2145, § 1, quos prima vice se inducere non potuisse probaverit.

§ 3. Decisio decreto nota parocho fiat.

CAN. 2154

§ 1. Amoto parocho Ordinarius, examinatoribus vel parochis consultoribus, qui partem habuerunt in amotione decernenda, in consilium adscitis, pro viribus consulat sive translatione ad aliam paroeciam vel assignatione alius officii aut beneficii, si ad haec idoneus sit, sive pensione, prout casus ferat et adiuncta permittant.

§ 2. Ceteris paribus, in provisione favendum magis renuntianti quam amoto.

1. The pastor then shall duly prepare *his defence,* for which purpose he may produce two or three witnesses, according to can. 2145, and also papers referring to the

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case. Here, of course, much depends on the reason that prompted the invitation. In case of mental or bodily infirmity, the physician's verdict should be procured under affidavit. Concerning the hatred of the people, we believe local inspection, either by the Ordinary or by the examiners, would be the proper way, otherwise the pastor or bishop might have to call the whole parish. As to the loss of esteem, the men who testify to it must be examined as to their character, and it is also necessary to prove the approximate number of those in whose eyes the pastor's reputation has greatly suffered. In case of an occult or secret crime, the main investigation should turn about the probability of divulgation and the means of proving it. In that case a clever and conscientious lawyer and a detective might render good services. Finally, in case of mal-administration, the account books may be submitted to an auditor assisted by the trustees and the diocesan board. We add that, if the matter is of a delicate nature, little writing should be done and the examination carried on with as few witnesses as possible.

2. After the defence has been produced, or if it is made orally, during the hearing, the Ordinary, *for valid procedure,* is bound to call the *two examiners, in order to hear their advice.* As said above, the examiners should, or at least may, be present when the oral defence is made. After that the pastor, who may be represented by proxy,[24] shall retire, in order to permit the Ordinary and the two examiners to discuss the case freely.

The *decision is left entirely to the Ordinary,* who is not bound by the consent, much less, of course, by the advice, of the examiners. We draw special attention to

24 "*Maxima cura,*" can. 18, 2, admits proxy, who, however, must be a priest approved by the bishop for that purpose.

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this fact because the "*Maxima cura*" (can. 19) requires secret balloting, which is no longer needed now.

The *result* of the bishop's decision may be either positive or negative, *i.e.*, he may either *accept* the defence of the pastor as sufficient to clear him or he may *reject* it as insufficient. In either case the decision must be communicated to the pastor in the *form of a decree*. The text may be usefully complemented from can. 20 f. of the "*Maxima Cura*," which says that if the decree is *negative*, the reason for removal may be stated in general terms, as, *e.g.*, the welfare of souls. Special or particular reasons may be alleged if the Ordinary deems it expedient and feasible; but mention must be made of the invitation tendered to resign, of the counterplea of the pastor, and of the vote of the examiners. However, this last addition must now be formulated differently, for instance, having heard the advice of two examiners according to can. 2152, § 1. An *affimative* decree, *i.e.*, one admitting the defence of the pastor, must also be communicated, but in this case the Ordinary should not omit to add wholesome admonitions and precepts, which may serve for future procedure.

3. The next stage in the procedure is a possible recourse on the *part of the pastor*. Note the term *recursus*, which is not equivalent to appeal, and consequently does not *suspend* the effect of the decree. The proceeding is as follows:

a) The recourse against removal must be lodged within *ten days* from the date of receiving notice of the decree.

b) The recourse is to be presented to the *same Ordinary* who issued the decree of removal. If he should have gone out of office in the meantime, either by death, resignation or transfer, etc., the recourse may be sent to the

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vicar-capitular (administrator). However, we believe that in this case the equitable time should be suspended until the new Ordinary's arrival, unless the scandal is too great.[25]

c) Then the Ordinary grants the pastor *another ten days,* within which he may produce his new defence. Thus the pastor has twenty days in all from the date when he receives the notice of his removal, in order to prepare his second defence.

d) The Ordinary must call in two *pastors who are consultors,*[26] in order to proceed *validly* in the examination of the new allegations. These new allegations may be accompanied by new *witnesses,* whom the pastor could not produce at the first trial. But the pastor must prove that the new witnesses could not be brought to the witness-stand before. To prove that, it would be sufficient for the witnesses to affirm it, because they are under oath according to can. 2145.

Together with these two consultors the Ordinary shall discuss the case, as he did before with the examiners. However, in order fully to enlighten the consultors, the allegations and depositions made in the first pleading in presence of the examiners must again be examined. The consultors have no decisive vote.

e) Then comes the *decision, in the form of a decree,* wherein the presence of the consultors together with the reasons in general (as above) is mentioned.

f) Finally this *decree* must be *communicated to the pastor.*

3. Supposing now that the *decree insisted on removal* and was duly notified to the pastor, it appears but logical that the parish is declared vacant, at least *de iure;* al-

25 Our view is based on can. 436: *sede vacante nihil innovetur.*

26 Concerning these, see can. 385 ff.

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though no declaration to that effect is required by the Code. But there can be no doubt that from the moment the pastor has received the decree of removal he is *no longer pastor*. The consequences are too serious not to be mentioned. The parochial rights, the ordinary jurisdiction for hearing confessions, the claim to the revenues cease from the moment of removal.[27] Therefore, in order to remedy these inconveniences, the decree of removal should contain a clause to the effect that the pastor is left in the enjoyment of all his pastoral rights until the new pastor or temporary vicar has arrived, or until further notice. In case of doubt or probable error, can. 209 may be applied. This premised, after the removal has been decreed and the decree communicated, the Ordinary must proceed as follows:

a) If the invitation was accepted or obeyed after the first plea for defence, without recourse, *the examiners* must be called to a meeting, the purpose of which is to provide for the removed pastor;

b) If recourse was had, and a second defence is therefore required, the *consultors* must be called in for the same purpose;

c) The *debate* concerns the mode of providing for the removed pastor, either by transfer to another parish, or by appointment to another office or benefice, provided he is fit for any of these places, or by a pension. The correct mode must be determined by the nature of the case and the circumstances.

d) All other things being equal, one who has *resigned is to be favored* more than one who was removed.

The Code leaves it to the prudent judgment of the Ordinary how to provide for the removed pastor. Yet,

27 See can. 462 f.; can. 873, § 1; can. 1095 can hardly be applied here.

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though not juridically, at least morally, he is bound by various conditions. For besides the advice of the examiners or consultors he should follow this dictate: "*pro viribus consulat,*" as far as lies in his power, he should make provision for the pastor who has been removed. He must take into consideration the *fitness* of the priest for the respective place (parish, office, benefice). Furthermore he should weigh the case decided, because the five reasons advanced in can. 2147 are not all of the same nature (*prout casus ferat*). Besides, the circumstances of the parish, of the pastor (his health, good name, etc.), and of the diocese should also be taken into account (*prout adiuncta permittant*). After having weighed all these conditions, if there are several competitors for a parish, office or benefice, one who has resigned is to be preferred to one who was removed: *ceteris paribus,* or, as the "*Maxima cura*" (can. 257, § 3) says, "*in pari conditione.*" For if the resignee is not fit for the place, the Ordinary cannot conscientiously assign it to him.

The next question that arises is, whether the bishop is bound to give the resignee a *better parish* than the one he has resigned. But what is a better parish? The former law considered a parish with a richer income (*pinguiores reditus*) a better parish. The "*Maxima cura*" (can. 27, § 1) simply distinguishes between parishes of inferior and superior rank or order,— which admits of a wide interpretation and the play of personal tastes. For to some a small city parish seems preferable to a large country parish. Therefore, with the exception of a cathedral or collegiate parish, we believe that the old view of a richer income is still a safe index of superior rank. Besides, the irremovable character should be considered. This premised, the answer to the foregoing

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question is that a pastor who has resigned voluntarily for reasons which he himself has not brought about (for instance, on account of hatred), should be promoted to a better parish, or one of equal rank and income, provided he is fit for it, and the place is open, or the Ordinary can give it to him without inconvenience. Another question connected with this canon is this: Has a resigned or removed pastor *a right to demand a pension* instead of accepting another parish, or office, or benefice? in other words: Is he entitled to choose between a parish, office, or pension? Neither the wording of the "*Maxima cura*" [28] nor the text of the Code grants such a right. Of course, if the bishop leaves him the choice, the pastor is entitled to choose what he pleases. But there are very few, if any, dioceses in our country which could furnish pensions sufficient to provide for all cases of resignation or removal. If, then, the pastor refuses another place, offered to him by the Ordinary, the latter is not obliged to provide him with a pension.

Concerning pensions attention must be called to can. 1429, which is not affected by canon 2154.

AFTER REMOVAL

CAN. 2155

Negotium novae provisionis parochi amoti potest Ordinarius sive ipso amotionis decreto sive postea, quamprimum tamen, expedire.

CAN. 2156

§ 1. Sacerdos a paroecia amotus debet quam primum liberam relinquere paroecialem domum, et omnia quae

[28] Thus Hilling, *l. c.*, p. 32.

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ad paroeciam pertinent novo parocho vel oeconomo ab Ordinario interim deputato tradere.

§ 2. Si autem de infirmo agatur qui e paroeciali domo sine incommodo nequit alio transferri, Ordinarius eidem relinquat eius usum etiam exclusivum, eadem necessitate durante.

Provision for the removed pastor may be made in the decree of removal itself or, at least, should be made as soon as possible thereafter. The "*Maxima cura*" (can. 28) permitted insinuation of the provision to be made in the invitation to resign, and pending the case of removal. These two points are not mentioned in the Code. But one thing stated in said decree, *viz.*, that the question of removal and the question of provision should not be mixed up, in order not to impair the welfare of souls, applies also to the decree of removal. And here again attention must be drawn to the necessity of mentioning the duration of parochial rights and duties.

After removal, what has the removed pastor to do? He must, as soon as possible, *leave the parochial residence* and hand all the belongings of the parish to the new pastor or administrator *pro tempore*, appointed by the Ordinary. *Omnia quae ad paroeciam pertinent* signifies all the parish books, all the account books, and all the utensils or *sacra suppellex*[29] belonging to the parish. Concerning the *furniture of the residence* this is generally provided by the parish and therefore must be left in the residence. However, if there should be a piece of family furniture to which the pastor has a claim, he may take it along; also the books which he bought out of his patrimony or salary.

[29] Chalices or vestments which were given to the pastor for personal motives, *intuitu personae*, belong to him and may be taken away.

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Next the Code provides for the case of a *sick priest* who can not be lodged elsewhere. This evidently supposes either a bedfast or crippled or paralytic person, who cannot conveniently be transported to another place. If he can travel, the favor extended here cannot be claimed. This favor consists in that the Ordinary should *leave the sick priest* in the (if necessary exclusive) enjoyment of the pastoral residence *as long as need requires.* Of course in that case the new pastor or administrator would have to look out for another residence within the parish limits, unless the two priests would agree to live peacefully in the parochial residence.

If a pastor who has been removed and told to leave the pastoral residence, obstructs the execution of the bishop's decree by having recourse to a *higher ecclesiastical court,* he must remember that this recourse has only devolutive, not suspensive, force,[30] and that, consequently, he must leave his residence. If the pastor should be tempted directly or indirectly to impede the execution of the episcopal decree by having recourse to the *civil power,* he should read can. 2334, which renders him liable to excommunication specially reserved to the Apostolic See. Besides, our civil law holds that a clergyman is entitled to the possession of a parsonage only as long as his connection with the congregation continues, and that one who is deposed (removed) but nevertheless stays in possession of the parsonage, becomes liable for rent.[31]

EXCURSUS ON DISABLED PRIESTS' FUNDS

The question of making provision for priests in case of removal is intimately connected with the general problem of raising funds for the support of disabled priests.

30 See Can. 2153, as compared with can. 1889, § 1.

31 Zollmann, *American Civil Church Law,* 1917, p. 342.

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It is not an easy task to solve, and the Code makes no attempt to solve it; but it is worth while to compare some texts which bear on the subject. For the rest we refer to other sources.[32]

1. It must be remembered that every clergyman is incardinated in a diocese, to which he belongs and to which he is (can. 111) under obligation. A clergyman receives his support, not precisely in virtue of the office he holds or the services he renders to the diocese at large, but for the attention he gives to a determined function, or pastoral office, or benefice. This is expressed by the well-known adage: "*Beneficium propter officium.*" From this it follows that the *bishop cannot be held responsible* for the salary or support of a pastor. Attempts made to that effect have met with no favor in our civil courts.[33] And if the bishop cannot be held

32 See *Eccl. Review,* Vols. XIX, 645 ff., XXIII, 458 ff., XXIV, 20 ff., 339 ff.

33 K. Zollmann, *American Civil Church Law,* 1917, p. 350, says: "It has been held that the relation between bishop and priest *is* not that of hirer and hired, but rather that of superior and inferior agents of the same church. The bishop is the priest's superior and according to the established order of things in the economy of church government regulating the degrees of subordination and the methods of administration, it is his province to designate the place for the priest to exercise his functions and to prescribe, under certain limitations, the rules for his guidance and control. To hold the bishop personally liable at law for the priest's services would be as unjust as holding the general agent of a railroad company liable for the pay of the railroad employees engaged by him in the course of his agency. Men are constantly going into positions under appointments by superior agents who are universally understood not to assume any personal liability by such appointment. Since there is no contract relation between priest and bishop after the priest has been assigned to a charge, there can be none before such assignment. Whatever duty a bishop may have to appoint a priest to some charge is a religious duty only. For its performance or nonperformance he is answerable only *in foro conscientiae* or to his ecclesiastical superior. It is a matter in which the ecclesiastical discretion of the bishop is, and must be the determining factor. In the exercise of that discretion he is answerable only to the laws of the church. If for a breach of this clearly ecclesiastical duty there should be a remedy by law, it must follow that a man may have an action for the

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responsible for the salary of a working priest neither can he be obliged to provide personally for relief or support in case of disability.

2. How then may funds be raised to support disabled priests? On the one hand there is the universal conviction, emphatically expressed in the well known decretal of Innocent III, that affliction is not to be added to affliction but rather pity to be shown.[34] The tender solicitude of the Church has always been shown in the succor granted to the helpless and the poor. How much more it should be applied to the "*portio Domini*" needs no proof. Where the cooperation of the State could be invoked, the difficulties were to a great extent solved by pensions. But where Church and State are completely separated, the ecclesiastical authorities had necessarily to call upon the clergy and the faithful to mitigate the lot of helpless priests. The Third Plenary Council of Baltimore enacted that each bishop should establish a fund for the maintenance of indigent priests under his jurisdiction. This fund was to be raised either by a tax levied upon the *parishes,* or, if these were al-

refusal of a clergyman to baptize him. If there is a contract duty on the part of the bishop to assign a priest to a charge, it must follow that there is a similar obligation on the part of the priest to accept such charge. No one will contend that a bishop has any such civil right. The priest, so far as the courts are concerned, can lay down his office and its duties at pleasure. For doing so he can be visited only with ecclesiastical censure and such punishment as the church canons prescribe. The priest, so far as the courts are concerned, is thus completely without remedy as against his bishop. The bishop may appoint him or not in his discretion. He may, after he has appointed him, assign him to another charge. He may even enjoin him from exercising priestly functions and remove him absolutely without trial, and the courts will be in no position to afford him any relief. Since he has no contract with his congregation and with his bishop, the question arises whether he has any remedy against the church as a whole. Even this must be answered in the negative. The church, even if it is capable of being sued, has assumed no legal liability for his support."

[34] C. 5, X, III, 6.

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ready too heavily taxed, *on the clergy,* who were to contribute pro rata from their personal income. A third method also was suggested, *viz.,* that the clergy organize themselves into a *mutual benefit society,* administered by the members themselves, with the bishop as *ex officio* president.[35] The two first methods may work well in larger dioceses, but smaller dioceses are hardly able to raise sufficient funds for the purpose.[36] There a *provincial* system might supply the shortcomings of the individual dioceses. More efficient, and, we believe more pleasing to sensitive priests and more businesslike, is the third method suggested by the Council, which entitles each priest to a share in the general fund in case of disability, regardless of his personal revenues. The only drawback we can see in this system consists in the danger of unjust distribution and of fostering an indolent, and perhaps insolent, spirit among the clergy. However, the constitutions or by-laws could be framed in such a way as to counteract these evils.

3. The next question is: *What does the Code say in this matter?* We could find only three canons that bear on the subject. They are 1429, 1505, and 2154.

Can. 1429, as explained in Vol. VI, permits the Ordinary to impose a *pension* upon parochial benefices or parishes, in favor of the pastor or assistants of the same. The amount of this pension is not to exceed one-third of the net revenues of the parish.

Canon 2154 permits a pension to be paid to a removed or resigned pastor.

Canon 1505 empowers the Ordinary to impose a *charitable subsidy* on all beneficiaries, secular as well religious, provided the needs of the diocese impel him

[35] *Acta et Decreta Conc. Plen. Balt.* III, n. 71.
[36] *Am. Eccl. Rev.,* XXIII, 473.

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thereto and the taxation be extraordinary and moderate.

Of these texts two only refer to pastors and curates of parishes, because the pension is intended only for these. A *pastor emeritus* or a *vicarius emeritus* may be benefited by such a pension, but regular funds destined for all disabled priests cannot be construed into these two canons.

Can. 1505 is broader because the condition "*dioecesis necessitate impellente*" undoubtedly exists when there is question of providing for needy priests. But the *exactio* is to be only *extraordinaria*. This would seem to exclude regular yearly contributions. The most a private interpreter could admit is that a contribution could be demanded whenever the diocesan treasury is at a very low ebb. When this condition exists, all the *beneficiaries*, but not the parishes, may be taxed, and religious who hold parishes in the diocese would have to contribute their share to this fund.

4. This observation calls for another. Suppose the case of a *clerical aid society*, of the type found in some dioceses. Is the Ordinary or the Board of such a Society entitled to tax *religious* entrusted with congregations in the diocese? We hardly believe so, for, first of all, whatever is not connected with the care of souls is withdrawn from the episcopal jurisdiction,[37] and consequently the bishop is not entitled to exact contributions which have nothing to do with the congregation itself. Secondly, it does not appear just that religious, who are taken care of by their respective communities in case of disability, should be forced to contribute to a fund from which they derive no benefit. This reason, of course, holds only if the religious claim no subsidy from the aid society in case of sickness or other impediment.

5. Another question is, *whether the bishop is entitled*

37 Cfr. can. 533, § 1, n. 4; can. 630, § 1, 3.

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to levy a contribution on the personal income of (secular) *priests under his jurisdiction to meet the expenses of a clerical aid fund?* The Third Plenary Council of Baltimore, in the text already quoted (n. 71), not only permits, but obliges Ordinaries to establish a fund for the support of indigent priests. The Code, while it does not favor extraordinary charitable subsidies except moderately and extraordinarily, does not prohibit the institution of benevolent societies. Since the Code does not explicitly provide for disabled priests — a canon to that effect would have been opportune — it is certainly left to the Ordinaries to supply this defect; because the Ordinaries are allowed to legislate within the range of common law, except where they are explicitly prohibited.[38] Hence the right of making laws for the purpose of raising clerical funds and distributing them justly cannot be denied to the Ordinaries. And if this is true of such laws in general, it must also apply to by-laws or constitutions that may be necessary for the just or equitable administration of these funds. Thus diocesan statutes concerning prompt payment, or the prorating of contributions, or conditions for receiving aid, are entirely justifiable.[39] The diocesan statutes should contain the by-laws of such aid societies, in order that they may become diocesan laws. The by-laws themselves should clearly set forth when and under what conditions a disabled priest is entitled to draw on the diocesan fund or the Clerical Aid Society. Priests who have means of their own from patrimonial or other revenues should be excluded from the privilege of receiving such aid, which is destined for those unable to procure a decent support.[40]

38 Bened. XIV, *De Syn. Dioec.*, XIII, 1, 3; *Am. Eccl. Rev.*, XXIV, 26.

39 Such statutes exist in various dioceses; see *Am. Eccl. Rev.*, XXIV, p. 29 f.; p. 339 ff.

40 Concerning culpably — *ex delicto* — disabled priests we refer to

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6. A last question: ***May the Ordinary command the congregations or parishes of his diocese to contribute to the clerical aid fund?*** He may do this in a friendly, but not in a domineering or threatening way. The reason lies in can. 1505 f. and can. 1186 and 1297. If the legislator would have the Ordinaries use their power in favor of the repairs required for the cathedral and other churches by persuasion rather than coercion, it is certainly not too much to argue *a pari*. The same rule of mitigation and moderation occurs in can. 1297 with regard to the *sacra utensilia*. Of course, we do not deny that Ordinaries may have collections taken up at irregular intervals for the purposes of a clerical relief or aid society.

In conclusion attention may be drawn to ***life insurance for the clergy,*** which may be handled, not only by responsible private companies, but also by provincial or interprovincial clerical companies, under the supervision of the ecclesiastical authorities.

can. 2303, § 2. The legislator there tells the Ordinary that he should provide for an indigent, though deposed, clergyman, lest he should have to beg, to the disgrace of the clerical state. But the obligation is merely one *ex titulo caritatis*.

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TITLE XXVIII

PROCEDURE IN REMOVING REMOVABLE PASTORS

CAN. 2157

§ 1. Parochus quoque amovibilis a sua paroecia amoveri potest ex iusta et gravi causa ad normam can. 2147.

§ 2. Ad parochos religiosos quod attinet, servetur praescriptum can. 454, § 5.

CAN. 2158

Si Ordinarius aliquam ex his causis adesse existimaverit, parochum paterne moneat atque hortetur ut paroeciae renuntiet, causam indicans, quae paroeciale ipsius ministerium fidelibus noxium aut saltem ineffi-cax reddit.

CAN. 2159

Firmo praescripto can. 2149, si parochus renuat, rationes in scriptis reddat, quas Ordinarius, ut valide procedat, perpendere debet una cum duobus examinatoribus.

CAN. 2160

Si, auditis examinatoribus, Ordinarius allatas rationes legitimas non iudicaverit, paternas iteret hortationes ad parochum, comminata amotione, si intra

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congruum definitum tempus paroeciam sponte non dimittat.

CAN. 2161

§ 1. Expleto praefinito tempore, quod pro sua prudentia prorogare potest, Ordinarius decretum amotionis emittat.

§ 2. Parocho autem renuntianti aut amoto providere tenetur ad normam can. 2154–2156.

The procedure for removing a removable pastor has been modified. The modification consists in the provision that no formal invitation to resign is required and no legal rebuttal or recourse against the decree of removal is admissible. Hence the consultors need not be called in, but the cooperation of the examiners is sufficient.

1. The removal of a removable no less than of an irremovable pastor requires a *just and grave cause, i.e.*, one of those stated in can. 2147.

If a *religious pastor* is to be removed, the procedure is very simple. See can. 454, § 5, where it is said that pastors belonging to a religious community may be removed *ad libitum* either by the local Ordinary or by the religious superior. The one has only to notify the other of the removal, without stating the reasons. Recourse to the Holy See is admissible, but with devolutive effect only.[1]

2. If the local Ordinary is convinced that one of the reasons stated under can. 2147 can be advanced against a removable pastor, he shall *paternally warn and exhort* the latter to resign his parish, and state the reason why his pastoral ministry has become detrimental or at least useless. No special formality is required for this ad-

1 Cfr. Vol. II, p. 520 f. of this Commentary.

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monition, which is expressly styled paternal, *i.e.*, not canonical. But a certain and fixed term must be given the pastor for answering the Ordinary's demand.

If the warning is given in writing, it should be sent by registered mail, because can. 2149 also applies in this case.

3. *If the pastor does not act* upon being thus warned, he may be removed at once without the benefit granted by can. 2154. If he answers *negatively, i.e.*, if he refuses to resign, he must state the reasons for his refusal in writing. The Ordinary shall then *discuss these reasons with two examiners.* This discussion is required for *valid* procedure.

4. If the Ordinary, after having heard the advice of the examiners — which he is *not* bound to follow [2] — deems the reasons brought against the removal groundless or unlawful, he shall repeat the exhortation to resign under *threat of involuntary removal* in case the pastor refuses to leave the parish within the time appointed.

5. After the expiration of this term (which may, however, according to the prudent judgment of the Ordinary, be prolonged) the Ordinary shall issue *the decree of removal.* This, of course, must be *intimated* to the pastor. This is the last phase and requires no recourse and no calling in of the consultors. But provision is to be made just as for irremovable pastors, and therefore canons 2154–2156 apply to this case.

2 See can. 105.

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TITLE XXIX

PROCEDURE IN THE TRANSFER OF PASTORS

CAN. 2162

Si bonum animarum postulet ut parochus a sua, quam utiliter regit, ad aliam paroeciam transferatur, Ordinarius eidem translationem proponat ac suadeat ut eidem pro Dei atque animarum amore consentiat.

CAN. 2163

§ 1. Parochum inamovibilem Ordinarius invitum transferre nequit, nisi speciales facultates a Sede Apostolica obtinuerit.

§ 2. Parochus vero amovibilis, si paroecia *ad quam* non sit ordinis nimio inferioris, etiam invitus transferri potest, servatis tamen praescriptis canonum qui sequuntur.

CAN. 2164

Si parochus consilio ac suasionibus Ordinarii non obsequatur, rationes in scriptis exponat.

CAN. 2165

Ordinarius, si, non obstantibus allatis causis, iudicet a proposito non esse recedendum, debet, ut valide agat, super eisdem causis audire duos parochos consultores, et cum eisdem perpendere adiuncta in quibus versatur tum paroecia *a qua*, tum paroecia *ad quam*, et rationes quae translationis utilitatem aut necessitatem suadent.

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CAN. 2166

Si, auditis parochis, Ordinarius translationem peragendam censeat, paternas exhortationes iteret ut parochus voluntati sui Superioris morem gerat.

CAN. 2167

§ 1. His peractis, si parochus adhuc renuat et Ordinarius adhuc putet translationem esse faciendam, parocho praecipiat ut intra certum tempus ad novam se conferat paroeciam, eidem in scriptis significans, elapso praefinito tempore, paroeciam, quam in praesens obtinet, ipso facto vacaturam esse.

§ 2. Hoc tempore inutiliter transacto, paroeciam vacantem declaret.

By *transfer* is understood an exchange of parishes made with the consent of the legitimate superior. Reasons, at least in general, are required for lawful transfers, because they are generally looked upon as odious, unless they involve promotion.[1] The Code admits the welfare of souls (*bonum animarum*) as a valid reason. Our text says that the *competent superior* may decree a transfer, and draws a distinction between irremovable and removable pastors. Besides, as admitted by the old and the new law, there is a difference between voluntary and involuntary transfers, and transfers to a better or to a worse parish. It may also be noted that the practice of the Roman Court concerning transfers extends almost exclusively to the so-called *desservants* of France, who were considered *rectores ad nutum amovibiles*.[2]

1. The Code states that if the welfare of souls requires

1 Cfr. Vol. II, p. 167 f. of this Commentary; *A. S. S.*, XIX, 53 ff.

2 The decisions quoted by Card. Gasparri regard France and confirm what we stated in the beginning of can. 2147.

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that a pastor be transferred from a parish which he has governed with success, to another parish, the Ordinary shall propose the matter to the pastor and persuade him to accept the transfer for the love of God and of souls. The reason [3] for the transfer is here supposed to exist in the parish to which (*ad quam*) the pastor is to be transferred. It may be that this parish is financially or spiritually neglected, or that factions or parties are tearing it up to the detriment of souls.[4]

2. The Ordinary, however, must duly consider the character of the pastor, whether he is removable or irremovable, and whether he is willing or not to accept the transfer. For the Ordinary (*iure ordinario*) ***has no right to transfer an irremovable pastor*** against his will to another parish. To do this, special faculties are required from the Apostolic See. Whether our Ordinaries have obtained such faculties, is unknown to us; the former formularies contained no such faculty.[5] The Ordinary should beware of making threats, because a transfer made under threats, or by deceit, would be rescindible by a sentence of the diocesan court.[6] Therefore the Ordinary is not allowed to conceal the real condition of the parish to which an irremovable pastor is to be transferred, though he may emphasize its advantages.

3. A *removable pastor* may be transferred to another parish *even against his will,* provided the parish to which he is to be transferred is not of too low a rank, and pro-

[3] Cfr. cc. 37, 39, C. 7, q. 1; c. 5, X, VIII, 19, mentions *utilitas et necessitas.*

[4] S. C. C., March 27, 1886 (*A. S. S.*, XIX, 53).

[5] Not even the faculties (*Formula III, maior*) granted lately to the Vicars Apostolic by the S. C. P. F. contain such a faculty. The faculties just mentioned were kindly communicated to us for inspection by the Rt. Rev. Leo Haid, O. S. B., Vicar Apostolic of North Carolina, for which favor we wish to express our heartfelt thanks.

[6] Cfr. can. 103; *A. S. S* XI, 387.

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vided the Ordinary proceeds according to the following canons.

What *inferioris ordinis* means has been touched upon above. The inferiority may be owing to a smaller income or to less importance or smaller size. The pastor, as stated before, may have his own ideas about the superiority or inferiority of a parish. If he accepts the parish offered to him no further formality is required, except that he declare his willingness to accept, in order that the Ordinary may declare the parish vacant,— but not by resignation. For it is a transfer, not a resignation.

4. If the removable pastor thinks he has reasons for *not following the advice of the Ordinary,* then

a) He must *state in writing* the *reasons* for not accepting the transfer, *e.g.,* his health, his mental qualities, his financial condition, etc.

b) The Ordinary shall then ponder the reasons given and consider the status of the parish. If, after due deliberation, he insists upon the transfer, he is bound, for *valid procedure,* to hear the opinion of *two pastors-consultors* on the reasons advanced, on the condition of both parishes (*viz.,* the one from which and the one to which the removable pastor is to be transferred), and, finally, on the reasons of necessity or utility which apparently demand a transfer.

Here may be added *some remarks as to the conduct of the pastor while the case is pending.* He should keep silent and above all not stir up or arouse the congregation, or create factions, or, what is still worse, have recourse to civil authority in order to bring pressure to bear upon the Ordinary.[7] Such methods are not only

[7] S. C. C., March 23, 1878; March 27, 1886 (*A. S. S.,* XI, 382 ff.; XIX, 53 ff.).

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unbecoming to a priest, but may exasperate the lawful authority and cause scandal.

c) After having heard the consultors, if the Ordinary still insists on the transfer, he may *renew his paternal* (not canonical) admonition to move the pastor to acceptance.

d) If this proves fruitless, and the Ordinary remains unmoved in his former decision, he *shall command* the removable pastor (*parocho praecipiat*) to repair to the new parish within a certain time. This is a formal precept, to be served *in writing*, wherein the Ordinary declares that, after the expiration of the time granted the pastor for going to his new parish, the parish which he holds at present will *ipso facto* be vacant. But a reasonable time should be given. Twenty-four hours is not considered reasonable.[8] Ten days is more acceptable.

e) After the expiration of the appointed time, if the removable pastor has not gone to the parish assigned to him, his *old parish must be declared vacant*.

Here the procedure ends. No recourse is mentioned. It would be useless to have recourse to the Holy See, because it would cause expenses without any practical result. This whole legislation is modern and, as stated, has grown out of the conditions of the present time.

[8] See *A. S. S.*, XI, 387.

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TITLE XXX

PROCEDURE AGAINST CLERGYMEN TRANSGRESSING THE LAW OF RESIDENCE

CAN. 2168

§ 1. Parochum, canonicum aliumve clericum, qui residentiae legem, qua ratione beneficii tenetur, negligat, Ordinarius moneat, et interim, si agatur de parocho, eiusdem impensis provideat ne salus animarum detrimentum patiatur.

§ 2. In monitione Ordinarius recolat poenas quas incurrunt clerici non residentes itemque praescriptum can. 188, n. 8, et clerico significet ut intra congruum tempus ab eodem Ordinario definiendum residentiam instauret.

CAN. 2169

Si intra praestitutum terminum clericus nec residentiam instauret nec absentiae causas afferat Ordinarius, servato praescripto can. 2149, declaret paroeciam aliudve beneficium vacare.

CAN. 2170

Si clericus residentiam instauret, Ordinarius, non modo debet, si absentia illegitima fuerit, ei infligere privationem fructuum pro tempore absentiae, de qua in can. 2381, sed potest etiam, si casus ferat, pro gravitate culpae eum congrue punire.

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CAN. 2171

Si clericus residentiam non instauret, sed absentiae causas afferat, Ordinarius, accitis duobus examinatoribus et institutis, si opus fuerit, opportunis investigationibus, videre debet num causae sint legitimae.

CAN. 2172

Si, auditis examinatoribus, Ordinarius censeat adductas causas non esse legitimas, rursus clerico praefigat terminum intra quem redire debet, salva semper privatione fructuum pro tempore absentiae.

CAN. 2173

Si parochus amovibilis intra praescriptum tempus non redierit, Ordinarius statim procedere potest ad paroeciae privationem; si redierit, Ordinarius det ei praeceptum ne rursus discedat sine scripta sua licentia sub poena privationis paroeciae ipso facto incurrenda.

CAN. 2174

§ 1. Si clericus, qui beneficium inamovibile obtinet, residentiam non instauret, sed novas alleget deductiones, Ordinarius eas cum eisdem examinatoribus ad examen revocet ad norman can. 2171.

§ 2. Si nec ipsae legitimae habitae fuerint, posthabitis quibusvis aliis deductionibus, Ordinarius clerico praecipiat ut intra tempus praescriptum vel iterum praescribendum redeat sub poena privationis beneficii ipso facto incurrenda.

§ 3. Si non redeat, Ordinarius eum beneficio privatum declaret; si redeat, Ordinarius idem det praeceptum de quo in can. 2173.

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CAN. 2175

Neutro in casu Ordinarius beneficium vacare declaret, nisi postquam, perpensis una cum examinatoribus discessus rationibus quas clericus forte allegaverit, eiusdem Ordinarii licentiam in scriptis ab eodem clerico peti potuisse constiterit.

The obligation of a cleric to reside at the place of his office or benefice, if this requires permanent residence, was set forth in previous canons.[1] Here the Code lays down rules for the treatment of those who violate this divine-human law. It is evident that a canon who has the obligation of choir service or other residential duties cannot be punished for a lawful absence of three months each year. The pastor may enjoy a two months' vacation, during which he should not be unnecessarily vexed by a recall from the Ordinary. Outside this lawful absence pastors and canons, unless urgent need calls them away, must remain within the limits of their parishes, though during a few days of the week they may sometimes absent themselves for good reasons, provided they stay at home on Sundays and holydays of obligation. Unqualified, however, and liable to the penalties enacted in the following canons, would be regular absence from the parish on all weekdays, as if the pastor were pastor only on Sundays. The Code provides the Ordinary with rules that should be observed in proceeding against clergymen who infringe upon the laws of residence.

1. The first question naturally turns upon the *persons* whom the law intends. They are (a) *pastors, i.e.,* all who go by this name, either removable or irremovable, incumbents of true or holders of quasi-parishes, also those

1 Cfr. Vol. II, p. 546 f. of this Commentary.

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who govern parishes as vicars of chapters or religious corporations; for instance, the religious called *expositi*, for these are bound by the same obligations as other pastors.[2] Temporary substitutes or *oeconomi* are bound by the same duty.[3] Also the *coadjutors* of disabled pastors, if they take the place of the pastor in all things.[4]

b) *Canons* of cathedral and collegiate chapters must observe the law of residence if they are obliged to daily choir service and are not allowed to engage a substitute.[5]

c) *Alius clericus, qui residentiae legem ratione beneficii tenetur*, or, in other words all clergymen possessing a residential benefice, *i.e.*, one which, either by its nature, or by reason of a charter or particular law, requires residence.[6] Our assistants or curates (*cooperatores*) are not obliged to residence by reason of the beneficiary character of their office, because the notion of benefice can hardly be applied to the same, but can. 476, § 5 obliges them to reside within the parish to which they are attached, according to the diocesan statutes and praiseworthy custom. There can be no doubt whatsoever that a priest incardinated and engaged at a certain church as assistant to the pastor, must stay at that church according to the orders of his Ordinary.[7] *Rural deans*, who are not at the same time pastors, must nevertheless reside in the territory of their deanery.[8]

2. The *procedure* against clerics who seriously transgress the law of residence, is as follows:

a) The Ordinary shall first give a *canonical warning* or *admonition* and in the meantime, in the case of a negligent pastor, provide as well as he can for the welfare

2 Can. 471, § 4.
3 Can. 473, § 1.
4 Can. 475, § 2.
5 Can. 418 f.
6 Can. 1411.
7 S. C. C., May 8, 1756 (*Richter, Trid.*, p. 207, n. 5); Aug. 4, 1880 (*A. S. S.* XIV, 113 ff.).
8 Cfr. can. 448, § 2; also consultors, see can. 425, § 1.

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of his subjects. The expenses of this temporary provision must be borne by the careless pastor.

If we say, a canonical warning, not merely a paternal admonition, it is because the warning here intended has all the features of a canonical basis of procedure. Therefore it should be given in *writing,* or in presence of two witnesses, according to can. 2143, § 1. The canonical nature of the warning also appears from its *contents.* For in it the Ordinary must (a) mention the penalty (loss of income according to the time of unlawful absence),[9] (b) recall to the cleric's mind that contumacious absence means tacit resignation of the office or benefice he holds,[10] and (c) appoint a certain time within which the cleric should again take up his residence.

b) The admonition may or may not produce the desired effect. *Three hypotheses* are conceivable: Either the cleric does not heed the warning at all, or he takes up his residence without further ado, or he give reasons for his absence.

(1) If the cleric *neither takes up his residence nor gives reasons* for his absence within the term appointed in the admonition, the Ordinary shall declare the parish or benefice vacant.[11] However, to do this validly, he must first make certain that the canonical warning was duly served and that there was no reason for not answering.

(2) If the cleric *returns* to his residence, the Ordinary *must,*— if the absence was entirely unlawful (of which the Ordinary is the judge),— deprive him of a pro rata share of his income, and *may* also inflict other punishments proportionate to the guilt incurred. The pro rata

9 Can. 2381.
10 Can. 188, n. 8.
11 *Trid.*, sess. 6, c. 2; sess. 23, ce. 1, 16, *de ref.* (Richter, *Trid.*, *l. c.*).

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share of the income is to be reckoned by the time of the unlawful absence. Thus, if the yearly salary is $1000, and the unlawful absence was six months, the fine would be $500. However, this would be excessive. For even a delinquent clergyman, as long as he is incardinated and has not forfeited every claim to a decent livelihood, must be allowed the necessary support. Therefore he may subtract the expenses for his maintenance during the six months, say about $250 or $300, and, as required by can. 2381, give the rest to the Ordinary, who shall devote it to charitable purposes.

The bishop is not entirely free to remit the fine, because the text says *debet,* whereas the other punishments may or may not be inflicted, *ad libitum.*

(3) If the cleric does not return to his residence, but *submits the reasons* for his absence, the Ordinary must call in two examiners, hear their advice, and investigate whether the reasons are acceptable and lawful. Lawful would be sickness, or necessary business transactions connected with the parish or benefice, or other reasons which Christian charity or necessity dictate.[12] Should the Ordinary, after having heard the examiners, think the proffered reasons unacceptable or unlawful, he must assign *another term for the cleric's return* to his residence. The fine for unlawful absence runs in the meanwhile.

At this stage, *i.e.,* after the second warning, with a new term appointed for the absentee clergyman, another distinction is introduced and must be duly considered, *viz.,* the difference between a removable and an irremovable pastor.

[12] See can. 338 and Vol. II, p. 361 of this Commentary. But private business of merely personal interest cannot be called lawful; these personal interests are not in keeping with clerical obligations.

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a) A *removable* pastor, who does not return after the second canonical warning, *may* (not must) *be deprived* of his parish immediately after the appointed time has elapsed. If he returns within the time set, the Ordinary shall *issue a precept* to the effect that if he again leaves the parish without a written permission, he shall *ipso facto* be deprived of the parish. It is not only advisable, but necessary, that a copy or abstract of this precept be kept in the archives of the diocese for further use. We may also add that a written permission is needed for protracted absence. But it does not mean that a removable pastor can not leave his parish for one or two days a week, provided this absence does not occur too frequently.

(b) If a cleric who holds an *irremovable benefice* (our irremovable pastors are here included) does not return to his residence after being duly warned, but brings forward new excuses for his absence, the Ordinary shall *discuss them with the examiners* to see whether they may be admitted as lawful. If not, he shall not demand other proofs, but simply command the cleric to return within the time already appointed or a new term now fixed, under penalty of privation of his benefice, to be incurred *ipso facto*.

If the cleric does not return within the prescribed time, the Ordinary shall *declare* him deprived of his benefice; if he returns, the Ordinary shall give him a *precept* like that issued in the case of removable pastors, *viz.*, not to leave the place a second time without a written permission, under penalty of *ipso facto* incurring privation of benefice.

However, in neither case (whether the cleric be removable or irremovable), should the Ordinary declare the benefice vacant unless he has first discussed the rea-

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sons alleged with the *two examiners* and ascertained for himself that the cleric was unable to obtain a written permission or leave of absence. For it may be that the pastor or beneficiary was retained unlawfully in a place and had no means of communicating with the bishop, or that communications were interrupted for a long time. Besides, it sometimes happens that the secretary or chancellor makes a mistake in opening or reading the mail. The same may happen to the bishop. Hence it is advisable that clergymen ask for leave of absence by registered letter.

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TITLE XXXI

DE MODO PROCEDENDI CONTRA CLERICOS CONCUBINARIOS

CAN. 2176

Ordinarius clericum qui contra praescriptum can. 133 mulierem suspectam secum habeat aut quoquo modo frequentet, moneat, ut eam dimittat vel ab eadem frequentanda sese abstineat, comminatis poenis in clericos concubinarios can. 2359 statutis.

CAN. 2177

Si clericus neque praecepto pareat, neque respondeat, Ordinarius, postquam sibi constiterit id clericum praestare potuisse:

1.° Eum suspendat a divinis;

2.° Parochum praeterea statim paroecia privet;

3.° Clericum vero qui aliud beneficium sine animarum cura habet, si, exacto bimestri tempore a suspensione, sese non emendaverit, privet dimidia parte fructuum beneficii; post alios tres menses, omnibus beneficii fructibus; post alios tres menses, ipsomet beneficio.

CAN. 2178

Si clericus non obediat, sed causas excusationis adducat, Ordinarius debet super eisdem audire duos examinatores.

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CAN. 2179

Si, auditis examinatoribus, Ordinarius existimaverit allatas causas non esse legitimas, id clerico quamprimum significet eique det formale praeceptum ut intra breve tempus a se definiendum pareat.

CAN. 2180

Parochum amovibilem inobedientem Ordinarius statim ad normam can. 2177 coercere potest; si vero agatur de clerico qui, beneficium inamovibile obtinens, non paret, sed novas allegat deductiones, Ordinarius eas ad examen revocet ad normam can. 2178.

CAN. 2181

Si ne eae quidem iudicentur legitimae, Ordinarius clerico rursus praecipiat ut intra congruum tempus mandato obtemperet; quo tempore inutiliter transacto, procedat ad normam can. 2177.

Can. 133 determined the right of the Ordinary concerning the conduct of clergymen towards suspected women. If the bishop's injunction goes unheeded, the cleric may be presumed to be a concubinarian. Can. 2176 states that the Ordinary may issue a *canonical warning* to such a cleric, asking him to dismiss the suspected woman from his house, or to abstain from visiting her. The warning should contain the *threat* of penalties as established by can. 2359.

Concubinatus is generally defined as "*illicitus consuetudinarius concubitus cum aliqua foemina corrupta et soluta, in domo sua vel alibi commorante.*"[1] There is

1 Schmalzgrueber defines *clericus concubinarius* as one "*qui concubinam vel domi suae vel extra illam instar uxoris continuo retinet et as-*

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no doubt that the term implies a number of transgressions, at least two.[2] Besides, the woman must, according to general opinion, be the same, because concubinage imitates the marital state.[3] *Quo modo* frequented seems to imply any kind of suspicious conversation or intimacy or visits to a suspected house, for instance, a theatre of ill fame, etc., wherever this may be. Epistolary converse cannot be styled *frequentatio;* there must be personal visits. The woman must be suspected, *viz., suspecta de incontinentia vel lascivia.*[4] Suspicion is a kind of doubt which does not permit reason to form a judgment, but inclines it to admit one statement rather than another. Hence, in this case a suspected woman would be one to whom a *mala fama* had been attached. That there should be a careful investigation of such rumors and the persons who start them goes without saying.[5]

Two things must be absolutely certain, *viz.,* that the woman is really suspect, and that the clergyman retains or visits her against the command of the bishop. If the *concubinatus* is not notorious, strong proofs are required, *i.e.,* such as are furnished by two first-class witnesses or by authentic documents.

The text requires a *canonical warning,* which is to be

siduam cum ea tenet consuetudinem;" l. III, tit. 2, n. 9; see also Reiffenstuel, III, 2, n. 13; Wernz, *Ius Decret.,* II, n. 208.

2 Reiffenstuel, *l. c.,* n. 13; Schmalzgrueber, *l. c.,* n. 11; *simplex fornicatio* cannot be called *concubinatus.*

3 The S. C. C., quoted by Garzia, *De Benef.,* P. II, c. 10, n. 185, however, held (sess. 24, c. 14, *de ref.*): *"quod habeat locum [sc. hoc decretum] etiamsi clericus modo cum una, modo cum alia deprehendatur."*

4 Reiffenstuel, *l. c.,* n. 15, see also *A. S. S.,* VII, 414 f.

5 *Ibid.,* II, tit. 20, n. 363, relates the following: A pastor was accused of such a misdeed, but denied it, although eighty witnesses were produced. He was condemned, but upon a second hearing had to be absolved, because he could prove that all the witnesses testified from hearsay, and the story had been started by one garrulous old woman. Caution, therefore, is required.

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administered according to can. 2143 and is called personal and special, *i.e.*, directed to the clergyman himself, with special mention of the imputation.[6] Besides, the admonition must also contain the threat of the penalties, *ferendae sententiae*, which are mentioned in can. 2359. This canon refers to clerics in higher or sacred orders only.

The Code now goes on to lay down the rules of procedure after the canonical warning has been issued. Here, again, as under Title XXX, three hypotheses are possible.

The cleric *neither obeys* the command or precept given by the Ordinary to dismiss the suspected woman, or to abstain from visiting her, *nor does he answer at all*. In that case the Ordinary must make certain that the clergyman was in a condition to answer the charge. If the admonition was given orally in the presence of two witnesses, there will be no trouble concerning this requisite. If it was sent by registered letter and the receipt kept, it will be a relatively easy matter to find out whether the letter reached its address. There remains only the case where an impediment or obstacle prevents the clergyman from answering, but such cases are rare. Besides, excepting absence, there may be another person asked to answer in general, *viz.*, that the clergyman addressed is at present indisposed and will answer later. Of course, if the letter should have been intercepted by a third person, the clergyman may not know of it.

Provided the warning or precept was duly made and no answer returned, the Ordinary shall proceed as follows:

(a) He shall *suspend* the cleric *a divinis, i.e.*, from ex-

6 Schmalzgrueber, *l. c.*, III, 2, n. 9; Barbosa, *Summa Decisionum Apost.*, 1658, p. 148, *s. v.* "*Concubinatus.*"

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ercising the acts of the power of ordination (can. 2279, § 2, n. 2°).

(b) If he is a *pastor*, he shall be immediately deprived of his parish;

(c) Against a *beneficiary* without the care of souls the Ordinary shall proceed with the privation of half the income if he does not amend within six months from the date of the suspension; after three more months of all the income, and after three more months of the benefice itself, again provided, of course, that no emendation has followed.

There is but one difficulty in this rather categorical procedure,[7] *viz.*, concerning *suspension*. Is it a censure or a merely provisional penalty? The commentators were divided as to the character of this suspension, some holding that it was a censure, others (the more weighty ones) denying it.[8] The question is rather important, because if there is a censure involved, its violation would render the clergyman irregular. If a pastor, therefore, would say Mass while thus suspended, he would incur irregularity. Is this the intention of the lawgiver? Great canonists, like Reiffenstuel and Schmalzgrueber, maintain that it is not a suspension proper, because not expressed in law, and therefore no censure involving irregularity. However, *pace tantorum auctorum*, it appears to us that, even if it were not a censure, irregularity would nevertheless be incurred in case of violation. The reason for this assertion lies in can. 985, 7°, where irregularity from crime is attached to any violation of either a personal, medicinal, or vindicative penalty. And that the suspension here mentioned has

7 C. 15, Dist. 81, also threatened a so-called suspension for the faithful who would assist at ecclesiastical functions of *clerici concubinarii*; which suspension is now out of date.

8 Schmalzgrueber, III, 2, n. 14 f.; Reiffenstuel, III, 2, n. 40 f., deny it.

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the character of at least a personal penalty, can hardly be denied. The only way of avoiding this consequence would be found in can. 1933, § 4, where it is said that suspension may be inflicted by way of *a precept* in an extrajudicial manner. However, according to can. 2306, even a precept belongs to the class of penal remedies, wherefore the penal character of such a suspension must, in our view, be maintained. On the other hand, it is argued that penalties must be interpreted benignly, and since irregularities *ex delicto* savor, at least indirectly, of penalties, it appears more conformable to the benign spirit of the Church to exclude irregularity. However, this argumentation is specious rather than solid. Therefore, until an authentic interpretation settles the controversy we are bound to cling to the severer opinion.

Whether the Ordinary is *obliged* to proceed in this manner is solved by can. 2223, which states that, when the law employs preceptive terms, the penalty should, as a rule, be inflicted, but admits delay or postponement to a more opportune time, also mitigation or change of penalty, or even abstaining from infliction, if emendation is achieved and scandal repaired.

2. It is possible that the cleric does not obey the injunction of the Ordinary, but *proffers excuses*. In that case the Ordinary must call in *two examiners* and discuss with them the validity or lawfulness of the reasons alleged. This discussion is absolutely required, although the Ordinary is not bound to accept the views of the examiners. But, as stated above, the reasons must be impartially discussed, as also the testimonies on the strength of which the cleric was charged with this offence.

3. The third *hypothesis* is that the Ordinary, after discussing the proffered reasons with the examiners, finds them *unfounded* or unlawful, either because they

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are insufficient or because the evidence is too weak. The *result of this negative finding* must as soon as possible be *communicated* to the suspected cleric, together with a formal precept to obey the injunction given in the former warning within a term appointed by the Ordinary. The length of time is not precisely determined except by the adjective brief (*breve*), which may be interpreted as meaning ten days, more or less, according to circumstances or persons and the danger of scandal.

This last hypothesis has different judicical consequences, according to the difference between removable and irremovable rectors. For can. 2180 rules that a *removable* cleric who has disobeyed the second warning or formal injunction to dismiss the suspected women or to quit her company, may be punished as *contumax* (can. 2177) *i.e.*, the Ordinary *may* (though he is not obliged to) suspend him, and if he is a removable pastor, deprive him of his parish, or if a beneficiary, of the pro rata revenues, and, finally, of the benefice itself.

But an *irremovable* pastor or beneficiary must be treated somewhat more considerately. He may, after the formal precept, have discovered more and stronger excuses for not obeying the first canonical warning. These new reasons or allegations must again be discussed by the Ordinary with the two examiners. No ballot is required, since the examiners need only be heard.

If these new reasons are rejected by the Ordinary, the latter must issue *another precept* (which might be called the third canonical warning) bidding the accused cleric to abide by the injunction of the Ordinary, or rather to carry it into effect within the time appointed for that purpose. If the irremovable clergyman does not dismiss the obnoxious woman, or give up her company, the Ordinary shall proceed as stated in can. 2177, *i.e.*, he shall

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inflict suspension, and deprive the culprit of his parish, of the income, and of the benefice.

Note that can. 2180 permits the Ordinary to proceed, after the third warning, against a removable cleric in the same way as against an irremovable one. *Recourse* indeed is *admitted*, but it has no suspensive, but only a devolutive, effect.[9]

[9] Bened. XIV, "*Ad militantis*," March 30, 1742, §§ 12, 25; *Archiv für K.-R.*, 1910, Vol. 90, 697 ff.

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TITLE XXXII

PROCEDURE AGAINST PASTORS NEGLECTING THEIR PASTORAL DUTIES

CAN. 2182

Parochum qui officia paroecialia de quibus in can. 467, § 1, 468, § 1, 1178, 1330–1332, 1344, graviter neglexerit aut violaverit, Episcopus moneat, in memoriam eius revocans et strictam obligationem qua eius conscientia oneratur et poenas in haec delicta iure statutas.

CAN. 2183

Si parochus sese non emendaverit, Episcopus eum corripiat et aliqua congrua poena pro gravitate culpae puniat, postquam, auditis duobus examinatoribus et facta parocho sese defendendi facultate, probatum iudicaverit praedicta paroecialia officia etiam atque etiam per notabile tempus in re gravis momenti pratermissa aut violata fuisse et eorundem omissiones aut violationes nulla iusta causa excusari.

CAN. 2184

Si et correptio et punitio in irritum cesserint, Ordinarius, probata, ad normam can. 2183, perseverante ac culpabili officiorum paroecialium omissione vel violatione in re gravi, parochum amovibilem sua paroecia statim privare potest; parochum vero inamovibilem

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beneficii fructibus, pauperibus ab Ordinario distribuendis, pro gravitate culpae in totum vel ex parte privet.

CAN. 2185

Mala voluntate persistente ac probata, ut supra, Ordinarius etiam parochum inamovibilem e sua paroecia removeat.

The *neglect* here mentioned concerns:

1. The *administration of the Sacraments,* pastoral correction and charity, care of the sick and dying (can. 467, §1; 468, § 1);

2. *Catechetical instruction* and personal preaching, especially on Sundays and holydays of obligation (can. 1330–1334; 1344);

3. *Neatness and decorum in the house of the Lord,* which includes care that no profanation occur (can. 1178).

If a *pastor,* who is personally responsible for all the things mentioned, *grossly neglects or violates* the regulations laid down by the law, the bishop shall *warn* him, recall to his memory the strict and grievous obligation imposed on his conscience, and remind him of the penalties with which the law visits such offences.

Although at first blush this admonition seems to be a merely paternal one, yet can. 2143, § 3 makes it certain that it is intended as an *official warning.* It must be given either in writing, by registered letter, or orally, in the presence of two witnesses. Note that the *bishop* is mentioned here, which means that the bishop himself, and not the vicar-general or *officialis,* should administer this warning.

Gravis neglectus must be judged in proportion to the

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detriment or spiritual damage that results to souls, but the judgment whether or not it is serious enough to call for a warning is left to the bishop. Besides, according to can. 447, the rural deans are called upon to watch in their respective territories over the fulfillment of these duties.

The *penalties* mentioned in law are those set forth here, because can. 2382 expressly refers to this title.

If the pastor, after the warning has been duly administered, does not amend his ways, the bishop shall rebuke him and mete out a punishment commensurate with the gravity of his neglect. *Corripere* and *punire* says the text. *Correptio* is a public admonition, to be administered before the ecclesiastical notary or two witnesses, or by letter, but always in such a way that the pastor is really reached.[10] It is a personal *reprimand* which no doubt has a canonical bearing. *Punire,* to punish, is a general term embracing all kinds of ecclesiastical punishments, not excluding suspension, as is evident from can. 1933, § 4. Only there should always be a due proportion between guilt and punishment.

However, rebuke and punishment may be inflicted only *after* the bishop has heard the advice of two examiners *and* after the pastor has been given a chance to defend himself. This defence may be made personally or by proxy, orally or in writing. If the pastor does not succeed in purging himself of the charge, rebuke and punishment may follow, and are deserved. The defence shall, of course, turn about the fact and about the reasons or excuses that the accused may offer for his neglect. The *fact* concerns the neglect of pastoral duties, especially if this lasted for a considerable time and affected matters of importance, such as omitting the teaching of

10 Can. 2309, § 2.

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catechism for months, or not preaching on many Sundays, or not saying Mass on one or more holydays of obligation, neglecting to hear confessions on the days required, keeping the sacred vessels in an unclean condition, etc. Torn vestments and dirty or disorderly sacristies also belong here. Such neglect may easily be found out at the time of the visitation or through the rural deans.

But the pastor may plead not guilty, in other words, he may *offer an excuse.* There may indeed be an excuse for not preaching or teaching catechism, for instance, inborn timidity or physical impediments. But there can hardly be an excuse for tolerating filth or disorder. If the pastor is too lazy, he can at least get the altar society to attend to these matters. A prudent Ordinary will weigh personal and local circumstances with justice and impartiality, and if he deems rebuke and punishment necessary, will not fail to administer it cautiously, so that the delinquent's reputation is not jeopardized and the admonition produces its effect.

If neither rebuke nor punishment proves effective, the Ordinary shall again call in the examiners and discuss the facts and excuses with them. If the same culpable neglect continues, and concerns a serious matter, he *may* remove a *removable* pastor from his parish without further ado. An *irremovable pastor* he shall deprive of either a part, or the whole of his income, according to the gravity of the neglect, and distribute the money among the poor. If the misconduct should continue, the Ordinary may remove also an irremovable pastor from his parish. We suppose, however, that can. 2154–2156 should here be taken into consideration, as these dispositions were applied to this case by the "*Maxima cura,*" although the Code is silent about their application. Equity, however, appears to require it.

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TITLE XXXIII

PROCEDURE IN INFLICTING THE SUSPENSION EX INFORMATA CONSCIENTIA

Up to the time of the Council of Trent the general rule was that no one could be sentenced except he was first tried according to the forms of a properly conducted trial.[1] An apparent exception was admitted in crimes of homicide and heresy, for which, even though occult, a cleric could be judged and suspended. However, even these crimes called for at least the semblance of a trial, because justice requires that every one accused of a crime be given a chance to defend himself and demanding an investigation. Besides the adage: "*De internis non iudicat praetor*" is applicable to all occult crimes which escape evidence and the courts. However, some kind of a conscientious suspension was, according to a decretal of Lucius III, permitted to regular prelates, who could prohibit their subjects from ascending to higher orders if they had committed a secret *delictum* known to the superior.[2] This was a partial suspension and strictly reserved to prelates regular.

The *Council of Trent* ushered in a new era by establishing the suspension called *ex informata conscientia.*[3] It permitted bishops to inflict suspension on their subjects

1 Cfr. cc. 4, 7, X, I, 11; Bouix, *De Iudiciis Eccl.*, II, 315 ff.; Wernz, *Ius Decretalium*, Vol. V, P. II, n. 887 ff.; Smith, *Elements of Eccl. Law*, 1892, Vol. II, 315 ff.

2 C. 5, X, I, 11; Bouix, *l. c.*, II, 317.

3 Sess. 14, c. 1, *de ref.*

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for an occult crime in an extrajudicial manner. This was extended also to regular confessors found guilty of a crime in connection with confession.[4] That the Jansenists and Regalists were incensed at this extension of the episcopal power is not surprising;[5] but the various ways of interpreting the resp. decree of the Council and the manner in which this power was extolled by a few writers is a surprise indeed.[6] The Code lays down rules which are apt to disperse many misconceptions and misgivings, and also warns the Ordinaries against a too liberal use of this dangerous power. The text first establishes the right to use this power, then sets forth the rules for proceeding, declares for what crimes the suspension *ex informata* may be inflicted, and, finally, admits recourse to Rome.

THE POWER OF ORDINARIES

CAN. 2186

§ 1. Ordinariis licet ex informata conscientia clericos suos subditos suspendere ab officio sive ex parte sive etiam in totum.

§ 2. Extraordinarium hoc remedium adhibere non licet, si Ordinarius potest sine gravi incommodo ad iuris normam in subditum procedere.

Ordinaries are allowed ex informata conscientia to suspend *their clerical subjects from office, either partly or totally.* This simple text raises various questions, which call for an answer.

1. What is meant by the phrase, "*ex informata con-*

4 Clem. X, "*Superna,*" June 21, 1670.

5 Pius VI, "*Auctorem fidei,*" Aug. 28, 1794, prop. 49 f. (Denzinger, *l. c.*, n. 1420 f.).

6 Cfr. Bouix, *l. c.*, II, 359 ff.; Wernz, *l. c.*, n. 891.

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scientia"? [7] No doubt stress is to be laid on conscience, not on *informata,* because information is required to form the conscience. Negatively, as is evident from the Tridentine text, the meaning is that the bishop, in inflicting this sentence of suspension, need not observe the proceedings of a full and solemn, or even of a summary trial, but may suspend one as soon as his conscience is informed of the crime. However, it must be added that this information is not merely a matter of personal conviction or moral certitude, but must be based upon objective and reliable information. Bouix [8] justly observes that the bishop must have in hand such proofs as would move a judge to give sentence. Therefore, even if a clergyman would confess his guilt privately to the bishop — not in confession, because sacramental knowledge could not be used at all — or if the bishop himself, alone, without other witnesses, would have seen the clergyman commit the crime, he could not make use of this power, because his information would be merely private. The proof must be such as would convince the public. This is evident not only from can. 2190, but also from the fact that recourse (can. 2194) may be had from this sentence, and the S. Congregation (Concilii) would not ratify a sentence not based on objective evidence.

2. The object of this sentence *ex informata conscientia* is *suspension* from *office.* This suspension is described in can. 2279. If the suspension is *ab officio,* without further determination or limitation, it forbids every act of order, jurisdiction, and administration implied in the office itself, except the administration of the benefice as such. Hence a pastor in our country, when suspended

7 The term does not occur in the conciliar text, but was coined by canonists.

8 *L. c.,* II, 346 ff.

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from office *ex informata conscientia,* cannot licitly exercise any priestly functions nor validly perform any acts of jurisdiction, nor administer ecclesiastical property, because this administration is attached to his pastoral office, the parish income not being a distinct entity, as if it were a benefice. Can. 2281 says that a suspension *ab officio* includes all offices which a clergyman may hold in a diocese.

On the other hand, this suspension *does not include the benefice,*[9] wherefore the administration and enjoyment of the benefice is not taken away from the beneficiary. Much less does our text permit sentence of excommunication or interdict to be pronounced *ex informata conscientia.*[10] Does it include ascent to, or *reception of, the higher orders?* According to the decree of the Council of Trent and all commentators up to the promulgation of the Code, this suspension could be inflicted upon a cleric who wished to receive higher orders. However, the Code *only mentions* suspension *ab officio, i.e.,* an office which one is supposed to hold. Consequently, since penalties must be strictly interpreted, suspension from receiving a higher order can no longer be inflicted *ex informata conscientia.* Neither is such a measure required, inasmuch as the irregularities and impediments cover the field sufficiently.[11]

The suspension may be either *partial or total.* It is *total,* if all the effects of suspension are intended, *i.e.,* all acts of the power of order and jurisdiction as well

9 Some authors, *v. g.,* Santi (V, 1, n. 22) held this, but it was justly rejected by others, *v. g.,* Wernz, *l. c.,* n. 897.

10 Bouix, II, 341.

11 This seems more probable also on the ground that the new law requires for every office of any importance the priestly character. Therefore only the prelacies might be considered or, more correctly speaking, the episcopate. But the *processus informativus* and S. C. Consist. will settle this point quite effectively.

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as of administration. It is *partial*, if only the one or the other effect is clearly indicated — because these must according to can. 2188, 3°, be pointed out expressly — as, for instance, from hearing confessions, *a divinis*, etc., as enumerated in can. 2279.

3. The prelates who may inflict this suspension are here simply called *Ordinaries, i.e.*, all those who go by the name of Ordinary, according to can. 198: residential bishops, abbots and prelates *nullius*, vicars and prefects apostolic, administrators, and religious superiors of exempt clerical orders. The vicar-general is excluded, unless he has obtained a special commission from his bishop, because can. 2220, § 2, certainly must here be applied, as was held before.[12] As to the *superiors of exempt clerical institutes*, it is certain that they may suspend their subjects from office. This power is vested in all provincials and such as hold their places, hence also in conventual priors or guardians. According to can. 199, § 1, this power may, either partially or totally, be delegated to others. Thus an absent abbot may delegate this power to a cloistral prior, a guardian to the vicar, etc. But can. 519 must always be observed. Hence, though a religious may have been suspended by his superior *ex informata conscientia* from hearing confessions, he could absolve validly if he had obtained jurisdiction from the local Ordinary.[13]

4. Who is the *passive subject* of this power? The text says: "*clericos suos subditos*," *i. e.*, all their clerical subjects. Therefore, laymen do not fall under this penalty.[14] On the other hand, any one who has received

12 Thus Wernz, *l. c.*, V, P. II, n. 892, and others, quoted by him *ibidem*.

13 S. C. EE. et RR., July 2, 1627; March 2, 1866 (Bizzarri, *Collect.*, p. 24, p. 755).

14 Formerly they could, because of the prohibition of receiving orders.

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the tonsure, is a cleric, and may therefore be suspended *ex informata*. Besides, the Ordinary can inflict this sentence on all who hold an office in his diocese, whether with or without a dignity. Therefore the vicar-general, canons, consultors, and officials are subject to such a sentence.[15] Concerning offices which one holds in a strange diocese, can. 2282 must be observed. This sentence follows the clergyman affected by it everywhere.[16] Ordinaries may also suspend regulars from hearing confessions, even though they had obtained faculties from the local Ordinary without limitation; nor is the latter bound to indicate the reasons for this suspension.[17]

In order, however, to remind Ordinaries of the *extraordinary character of this power,* they are warned to make use thereof for no frivolous reasons; in other words, they *should not inflict suspension ex informata conscientia when they can proceed in the judiciary way without great inconvenience* (can. 2186, § 2). For the procedure *ex informata conscientia* involves a severity which is justified only by very strong reasons, such as the public welfare, scandal to be avoided, or very serious guilt.[18] Thereby, however, we do not mean to say that the sentence would be invalid if the reasons were not entirely strong enough, because the text merely says: "*adhibere non licet.*"[19]

15 Wernz, *l. c.*, n. 893.

16 See can. 2226, § 4.

17 Clem. X, "*Superna,*" June 21, 1670, § 6.

18 Bouix, *l. c.*, II, 344; a case of this kind was solved by S. C. C., Feb. 25, 1875 (*A. S. S.*, VII, 547 ff.).

19 Bened. XIV, *De Syn. Dioesc.*, XII, 8, 6, says that a bishop who would declare at a synod that henceforth he would proceed only *ex informata conscientia* would deserve to be rebuked, because his action would savor of ambition and ostentation and breed hateful tyranny, or autocracy, as we would now style it.

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PROCEDURE IN INFLICTING THIS PENALTY

CAN. 2187

Ad ferendam hanc suspensionem neque formae iudiciales neque canonicae monitiones requiruntur; sed satis est si Ordinarius, servato praescripto canonum qui sequuntur, simplici decreto declaret se suspensionem indicere.

CAN. 2188

Huiusmodi decretum detur in scriptis, nisi adiuncta aliud exigant, designato die, mense et anno; in eoque:

1.° Expresse dicatur suspensionem ferri ex informata conscientia seu ex causis ipsi Ordinario notis;

2.° Indicetur tempus durationis poenae; abstineat autem Ordinarius ab ipsa infligenda in perpetuum. Potest vero infligi etiam tanquam censura, dummodo hoc in casu clerico patefiat causa propter quam suspensio irrogatur;

3.° Clare indicentur actus qui prohibentur, si suspensio non in totum sed ex parte infligatur.

CAN. 2189

§ 1. Si clericus suspensus sit ab officio in quo alius in eius locum substituendus est, ut, ex. gr., oeconomus in cura animarum, qui substituitur mercedem ex fructibus beneficii percipiat secundum prudens Ordinarii iudicium determinandam.

§ 2. Clericus suspensus, si se gravatum senserit, potest imminutionem pensionis petere ab immediato Superiore qui in via iudiciaria esset iudex appellationis.

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CAN. 2190

Ordinarius, qui fert suspensionem ex informata conscientia, debet ex peractis investigationibus tales collegisse probationes, quae eum certum reddant clericum delictum revera perpetrasse et quidem adeo grave ut eiusmodi poena coercendus sit.

It was stated above that *informata conscientia* means absence or lack of judicial procedure, either summary or solemn. This is clearly indicated in can. 2187, which states that *neither judiciary formalities* (such as summons, *contestatio litis,* hearing of witnesses, defence, sentence), *nor canonical warnings* are required to inflict a suspension *ex informata conscientia;* all that is *required* is that the Ordinary observes the rules here laid down and simply declares that the suspension is hereby inflicted.[20]

Can. 2188 rules that the *decree of suspension* must be issued *in writing,* unless the circumstances should advise another mode, for instance, when there is a well-founded suspicion that the clergyman or others are bent on causing trouble in any shape or form. The decree must contain the *precise date, i.e.,* day, month, and year of issue. Besides, it must contain the following statements:

1.° That the suspension is inflicted *ex informata conscientia,* or for reasons known to the Ordinary;

2.° That it is inflicted for a certain clearly expressed period of time;

20 The following formula may be used (see Smith, *l. c.,* II, p. 331, according to Monacelli): "*Constito nobis; presbyterum N. esse reum criminis, eum ob causas quae animum nostrum digne movent, et de quibus Deo et Sedi Apostolicae, cum habuerimus in mandatis, rationem reddere debemus, et ex informata conscientia, a divinis [ab audiendis confessionibus a dicenda Missa] suspendimus per sex [tres] menses, et suspensum declaramus, ac ei decretum suspensionis intimari mandamus. N. Episcopus N., N. Actuarius.*"

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3.° A specification of the *acts* forbidden if the suspension is partial only.

The reason for 1° is that the clergyman may know immediately that no appeal to a higher instance or court is admitted. On recourse to Rome, see can. 2194.

To n. 2 the text itself adds that the Ordinary *should abstain* from inflicting a *perpetual suspension.* However, this does not mean that a suspension inflicted *in perpetuum* would be null and void; because the text itself has no invalidating, but only a warning clause. Therefore, to assert the invalidity of such an indefinite or perpetual suspension would be against the wording of the text.[21] If the Ordinary should suspend one "*ad beneplacitum nostrum,*" this would be an indefinite suspension, but would expire with the death or removal of the Ordinary who issued the sentence.[22]

The text adds to n. 2 that the suspension *ex informata conscientia* may also be issued as a *censure,* provided the reason for which it is inflicted is made known to the cleric in the case. Although the effect would be the same, yet absolution in case of repentance and repair of scandal could not be withheld (can. 2242, § 3).

It was said that the *effect* is the same, no matter whether the suspension is inflicted as a vindictive penalty or as a censure. This effect consists in prohibiting the clergyman from exercising the functions attached to his office, either partially or totally. If notwithstanding this suspension the clergyman would perform the forbidden acts, he would become *irregular.*[23]

21 Smith, *l. c.,* II, p. 323, maintained invalidity, for which he could refer to S. C. C., Feb. 24, 1853 (*A. S. S.,* VII, 574 f.; he might have added S. C. C., Dec. 20, 1873, *A. S. S., ib.*); but Bouix, *l. c.,* II, 334 f., defended the validity and could also allege decisions of the S. C. C. Wernz, *l. c.,* n. 898 simply says: "*non potest infligi —*"; answer: "*licite, concedo; valide, nego.*"

22 Bouix, *l. c.,* II, 336; Wernz, *l. c.,* n. 900.

23 Cfr. can. 985, n. 7; S. C. C.,

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If one is suspended from office in such a way that another must take his place, as, for instance, when a pastor is suspended from his pastoral office, the *substitute must be paid* from the income of the benefice or the pastor's salary, respectively. The *amount* of the remuneration to be paid to the substitute is to be determined by the Ordinary according to his own prudent judgment. In our country, where no state funds can be resorted to, this will depend on the wealth or income of the parish. This may cause some trouble. For the suspended clergyman may think himself unjustly treated if too much is subtracted from his salary. There may not be enough left to support him. Therefore, the Code permits him to appeal (in the widest sense of the word) to his immediate superior. The scope of this quasi-appeal is to ask for a *diminution of the amount of compensation* decreed by the Ordinary for the substitute. To the metropolitan court, therefore, or the court of appeal in the second instance, a clergyman who thinks himself aggrieved should have recourse. But note well that this is no recourse from the sentence inflicted *ex informata conscientia,* but merely concerns the material question of support or remuneration.

Can. 2189 rules, what was already explained above, that the Ordinary who suspends a cleric *ex informata conscientia,* must have *evidence* sufficient to be certain:

1.° That the cleric really perpetrated the crime with which he is charged, and

2.° That the crime is of a nature to deserve such a severe punishment.[24]

April 8, 1848, ad IV (*A. S. S.*, XIV, 314); Wernz, *l. c.*, n. 901.

24 Some cases may be seen in *A. S. S.*, VII, p. 569 ff. (*turpissimi criminis*); VIII, 547 ff. (of the same nature); XIV, 299 ff. (*prava vivendi ratio et corrupti mores,* also embezzlement of church funds).

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OCCULT CRIMES

CAN. 2191

§ 1. Suspensioni ex informata conscientia iustam ac legitimam causam praebet delictum occultum ad normam can. 2197, n. 4.

§ 2. Ob notorium delictum suspensio ex informata conscientia nunquam ferri potest.

§ 3. Ut delictum publicum suspensione ex informata conscientia plecti possit, occurrat necesse est aliquod ex adiunctis quae sequuntur:

1.° Si testes probi et graves delictum quidem Ordinario patefaciant, sed nulla ratione induci possint ut de eo testimonium in iudicio ferant, neque aliis probationibus delictum iudiciali processu evinci possit;

2.° Si ipsemet clericus minis aut aliis adhibitis mediis impediat ne processus iudiciarius instituatur aut inceptus perficiatur;

3.° Si processui iudiciali conficiendo ferendaeque sententiae impedimenta exoriantur ex adversis civilibus legibus aut gravi scandali periculo.

CAN. 2192

Suspensio ex informata conscientia valet si ex pluribus delictis unum tantum fuerit occultum.

The two canons settle the controversy as to which crimes can be punished with suspension *ex informata conscientia.* The Council of Trent really intended and mentioned only a "*crimen occultum,*" as is manifest from the preface to Sess. 14, *de ref.* For public and notorious crimes the bishops needed no extension of their power, since they could prosecute these in the judiciary way.[25]

25 Wernz, *l. c.*, n. 896.

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The text itself, ch. 1 of session 14, explicitly states: "occult crime." Nevertheless some authors extended this suspension to public crimes.[26] The Code takes the golden mean between the two extremes.

1.° *A just and legitimate cause* for suspending one *ex informata conscientia* is an *occult crime, i.e.,* one which is not yet divulged or has been committed under, or is involved in, circumstances which render it unlikely that it will become known. *"Occultum, quod non est publicum,"* says can. 2197.

Hence, if the crime is not liable to be divulged on account of the secret circumstances under which it was committed, it is supposed to remain secret. This is somewhat similar to a secret impediment, which is one that cannot be fully proved in court. However, if a case has been tried in court, although without result, it can no longer be called occult, and in that hypothesis the Ordinary would act wisely if he abstained from inflicting suspension *ex informata conscientia.*[27]

2.° Suspension *ex informata conscientia can never be inflicted* for a *notorious crime* because such a crime requires judiciary procedure, in order to safeguard public welfare and justice and the authority of the law. This was generally admitted.

3.° The Code makes some concessions to those who hold that this suspension may be inflicted *also for a public crime,* but it requires that at least *one of the* three following *conditions* be present:

a) That trustworthy and serious witnesses made the

26 Thus Bouix, *l. c.,* II, 325 f.

27 S. C. C., Dec. 20, 1873 (*A. S. S.,* VII, 569) granted an appeal proper, because the case had been brought before the civil court, which could not find sufficient proof for condemnation, and then twice before the ecclesiastical court, from which the pastor appealed, but was in the meanwhile suspended by the bishop *ex inf. consc.,* in order to cause less noise.

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crime known to the Ordinary, but cannot in any way be induced to make depositions at a trial, and no other evidence is at hand which would prove the crime in a judiciary way;[28]

b) that the clergyman would use threats or other means to impede or stop a judiciary trial;

c) that the civil law or a serious scandal stand in the way of a formal trial or judicial sentence. This is possible in countries where the *brachium sæculare* not only does not assist but directly opposes the Church.[29]

Suspension *ex informata conscientia is valid* if *only one* crime of several imputed to the same party is occult. Thus if a clergyman should be publicly accused and tried for embezzlement of church funds, but has also been guilty of a crime which is not provable in court, he may be suspended *ex informata conscientia.*[30]

MANIFESTATION OF REASONS AND RECOURSE

CAN. 2193

Prudenti Ordinarii arbitrio relinquitur suspensionis causam seu delictum clerico patefacere aut reticere, pastorali tamen adhibita sollicitudine et caritate, ut, si delictum clerico manifestare censuerit, poena, ex paternis quae interposuerit monitis, nedum ad expiationem culpae, verum etiam ad emendationem delinquentis et ad occasionem peccati eliminandam inserviat.

28 This was the case narrated in *A. S. S.*, VII, 570; *puella honesta et sincera, quae turpia passa est a clerico.*

29 As to b) and c) see S. C. C., April 8, 1848 (*A. S. S.*, XIV, 300); the witnesses were serious and respectable citizens, but afraid of the pastor, and the civil court seemed to favor the priest.

30 S. C. C., April 8, 1848; Feb. 27, 1875 (*A. S. S.*, XIV, 299 ff.; VIII, 547 ff.).

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CAN. 2194

Si clericus recursum a suspensione sibi inflicta interponat, Ordinarius ad Sedem Apostolicam mittere debet probationes quibus constet clericum delictum revera perpetrasse quod extraordinaria hac poena puniri queat.

The Tridentine decree permitted Ordinaries to inflict this suspension *quomodolibet, etiam extraiudicialiter*. Since, then, there is no judiciary procedure involved, it is left to the prudent judgment of the Ordinary to manifest or conceal the reason for the suspension. If he deems it prudent to make the reason known to the suspended cleric, he should use pastoral care and charity, in order that the penalty inflicted and accompanied by paternal admonitions, will not only procure an atonement of the transgression, but also better the delinquent and eliminate further occasions of sin. For the Ordinaries, as our Code,[31] following the Council of Trent, says, should remember that they are "*pastores, non percussores.*" Of course, the admonitions referred to are not canonical, but purely paternal, and hence destitute of the judiciary character.

The lawgiver, however, in order not to leave the suspended clergyman entirely defenceless, which would be against every dictate of justice, allows him to *have recourse to the Apostolic See* (S. C. Concilii). Hence there is no appeal to the metropolitan or second instance. This recourse has no suspensive, but only a devolutive effect, and the suspended clergyman must therefore conduct himself as one suspended, and abstain from every act prohibited by the suspension, whether specifically or generally stated.

31 Can. 2214, § 2; *Trid.*, Sess. 13, c. 1, *de ref.*

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The *Ordinary* must forward the papers to the same S. Congregation. They must contain the evidence or proofs that the clergyman really committed the crime for which he was suspended *ex informata conscientia.* These must be sent in trustworthy and correct abstracts bearing the official seal and signature. If the witnesses do not object, the original documents may be sent, provided a faithful translation accompanies the vernacular text. Besides, we may reasonably suppose that if the sentence was inflicted for a public crime, at least one of the three conditions mentioned above should be added and testified to; otherwise there might be delay in deciding the case.

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APPENDIX I

(*To Canon 1990*)

The Papal Commission for the Authentic Interpretation of the Code has decided the following cases:[1]

1. If two Catholic parties have contracted marriage before the civil magistrate only, without observing the "*Tametsi*" or the "*Ne temere,*" in places where these laws are binding, and wish to contract marriage anew *in facie Ecclesiae,* or to have their civilly contracted marriage revalidated, the local Ordinary (or the pastor after having consulted the local Ordinary) may declare the first marriage null and void without a formal trial and without the intervention of the *defensor vinculi,* after having made the investigation prescribed in can. 1019, *i.e.,* after having ascertained the free status of the couple, — that no other impediment except the formerly clandestinely and therefore invalid contracted civil marriage is in the way.

2. The same rule is to be applied in cases of *mixed marriage* contracted invalidly in a non-Catholic Church under the same condition, provided the Catholic party wishes to contract a new marriage with a Catholic.

3. The same rule applies in cases where apostates from the Catholic faith have contracted an invalid civil marriage for the same reason, and, now repentant, wish to contract a new marriage with a Catholic party *in facie Ecclesiae.*

But in each and every one of these cases a *civil divorce* must have first been obtained.

1 Cfr. *A. Ap. S.,* Vol. XI, 479 (Oct. 16, 1919). We add this decision here for the convenience of those who have the first edition of Vol. V of this Commentary.

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APPENDIX II

"DECRETUM" AND "DECERNERE"

Canon 1868 states that "all other settlements are called decrees," and hence it seems worth while to give a list of these contained in the Code. We shall do so by quoting the respective canons and mentioning the topics treated therein.

1. Can. 1570, § 2	Intimation of decrees.
2. Can. 1577, § 2	Official's administration method.
3. Can. 1591, § 1	Beadle.
4. Can. 1601	No recourse from decrees.
5. Can. 1604, § 4	Signatura decrees acceptance of petitions.
6. Can. 1607, § 2	Bishop decrees extraordinary ministers.
7. Can. 1627	Order of taking cognizance.
8. Can. 1635	Dilatory terms.
9. Can. 1638, § 1	Hours of trial.
10. Can. 1639, § 1	Days of trial.
11. Can. 1663	Removal of procurator and advocate.
12. Can. 1672, § 3	Sequestration.
13. Can. 1674	"
14. Can. 1675, §§ 2, 3	"
15. Can. 1699, § 3	Spoliation.
16. Can. 1710	*Oblatio libelli.*
17. Can. 1724	Summons.
18. Can. 1729, §§ 2, 3, 4	*Litis contestatio.*
19. Can. 1758	Suspected witnesses.
20. Can. 1765	Summons of witnesses.
21. Can. 1782, § 1	Publication of witnesses.
22. Can. 1784	Rejection of witnesses.
23. Can. 1786	Readmission of witnesses.
24. Can. 1796, § 2	Experts.
25. Can. 1799, § 1	"

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26. Can. 1806	Local inspection.
27. Can. 1810	" "
28. Can. 1811, § 1	" "
29. Can. 1821, § 1	Documents.
30. Can. 1823, § 3	"
31. Can. 1830, § 5	Oaths.
32. Can. 1839	Incidental questions.
33. Can. 1840, §§ 1, 3	" "
34. Can. 1856, § 2	Attempts.
35. Can. 1857, § 1	"
36. Can. 1860, § 3	*Publicatio processus.*
37. Can. 1861, § 2	*Conclusio in causa.*
38. Can. 1868, § 2	Decrees.
39. Can. 1878, §§ 2, 3	Correction of errors.
40. Can. 1880, n. 6.	Appeal.
41. Can. 1899, § 4	Opposition of Third Person.
42. Can. 1907, § 2	*Restitutio in integrum.*
43. Can. 1918	Execution of sentence.
44. Can. 1946, § 2	Denunciation.
45. Can. 1957	Removal from a place.
46. Can. 1958	" " "
47. Can. 1988	Matrimonial cases.
48. Can. 1992	" "
49. Can. 2040, § 2	Beatification and Canonization Decrees.
50. Can. 2073	
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56. Can. 2110, § 1	
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58. Can. 2124, § 1, 2	
59. Can. 2134	
60. Can. 2139	
61. Can. 2140	
62. Can. 2141	
63. Can. 2146	Removal of pastors.
64. Can. 2152, § 2	" " "
65. Can. 2153, §§ 1, 3	" " "
66. Can. 2154, § 1	" " "

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67. Can. 2155	Removal of Pastors.
68. Can. 2161, §1	" " "
69. Can. 2187	Suspension *ex informata conscientia.*
70. Can. 2188	" " " "

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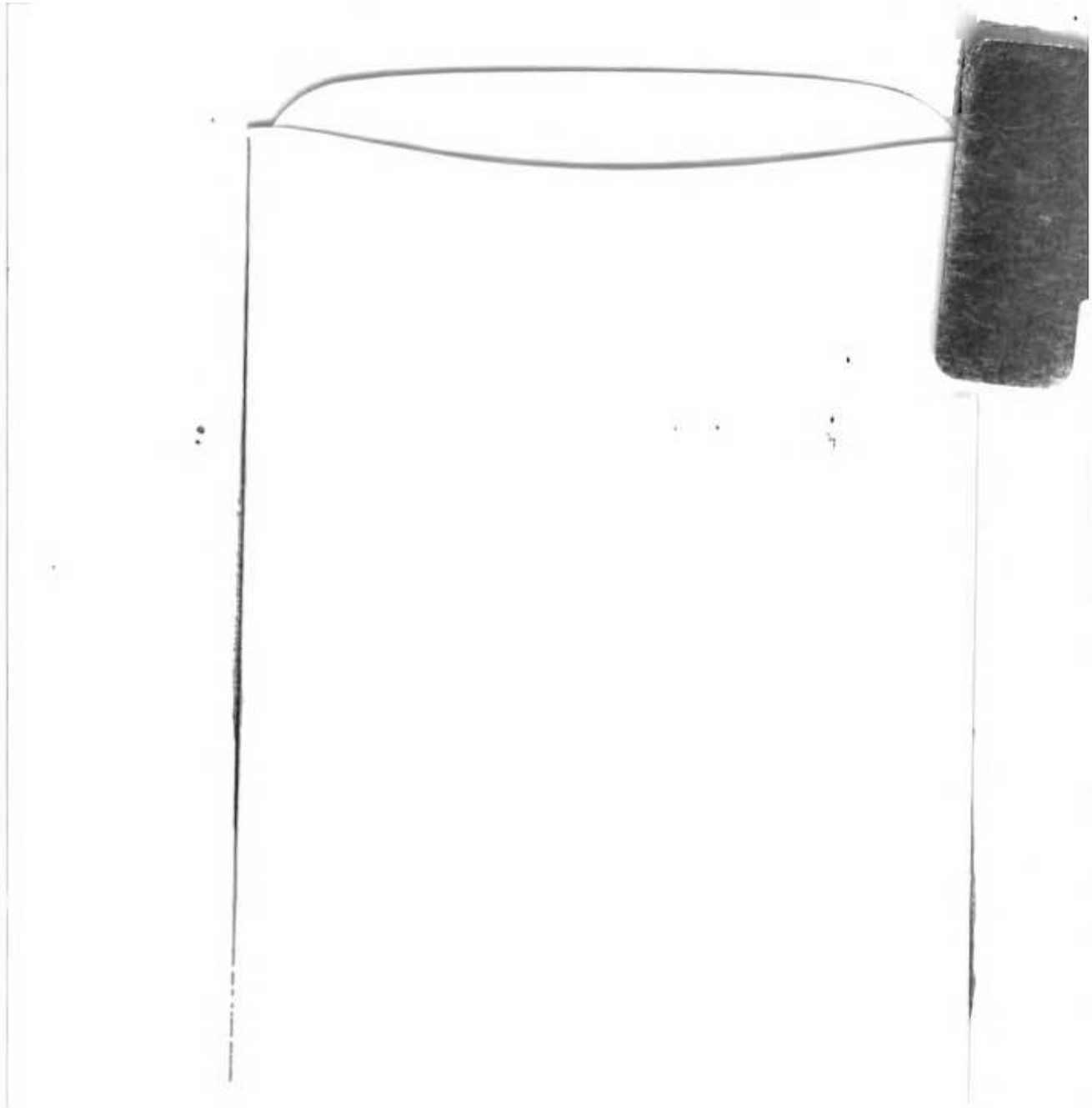
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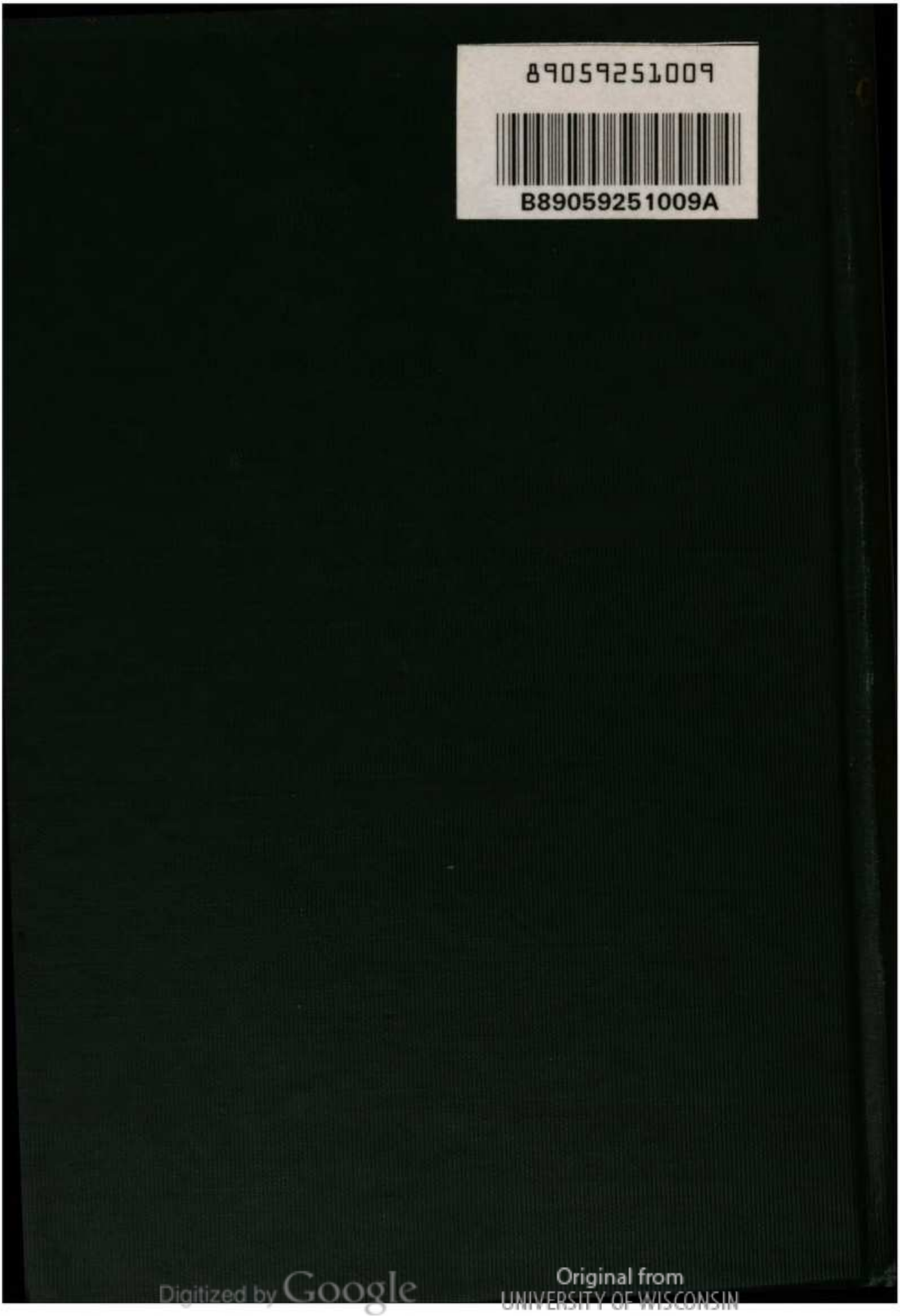
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A COMMENTARY ON THE NEW CODE OF CANON LAW

By THE REV. P. CHAS. AUGUSTINE, O.S.B., D.D.
Professor of Canon Law

VOLUME VIII

BOOK V

Penal Code (Can. 2195-2414)
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THE PENAL CODE

BOOK V

INTRODUCTION

"Brutal laws brutalize a people," is a well known dictum of Montesquieu. If this is true of all laws, it is even more so of penal laws. For penalty means pain or suffering, and if this is out of proportion with the crime, it becomes an incentive to rebellion against law, and finally against authority itself. Moderation in the penal code, therefore, should be the keynote of wise legislation.[1] We say this, not as if we had expected that the Code of Canon Law would fail in moderation, but for the reasons which follow. Modern criminology is too moderate; it even eliminates the very notion of penalty. This is due to an inevitable reaction. Legislators had not always followed wise moderation or sufficiently considered the physical and psychological condition of the delinquent. With regard to this point, and more especially the treatment of youthful delinquents, the modern theories of criminology deserve some consideration. On the other hand these theories cannot claim universal, either scientific or dogmatic, acceptance. For they are based on mere assumptions and neglect sound philosophical principles,

[1] This is true of all, including prohibition laws, notwithstanding the purely technical decision of the U. S. Supreme Court.

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which must necessarily lead to a sceptic attitude on the part of jurists as well as philosophers.

The "Modern Theories of Criminality"[2] are crystallized in two materialistic views, viz.: determinism and transformism or natural selection. They investigate the causes of crimes and then try to find preventive remedies for them. As to what crime is, they neglect to define. Ferri says crime is "a phenomenon of complex origin and the result of biological, physical, and social conditions."[3] The criminal, "being the product of cosmic, biological, or social influences which put him out of harmony with conventional morality and cause him to disturb the recognized aims of community existence, must be treated as a ward of the State for the purpose of curing his impairment and meanwhile keeping him sufficiently restrained so as to prevent injury to others."[4] But "the old and still dominant thought is, as to cause, that a crime is caused by the inscrutable moral free will of the human being, doing or not doing the crime, just as it pleases."[5] The criminal type, therefore, either natural, or occasional, or emotional, or social, or whatever it be — for there is a remarkable variety of hues and shades and colorings among the various propounders,— is rather a creation or miscreation of nature for which the criminal cannot be held responsible. Imputability is eliminated. Consequently, away with jails and penitentiaries;[6] convert them into state asylums, and abolish penal laws

2 This is the title of a book published by C. Bernaldo de Quirós, translated into English by Alfonso de Salvio, Ph.D., Boston, 1912.

3 *L. c.*, p. 21.

4 *L. c.*, p. xv.

5 *L. c.*, p. viii.

6 *L. c.*, p. 170.

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completely. That the penal code must undergo a radical change is evident on the basis of this theory. "The public in general and the legal profession in particular," we are told, "have remained either ignorant of the entire subject or indifferent to the entire scientific movement, and this ignorance or indifference has blocked the way to progress in administration." [7]

There we are. Inferiority is the signature of the "deeply imbedded tradition," because science is monopolized by modern criminologists. But natural selection has received a rather severe blow from modern science, and the free will theory is not easily disposed of yet. Even the criminologists find it rather difficult to fix responsibility. "This constantly debated question is proving unusually troublesome for our contemporaries who have not been able to look at it from the correct point of view." [8]

The "classical theory," as the modern theorists benignly call the traditional, which is also the Catholic view, assumes a moral and social responsibility, based upon the notions of obligation, free will, and personality.

It is not our task to refute determinism, *i.e.*, the theory that the human will is not free and that all man's acts, including those that are apparently free, are adequately and inevitably determined by their antecedents. We leave this to the philosophers.[9] What must be especially emphasized here is the connection existing be-

7 *L. c.*, p. ix.
8 *L. c.*, p. 142.
9 See for instance, Urráburu, *Inst. Phil., Psych.*, III. 1898, p. 222 ff.; Mercier, *A Manual of Modern Scholastic Philosophy* (Engl. tr.), 1916, Vol. I, p. 265 ff.

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tween guilt and penalty and the various purposes of the latter illustrated in the course of our Commentary. We pay no special attention here to the right of the Church to employ coercion, for this shall be set forth under can. 2214. But one thing needs stressing, namely, that the sentimentality of modern criminologists is not conducive to public welfare. It would be much better for our legislators to borrow correct ideas from the penal code of the Church, which is at the same time a specimen of true moderation and of the spirit in which penal laws ought to be made and executed.

Concerning the *sources* (*fontes*) of the penal code, it must be understood above all that the ***ancient sources now have only an interpretative value*** (see can. 6). For the Code is ***the sole authentic*** source of ecclesiastical law, to the exclusion of all others, whether found singly or in collections. *Single* penal laws were enacted at particular as well as general councils, and some of them found their way into collections.[10] Gratian's Decree contains penal laws dispersed throughout, and an attempt at systematic treatment is made in Causae I–III. The fifth book of the *Decretals* is more compactly, though not exclusively, penal, as may be seen from title 33 on privileges. After the "classical" period of Canon Law no systematic digest of the penal law was attempted,—if we except the so-called "*Reserved Cases*" in the Bull "*In Coena Domini*," — until the time of Pius IX. This Pontiff revised the penal law, as far as *censures* are concerned, in his well-known Constitution "*Apostolicae Sedis*," of Oct. 12, 1869.

Other penal laws were scattered in the papal constitu-

10 Here the Penitential Books may be cited, *e.g.*, Wasserschleben, *Die Bussbücher der abendländ. Kirche*, 1851; Schmitz, *Die Bussbücher und Bussdisciplin der Kirche*, 1883.

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tions that emanated from time to time after the Clementine Collection, *i. e.*, after 1317. Among these the one called "*Ad vitanda scandala*," of Martin V (1418) is of special importance because of the distinction it makes between *excommunicati vitandi* and *tolerati*. Otherwise, as stated above, no exhaustive and complete redaction was attempted until the promulgation of the new Code.

The Code has taken cognizance of the postulates of the French and German Bishops at the Vatican Council, who wished to see the number of censures and reserved papal cases diminished.[11] A comparison with the "*Apostolicae Sedis*" shows this. Besides, the formulation of the present penal laws has been modified to such an extent that only a few former texts have been inserted entirely (*ex integro*) in the new Code. This should serve as a caution to the reader who is tempted to follow the old interpreters.

The *literature* on the penal laws of the Church is considerable, though now-a-days antiquated for more than one reason. Besides the commentaries on Book V of the Decretals, there are some specific treatises which deserve mention. They are:

C. A. THESAURUS, S. J., *De Poenis Ecclesiasticis*, 1640, re-published with notes and additional laws up to the year 1760, by Ubaldus Giraldi, whose edition of 1831 we use;

F. SUAREZ, *Disputationes de Censuris*, etc., Paris edition of 1861, t. xxiii;

F. KOBER, *Der Kirchenbann nach den Grundsätzen des*

11 Cfr. Granderath-Kirch, *Geschichte des Vatik. Konzils*, 1903, Vol. I, p. 441, p. 444; U. Stutz, *Der Geist des Codex Iuris Canonici*, 1918, p. 153 f.

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Kanonischen Rechtes, 1863; ID., *Die Suspension der Kirchendiener,* 1862; ID., *Das Interdict,* in the *Archiv für kath. K-R.,* 1869.

Since the promulgation of the "*Apostolicae Sedis,*" 1869, the following commentaries have been published:

D'ANNIBALE, *Commentarius in Const. Apostolicae Sedis,* Prati, 1894.

AVANZINI, *De Constitutione Ap. Sedis,* Romae 1883.

HILARIUS a SEXTEN, *Tractatus de Censuris Ecclesiasticis cum Appendice de Irregularitate,* Moguntiae 1898.

PENNACHI, *Commentaria in Const. Ap. Sedis,* 1883.

Of a more general character are the following works:

P. HINSCHIUS, *Das Kirchenrecht der Katholiken und Protestanten in Deutschland,* Vol. IV, 1888; V, 1895; VI, 1897. The author, being a non-Catholic, could not always free himself from prejudice, but none the less his work is a fountainhead of historical and practical knowledge.

SMITH, *Elements of Eccl. Law,* Vol. III, ed. 3, N. Y. (*s. a.*)

Useful for the student of secular criminal law is:

KENNY-WEBB, *Outlines of Criminal Law,* New York, 1907.

Worthy of especial mention are:

J. HOLLWECK, *Die kirchlichen Strafgesetze,* 1899. He formulates the whole penal law into 301 paragraphs and then offers a commentary on the same.[12]

F. WERNZ, S. J., who entitles Vol. VI of his *Ius*

12 Msgr. Hollweck was an active member of the Commission on the Penal Code. We remember his telling us how difficult it was to arrange these canons. "It is," he said, "like taking a stone out of a building if you remove one censure or the other." We notice that Hollweck's arrangement has been adopted by the Code.

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Decretalium, Ius Poenale Ecclesiae Catholicae, Rome 1913.

M. LEGA, *De Iudiciis Eccl.,* Vols. III et IV, 1906 ff.

Since the promulgation of the Code there have been issued:

H. A. AYRINHAC, *Penal Legislation,* N. Y. 1920.

F. M. CAPPELLO, S. J., *De Censuris iuxta Cod. I. C.,* 1919.

E. EICHMANN, *Das Strafrecht des Codex I. C.,* 1920.

A. PERATHONER, Auditor S. R. R., *Kirchliches Gerichtswesen und kirchl. Strafrecht,* 1919 (for the most part only a translation of the respective canons of the Code).

J. SOLE, *De Delictis et Poenis,* Rome 1920.

Our Code divides the whole fifth book into three parts, as follows:

Part I: *De Delictis*
1. Nature of crime and its division.
2. Imputability and circumstances.
3. Attempted crimes.

Part II: *De Poenis*
1. Nature, kinds, interpretation, application.
2. Power of inflicting penalties.
3. Subjects of penalties.
4. Pardoning power.
5. Censures in general and particular: excommunication, interdict, suspension.
6. Vindictive penalties for clergymen in general and in particular.
7. Penal remedies and penances.

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Part III: *De Poenis in Singula Delicta*

1. Crimes against faith and the unity of the Church.
2. Crimes against religion.
3. Crimes against ecclesiastical authorities, persons, and things.
4. Crimes against life, liberty, property, good name and morals.
5. *Crimen falsi*, or forgery of documents.
6. Crimes in the administration and reception of orders and other Sacraments.
7. Crimes against the clerical and religious state.
8. Crimes in conferring, receiving and dismissing ecclesiastical dignities, offices and benefices.
9. Abuse of ecclesiastical power or office.

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PART I

ON CRIMES

TITLE I

NATURE AND DIVISION OF CRIME

CAN. 2195

§ 1. Nomine delicti, iure ecclesiastico, intelligitur externa et moraliter imputabilis legis violatio cui addita sit sanctio canonica saltem indeterminata.

§ 2. Nisi ex adiunctis aliud appareat, quae dicuntur de delictis, applicantur etiam violationibus praecepti cui poenalis sanctio adnexa sit.

CAN. 2196

Qualitas delicti desumenda est ex obiecto legis; quantitas vero dimetienda non solum ex diversa gravitate legis laesae, sed etiam ex maiore minoreve imputabilitate aut damno illato.

CAN. 2197

Delictum est:

1.° Publicum, si iam divulgatum est aut talibus contigit seu versatur in adiunctis ut prudenter iudicari possit et debeat facile divulgatum iri;

2.° *Notorium notorietate iuris,* post sententiam iudicis competentis quae in rem iudicatam transierit

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aut post confessionem delinquentis in iudicio factam ad normam can. 1750;

3.° *Notorium notorietate facti,* si publice notum sit et in talibus adiunctis commissum, ut nulla tergiversatione celari nulloque iuris suffragio excusari possit;

4.° *Occultum,* quod non est publicum; *occultum materialiter,* si lateat delictum ipsum; *occultum formaliter,* si eiusdem imputabilitas.

CAN. 2198

Delictum quod unice laedit Ecclesiae legem, natura sua, sola ecclesiastica auctoritas persequitur, requisito interdum, ubi eadem auctoritas necessarium vel opportunum iudicaverit, auxilio brachii saecularis; delictum quod unice laedit legem societatis civilis, iure proprio, salvo praescripto can. 120, punit civilis auctoritas, licet etiam Ecclesia sit in illud competens ratione peccati; delictum quod laedit utriusque societatis legem, ab utraque potestate puniri potest.

The Code first defines crime, then describes its qualities and guilt, and then enumerates the various kinds of crimes, so far as the *forum internum* and *externum,* the ecclesiastical and civil court, are concerned.

A crime, in ecclesiastical law, is an external and morally imputable transgression of a law to which is attached a canonical sanction, at least in general.

1. *Delictum* is taken from the word *delinquere* (*de* and *linquere,* to forsake, to leave, to omit) and means an offence in the general sense. However, by common usage the term is restricted to a public offence or crime against the juridical order or law. Therefore it is called a *transgression of the law,* whether divine or human, *i. e.,* merely ecclesiastical. It is the law, either eternal or positive,

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that governs order, the relation of man to God and of man to man, and any defection from that order constitutes a frustration of the designs of Providence.

2. But the transgression which the ecclesiastical law considers is not merely the guilty mind (*mens rea*), but the *act*,—i. e., an outward manifestation of a vicious intention, or a breach of the law as externally apprehensible. This may be positive or negative, or, in other words, it may consist in an act or in an omission. Thus a sacrilege is a positive act, but neglect of pastoral duties is an omission. It is essential to the notion of *delictum* that it be an *external act,* either of speech or deed, although it need not necessarily be provable.

3. Externality, however, does not exclude imputability, and hence the definition contains the addition, ***morally imputable***. The vicious act, therefore, presupposes a guilty mind (*mens rea*).[1] Why? A transgression of the law is an act, and the transgressor, therefore, is an agent, and when that agent is intelligent and free, and acts as such, we say that the effects caused by such an agent are to be imputed or credited to him. Because an intelligent being has dominion over its actions, it is capable of moral proprietorship in the praise or blame justly due to its deliberate acts, according as they are seen to be good or bad.[2] In this feature crime shares the notion of sin, for every crime is a sin, though not conversely. For a sin (*e. g.,* mental apostasy or heresy) may be committed by the mind only, whereas a crime supposes an external act.

1 English lawyers for nearly 800 years have been familiar with the maxim: "*Actus non facit reum nisi mens sit rea,*" the origin of which is attributed to St. Augustine; see Kenny-Webb, *Outlines of Criminal Law,* 1907, p. 33.

2 W. Hill, S. J., *Ethics,* 8th ed., p. 47.

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It may be asked whether *imputability* is required under all conditions. In general there is no doubt that every crime supposes personal imputability. An apparent exception seems to be the local interdict, which may affect guilty as well as innocent persons. But provision for these is made by can. 2276.

A more serious objection might arise from the existence of *pure penal laws,* which many moralists assert. However, in the first place, it would have to be proved that these laws really are laws. We cannot regard the prohibition of wine and beer, for instance, as a true law, because it neither pertains to reason nor is it intended for the public good, unless we identify the latter with the aims of fanatics. Secondly, it would have to be proved that the conscience does not feel guilty at all in transgressing such penal laws, *e. g.,* the constitutions of religious communities. No matter what the constitutions may say, it is a solemn and certain fact that religious do feel the sting of conscience when they transgress the rules laid down.[3] Be that as it may, the Code does not contain a single purely penal law.

4. But what does the addition "*cui addita sit sanctio canonica saltem indeterminata*" mean? The transgression is accompanied by penal sanction, at least in general terms. This means that there is neither crime nor punishment without a penal law.[4] It is, therefore, as stated above, the law which is infringed and which punishes. Superficially considered, this appears quite plausible and perhaps sufficient. Yet there are some philosophico-

3 On this question see *Tübinger Quartalschrift,* 1900, pp. 204–281; 1902, pp. 574–620. Layman, S. J., appears to hit the nail on the head when he says: "*Si recte attendimus, eiusmodi constitutiones aut ordinationes non sunt proprie leges.*" (*Theol. Moral.,* l. I, tr. 4, c. 15, n. 1.)

4 "*Nullum crimen, nulla poena sine lege poenali,*" was the adage of the School; Eichmann, *l. c.,* p. 27.

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juridical questions involved in this simple answer. Thus it may be asked, why the law punishes certain transgressions, while it leaves others unpunished? Take, for instance, the reading of forbidden books, which is not punished generally (can. 1395), but only in particular cases (can. 2318); hunting by clergymen (can. 138), etc. Yet these forbidden actions cannot be called crimes in the sense of the ecclesiastical law.

There is another element implied in the word crime: it means a serious violation of the *public or social order*, which, when disturbed, requires reparation. We may indeed say that punitiveness or non-punitiveness forms a test between civil and criminal procedure, or between crimes proper and civil offences, and may even add, as a further distinction the legal power of remitting the sanction, yet the intrinsic and doubtless first intended demarcation is the amount or degree of social disturbance.[5] Sin may be a merely ethical transgression, but crime will ever be an ethico-juridical offence against the order established by law, and declared punishable at least in general terms.

The *sanctio canonica indeterminata* signifies a penalty to be meted out according to the good pleasure of the judge or superior (can. 2217, § I, n. I). It follows that, although no special penalty is provided for the transgression of a law, yet if that law embodies the provision that the punishment of the transgressor is left to the prudent judgment of the Ordinary, this is sufficient to mark the transgression as a crime, provided the other neces-

5 Kenny-Webb, *l. c.*, p. 3, enters upon this question thoroughly, yet when he says that the final distinction between civil and criminal lies "in the legal power of remitting the sanction" (*l. c.*, p. 15 f.) he seems to beg the question; for unless we assume that legal power to be absolute, it cannot remit penal sanction *ad libitum* or without the supposition of justice or some kind of law.

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sary marks are not wanting. Instances of this kind are enumerated in can. 2170, 2183, and 2391. There is one exception to this general rule, however, *viz.*, can. 2222, § 1, which, as shall be seen, is nothing but an external corroboration of the idea of reparation and the supreme law of the Church, *viz.*, the welfare of souls.

§ 2 of can. 2195 ascribes the criminal character also to the violation or the *non-observance of a precept given under a penal sanction.* A specimen of such a precept is that mentioned in can. 2173 and 2176. But the precept must have been duly given and intimated according to can. 2310. Besides, the essential features of a crime must not be sacrificed in these violations, which consequently must be external and imputable.

Can. 2196 establishes the quality and determines the grievousness of crimes (*qualitas et quantitas*). Moralists, when speaking of the different species of sin, are wont to lay down a threefold rule for determining them. Two of these rules coincide with the quality of crime stated in the first clause of our canon. Crimes differ from one another in quality by reason of the different objects of the law. However, since every law has in view special acts, it is evident that crimes differ specifically according to their formal objects. Thus the crimes against faith and unity of the Church differ from those against religion, even though faith belongs to religion,[6] the sins against property and life differ from one another, although all are directed against the virtue of justice, because they are morally specified by their formal objects.

The *gravity of a crime* depends on the conditions mentioned, *viz.*, the objective gravity or importance of the law violated, the greater or less imputability, and the

[6] See can. 2314, 2319, and can. 2320–2329.

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damage done. The *objective* gravity of a law can easily be gauged by the gravity of the penalty attached to it. A law provided with a penal sanction (*lex perfecta*) is manifestly more important than a law destitute of such a sanction. Besides, the *subjective condition of the transgressor* must be considered, of which more under Title II. Lastly, an action which might be considered less weighty in its nature and on account of diminished imputability, might still entail very serious consequences[7] and thus enhance responsibility. English and American criminal law distinguishes between indictable and petty offences, and the former are classified as treasons, felonies, and misdemeanors.[8] There can be no doubt that this law is bottomed on the natural distinction of heinousness. Consequently, also, the procedure is different.

PUBLICITY OF CRIMES

Can. 2197 distinguishes three kinds of crimes,— public, notorious, and occult.

1. A crime is *public* if committed under, or accompanied by, circumstances which point to a possible and likely divulgation thereof. Canonists[9] enumerate different degrees of publicity: *almost occult* (*pene occultum*), which is known to at least two witnesses; *famosum* or *manifestum,* which not only can be proved, but is known to many; and, finally, *notorium.* From this it will be seen that a real intrinsic distinction be-

7 Take, for instance, an operation performed by an unskilled surgeon or midwife, or an innocent hunting trip by a clergyman.

8 Cfr. Kenny-Webb, *l. c.,* p. 84 ff. The French law distinguishes *crimes, délits, contraventions;* the German: *Verbrechen, Vergehen, Uebertretungen;* the Roman: *facta, dicta, scripta, consilia;* l. 16, Dig. 48, 16; see c. 19, Dist. 1, *de Poenit.*

9 Reiffenstuel, V, 1, 241 ff.; Schmalzgrueber, V, 1, n. 1 ff.; Hollweck, *l. c.,* p. 67 f.; Wernz, *l. c.,* VI, n. 17, p. 21.

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tween a *public crime* and a *crime notorious in fact* can hardly be established.[10] (We shall point out one distinctive trait below.) To fix the number of persons required for making a crime a public one[11] is rather hazardous, though it may furnish a certain rule which will enable the judge to decide as to the secrecy or public character of a crime. Many canonists hold that *at least six persons* in a community, even the smallest (for instance, a religious house of 10 or 12 inmates), must know of a crime, to render it public.[12] Nor should there be any doubt about the character of the persons who are witnesses to the crime. Furthermore, the interest they may have in the crime should be weighed.[13]

2. A crime is *notorious* by notoriety of law (*notorietate iuris*) if it has become an adjudged matter, according to can. 1902–1904, or judicially confessed, according to can. 1750. Extrajudicial confessions do not render a crime notorious by notoriety of law. Here we must take issue with the assertion that the Code acknowledges such confessions. Thus it has been stated[14] that it would be a *notorium juris* if the bishop or vicar-general would catch a clergyman *in flagranti!* The Code contains nothing to that effect, but requires (*can. cit.*) a confession before the judge sitting in court.

A crime is notorious *notorietate facti* when it is pub-

10 The sources are not consistent; see c. 17, C. 2, q. 1; c. 8, X, III, 2, where the *notorium* is called *publicum* and *manifestum*.

11 Wernz, *l. c.*, VI, p. 22, note 35.

12 Reiffenstuel, V, 1, n. 252; unless, he says, it has been committed in the presence of the competent authority who enjoys power *in foro externo*.

13 Eichmann, *l. c.*, p. 32; for instance, in adultery.

14 Hollweck, *l. c.*, p. 67, note 4, quotes Reiffenstuel, V, 1, 267; but Reiffenstuel is cautious enough not to make such a general statement, for he demands that the judge surprise the delinquent before witnesses. This is evident, otherwise the judge would at the same time be the accuser. That the pastor does not constitute a public person in judiciary matters is clear.

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licly known and has been committed under such circumstances that it cannot be concealed by any artifice or be excused by any legal assumption or circumstantial evidence. The term *nulla tergiversatione celari* is equivalent to the other used in the Decretals.[15] The second clause refers to imputability, which may be lessened by extenuating circumstances, according to can. 2201–2206. Hence not only the fact itself must be notorious, but also its criminal character.[16] Thus, for instance, the fact of alienation may easily be proved by a legal deed, but whether it was criminal must be ascertained by other means; because it may be that the administrator or procurator had due permission and therefore acted lawfully. It is this element of inexcusability or of knowledge of the criminal character of the deed that appears to distinguish a public from a notorious crime. For the text manifestly lays stress on divulgation with regard to public crimes and emphasizes the criminal character as known and inexcusable.

3. Every *crime* which is not public, says our text, is occult or *secret*. The Code distinguishes a twofold secrecy, *viz.:* merely material *(materialiter occultum)*, which exists when the fact is unknown, or known only to the perpetrator and a few reticent persons; and formal (*formaliter occultum*), when the moral and juridical guilt is unknown. An example may illustrate the distinction. If a *percussor clericorum* beats a pastor at night, his identity may remain unknown, though the effects point to a crime; if the priest was beaten in a public row, there may be a reasonable doubt as to the real perpetrator. The authors,[17] therefore, assumed that a crime committed at night could not be notorious or public. However,

15 C, 10, X, III, 2.
16 Reiffenstuel, V, 1, n. 265; Hollweck, *l. c.*, p. 68.
17 Schmalzgrueber, V, 1, n. 5.

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this theory cannot be accepted in this general sense. Take, for instance, a sacrilegious burglary.[18] If a sufficient number of persons witnessed such a crime and recognized the perpetrator, the crime could not be styled occult. Neither does it seem true that a duel is always a secret crime, as some maintain.[19] For although duels are generally held in a secret place, yet there are, as a rule, witnesses and signs which admit of a perfectly safe judgment that a duel has taken place.[20]

ECCLESIASTICAL, CIVIL, AND MIXED CRIMES

The Code does not distinguish between private and public crimes, as far as prosecution is concerned, but it draws a line of demarkation between ecclesiastical, civil, and mixed crimes.

As *ecclesiastical crimes* were acknowledged manifest and serious transgressions of the law of the Church,[21] and as typically canonical crimes were considered: homicide, *moechia,* and apostasy. However it would be vain to look for a fixed list of so-called ecclesiastical crimes. The fact is that, since the fourth and fifth centuries, besides the three above named crimes, usury, simony, *crimen falsi,* and intercourse with excommunicated persons were also adjudged by the ecclesiastical courts.[22] The Decretals enumerate quite a list of crimes subject to ecclesiastical judicature: apostasy, heresy, usury, simony, sacrilege, incest, adultery, bigamy, usurpation of ecclesiastical power, and so forth, so that the whole Decalogue was more or

18 Kenny-Webb, *l. c.*, p. 171.

19 Hollweck, *l. c.*, p. 68, note 3.

20 When students enter the schoolroom with seared and bandaged faces and smelling from carbolic acid, there seem to be "loud" signs, nor do they, as a rule, make any secret of the duel.

21 Cfr. cc. 21, 22, C. 11, q. 3.

22 Cfr. Hinschius, *l. c.*, IV, p. 746.

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less included.[23] This is not surprising, since, with the exception of purely political crimes, the others were all taken to imply the *ratio peccati,* which the Church is certainly competent to judge.[24] Our Code greatly reduces this list, as may be seen from the bare enumeration of the titles, *viz.,* Title XI, Title XIII, and Titles XVI-XIX.

Crimes that violate an ecclesiastical law are prosecuted by ecclesiastical authority, as the nature of the crime, and, we may add, the nature of the Church as an autonomous society, require. If the Church should deem it necessary, or opportune, she may ask for the assistance of the secular power. This aid, of course, will be offered by the State only in countries where the separation of the two societies has not yet become an accomplished fact, and where the mutual relations of both are regulated by concordats.

The text: "*requisito interdum auxilio brachii saecularis,*" has a diplomatic tinge. Formerly, *e. g.,* in the time of Innocent III or Boniface VIII, it went without saying that the State was obliged to lend a helping hand to the Church. The secular sword was supposed to be at the disposal of the Church (*ad nutum ecclesiae*) and the Roman Pontiffs did not hesitate to remind rulers of their duty. Thus heretical disturbances, which usually caused also civic disorders, were frequently quelled by the civil authority at the request of the Church.[25] The same course was taken in prosecuting those who attacked ecclesiastical personages of higher rank.[26]

The separation of State and Church, brought about by

23 See lib. V, *Decretal.;* Eichmann, *l. c.,* p. 13.

24 C. 13, Novit., X, II, 13. Even political crimes were looked upon as heinous and had to be considered as such because of the intimate relation between Church and State.

25 Cfr. cc. 9, 13, x, V, 7; c. 11, 6°, V, 2; see Scholz, *Publizistik zur Zeit Philipps des Schönen und Bonifaz VIII.* (Stutz, *K.-R. Abhandl.*)

26 See c. 5, 6°, V, 9.

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the religious breach of the XVIth century, lessened the influence of the spiritual upon the temporal society. Royal absolutism grew jealous of the power of the Church and fomented aversion towards her in quarters which had every reason to sustain her authority. Thus it came about that the rights of the Church were often trampled under foot and she had no longer the means to enforce them. This is an actual condition, but it is not the proper relation intended by the Governor of the Universe, who desires peaceful and harmonious coöperation between the two societies, sovereign in their respective spheres.[27] Hence it is that the Church still claims the right of being helped and supported in the attainment of her ends. Evil-doers in the bosom of the Church can hardly be desirable citizens, and permanent tranquillity can be established only by the elimination of disorderly elements. This requires a firm and effective means of righting wrong whenever it makes itself felt, even in the ecclesiastical order, and the civil power should be aware that the civil order must necessarily suffer if and whenever the ecclesiastical order is seriously disturbed.

Whilst the Church claims the right of punishing crimes of a merely ecclesiastical character and of invoking the civil power in the exercise of this right, she avoids interference in the prosecution of *merely civil crimes,* such as treason, revolution, counterfeiting, evading the payment of duties and taxes, etc. These crimes fall within the exclusive purview of the State, provided the clerical privilege is safeguarded according to can. 120, where it has not been abolished by concordats or lawful custom. But the text adds: "although the Church, too, would be competent concerning such crimes, in as far as moral guilt

27 See Leo XIII, "*Immortale Dei,*" Nov. 1, 1885.

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is concerned" For moral guilt touches the soul and consequently the salvation of men, which belongs to the spiritual power. Just here it may be perceived how well the State would fare if it coöperated with the Church. The authority of the State would be greatly strengthened, men would realize that a crime against the civil authority is abhorred also by the representative of Him from whom all power is derived,[28] and thus be made to understand that they are not mere cogs in a machine, but responsible members of an organism which has the spiritual power behind it.

A third class of crimes is called *mixed*. It comprises such crimes as offend against the moral-juridical order of both societies. Both Church and State are interested in the prosecution of crimes which include offences against religion in general, as mentioned in Title XII, crimes committed against life, liberty, property, good name and morals, as stated in Title XIV, forgers of official documents, as mentioned in can. 2362, because ecclesiastical documents may also serve state purposes.[29] These mixed crimes may be prosecuted by both the civil and the ecclesiastical power, with due regard to prevention [30] and to the ruling of can. 1933, § 3, concerning laymen, who, after being duly punished by the civil authority, should not be prosecuted by the Church.

28 Rom. 13, 1.

29 Cfr. Kenny-Webb, *l. c.*, p. 241; most of the so-called mixed crimes are also mentioned in the civil code (*ibid.*).

30 See can. 1553, § 2; can. 1568.

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TITLE II

IMPUTABILITY, AGGRAVATING OR EXTENUATING CIRCUMSTANCES, AND JURIDICAL EFFECTS OF CRIME

Imputability was explained above as moral proprietorship in the praise or blame justly due to deliberate acts performed by a free agent. Hence a crime, to be imputable, must proceed from a deliberate intention, which presupposes knowledge and free will. The Code first explains imputability in general and the excusing, extenuating or aggravating influences bearing upon it, then sets forth some circumstances or conditions of this influence, in particular, the aggravating circumstances, then concurrence in crime, and, lastly, its juridical effects.

IMPUTABILITY IN GENERAL

Can. 2199

Imputabilitas delicti pendet ex dolo delinquentis vel ex eiusdem culpa in ignorantia legis violatae aut in omissione debitae diligentiae; quare omnes causae quae augent, minuunt, tollunt dolum aut culpam, eo ipso augent, minuunt, tollunt delicti imputabilitatem.

Can. 2200

§ 1. Dolus heic est deliberata voluntas violandi legem, eique opponitur ex parte intellectus defectus cognitionis et ex parte voluntatis defectus libertatis.

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§ 2. Posita externa legis violatione, dolus in foro externo praesumitur, donec contrarium probetur.

The imputability of a crime depends on two essential conditions of the perpetrator, *viz.*, (1) deliberation (*dolus*), and (2) speculative or practical guilt (*culpa*). *Dolus* or malice is here taken as the deliberate will of transgressing the law, as opposed to lack of knowledge on the part of the intellect, and to deficiency on the part of the will. This follows from the complex nature of human acts which require knowledge as well as will (*"nihil volitum nisi cognitum"*) [1] and hence, where the voluntary element is entirely wanting, there can be neither *dolus* nor *culpa,* and where volition is impeded, this defect diminishes the guilt.

But the text adds (can. 2200, § 2), that if the fact of the violation of a law is certain, the intention or *dolus* is presumed until the contrary is proved. Hence the proof of ignorance rests on the perpetrator. This is also recognized by civil law. For criminal liability may exist even though the offender had no intention to commit the particular crime which he did in fact commit, and consequently it suffices to commit any crime, whatever it may have been. [2] This is the meaning of the legal maxim: *"Ignorance of fact, not of the law, excuses."* [3] How far deliberation and knowledge may affect culpability or immunity from criminal punishment depends on the mental condition of the perpetrator, but also on the wording of the law, as is evident from can. 2228 f. This supposes that for any punishable act there are required:

1 Cfr. S. Thomas, *Summa Theol.*, I–II, q. 6; W. Hill, *Ethics,* 8th ed., p. 46; according to general usage in English, the term *voluntary* means free.

2 Kenny-Webb, *l. c.*, p. 36.

3 *Reg. Iuris 18 in 6°*; cfr. *Reg. Iuris 23 in 6°*: *"Sine culpa, nisi subsit causa, non est aliquis puniendus."*

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Knowledge that what the offender is doing is criminal, and *will* or power of volition, *i. e.*, the offender must be able to abstain from doing what he does: if either condition fails, immunity from criminal punishment will arise. This is sound theological as well as juridical doctrine, provided always that the law may add a specific clause as to the degree of knowledge or malice, as can. 2229 plainly indicates.[4]

The *culpa,* as distinguished from the *dolus,* may arise from ignorance and carelessness. Concerning ignorance, see can. 2202. The *omissio debitae diligentiae* may be the result of carelessness, or of negligence, or of thoughtlessness. Different occupations and conditions require more or less diligence.

Thoughtlessness must, however, be in one or the other way connected with volition or the exercise of the will, or what the theologians call *voluntarium in causa.* For in order to render an act imputable it is required that the evil effect be foreseen, at least in a general or confused way, that the agent had it in his power or was free to posit the cause, and, lastly, that there was an obligation to avoid the evil effect that followed the cause.

Any act, therefore, which is not a human act, *viz.,* one that does not proceed from reason and free will, cannot be imputed to a human agent. But since either reason or free will may be affected, not entirely, but partially, the degree of imputability or guilt is proportionate to the mental state in which the agent was at the time he committed the criminal act. Hence, § 2 of can. 2199 very appropriately states that every cause that increases, diminishes, or takes away the *dolus* or *culpa,* also

4 Kenny-Webb, *l. c.,* p. 35. If the law determines no further degree of *dolus* or *culpa,* it is understood that the degree required for constituting a mortal sin is sufficient. Hollweck, *l. c.,* p. 75, note 6.

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increases, diminishes, or takes away responsibility for the *delictum*. This, of course, presupposes the existence and exercise of freewill, but it does not exclude the possibility of so-called biological or physiological influences on the morality of human acts. No psychologist denies the possible alteration of the ethical element by reason of the composite nature of man. An eminent philosopher has stated it as follows: "That there are certain unfortunate individuals who, owing to mental derangement, are irresponsible, is beyond doubt and has never been disputed. That there are others who, while able to form correct judgments on speculative matters, are incapable of resisting solicitations to evil, does not contradict any point of our doctrine but seems rather to be established by experience. It may not be even impossible that there exists, as Lombroso professed, 'a criminal type,' that is to say, monsters irresistibly given over to crime who can be recognized by certain anatomical, physiological, and pathological characteristics. Such characteristics are to be found more or less numerous among most criminals. Further, we may also admit, though the experiments on which this assertion rests must be viewed with caution, that a person may under the influence of hypnotic suggestion lose the use of his liberty. All these facts are not incompatible with the theory of free-will, as the exception does not disprove the rule." [5]

DEFECTUS COGNITIONIS

Can. 2201

§ 1. Delicti sunt incapaces qui actu carent usu rationis.

[5] D. Mercier, *A Manual of Modern Scholastic Philosophy*, Engl. Transl., 1917, Vol. II, p. 225 f.

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§ 2. Habitualiter amentes, licet quandoque lucida intervalla habeant, vel in certis quibusdam ratiocinationibus vel actibus sani videantur, delicti tamen incapaces praesumuntur.

§ 3. Delictum in ebrietate voluntaria commissum aliqua imputabilitate non vacat, sed ea minor est quam cum idem delictum committitur ab eo qui sui plene compos sit, nisi tamen ebrietas apposite ad delictum patrandum vel excusandum quaesita sit; violata autem lege in ebrietate involuntaria, imputabilitas exsulat omnino, si ebrietas usum rationis adimat ex toto; minuitur, si ex parte tantum. Idem dicatur de aliis similibus mentis perturbationibus.

§ 4. Debilitas mentis delicti imputabilitatem minuit, sed non tollit omnino.

Can. 2202

§ 1. Violatio legis ignoratae nullatenus imputatur, si ignorantia fuerit inculpabilis; secus imputabilitas minuitur plus minusve pro ignorantiae ipsius culpabilitate.

§ 2. Ignorantia solius poenae imputabilitatem delicti non tollit, sed aliquantum minuit.

§ 3. Quae de ignorantia statuuntur, valent quoque de inadvertentia et errore.

The degree of imputability is in proportion to the degree of *dolus* and *culpa*. *Dolus* or intention supposes a normal condition of the reasoning faculties, which in turn depends on organic conditions, which may be either actual or habitual, *i. e.*, more or less permanent. Besides, even in a normal condition ignorance may play a part in forming an imputable judgment. Can. 2201 treats

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of abnormal organic conditions, whilst can. 2202 has ignorance in view.

1. *Incapable of committing a crime are those who are actually deprived or destitute of the use of reason.* Hence acts committed in sleep or in a frenzied or furious state of mind cannot be imputed.[6] The text also includes insanity.

2. Those *habitually insane*[7] are *presumed* to be incapable of committing a crime, even though they may have lucid moments or may appear sane as to certain processes of reasoning or certain acts. Insanity is a disturbance of the mental faculties and, as such, influences the legal aspect of crime. Modern criminologists attribute insanity to pathological conditions and speak of the epileptic, the neurasthenic, and the psychopathic states.[8] *Moral insanity,* so-called, "in which all the upright sentiments are eliminated, while the intelligence presents no disorders,"[9] is inadmissible and *de facto* rejected in American and English law. There are, on the other hand, different degrees of mental unsoundness, but "the very difficult practical question as to where the line of demarcation should be drawn" is yet unsolved.[10] Two classes of mentally unsound persons are: (a) lunatics over whom the threats and prohibitions of the criminal law exercise no control; and (b) those whose insanity is so slight that they would not yield to it if a policeman were at their elbow.[11] This rather technical distinction has been accepted by jurists ever since the case of Daniel McNaughten, A. D. 1843. We quote the replies given by the

6 Cfr. cc. 1, 3, Dist. 6.

7 C. 12, C. 15, q. 1, would inflict a milder penance after the return of normal conditions, which is inconsistent with our Code.

8 De Quirós, *l. c.*, p. 52 ff.

9 *Ibid.*, p. 9.

10 Kenny-Webb, *l. c.*, p. 48.

11 *Ibid.*

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judges, because they not only are the norm of modern criminal law, but are also, to some extent, in accord with our Code.

(I) Every man is presumed to be sane, and to possess a sufficient use of reason to be responsible for his crime, until the contrary has been proved to the satisfaction of a jury.

(II) To establish a defence on the ground of insanity, it must be clearly shown that, at the time of committing the act, the party accused was laboring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he was performing, or if he did know, not to know that what he was doing was wrong.

(III) As to his knowledge of the wrongfulness of the act, the judges say: "If the accused was conscious that the act was one which he ought not to do, and if the act was at the same time contrary to the law of the land, he is punishable." Thus the test is the power of distinguishing between right and wrong, not, as was once supposed, in the abstract, but in regard to the particular act committed.

(IV) When a criminal act is committed by a man under some insane delusion as to the surrounding facts, which conceals from him the true nature of the act he is doing, he will be under the same degree of responsibility as if the facts with respect to which the delusion exists, had been as he imagined them to be.

We say, these principles agree with the new Code *to some extent,* because on account of the rules governing imputability these rules may be accepted *in globo.* However, the Code is very liberal in presuming immunity from criminal intent or responsibility, even for lesser or inter-

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mittent insanity. But this is only a *praesumptio iuris* and not a *praesumptio iuris et de iure*.[12] Hence the burden of proof is thrown upon the defendant, *i. e.*, the one accused of crime. The proof of insanity is furnished by the preponderance of evidence. Experts are to be called in and the rules laid down under can. 1762–1805 applied.

All the persons mentioned in can. 2201, § 2, are to be treated as habitually insane, which, of course, presupposes a morbid disease and not merely an *irrational impulse*. However, such an impulse, which sometimes takes on the nature of an irresistible force, may only be the symptom of a latent though not violent habitual madness, and in that case it must be treated like habitual insanity, although courts of some states of our country and England exclude it as a plea of defence.[13]

One form of insane impulse is *kleptomania*, because the impulse to steal really seems to arise from actual insanity.[14]

With regard to *hypnotism* note that it has not yet become a subject of sufficient judicial consideration to justify the attempt to formulate any rules[15] for it, and hence it must be treated like intoxication and passion, which are to be considered as to their antecedent causes and the intent.

3. *Intoxication* or drunkenness, if deliberate, *does not entirely take away responsibility* for a crime committed in that state, although it diminishes imputability, thus rendering the crime less offensive than when committed in the state of complete responsibility, unless indeed the state of intoxication was brought about purposely in order to commit or excuse the crime. Responsibility is to be fixed

12 See can. 1825–1828.
13 Kenny-Webb, *l. c.*, p. 52.
14 *Ibid.*
15 *Ibid.*, p. 55.

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according to the degree of drunkenness, because it is this that determines the measure of voluntariness. But to excuse entirely a deed done in the state of voluntary intoxication would be to excuse one wrongful act by another, which neither the ecclesiastical nor the civil law[16] can permit. For no one is allowed to put himself into a state of irresponsibility or to deprive himself of the use of reason without adequate cause. There is no difference between intoxication produced by alcoholic liquor and the state superinduced by certain drugs, such as opium, morphine, and cocaine. Even blameable drunkenness may sometimes have the effect of diminishing criminal responsibility. Thus it may easily cause a mistake in regard to facts which in itself excuse an otherwise unlawful act. Take, for instance, a *percussor clericorum,* who in a drunken condition is not aware of the clerical character of his victim. Besides, intoxication may also lessen the guilty intent necessary for a particular crime. Thus murder in the first degree may be reduced to homicide. An exception is *intentional drunkenness brought about for the purpose of committing a crime.* But this supposes that the criminal had the wicked act in mind before getting drunk. Thus a pregnant woman who drank immoderately to brace herself for committing abortion would have no defence or excuse; on the contrary she would commit two distinct crimes.

The next clause of § 3, can. 2201, mentions *involuntary intoxication.* This, if it takes away the use of reason, also takes away responsibility, and diminishes imputability in proportion to the diminished use of reason. Biblical examples are well known.[17] Such a state may be caused by malicious companions or by the administration

16 *Ibid.*

17 Noah, Gen. 9, 20 f.; Lot, Gen. 19, 32 ff.; see c. 9, C. 15, q. 1.

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of alcohol for medical purposes, or by exceptional susceptibility to stimulants. It will be no defence, however, for a person to say that he did not intend to get drunk,[18] although the fact may lessen his imputability in the court of conscience. The degree of responsibility is gauged by the control one has over his reasoning faculties.

The text adds: "*Idem dicatur de aliis similibus mentis perturbationibus.*" These "other similar disturbances of the mind" may be caused by extraordinarily strong emotions of the irascible power. Thus the loss of dear ones may cause a sudden excitement, external natural causes such as fires, earthquakes, shipwrecks, etc., are apt to create a panic, and so forth. Hither also belong spiritistic and hypnotic suggestions and evocations which tend to upset the nerves.

4. Finally the Code says that *imbecility of mind lessens,* though it does not take away, responsibility. Among imbeciles are reckoned the *minus habentes,* the half-stupid and, we believe, also such as are physically very weak, because there can be no doubt that great feebleness of the body also affects the mind, no matter of what age the person may be. Concerning age consult can. 2204.

Canon 2202 has in view *ignorance,* which is not nescience, or absence of all knowledge, but properly means an absence of knowledge that is morally imputable to the free agent.[19] Such ignorance may be culpable or inculpable, and hence our text says

1. That *inculpable ignorance* of the law renders one immune from responsibility for transgressing it, while culpable ignorance diminishes the degree of imputability

18 Kenny-Webb, *l. c.*, p. 55 f.

19 Arregui, *Summarium Theol. Moral.*, 1919, ed. 4, n. 11: "*Carentia scientiae moraliter debitae*"; cfr. c. 9, X, V, 36: "*si scire debuisti.*"

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only in proportion to the obligation one is under of acquiring the necessary knowledge. Here the distinction between vincible and invincible ignorance is properly employed, whereas the distinction between antecedent and consequent ignorance has little or nothing to do with our text, as all agree that antecedent ignorance is not imputable. Thus if a clergyman goes hunting, he may be reasonably ignorant that hunting is forbidden, because really only the *chase* in the proper sense is forbidden, not simple hunting. He may also be ignorant about the game laws, and become aware of the unlawfulness of hunting only after a fine has been imposed.

Ignorance is *vincible* if it can be removed by the use of ordinary means proportionate to the matter and the person who has to employ these means. If it cannot be remedied except by extraordinary means which are required neither by the thing itself nor by the state or vocation of the person who is supposed to be obliged to use such means, ignorance is called *invincible*.

There are different degrees of vincible ignorance: *affected,* when one purposely avoids knowing the laws, so as to escape the burden of observing them; *supine* or *crass,* when one is ignorant of the law through indolence or carelessness. Both affected and supine ignorance, being consequent, render a crime simply involuntary.[20]

2. *Ignorance of the penalty does not take away imputability,* but to some extent diminishes it. The reason is that penalty indeed deters from committing a crime too readily, but the *mens rea,* the remorse of conscience, is

20 Ignorance, if purely affected, approaches *dolus,* and is still further distant from *culpa,* as far as this signifies carelessness; but it is related to *culpa,* inasmuch as it bears upon the necessary or required knowledge of the law; ignorance enters *dolus* as well as *culpa;* see c. 102, C. 11, q. 3; concerning penalties see can. 2229.

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there and convicts the perpetrator of sin. However, since the penalty is, as a rule, proportionate to the gravity of the crime, it is but natural that ignorance of the penalty should diminish responsibility. What kind of ignorance is here intended is not explicitly stated. But since the term is used generally, it appears to include both vincible and invincible ignorance, as far as responsibility is concerned, though not as far as incurring the penalty is implied.

3. What has been stated with regard to ignorance, must also be applied to *inadvertence* and *error*. Hence if one is not sure that a certain occupation or action may cause harm, he is supposed to be innocent of guilt.[21] The same is true concerning error, for instance, if one is mistaken about the law prohibiting intercourse with *excommunicati vitandi,* he does not incur the penalty of excommunication.[22] Note, however, that error and inadvertence as well as ignorance excuse from criminal responsibility in a higher or lesser degree according to the wording of the law.[23] For laws which have the clause: *scienter praesumpserit, ausus fuerit,* require a higher degree of knowledge and attention, and on the other hand excuse more easily from criminal intent. This is a decidedly superior concept of law and responsibility than we find in secular codes. For, according to civil criminologists, a mistake in regard to the law, even though it be inevitable, does not afford an excuse for crime.[24] This is quite intelligible, for the State has in view chiefly the public order.

21 C. 23, C. 22, q. 4: *"Hoc est innocentem esse, ignorare quod noceat."*

22 C. 102, C. 11, q. 3.

23 Compare can. 2365, 2369, 2371.

24 Kenny-Webb, *l. c.,* p. 62.

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CARELESSNESS

Can. 2203

§ 1. Si quis legem violaverit ex omissione debitae diligentiae, imputabilitas minuitur pro modo a prudenti iudice ex adiunctis determinando; quod si rem praeviderit, et nihilominus cautiones ad eam evitandam omiserit, quas diligens quivis adhibuisset, culpa est proxima dolo.

§ 2. Casus fortuitus qui praevideri vel cui praeviso occurri nequit, a qualibet imputabilitate eximit.

Carelessness, although it may approach *dolus,* is, according to Can. 2199, rather to be referred to *culpa* or lack of attention. But since many circumstances which puzzle the judge may surround the agent as well as the criminal act, he is to decide according to the common or ordinary circumstances. But if carelessness amounts, as it were, to forethought, it is more culpable. The text therefore says, *a breach of law committed by omitting the required diligence is less imputable,* but the degree of imputability is left to be fixed by the judge, who must weigh all the circumstances. The judge, therefore, is not to set up the law, but to consider whether the act is punishable by law, *i. e.,* whether a law exists that would punish such an act, at least in general.

Diligence is taken here as the contrary of negligence; and therefore omission of it spells negligence, or carelessness, or thoughtlessness, etc. All these terms clearly refer to the intellectual (either speculative or practical) attitude of man with regard to a determined law, *e. g.,* the prohibition of homicide. If the term "*debita,*" is added to diligence, this cannot mean all possible diligence

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or attention, for to use such is not in the power of man; nor is it the intention of the lawgiver, else we should have to recur to the Sovereign Pontiff in each individual case.[25] Diligence therefore must be gauged by the object itself, *ex rei gravitate*. For greater diligence is required in important cases than in cases of a less serious nature. Besides, diligence must be applied in proportion to the position or condition of the agent or person, *ex qualitate personae*. For persons in a responsible position, like prelates, physicians, and lawyers, are justly supposed to employ more attention, and to consider more carefully than ordinary human beings the circumstances and consequences of an action they are about to perform. The general rule is that a man shall omit nothing of his own accord that he can and must do in order to dispel ignorance. Hence it must be in his power and he must be under obligation to dispel noxious ignorance. For instance, can. 1269 states the rules for preserving the Holy Eucharist. Now if a priest to whose care the Blessed Sacrament is committed, would leave the place without taking proper precautions, he would be responsible if a sacrilege were committed through his negligence, and his responsibility would be as great as his thoughtlessness had been.[26]

But, continues can. 2203, *if a person has been able to foresee the event* (or effect of an action) *and has nevertheless omitted to take the precautions which ordinary diligence would have dictated, carelessness approaches vicious intent or dolus.* Thus a clergyman may not be guilty of voluntary homicide if he throws a stone and

25 Ballerini-Palmieri, *Opus Theol. Morale*, 1892, ed. 2, Vol. I, p. 35, n. 64 ff.

26 See c. 1, X, III, 44; on negligence in civil courts one may find interesting matter in Kenny, *A Selection of Cases Illustrative of English Law of Tort*, 1904, p. 531 ff.

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kills some one,[27] but if he goes hunting and omits the necessary precautions, he cannot be declared free of guilt in case a stray bullet from his gun kills or injures some one. Similarly, a clergyman exercising surgery (which he should not do) and omitting the necessary precautions or neglecting to acquire the necessary skill, cannot be declared guiltless.[28]

The next case considered by the Code is a *casual one*, or, as we call it, an accident, something that is not *foreseen or, if foreseen, could not be avoided*. Such an accident cannot be imputed. For instance, if a woman who has made her escape from her abductor jumps into a river and drowns, she is not considered a suicide who must be deprived of ecclesiastical burial.[29] Thus also a homicide committed in self-defence against an unjust aggressor who could not otherwise be repelled, would not render one liable to excommunication; nor would a woman who suffered abortion by an unlucky fall be subject to the penalty established for that crime.[30] How far carelessness may enter here must be judged according to what was said above on diligence. But the power and obligation there mentioned are a sure indication of the measure of diligence to be used. A fortuitous case, however, presupposes that it could not be foreseen or, at least, that it was unlikely to happen.[31]

27 C. 37, Dist. 50.

28 Cfr. can. 139, § 2; c. 19, X, V, 12.

29 C. 11, X, III, 28; see can. 1240, § 1, n. 3.

30 See c. 3, X, V, 39; can. 2350.

31 C. 25, X, V, 12: a priest intended to build a new church and in tearing down the old one, the roof fell and killed a workingman, who had been warned by the priest.

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AGE

CAN. 2204

Minor aetas, nisi aliud constet, minuit delicti imputabilitatem eoque magis quo ad infantiam propius accedit.

Here only imputability is considered, for the diverse penalties are stated in can. 2230. Unless the contrary is evident, youth diminishes responsibility in proportion to its closeness to infancy. The Roman law regarded *impuberes* as entirely incapable of *dolus*.[32] Canon Law, and the Decretals particularly,[33] do not exclude responsibility, but admit that it may be lessened, more especially with regard to the sixth commandment. The Church is also very indulgent to minors (*i. e.*, those who have not yet completed the twentieth year of age) when the right of immunity, or rather the *ius asyli* is concerned. Thus Clement XIII vindicated this right to minors even in case of homicide; because, he said, full malice cannot be attributed to youths and atrocious crimes are committed by them but rarely.[34] This may have been true at that time, but newspaper reports now-a-days tell a sad story of youthful depravity. Therefore our Code adds: *nisi aliud constet, i. e.*, if malice does not supply the lack of age. Juvenile courts have been established of late years for youthful offenders and they deal with them more leniently than the lay courts were wont to do, not only at the time of Clement XIII, but also up to a comparatively recent date.[35]

32 L. 3, Dig. 47, 10=c. 2, C. 15, q. 1.

33 Cc. 1, 2, X, V, 23.

34 "*Quemadmodum*," May 25, 1763, § 5 f. (*Bull. Rom. Continuatio*, ed. Prati, 1862, Vol. IV, p. 754).

35 Kenny-Webb, *l. c.*, p. 45 f.

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VIOLENCE, FEAR, NECESSITY, DETRIMENT

CAN. 2205

§ 1. Vis physica quae omnem adimit agendi facultatem, delictum prorsus excludit.

§ 2. Metus quoque gravis, etiam relative tantum, necessitas, imo et grave incommodum, plerumque delictum, si agatur de legibus mere ecclesiasticis, penitus tollunt.

§ 3. Si vero actus sit intrinsece malus aut vergat in contemptum fidei vel ecclesiasticae auctoritatis vel in animarum damnum, causae, de quibus in § 2, delicti imputabilitatem minuunt quidem, sed non auferunt.

§ 4. Causa legitimae tutelae contra iniustum aggressorem, si debitum servetur moderamen, delictum omnino aufert; secus imputabilitatem tantummodo minuit, sicut etiam causa provocationis.

§ 1. *Violence, which takes away all freedom of action, excludes responsibility and consequently the guilt of crime.*

Violence means external physical compulsion applied to force one to act against one's own will, as when a young man is haled before the ordaining bishop by his foolish parents. The doctrine of St. Thomas [36] is very clear on this subject. The act of the will is twofold: one is its immediate act, as it were, elicited by it, namely *to wish;* the other is an act of the will commanded by it, and put into execution by means of some other power, such as *to walk* and *to speak,* which are commanded by the will to be executed by means of the motive power. As regards the commanded acts of the will, the *actus imperati,*

36 *Summa Theol.*, I–II, q. 6, art. 4 et 5; translated by the Fathers of the English Dominican Province, 1914.

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the will can suffer violence, in so far as violence can prevent the exterior members from executing the will's command. But as to the will's own proper act, the *actus elicitus,* violence cannot be done to the will. The reason is that the act of the will is nothing else than an inclination proceeding from the interior principle of knowledge. On the other hand violence or compulsion proceeds from an exterior principle or agent. It is contrary to the nature of the will that it should be subject to compulsion or violence, just as it is contrary to the nature of a natural inclination or movement to be bent in a contrary direction. Violence, therefore, is directly opposed to the voluntary as well as to the natural. For the voluntary and the natural have this in common, that both are from an intrinsic principle; whereas violence is from an extrinsic principle. And for this reason, just as in things of knowledge violence effects something against nature (*e. g.,* a stone thrown upwards); so in things endowed with knowledge it effects something against the will. Now that which is against nature is said to be *unnatural;* and in like manner that which is against the will is said to be *involuntary.* Therefore violence causes involuntariness, and consequently an act done under such external influence is no human act, because a human act is always a voluntary act. Violence, in other words, renders an act irresponsible. However, note well, violence must be complete and adequate and referable to the act in question; in other words, there must be a causal connection between the violent act and the act commanded or intended by violence, as stated expressly in can. 1087. See also can. 214 concerning ordination under compulsion, the impediment of abduction (can. 1074), and acts against faith commanded by idolatrous or heretical parents who may be wicked and powerful enough to compel their

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children to come with them into non-Catholic temples, etc.

§ 2. Fear, *even though relatively grave, necessity,* and *even a serious* loss or *detriment,* if merely ecclesiastical laws are violated, often *take away responsibility* and therefore the guilt of crime.

(a) Fear, or *trepidatio mentis ob malum imminens,* has been sufficiently explained elsewhere.[37] Since fear does not render a human act purely involuntary, but leaves it substantially free, it is evident that an act done from fear is imputable. Wherefore we need not be surprised that *"duress per minas"* forms a very rare defence in English-American law.[38]

(b) The same is true of *necessity,* which is a moral-physical state of man that prompts him to violate the law. Necessity has its degrees which depend on the helplessness of the person that is in need, and on the necessity of having or obtaining what is needed. Therefore extreme, grave, and light necessity are distinguished. *Extreme*[39] would be the necessity which would concern life or death, material or spiritual. *Grave* is the necessity which would cause a serious spiritual or material loss of property, name, honor, social condition. *Light* is the necessity if the loss threatened is of little importance, or if the damage, though great, can easily be warded off or repaired. The Code is very generous, as far as the external forum is concerned, in admitting any kind of necessity, which, as Gratian says,[40] knows no law.

37 See this Commentary, Vol. II, p. 30; Vol. V, p. 245 f.

38 Kenny-Webb, *l. c.,* p. 69.

39 Theologians distinguish *extrema et quasi-extrema.*

40 Dictum ad c. 39, C. 1, q. 1; cfr. c. 5, X, I, 40; c. 2, X, III, 46. Whether *gravis,* in our text, is also to be referred to *necessitas* may reasonably be doubted; for the adjective grave is repeated before *incommodum,* but not before *necessitas.*

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(c) *Incommodum* means inconvenience, trouble, bother, loss, detriment, and is related to necessity, with this difference, that necessity signifies rather a negative condition, or want, whereas *incommodum* may involve the positive deprivation of something that is convenient, or becoming, to one's state of life. However, the inconvenience must be *great*. *Incommodum* is a very elastic term, and may be referred to the person affected as well as to the object that causes convenience or inconvenience.

(d) Grave fear, necessity, and grave inconvenience excuse from crime only if the violation concerns an *ecclesiastical law*. For it is generally understood that merely positive laws do not oblige under great inconvenience, inasmuch as the human legislator is supposed not to wish to lay a too heavy burden upon man under such conditions. Thus the law of alienation without papal indult (can. 1532, 2347, n. 3) may really prove too burdensome, nay even detrimental, and therefore does not oblige under certain conditions.

§ 3. On the other hand, § 3 of can. 2205 states that *an intrinsically evil act or an act which implies contempt of faith or ecclesiastical authority or injury to souls may be excused* on the grounds of grave fear, necessity, and grave inconvenience, but can never be declared entirely immune from criminal imputability.

(a) Ethics teaches that the morality of an act arises from the object, the circumstances, and the end intended by the agent. These determinants make an act either good or bad; and since the moral quality is something objective, the act itself is objectively tainted by the defect of the intrinsic quality of the object, the circumstances or the end. Of course, the intention can be rectified, provided the object and circumstances are either

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good or indifferent. However, this rather belongs to the internal forum.

(b) To the external forum may be referred three kinds of acts here specified, namely, contempt of faith, contempt of ecclesiastical authority, and spiritual damage. Contempt of faith spells apostasy or heresy, contempt of authority implies schism, if not also heresy, and spiritual damage may be summed up under the heading of co-operation, scandal, and hatred. The synod of Ancyra (314 A. D.) issued three canons concerning the reception of the *lapsi, i. e.*, those fallen in the persecution, to whom clemency is shown, but who are nevertheless censured for the crime they had committed against the faith. Of course, the compulsory offering of incense to pagan idols was free of guilt, but whether the act was done under compulsion could be proved only by the fact that the priests and deacons suffered torments or confiscation and protested their faith.[41]

Spiritual damage would be perjury, which is not allowed under any circumstances.[42]

§ 4. *The motive of legitimate self-defence against an unjust aggressor, provided the measure of necessity is not exceeded, takes away the criminal offence,* and, like provocation, diminishes imputability. The reason for the clause is that a man may rightfully prefer his own life to that of an unjust assailant, who certainly and actually intends his death, when one or the other must die or will surely be killed. For the unjust assailant forfeits the right of his own life by intending to kill another.

The so-called *moderamen inculpatae tutelae* requires: (a) that no more force is used than necessary to ward off the attack; (b) that the assailant is *hic et nunc* in the act

41 See c. 32, Dist. 50.

42 C. 1–3, C. 22, q. 5.

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of aggression; (c) that no other means of escape are at hand, and (d) that the intention is (at least implicitly) directed not to the killing, but to the defence.[43]

Whether this plea of self-defence may also be made in cases where one's honor, liberty, or fortune are at stake, is not explicitly stated in our text. However, it is certain that no one would be allowed to kill a calumniator even though the calumny or detraction could not be warded off by any other means. Nor is it allowed to kill a thief for a small amount of money, say one gold ducat, or to kill a man for the sake of a property right to be possessed only in future or by way of inheritance; or to kill one who retains an inheritance, etc.[44]

Provocation and actual aggression not infrequently overlap, and it is difficult to distinguish one from the other.[45] A real challenge often amounts to great danger.

THE PASSIONS

CAN. 2206

Passio, si fuerit voluntarie et deliberate excitata vel nutrita, imputabilitatem potius auget; secus eam minuit plus minusve pro diverso passionis aestu; et omnino tollit, si omnem mentis deliberationem et voluntatis consensum praecedat et impediat.

A passion is a movement or disturbance of the sensible appetite which follows the imagination of good or evil, and has various degrees, from vehemence to mere appre-

43 Hill, *l. c.*, p. 209.

44 Cfr. prop. damn. by the H. O., March 4, 1679, nn. 30–33 (Denzinger, nn. 1047–1055).

45 This certainly was the case in *Papiensi*, S. C. C., May 18, 1726 (Richter, *Trid.*, p. 93, n. 9), yet a *dispensatio ad cautelam* was imparted.

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hension. The composite nature of man, *i. e.*, his rational and appetitive constituents, influence morality, the latter not directly, because, being seated in the appetite, they are "blind," but indirectly, inasfar as they are subject to the will. It is evident that passions here are understood, not as consequent, but as *antecedent, i. e.*, as preceding the will and the deliberate action of the will. *Consequent* passions, *i. e.*, such as follow the free act, cannot affect its free nature, although they may influence other subsequent acts. Antecedent passions sometimes pull in the same direction as the will, sometimes in opposition to it. But no matter in what direction they may pull, freedom of will does not cease entirely, except in rare cases. Yet it is also true that self-control, the characteristic feature of freedom, is lost in proportion as sensible emotion increases. How far it may affect the moral imputability of an act is very difficult to determine, because each individual differs in sensitive or appetitive constitution and the organic or material conditions of temperament and heredity, habits of life, climate and temperature also differ greatly and influence different individuals in greater or less degree.[46] Thus also one individual may have the irascible passions more developed whilst another may be more under the influence of the concupiscible.

This premised, the text says that the passions, when willfully and deliberately excited and fostered, increase imputability; otherwise, *i. e.*, if neither nurtured nor stirred up by wilful coöperation, but simply taken as they objectively affect human nature as a whole and individually, they diminish responsibility in proportion to the degree of strength with which they work on the imagina-

46 Cfr. S. Thom., I–II, q. 24; *De Veritate*, q. 22, art. 9; Hill, *l. c.*, p. 73; Mercier, *l. c.*, II, p. 226.

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tion. Should they precede and impede the deliberation of the mind and the consent of the will, the act following could not be imputed.

AGGRAVATING CIRCUMSTANCES

CAN. 2207

Praeter alia adiuncta aggravantia, delictum augetur:
1.° Pro maiore dignitate personae quae delictum committit, aut quae delicto offenditur;
2.° Ex abusu auctoritatis vel officii ad delictum patrandum.

CAN. 2208

§ 1. Recidivus sensu iuris est qui post condemnationem rursus committit delictum eiusdem generis et in talibus rerum ac praesertim temporis adiunctis ut eiusdem pertinacia in mala voluntate prudenter coniici possit.

§ 2. Qui pluries deliquerit etiam diverso in genere, suam auget culpabilitatem.

Circumstances which enhance a man's responsibility may arise from the quality of the person and his office as well as from a repetition of crimes.

Can. 2207 considers the *personal and official circumstances*. The higher the *dignitary* who commits a crime or against whom a crime is committed, the greater the crime itself. For not only is the scandal greater,[47] but the law itself surrounds these persons with greater protection and inflicts severer penalties for crimes commit-

47 Cfr. c. 4, C. 25, q. 1; c. 12, X,II, 24.

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ted against them.[48] Consequently clergymen are more severely punished than laymen.[49] A heavier penalty must be meted out to calumniators of the clerical state than to detractors of the lay state.[50] Heresy is more severely punishable in clerics than in laymen.[51]

But *authority and office* may be *abused,* and such abuse is the more detestable, the higher the office, and being an abuse of a public trust, also enhances imputability. Hither belongs the acceptance of gifts by ecclesiastical judges;[52] also the *crimen falsi,* wherefore ecclesiastics who falsify papal or episcopal documents are more guilty than laymen;[53] here also belong the abuse of the confessional[54] and all the crimes mentioned in Title XIX of this book.

Relapse into the same crime also increases culpability. The text first defines a *recidivus* in the juridical sense. He is one who, after a judicial sentence of condemnation, again commits the same crime under such conditions and circumstances, especially of time (for instance, soon after the sentence) that stubbornness in the practice of evil may be prudently presumed. This may be the case concerning those faults enumerated in can. 2168 ff. (non-residing clergymen) and can. 2176 f. (concerning concubinage with the same or another person). But it must be noted that *pertinacia* presupposes ill will, *i. e.,* resistance to either paternal or canonical warnings after formal condemnation.

Responsibility or culpability is increased also if one relapses into *crimes of a diverse kind.* The reason for

48 Can. 2343 f.
49 Can. 2323, 2336, 2340, § 2, 2345 etc.
50 C. 1, X, V, 1.
51 C. 13, X, V, 7.
52 Cfr. can. 1624, 1941, § 2; 2037, § 1.
53 Cfr. can. 2360, 2363; c. 4, C. 25, q. 1.
54 Can. 2367 f.; also can. 1665, § 2; can. 2408.

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this law must be sought in the increased *mens rea,* just as the virtues united in the one virtue of prudence enhance the good habit.[55] The civil law also takes into consideration whether or not a criminal has been sentenced before.

PARTIES TO A CRIME

CAN. 2209

§ 1. Qui communi delinquendi consilio simul physice concurrunt in delictum, omnes eodem modo rei habentur, nisi adiuncta alicuius culpabilitatem augeant vel minuant.

§ 2. In delicto quod sua natura complicem postulat, unaquaeque pars est eodem modo culpabilis, nisi ex adiunctis aliud appareat.

§ 3. Non solum mandans qui est principalis delicti auctor, sed etiam qui ad delicti consummationem inducunt vel in hanc quoquo modo concurrunt, non minorem, ceteris paribus, imputabilitatem contrahunt, quam ipse delicti exsecutor, si delictum sine eorum opera commissum non fuisset.

§ 4. Si vero eorum concursus facilius tantum reddidit delictum, quod etiam sine eorundem concursu commissum fuisset, minorem imputabilitatem secumfert.

§ 5. Qui suum influxum in delictum patrandum opportuna retractatione abduxerit plene, ab omni imputabilitate liberatur, etiamsi exsecutor delictum ob alias causas sibi proprias nihilominus patraverit; si non abduxerit plene, retractatio minuit, sed non aufert culpabilitatem.

55 Cfr. can. 2234.

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§ 6. Qui in delictum concurrit suum dumtaxat officium negligendo, imputabilitate tenetur proportionata obligationi qua adigebatur ad delictum suo officio impediendum.

§ 7. Delicti patrati laudatio, fructuum participatio, delinquentis occultatio et receptatio aliive actus delictum iam plene absolutum subsequentes, nova delicta constituere possunt, si nempe poena in lege plectantur; sed, nisi cum delinquente de illis actibus ante delictum conventum fuerit, non secumferunt delicti patrati imputabilitatem.

The present canon enumerates various kinds and degrees of participation in criminal acts. The first two sections (§ 1 and § 2) have in view conspirators and accomplices,[56] the following four deal with principals, as they are called in criminal law, who influence others more or less efficaciously, while the last section treats of cooperation after the act. But all kinds fall under the generic name of coöperation, which may be defined as physical concurrence in the evil act of another. However, since the act is supposed to be a criminal one, the distinction between material and formal coöperation is of little value here, because material coöperation presumes the act not to be evil or at least to be indifferent, if such acts exist.

1. *Conspirators* are those who, by mutual counsel to commit a crime, concur physically or actually in its perpetration. They are equally responsible with the criminal unless *de facto* circumstances increase or diminish their culpability. Thus in rape or sacrilegious burglary the

56 The difference between conspirators and accomplices may be thus stated: Agreement makes conspirators, crime, accomplices.

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robbers are held equally responsible.[57] *Percussores clericorum,* if they concur in the same criminal act, are all guilty, even though only one may strike the blow.[58] Conspiracy, of course, being supposed to be entered into by agreement, must be manifested in some way. But if the participants actually share in the criminal act, conspiracy is presumed, and it is incumbent on the participator to prove that he was no partner to the conspiracy. Thus Alexander III decided in the case of Thomas à Becket that all those who had come with the intention of killing or wounding the archbishop, even though they did not lay hands on him, were equally or almost equally guilty with the actual murderers.[59] Hence it is not too much to say that the mere fact of the parties having entered into such an agreement suffices to constitute a conspiracy.[60]

2. *Accomplices* are partners in a crime which, by its very nature, requires a helper. They are equally responsible with the criminal, unless circumstances lessen, increase or remove imputability. An accomplice is required in simony, which is equally punished in those who give, receive, and consent; religious superiors who simoniacally receive members, and bishops who bless abbots for the same motive are equally guilty.[61] Accomplices are also essential to adultery. However, here the culpability is diminished if one party does not know that the other is married.[62] Another crime which necessarily requires accomplices is duelling.[63] Those who claim ignorance or plead "not guilty" must prove their ignorance or innocence.

57 See cc. 1, 4, C. 36, q. 2: the *raptantes, cooperantes, conniventes* are subject to the same penalty.

58 C. 34, C. 23, q. 8.

59 C. 6, X, V, 12.

60 Kenny-Webb, *l. c.*, p. 272.

61 Cfr. c. 21, C. 12, q. 2; cc. 8, 30, 39, V, 3; can. 2371, 2392.

62 Cfr. c. 5, X, V, 16; can. 2388.

63 Can. 2351.

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3. *Principals or participators in a crime* may take part therein by a more or less efficacious influence, or they may withdraw their coöperation, or they may concur only in a negative way in the perpetration of the crime.

(a) Principals in the first degree are, as per § 3, the (1) *mandans* or principal author of a crime; (2) the instigators and (3) the aiders and abettors in whatsoever form. All these are no less guilty than the criminal himself, provided the crime would not have been perpetrated without their coöperation and provided all other things are equal. For instance, a prelate ordering celebration of divine office in an interdicted church would be a *mandans* and both the prelate and the celebrant would incur the same penalty.[64] An instigator *(ad delictum inducens)* would be a religious inviting outsiders to violate the papal enclosure.[65] The same crime may have abettors or aiders (*concurrentes*), for instance, in the usurpation or alienation of ecclesiastical property,[66] in procuring abortion and duelling,[67] in forging papal documents, and in the election,[68] presentation or nomination of candidates to ecclesiastical offices.[69] *Ceteris paribus* means that the guilt may be less in the one or other of the coöperators, because of ignorance of the law, or the greater dignity and official character of the author, instigator or aider.

(b) *Principals in a less degree,* according to § 4 of can. 2209, are those who aid in the perpetration of a crime, but not so that the crime would not have been committed if they had not concurred, in other words, they are, as it were, merely concomitant perpetrators. These are less responsible, provided, however, they were not acting as

64 Can. 2338, § 3.
65 Can. 2342, n. 1.
66 Can. 2347 f.
67 Can. 2350, § 1; 2351, § 1.
68 Can. 2360.
69 Can. 2394.

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conspirators. Thus, for instance, in the usurpation of ecclesiastical property the main robber may be a high personage and his tools incur less responsibility because the former was bent on carrying out his plans, even though the others would have resisted.

(c) Those who *withdraw their coöperation* in a crime in a proper and efficacious way are freed from every responsibility, even though the perpetrator commits the crime for reasons of his own; if the withdrawal is only half-hearted, the responsibility is lessened, but not taken away entirely. For instance, in a simoniacal election the money must be entirely refunded and every promise cancelled before election. A druggist who offered medicine for abortion must take it back; if he only dilutes or mixes it with other counteracting ingredients, he is guilty to some extent should abortion result; but he is not guilty at all if the medicine is taken back, and abortion results nevertheless.[70]

(d) *Official* aiders or abettors in crime are those who neglect their duty and thereby aid in the commission of crimes. Their responsibility is proportionate to the obligation by which they are bound, in virtue of their office, to prevent the crime. For instance, a pastor deserving removal for the reasons mentioned in can. 2182 or in can. 2176, should be removed by the bishop, and if the latter fails to remove him, he himself becomes responsible for the ensuing damage (decrease of Christian training, detriment to divine worship, scandal, etc.). There is now little excuse for not proceeding in such cases, because the law has rendered procedure less diffi-

70 But even in this case a druggist or a physician may be somewhat guilty, if the bottle or box had the formula written on it, because it could be copied before it was returned.

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cult and the obligation is incumbent on the Ordinary.[71]

4. *Principals or accessories "after the fact"* are such as laud and approve a crime, or share in the booty or fruits of the same, or hide and shelter criminals, or abet the crime after it has been perpetrated. Each of these acts constitutes a crime in itself if forbidden under penal sanction; otherwise they exclude imputability, unless conspiracy has preceded.

Can. 2338, § 2, which prohibits intercourse with *excommunicati vitandi,* affords an example of *patrati delicti laudatio* or *receptatio delinquentis;* can. 2338, § 3, would punish the *admittentes;* can. 2339 concerning ecclesiastical burial affords a similar case, though it appears as an independent crime.

The *fructum participantes* or *detinentes* of can. 2345 are here included, because they participate in the theft, provided they are aware of the injustice of the act.[72]

CONSEQUENCES OF CRIMES

CAN. 2210

§ 1. Ex delicto oritur:

1.° Actio poenalis ad poenam declarandam vel infligendam et ad satisfactionem petendam;

2.° Actio civilis ad reparanda damna, si cui delictum damnum intulerit;

§ 2. Utraque actio explicatur ad normam can. 1552–1959; et idem iudex in criminali iudicio potest ad instantiam partis laesae civilem actionem ad examen revocare et definire.

71 There may indeed be some impediments which prompt the Ordinary not to proceed; but there also are purely imaginary obstacles, such as fear of trouble and sheer indolence or ignorance.

72 Cfr. c. 4, X, V, 18.

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CAN. 2211

Omnes qui in delictum concurrunt ad normam can. 2209, §§ 1-3 obligatione tenentur in solidum expensas et damna resarciendi quae ex delicto quibuslibet personis obvenerint, licet a iudice pro rata damnati.

The Code calls these things *effectus,* we prefer to speak of *consequences,* since effect means the immediate and direct result of an act. These consequences are two: criminal and civil action (can. 2210), which must be proportionately applied to the principals in crime.

From crimes may arise:

1.° *A penal or criminal action* looking either to a declaration or condemnation to penalty and satisfaction or to retribution;

2.° *A civil action* looking to a repair of the damage done if any was done.

Both actions have been set forth in can. 1552–1959; but the present text adds that the judge in a criminal trial may, if the injured party demands it, also examine and settle the civil action or damage suit. Thus if damage was done by beating a cleric or by sacrilegious theft, the criminal court may decide the amount of reparation.

Can. 2211 states the *obligation of repairing the damage to be imposed on the conspirators, accomplices and instigators,* as mentioned under can. 2209, §§ 1–3. This threefold class of participants in a crime are held *in solidum* to repair the expenses and damage caused by the crime to any and every person who suffered by it. For instance, if two or three persons committed a theft, or three elected a fourth illegally, *i. e.,* simoniacally, to an office, each is held responsible for the whole amount of expenses and damages, just as if he were the only perpetrator, even,

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says the text, if he were condemned by the judge only to a *pro rata* payment. Therefore if A was condemned to pay $100, B $150, and C $200, A is liable for $450 in case the other two prove insolvent. Of course A may fall back on B and C by instituting a suit in the civil court, which would certainly recognize the claim of A independently of any criminal action.

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TITLE III

CONATUS DELICTI OR INCHOATE CRIMES

CAN. 2212

§ 1. Quicunque actus posuerit vel praetermiserit qui ad exsecutionem delicti natura sua conducunt, sed delictum non consummaverit, sive quia consilium suum deseruit, sive quia delictum propter insufficientiam vel ineptitudinem mediorum perficere non potuit, *delicti conatum* committit.

§ 2. Cum omnes actus positi vel omissi sunt qui ad exsecutionem delicti natura sua conducunt et ad delictum perficiendum sufficiunt, si ex alia causa, praeter voluntatem agentis, effectum sortiti non sint, delicti conatus dicitur proprio nomine delictum *frustratum*.

§ 3. Conatui delicti accedit actio illius qui alium ad delictum committendum inducere studuerit, sed inefficaciter.

§ 4. Si conatus delicti peculiari poena in lege mulctetur, verum constituit delictum.

CAN. 2213

§ 1. Delicti conatus suam habet imputabilitatem, eo maiorem, quo magis ad consummationem accedit, quanquam minorem prae delicto consummato, salvo praescripto § 3.

§ 2. Delictum frustratum magis culpabile est, quam simplex delicti conatus.

§ 3. Ab omni imputabilitate liberatur qui sponte

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ab incepta delicti exsecutione destiterit, si nullum ex conatu damnum aut scandalum ortum sit.

A *conatus delicti* is an external act committed with criminal intent, but without effect, in other words, a non-consummated crime. There are allusions to such attempted crimes in the old Corpus Juris Canonici,[1] but the most pronounced example is taken from the Roman law.[2] Our modern civil codes, too, recognize attempted crimes as indictable.[3] The Code distinguishes two species of inchoate crimes: attempted crimes and frustrated crimes. To the former is added the crime of incitement or instigation.

1. A *conatus delicti* exists whenever one does something which of itself would lead to the perpetration of a crime, but does not consummate the crime itself, either because he gives up the criminal intent, or because the means chosen are insufficient or inadequate to produce the criminal effect. Akin to this criminal attempt is every incitement by which another is induced to commit a crime, but unsuccessfully, because he does not commit the crime to which he is incited. Attempts consist in physical acts which help in a sufficiently "proximate" degree to carry out the contemplated crime. When the act is sufficiently "proximate" cannot be determined by a general rule. Thus, *e. g.*, if a man who contemplated murder or simple *percussio clericorum*, bought a pistol or other weapon and repaired to the place where he might find his victim, these acts would be too remote. But if,

1 Wernz, *l. c.*, Vol. VI, p. 41; but c. 3, X, V, 25 manifestly treats of provocation and excessive defence.

2 C. 6, Dist. 1 *de poenit.* = l. 5, Cod. I, 3: "*Si quis non dicam rapere, sed attemptare tantum matrimonii iungendi causa sacratissimas virgines ausus fuerit, capitali poena feriatur.*"

3 Kenny-Webb, *l. c.*, p. 72 ff.

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on meeting the victim, he pointed the pistol at him and put his finger to the trigger, or struck out to hit him, there would be a *conatus delicti.*[4] The same rule may be applied to the *procuratio abortus.*

2. A crime is said to be *frustrated* if all the acts necessary for its commission, whether positive or negative, are posited and sufficient preparations are made to commit the crime, but the same is not actually committed because another cause or agent aside from the perpetrator interferes and prevents it. For instance, it was held to be a criminal attempt to kill if one shot through a skylight into the room where he supposed a policeman was watching him, though the policeman had shortly before departed from his position.[5] Thus an assassin may be thwarted by the interference of a third person.

3. If *attempts at crime* have a determined penalty appointed in law, they constitute separate *crimes,* as, for instance, attempts to bribe officials and judges are declared to be punishable.[6]

Can. 2213 determines the imputability or responsibility for attempted and frustrated crimes.

1. An *attempt to commit a crime* is less imputable than the act of perpetrating it; the degree of responsibility for the former must be gauged by its approach to the latter, with due regard, of course, to the damage done.

2. Greater still is the responsibility resulting from a crime that failed involuntarily, or a *frustrated crime,* than for one resulting from a simple attempt.

3. Those who *wilfully desist from perpetrating* a crime are free from responsibility for the same, provided no damage and no scandal were caused by the attempted or frustrated crime — which, of course, they would have to repair, according to can. 2211.

4 *Ibid.* 5 *Ibid.,* p. 74. 6 Can. 2407.

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PART II
PENALTIES

SECTION I

PENALTIES IN GENERAL

CAN. 2214

§ 1. Nativum et proprium Ecclesiae ius est, independens a qualibet humana auctoritate, coercendi delinquentes sibi subditos poenis tum spiritualibus tum etiam temporalibus.

§ 2. Prae oculis autem habeatur monitum Conc. Trid., sess. XIII, *de ref.*, cap 1: "Meminerint Episcopi aliique Ordinarii se pastores non percussores esse, atque ita praeesse sibi subditis oportere, ut non in eis dominentur, sed illos tanquam filios et fratres diligant elaborentque ut hortando et monendo ab illicitis deterreant, ne, ubi deliquerint, debitis eos poenis coercere cogantur; quos tamen si quid per humanam fragilitatem peccare contigerit, illa Apostoli est ab eis servanda praeceptio ut illos arguant, obsecrent, increpent in omni bonitate et patientia, cum saepe plus erga corrigendos agat benevolentia quam austeritas, plus exhortatio quam comminatio, plus caritas quam potestas; sin autem ob delicti gravitatem virga opus erit, tunc cum mansuetudine rigor, cum misericordia iudicium, cum lenitate severitas adhibenda est, ut sine asperitate disciplina, populis salutaris ac necessaria,

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conservetur et qui correcti fuerint, emendentur aut, si resipiscere noluerint, ceteri, salubri in eos animadversionis exemplo, a vitiis deterreantur."

This canon vindicates to the Church a right which flows from her very constitution, namely, *the right to punish subjects who transgress her laws with spiritual as well as temporal penalties.* This right is natural and inherent in the Church, and therefore independent of human authority. It is what we call the coercive or restrictive power, sometimes also styled *potestas executiva,* although the English term executive does not accurately convey the idea embodied in the Latin word.

The Code uses three adjectives to determine the character of this coercive power:

1. It is called *nativum, i. e.,* an inherent or natural right. The proof for this dogmatic thesis[1] lies in the fact that Christ founded a visible autonomous society endowed with the means to achieve its appointed end.[2] The Church, indeed, is not merely a teaching institution, but a juridical society, the object of which is the common and individual spiritual welfare of men. It is therefore an *a priori* wrong conception of the Church, if only teaching and preaching penance is emphasized, whilst the binding character of the obligations imposed by membership is neglected. Christ granted power to rule His Church to Peter and the other Apostles, and this power is as wide and deep as the creative word that produced it.[3] There is no limitation or restriction or exception made of the power of binding and loosing. It embraces all things,

1 *Trid.*, sess. 7, can. 14, *de baptismo;* Martin V, "*Inter cunctas,*" Feb. 22, 1418, art. 31, 33 (Denzinger, n. 575, 577); Pius VI, "*Auctorrem fidei,*" Aug. 28, 1794 propp. 4, 5 (Denzinger, n. 1367 f.); Pius IX, *Syllabus,* prop. 24 (Denzinger, n. 1572).

2 See Hollweck, *l. c.*, p. IX ff.

3 Cfr. Matth. 16, 19; 28, 18 ff.

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all men who, by the regeneration of Baptism, are incorporated with the visible body of Christ. Neither is this power a merely internal persuasion produced by external exhortation. It means a reality that is sensibly manifested. For those who reject the authority of the Church and refuse to listen to her, are segregated from the body of Christ and must be treated as separated, *i. e.*, as heathen and publicans.[4]

The Apostles commanded as well as preached and were endowed with the power of punishing the disobedient.[5] We cannot imagine that the words addressed to them by Christ are merely strong metaphors inculcating obedience or penance. They rather communicate a power given by One who is the Governor of the universe.

This power of enforcing authority was understood and used by the Church throughout the course of her history. We will only point here to the fact of public penance and the ecclesiastical penalties inflicted on delinquent clerics. All this goes to show that the Church possessed and was conscious of possessing a vindictive power, and consequently it must be admitted that Christ laid down that authority in the constitution of the Church.

2. It is, however, a *ius proprium,* not merely in the sense of possession, but of a *characteristic power.* For the coercive power granted to the Church must not be considered as *an end,* but as a means to an end. Since the purpose of the Church is spiritual, the means, too, must partake of the same nature and therefore be spiritual. We clearly perceive from our Code that the spiritual element prevails. For most of the penalties are censures which directly reflect the spiritual element of the coercive power. In this respect the Church is superior to

4 Matth. 18, 17 f.

5, 4 ff.; II Cor. 8, 8; 10, 5 f.

5 Cfr. Acts 15, 28; I Cor. 4, 21;

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the State, which reaches only the external order of human society. However, this too must be understood in the right way. For we do not say that the Church is limited to merely spiritual means. This would be contrary to the nature of man, who is compounded of body and soul. Besides our text would give us the lie if we were to assume in the Church a merely spiritual (often confounded with internal) power.

3. The legislator further circumscribes this coercive power by the phrase: *independens a qualibet humana auctoritate,* a power that is independent of every human authority. This is merely a corollary of the *nativum ius,* for if this power is a constitutional, and therefore divine right of the Church, no human power can destroy or attack it with impunity. We do not read that St. Paul consulted the Proconsul of Achaia before he inflicted on the incestuous a severe punishment which had visible and external consequences. Neither did the Church borrow her power from the emperors. Quite a different thing is the personal immunity of Church dignitaries from the jurisdiction of lay courts. For this privilege may have been brought about and enlarged with the coöperation of the civil power. But the coercive power is not identical or coextensive with personal immunity. The abettors of Louis the Bavarian were dazzled by the imperial power, which they traced to imperial Rome, and therefore asserted that the Church, even as a whole, could not inflict coercive punishment on any man unless the emperor granted her this power. This error was promptly rejected by John XXII, who in this regard acted as the champion of an innate power, not of the papacy alone, but of the Church at large.[6]

6 "*Licet,*" Oct. 23, 1327, art. 5 (Denzinger, n. 427).

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That the Church has been hampered and often unjustly handicapped in exercising this power is apparent from the so-called "appeal from abuses" which the Gallican Liberties asserted as a privilege of the Frankish Church. The Church could not accept such a curtailment of her God-given power. She may tolerate abuses, as she has tolerated persecution, but she can never allow the substantial and necessary powers she has received from her Founder to slip from her.

4. The *extent* of this coercive power is either formal or material. Formal are the various kinds of punishment, and *material* are the subjects over whom this power may be wielded (see Title VI).

Here a word may be added concerning the various canonical penalties in general. The text says that these may be either *spiritual* or *temporal.* It may be said that this contradicts our statement, made above, that the means of exercising the coercive power must be commensurate with the spiritual purpose of the Church, and therefore spiritual. But we did not forget to say, at the same time, that man is a being who must be treated with human measure in meting out punishments. Now it is a fact, always supposing that the Church is a visible, autonomous society, that men, even clerics, are sometimes more afraid of temporal, sensible punishments than of the spiritual weapon of censures. This all the more where faith has suffered shipwreck or at least has been weakened. Consequently we find even in our Code some fines and detention in houses of correction for clerical offenders. Yet even these penalties clearly have a spiritual aspect: they are inflicted for the purpose of amendment.

The *development* in the practice of imposing penalties has kept pace with the outward growth and development

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of the Church and her relation to the State. Excommunication or exclusion from the ecclesiastical body is the oldest penalty; its civil effects are noticeable already in the Apostolic writings.[7] Very severe was the punishment for the relapsed, as the history of the penitential discipline abundantly shows. Reconciliation took place gradually and by way of stations, the gradation of which is a matter of dispute. Clergymen were removed from their office and functions.

After Catholicism had become the religion of the State, the number of delinquents increased and a varied system of penalties became imperative. Excommunication became twofold, major and minor, to which was later added the personal interdict. Clergymen, too, experienced a variety of penalties, the severity of which varied in different countries. Characteristic of all these penalties was their vindictive nature, as well as the element of atonement or expiation contained in them.[8]

The relation of the Church to the State after the thirteenth century naturally widened the field of penal laws, inasmuch as many crimes which were at first purely ecclesiastical, were now considered civil, and *vice versa*. Not only ecclesiastical penalties, such as censures, but also temporal penalties were meted out by the ecclesiastical authorities: prison, exile, branding, slavery, loss of civil honor and civil rights, and so forth. The Decretals contribute the last stone to the building of the Church's Penal Code. After this classical period there was a demand — and a most legitimate one — for mitigation.

The inquiring reader may expect an answer to the question whether the *ius gladii* or right of inflicting capital punishment belongs to the Church as an inherent right.

7 Cfr. I Cor. 5; III Joh. 10; II Thess. III, 14.

8 See Hinschius, *l. c.*, IV, 747 ff.; Eichmann, *l. c.*, p. 7.

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We think not. For to vindicate this right to the Church would entail danger of interference in the right of the State, and besides, the maxim: "*Ecclesia non sitit sanguinem*" is incompatible with the right of shedding blood. The spirit of the Church is, or at least should be, the spirit of Christ, which spells meekness and mercy. Moreover, one of the purposes of punishment is the correction or amendment of the delinquent. But this purpose is simply frustrated if the criminal is killed.[9] Furthermore, persuasion rather than force is to be used even with regard to the most serious ecclesiastical crimes, heresy and schism, which may be compared to treason in civil law. Yet the Code itself forbids compulsion in matters of faith (can. 1351), according to St. Augustine, who thought it expedient to call for armed resistance only after bloody crimes had been committed by the Donatists. We are aware of the objections that are drawn from the history of the Inquisition,[10] and do not wish to extenuate the stain it has left upon the annals of the Church; but it must be said to the honor of the latter that she always recommended clemency, even when she delivered stubborn recusants up to the secular arm. Besides it must not be forgotten that in the ages of faith heresy was punishable also as treason by the civil government. And finally we must not apply our kidglove notions of criminology and penal law to the ruder Middle Ages.

After this somewhat lengthy digression it remains to explain the term *delinquentes*. However, this has already been the subject of the first part, for delinquency is related to *delictum*, and consequently a delinquent means

9 Thus Hollweck, *l. c.*, p. XXVII.

10 The literature on this subject is immense; but we would recommend particularly the popular pamphlet by Eliza Atkins Stone, *A Brief for the Spanish Inquisition*, reprinted from *The Ave Maria*.

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one who has committed a crime in the ecclesiastical sense of the word.

§ 2 of can. 2214 recalls the wise admonition of the Council of Trent to the bishops when compelled to use the punitive power. It is essentially the same doctrine as that inculcated by the Apostles [11] and may be divided into three parts:

1. Being pastors, not tyrants, they should first use persuasion and paternal admonition in order to deter men from evil-doing;

2. If some through human frailty have been delinquent, they should be reproved, entreated, and rebuked, but benevolently rather than austerely, by exhortation rather than threats;

3. If, however, the seriousness of the crime requires the rod, gentleness should be combined with firmness, judgment with mercy, and leniency with severity. Thus the faithful shall not be exasperated and wholesome discipline shall be maintained, correction shall lead to amendment, or where malice is combined with stubbornness, the deterring example shall at least be a warning to others.

11 I Tim. IV, 2; I Pet. V, 2.

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TITLE IV

DEFINITION, KINDS, INTERPRETATION AND APPLICATION OF PENALTIES

DEFINITION

CAN. 2215

Poena ecclesiastica est privatio alicuius boni ad delinquentis correctionem et delicti punitionem a legitima auctoritate inflicta.

This text is quoted from the Council of Trent. It contains all the elements of penalty as now defined. For an ecclesiastical penalty means the privation of some good, inflicted by the lawful authority for the correction of the delinquent and the punishment of his crime.

Three elements are clearly discernible in this definition: the effect of penalty, its object and source.

1. The effect is privation of some good (*privatio alicuius boni*). This is the generic feature common to all penalties or pains, for *poena* means pain or suffering. St. Thomas says that it is essential to pain or penalty that it be an affliction against one's own will for some guilt or crime.[1] Hence man must be made aware of it either in body or mind. Every privation, however, be it in the natural or the supernatural order, causes pain because it is a want of perfection or lack of something that perfects and completes the well-being of man. If the Code

[1] *Summa Theol.*, I–II, q. 46, art 6, ad. 2.

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insists on privation or denial of some good, it is in accordance with modern ideas of criminal law, which emphasize privation rather than positive infliction of pain, thereby excluding the notion of torment or torture. It must be added that even privation should be based on ethical principles. It would be against these rules if those who are entitled to inflict penalties would not observe the limits of justice and morality nor take into consideration the grievousness of the crime committed. An immoral penalty or brutal treatment of criminals [2] is against human nature and invariably misses its purpose.

The *bonum* of which one may be deprived is determined according to the kind of punishment. If it is a spiritual punishment, supernatural or spiritual goods, such as sacraments and divine worship, are withdrawn; if it is a temporal penalty, natural goods, such as liberty and fortune, are taken away, in whole or in part.

2. The *purpose of punishment* is twofold, reformatory and punitive. It is notable that the Code emphasizes the *reformatory* feature first. There is little difficulty among modern criminologists in admitting the reformatory or corrective character of punishment. In fact, there is quite a tendency to proclaim this the sole legitimate object of punishment.[3] But this contention goes too far. There is a wide gulf between Church and State, the latter looking solely to the temporal order of things, whereas the Church considers the whole man, soul and body.

The Code mentions "*delicti punitionem.*" What does that mean? Penalty supposes guilt, and guilt is caused by the breach of an obligation set up either by natural or positive law. Law means order, coördination or sub-

2 The old maxim "*reus res sacra*," even a criminal is a sacred thing, should guide also the judge and the criminologist.

3 Kenny-Webb, *l. c.*, p. 28.

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ordination. It is evident that a crime is a breach of law and order, more specifically, a crime against public law, and a discord in human society. And since crime is a defection from public law and order, it naturally follows that human society requires atonement and expiation, not necessarily in the sense of revenge, but as a restoration of the public order by public punishment.[4]

This doctrine may or may not be distasteful to the great majority of modern writers.[5] At the bottom of all criminal law is the sense of public justice outraged by crimes, and the sense of ethical retribution demanding expiation.[6]

Furthermore it cannot be denied that public authority, being the guardian of law and order, must be entitled and obliged to *prevent* crime. This is the *preventive* element to be noticed in penalties. Certain reformers would deny that right to the State, but it is obviously implied by the right of self-preservation. "The right to punish must ever remain founded, in part at least, upon the idea of retributive justice. Pain must ever follow wrong-doing. While vengeance is a divine prerogative, human governments are the means and agencies through which divine Providence controls human affairs, and it is, therefore, not only the right but the duty of the State to punish those acts which are deemed subversive of society, quite apart from motives merely prudential or reformatory."[7]

We may, therefore, sum up the purpose of ecclesiastical law as follows: it is reformatory in its main tendency, owing to the nature of the Church as an institution for

4 Lynching, though it cannot be defended, may be understood as growing out of the deep-rooted sentiment of public indignation and as a demand for justice.

5 Kenny-Webb, *l. c.*, p. 28, rather incline to the conservative view.

6 Foerster, *Schuld und Sühne*, 1911, p. 72 f.

7 Kenny-Webb, *l. c.*, p. 29.

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saving souls, but it is also expiatory, preventive or deterring, in order to preserve divine and human laws, to keep the public order intact and to show forth the true nature of crime to the guilty as well as to the innocent. A society founded by God cannot dispense with these elements of genuine criminal law.

3. The penalty must be inflicted by *lawful authority*. For law is not a mere contractual order of things, but a participation in the will of God or divine Providence, and a breach of it therefore requires the intervention of the lawful custodian and guardian of the law. Penalty is neither revenge nor self-affliction, because, as stated above on the authority of St. Thomas, it means affliction against one's own will. Revenge is a private or first right, which, far from restoring the disturbed public order, disturbs it still more. Only the legitimate authority, as the founder of law and the representative of the supreme Ruler, is entitled to demand justice and inflict the necessary penalties on transgressors. Besides, in meting out the penalty, there must be an objective standard for measuring the crime as well as the punishment. The criminal himself or other interested individuals might be either too lenient or too cruel. The golden mean to be observed even in meting out punishment, demands an even balance, which can best be held by the administrators and executors of justice.

DIFFERENT KINDS OF PENALTIES

Can. 2216

In Ecclesia delinquentes plectuntur:

1.° Poenis medicinalibus seu censuris;

2.° Poenis vindicativis;

3.° Remediis poenalibus et poenitentiis.

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Can. 2217

§ 1. Poena dicitur:

1.° *Determinata,* si in ipsa lege vel praecepto taxative statuta sit; *indeterminata,* si prudenti arbitrio iudicis vel Superioris relicta sit sive praeceptivis sive facultativis verbis;

2.° *Latae sententiae,* si poena determinata ita sit addita legi vel praecepto ut incurratur ipso facto commissi delicti; *ferendae sententiae,* si a iudice vel Superiore infligi debeat;

3.° *A iure,* si poena determinata in ipsa lege statuatur, sive latae sententiae sit sive ferendae; *ab homine,* si feratur per modum praecepti peculiaris vel per sententiam iudicialem condemnatoriam, etsi in iure statuta; quare poena ferendae sententiae, legi addita, ante sententiam condemnatoriam est *a iure tantum,* postea *a iure* simul et *ab homine,* sed consideratur tanquam *ab homine.*

§ 2. Poena intelligitur semper ferendae sententiae, nisi expresse dicatur eam esse *latae sententiae* vel *ipso facto* seu *ipso iure* contrahi, vel nisi alia similia verba adhibeantur.

The Code deals with *three* kinds of penalties: censures or corrective (medicinal) penalties, vindictive penalties, and penal remedies and penances.[8]

1. *Censures* are called corrective or medicinal penalties because they principally, though not exclusively, aim at amending the delinquent. Consequently, if this purpose is achieved, the penalty is to be removed and the criminal may claim absolution from censure.[9] For, the chief purpose being reformatory, the contumacy or stubbornness is

8 See can. 6, n. 5.

9 Can. 2241, § 1; can. 2248, § 2.

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broken. It also follows that censures are not inflicted for crimes which are mere *facta* without reference to the future, or, once committed, have no further consequences.[10] But it must also be understood that, although the main object of censures is reformation or correction, yet the purpose of penalty in general, *viz.:* ethical retribution or reparation, is not excluded. For it is of public interest that each and every crime be duly punished, in order to deter others and thus prevent criminality.[11] The penal character of censures lies in this, that they deprive the delinquent of certain spiritual goods, which may entail temporal consequences, as in the case of an *excommunicatus vitandus*.

2. *Vindictive* penalties are intended directly to avenge crimes. Their primary purpose, therefore, is not reformation, but reparation of the violated public order.[12] They may be temporal or spiritual. As far as inflicted on the clergy, they are exhaustively enumerated in can. 2298, whilst vindictive penalties threatened against clergy and laity are mentioned in can. 2291. We need not refer to the former practice which abounded in temporal penalties, as mutilation, *decalvatio* or scalping, scourging, exile, deportation, galleys, fines, etc.[13] The Code has modified the use of such penalties and limited them to fines and detention in houses of correction.

3. *Penal remedies and penances* are purely preventive means, though they partake of the penal character, otherwise they would not be enumerated under the heading of penalties. They may indeed also have the purpose of

10 Wernz, *l. c.*, Vol. VI, n. 145, p. 150.

11 C. 35, X, V, 39; c. 1, Clem. I, 9.

12 These penalties may be dispensed, not absolved from, and call for judiciary procedure; can. 1933, § 4; can. 1889, § 2; can. 2207; Eichmann, *l. c.*, p. 54 f.

13 Cfr. Wernz, *l. c.*, n. 99, p. 100 f.

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mere prevention. For an enumeration see can. 2306 ff.

Penances, even when inflicted in the external forum, differ in character from vindictive penalties, as they generally depend upon acceptance and execution on the part of the penitent and chiefly aim at atonement made to God.[14]

A *subdivision of penalties* is that based upon the measure and mode of infliction, as per can. 2217.

1. A *fixed* penalty is one so clearly determined by law or precept, that no room is left for doubting what is meant. Thus, if the law says: "they incur excommunication," "are deprived of office," etc., this and no other penalty must be understood.

Another element must be considered in order to understand the term *taxative,* which means an accurately defined measure of punishment. An example is that of suspension *ex informata conscientia,* which must be clearly determined as to effect and time (can. 2188). The term *taxative* also implies that the circumstances of imputability have been duly weighed, else the judge would have a wide margin left for determining the penalty. This becomes more evident in penalties which are inflicted by a precept, (*praecepto*). For precept means an order of the judge or superior directly affecting the delinquent and indirectly the crime.[15]

An *undetermined* or arbitrary[16] penalty is one, the infliction of which is left to the prudent discretion of the judge or superior. The discretion may, however, concern the question whether any penalty is to be meted out at all,

14 *Ibid.*, n. 96, p. 98.

15 Precept differs from *verba praeceptiva,* because precept means a single order or injunction given under threat of incurring penalty, either *ferendae* or *latae sententiae,* whereas *verba praeceptiva* include the penalties stated in law, and merely state that these penalties must, as a rule, be inflicted, according to can. 2223.

16 See Wernz, VI, n. 61, p. 70.

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or what kind of a penalty, and in what measure. For the law may determine that a penalty must be inflicted, but leave the kind and measure to the judge; *e. g.*, where the phrase is used: "*pro gravitate delicti.*" Take, for instance, can. 2170. It says that the Ordinary *must* decree privation of income, but *may* inflict other penalties in addition thereto. Hence the law sometimes prescribes one penalty and intimates others. The law may also establish the minimum of penalties, and leave it to the judge to inflict a severer punishment.[17] Preceptive or obligatory terms in general are: *debet puniri, puniendus est, privandus, declarandus* or *declaretur infamis;* facultative or arbitrary terms: *pro gravitate culpae, ad arbitrium superioris,* etc.

2. A distinction of the ecclesiastical law which has been made a target of attacks against the Church is that between penalties *latae* and *ferendae sententiae.* A fixed penalty is *latae sententiae* if it is attached either by law or precept to the commission of the crime. The law uses, for instance, the terms *ipso facto, ipso iure incurrit excommunicationem*[18] (can. 2343, *privilegium canonis*); the superior decrees (*per modum praecepti*) suspension to be *ipso facto* incurred for a certain kind of crime: these are penalties *latae sententiae. Ferendae sententiae* are those which are to be inflicted by the judge or superior, although perhaps appointed by law.[19]

3. A fixed penalty *latae sententiae* as well as *ferendae sententiae* may be established by law (*a iure*). For instance, clerics who violate the *privilegium canonis* against cardinals and papal legates incur two penalties *ipso iure latae sententiae* and, besides, are to be deprived of their

17 Cfr. c. 2, X, V, 21; c. 3, X, IV, 3.

18 The Const. "*Vacante Sede,*" for instance, uses the term: *innodamus.*

19 Cfr. can. 2324, 2328 etc.

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benefices, offices, dignities, which is a penalty *ferendae sententiae,* although both kinds of penalties are laid down in law (can. 2343).

Ab homine is a penalty which, though established by law, is inflicted by way of a special order *per modum praecepti peculiaris,* or by a condemnatory judiciary sentence. For instance, the Ordinary may compel recusants to fulfill the terms of a last will, even by censures, because the law (can. 2348) gives him that right. In this case the Ordinary may simply issue a particular order, or, if the case has been brought before the ecclesiastical court, he may issue a sentence of excommunication, or, in the case of a clerical recusant, of suspension. Hence, continues our text, a penalty *ferendae sententiae* established by law, as in the case of can. 2343, § 2, n. 3, is one *a iure tantum* as long as no condemnatory sentence has been issued; but after such a sentence has been rendered, it becomes a penalty *a iure et ab homine,* although considered a penalty inflicted *ab homine.* The difference is very palpable in can. 2244, § 2 f., and can. 2247, § 2. A condemnatory sentence differs from a declaratory sentence in so far as the latter affects the execution or observance of the penalty as stated under can. 2232.

§ 2 of can. 2217 rules that the penalty must always be understood to be *ferendae sententiae,* unless *ipso iure,* or *ipso facto,* or similar terms are used.[20]

Why can the Church, unlike the State, inflict a penalty *latae sententiae?* It appears unjust and unworthy of a perfect society to condemn one before he is heard. But we must not forget that the Church is a peculiar society, with a religious character that does not remain on the surface, but penetrates and encompasses the whole man.

20 For instance, can. 2315: *habeatur tanquam haereticus, haereticorum poenis obnoxious.*

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She reaches into the court of conscience. Besides, the most sacred offices might be neglected and abused without punishment because of lack of witnesses and plaintiffs, and the fear of penalty and final exposure may check malice and carelessness.[21] Therefore the first traces of censures *latae sententiae* coincide with the spread of evil influences in the sixth and seventh century. In order to protect ecclesiastical discipline more efficaciously, this quasi self-executory remedy was found most efficient and secure.[22] Although the Church has now formally mitigated the practice of inflicting *ipso facto* penalties by demanding a declaratory sentence in most cases (see can. 2232), it would be against the mind of the legislator to maintain that sentences called *ipso facto* have no other significance or effect than that of a serious threat.[23]

THE APPLICATION OF PENALTIES

Can. 2218

§ 1. In poenis decernendis servetur aequa proportio cum delicto, habita ratione imputabilitatis, scandali et damni; quare attendi debent non modo obiectum et gravitas legis, sed etiam aetas, scientia, institutio, sexus, conditio, status mentis delinquentis, dignitas personae quae delicto offenditur, aut quae delictum committit, finis intentus, locus et tempus quo delictum commissum est, num ex passionis impetu vel ob gravem metum delinquens egerit, num eum delicti poenituerit eiusdemque malos effectus evitare ipse studuerit, aliaque similia.

21 See Hollweck, *l. c.*, p. xx f.

22 See Hinschius, *l. c.*, IV, 841; V, 85 ff.

23 Prop. 47 damn. by "*Auctorem fidei*," Aug. 28, 1794 (Denzinger, *l. c.*, n. 1410).

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§ 2. Non solum quae ab omni imputabilitate excusant, sed etiam quae a gravi, excusant pariter a qualibet poena tum latae tum ferendae sententiae etiam in foro externo, si pro foro externo excusatio evincatur.

§ 3. Mutua iniuria compensatur, nisi una pars propter maiorem iniuriae ab eadem illatae gravitatem damnari debet, deminuta, si casus ferat, poena.

1. Penalties must be proportionate to the crime, which is to be judged according to its imputability and the scandal and damage caused. This is the *objective* standard for the meting out of penalties. It may be noted by the way that the legislator here again takes the public order and public safety as the basis for criminal law.

There is also a *subjective* proportion, to be taken, not mathematically, as they say, but geometrically, that is to say, not only the objective importance of the law and the objective grievousness of the transgression must be considered in weighing the penalty, but also the circumstances under which, and the end for which the crime was perpetrated. All this has been sufficiently discussed under the title of imputability. Age, knowledge, education, sex, profession (*conditio*), the mental status of the delinquent, the dignity of the offender as well as of the person offended,[24] the purpose for which the crime was committed must be duly considered as well as the time (*e. g.*, during divine service) and the place (sacred or profane).

Imputability may be lessened or increased according to the degree and cause of passion or fear. The promptness of repentance, efforts made in curbing the evil effects, and similar individual circumstances should also be taken into account.

[24] See, for instance, the gradation in can. 2343.

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2. Those *circumstances* which relieve one from all guilt, as well as those which excuse the perpetrator from grievous sin, also render him immune from every penalty, *latae* as well as *ferendae sententiae,* even in the external forum, if he has sufficiently proved his defence in the external forum. The reason for this rule lies in the fact that penalties, especially censures, are grievous and therefore presuppose a grievous fault or crime.[25] The law, being intended chiefly for the upkeep of the external order, supposes such guilt and therefore requires proof of "not guilty," which must be furnished by the accused. Note the term "*in foro externo.*" If the defence is considered valid *in foro externo,* it is also valid *pro foro interno;* but not conversely. Compare canon 2251 on censures. Hence the *regula juris* 23 in 6° : "*sine culpa, nisi subsit causa, non est aliquis puniendus,*" that is, no one should be punished who is without *dolus* or *culpa,* unless for a special reason which involves the public welfare.[26]

3. *Mutual injury* is levelled or compensated, and therefore quashed, provided there is some proportion between the injury done on both sides. There may be an injury of the same nature complained of by two priests. This is looked upon as condoned by mutual calumny. But between a bishop and a priest there is no strict proportion and mutual condonation cannot be supposed *ex aequo.* It may, however, lessen the penalty, and thus become an extenuating circumstance, when punishment must be dealt out.

25 See c. 41, C. 11, q. 3.

26 Cfr. can. 723; Reiffenstuel, *Comment in Reg. Iuris 23.*

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INTERPRETATION OF PENALTIES

Can. 2219

§ 1. In poenis benignior est interpretatio facienda.

§ 2. At si dubitetur utrum poena, a Superiore competente inflicta, sit iusta, necne, poena servanda est in utroque foro, excepto casu appellationis in suspensivo.

§ 3. Non licet poenam de persona ad personam vel de casu ad casum producere, quamvis par adsit ratio, imo gravior, salvo tamen praescripto can. 2231.

The general rules of interpretation must also be applied to penal laws. For although the judge may use discretion and "fill up the gaps of the law"— *lacunae legis* — or mitigate the rigor of the penalty, yet an ecclesiastical judge, being inferior to the Pope, is only a minister and executor of the law, and hence, if the penalty is clearly expressed, and the fact is established, he must apply the penalty according to can. 2223.[27]

1. Rule 49 in Sexto: "In penalties the more favorable interpretation should be adopted," must be understood according to the general rules of interpretation, as stated above. If the penalty is clearly stated in law, it must be applied to the criminal, provided the crime and responsibility for it are ascertained. Therefore the *benignior interpretatio* concerns only dubious or disjunctive penalties, for instance, if the law uses *either — or,* and especially if it leaves the measure of punishment to the discretion of the judge.

27 Cfr. C. 11, Dig. 48, 19; Reiffenstuel in Reg. Iuris 49 in 6°; somewhat ambiguous, Wernz, *l. c.,* VI, p. 76, n. 67.

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There is also another rule in 6° (15) which may find a place here: "*Odia restringi et favores convenit ampliari.*" Its interpretation causes difficulty, for a law generally is a restriction and therefore disagreeable, although it may be favorable to another. Thus criminal laws are very hateful to careless citizens and criminally inclined individuals, yet at the same time very beneficial to the commonwealth.[28] It would not do to favor a criminal and provoke a peaceful community. This rule, therefore, must be understood in the light of imputability, damage and scandal. An example may illustrate this. Compare can. 1063, § 2, with can. 2319, § 1, n. 1, where the excommunication *latae sententiae,* reserved to the Ordinary, is inflicted on those who celebrate a marriage before a non-Catholic minister because scandal is given to the congregation.

2. If there is *doubt* whether a penalty inflicted by the competent superior is *just or unjust,* the penalty must be borne in both the internal and external forum, unless an appeal was lodged which has a suspensory effect. The reason for this rule lies in the character of the penal law as a safeguard of the public welfare as well as in the necessity of upholding lawful authority. Therefore an excommunicated person, even though innocent in conscience and justified by public opinion, must conduct himself as guilty.[29]

The meaning of the clause, "*excepto casu appellationis in suspensivo*" is evident from can. 2243, where censures

28 The laws in favor of religion must, although restrictive of human liberty, be widely interpreted; S. C. P. F., July 2, 1827 (*Coll.*, n. 796). If the law is divisible, *i.e.*, partly favorable and partly unfavorable, the favorable part may be amplified, but the unfavorable must be restricted.

29 Cfr. cc. 1, 31, C. 11, q. 3; see can. 1904. The example of Savonarola is a case in point.

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are declared to have only devolutive recourse attached. Consequently, one who is censured must bear the censure until it is reversed.

3. *Analogy is not admitted* in interpreting penal laws. Hence there is no stretching from one person to another, no extending from one case to another, even if the reasons or circumstances of persons and cases are quite alike, nay the reasons for extending the penalty seem even stronger. This, of course, depends on the terms which the law uses for persons; for instance, the pronoun *qui* is of a general tenor, and comprises females as well as males.[30] The term "religious" also comprehends both sexes, unless the context forbids this interpretation.[31] But if the term *parochus* is used, the penalty threatened must not be extended to other persons, even though they may have some qualities in common with pastors. If the pastor is mentioned, the assistant or curate is not included; if a priest is named, deacons and inferior clerics are excluded.[32] One case is not stretched to cover another because, although circumstances apparently seem to point to sameness, yet each single case has its own peculiar character and circumstances. Thus two pastors may be absent from their homes for the same length of time without the bishop's permission, yet on account of particular circumstances the one may be excused but not the other. Thus also in cases of *sollicitatio,* where the words used may be understood by one person but not by another. For the interpretation of the penal laws now in force for the whole Church can. 6, n. 5 is to be consulted. In other words, no penalties, temporal or spiritual, corrective or vindictive, are in force at present, except those mentioned in the Code. If these agree

30 Cfr. can. 2350, § 2; can. 2353.
31 Can. 490.
32 Can. 2387; concerning a distinction of persons, see can. 2358.

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verbally and substantially with penalties formerly in vogue, they may be interpreted according to the old forensic practice and theory of authors. If they agree with the old law only in part, the interpretation must be made according to the old practice as far as they agree, but according to the general laws from the wording and context, as far as they disagree.[33]

33 See can. 6, n. 2 and 3; can. 2351 on duelling. Analogy, although forbidden when application is concerned, may be admitted even in penal laws when competency as to application is in question, or if formalities only are concerned; cfr. can. 2296, § 1; 2310; Eichmann, *l. c.*, p. 116, note 2; 124, note 1.

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TITLE V

SUPERIORS WHO WIELD COERCIVE POWER

Can. 2220

§ 1. Qui pollent potestate leges ferendi vel praecepta imponendi, possunt quoque legi vel praecepto poenas adnectere; qui iudiciali tantum, possunt solummodo poenas, legitime statutas, ad normam iuris applicare.

§ 2. Vicarius Generalis sine mandato speciali non habet potestatem infligendi poenas.

The rule is that coercive power follows legislative power; for even though we may distinguish sovereignty into the three well-known departments, legislative, judiciary, and coercive, radically and virtually they must be held by one and the same sovereign power, otherwise authority would be divisible, which is absurd.[1] Therefore the Code says that *those who enjoy legislative power are authorized to attach a penal sanction to their laws.* This is done in order to render laws effective.

But the Code adds to these legislators another class, *viz.*: those who are entitled to *impose precepts.* These, too, it says, may attach penalties to their precepts or orders.

There is a notable distinction between precept and law. For a precept may be imposed also in virtue of

1 Montesquieu in his *L'Esprit des Lois* advocated a complete division, in order to counteract State omnipotence.

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merely domestic power, *e. g.,* a community of religious women may have a precept, which is not law, imposed on them. Furthermore a precept concerns the individual, not territory, and follows the subject everywhere, but ceases to oblige when the authority who has given the precept ceases to exist in whatever manner, unless it was given in writing or in the presence of two witnesses.[2] Taking precept as distinct from law, therefore, it follows that the power of attaching a penal sanction to a precept must be understood of penalties in general, not of censures. Were it otherwise, superioresses of religious congregations would be entitled to inflict censures, which is contrary to ecclesiastical law. On the other hand it would not be exceeding one's power if one endowed with jurisdiction in the external forum would attach a censure to the enforcement of a precept. The general rule, however, is that legislative and coercive power are correlated.

Different from the power of the legislator is that of the *judge,* as such; he can only administer justice or *apply the penal laws* already established according to the rules laid down in the Code. We say the judge, *as such;* for when the Ordinary acts as judge, he may apply the laws, as far as permissible, in proportion to his ordinary power.

The Code first sets forth the coercive power, explaining how far those endowed with this power may extend it; then it lays down rules for judges.

COERCIVE POWERS

Can. 2221

Legislativam habentes potestatem, possunt intra

2 See can. 24; can. 2143.

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limites suae iurisdictionis, non solum legem a se vel a decessoribus latam, sed etiam, ob peculiaria rerum adiuncta, legem tam divinam, quam ecclesiasticam a superiore potestate latam, in territorio vigentem, congrua poena munire aut poenam lege statutam aggravare.

Can. 2222

§ 1. Licet lex nullam sanctionem appositam habeat, legitimus tamen Superior potest illius transgressionem, etiam sine praevia poenae comminatione, aliqua iusta poena punire, si scandalum forte datum aut specialis transgressionis gravitas id ferat; secus reus puniri nequit, nisi prius monitus fuerit cum comminatione poenae latae vel ferendae sententiae in casu transgressionis, et nihilominus legem violaverit.

§ 2. Pariter idem legitimus Superior, licet probabile tantum sit delictum fuisse commissum aut delicti certe commissi poenalis actio praescripta sit, non solum ius, sed etiam officium habet non promovendi clericum de cuius idoneitate non constat, et, ad scandalum evitandum, prohibendi clerico exercitium sacri ministerii aut etiam eundem ab officio, ad normam iuris, amovendi; quae omnia in casu non habent rationem poenae.

1. Those who have legislative power may attach penal sanctions to their laws within the limits of their jurisdiction. Hence

a) The *Pope* has coercive power over and in the whole Church, and may abrogate, modify, and circumscribe penal laws.

b) *Ordinaries* and those who go by that name may do the same as far as their territory or subjects or powers

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reach. But their power is limited by the common law and must be interpreted acording to the rules laid down in the following canons.

c) *Metropolitans* enjoy coercive power in the dioceses of their suffragans only as far as can. 274, n. 5 admits.

d) The *Vicar-General,* according to can. 2220, § 2, requires a *special commission* from his Ordinary to inflict penalties.

e) *Religious superiors* of exempt clerical communities enjoy coercive power within the limits of the common law and their own constitutions. But their subjects, *i. e.,* regulars, are liable to be punished by the local Ordinaries in certain cases.[3]

f) Religious superiors who *enjoy only domestic power, i. e.,* no jurisdiction proper *in foro externo,* may indeed attach penalties to the enforcement of their precepts as far as the domestic power permits;[4] but they must abstain from inflicting censures or any other penalty that would savor of abuse of jurisdiction *in foro externo.* Neither can *pastors* or simple priests as such inflict censures.[5]

2. Those who have real legislative (not preceptive) power, that is, all except those mentioned above under f, are permitted by can. 2221:

a) To add a penal sanction to their own law or to any law issued by their predecessor which was a *lex minus quam perfecta, i. e.,* lacking a penal sanction;

b) To add to or to increase a penal sanction already attached by law to a divine or an ecclesiastical law issued by a superior lawgiver for that respective territory, if special circumstances demand such an addition or increase

3 Cfr. can. 616, § 2;; 619; 631; 1425, § 2; 2269, § 2.

4 Cfr. can. 501, § 1.

5 S. C. P. F., May 5, 1654 (*Coll.,* n. 120); some missionaries seem to have claimed this power.

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of penalty. Thus a general prohibition had been issued for the Christians of the Malabaric Rite not to play any kind of musical instruments for the purpose of idol worship. This was placed under excommunication and enforced with great rigor.[6]

Ordinaries may also use rigor in order to eradicate certain local or provincial vices, as stated under can. 897.

However, it should be noted that the canon just quoted, which treats of reservation, supposes that the crimes are atrocious, not merely conventional. An atrocious crime would be robbery, incendiarism, or keeping children away from religious instruction or sending them without necessity to non-Catholic schools, where Catholic schools are available.[7]

3. Can. 2222 instructs *superiors how to proceed* when inflicting a penalty for the transgression of laws which have no penal sanction attached (*leges minus quam perfectae*). Thus canon 140 forbids a cleric to attend theatres or balls. There is no penalty provided against the transgressors of this canon. Yet the Ordinary could mete out a just punishment. Therefore § 1 of can. 2222 distinguishes thus:

a) The general rule is that *no penalty is to be inflicted without a threat or canonical warning.* This warning must contain a penalty of either *ferendae* or *latae sententiae* before the transgression happens. Only in case the transgression is proved does the penal sanction go into effect. Thus, in the case mentioned, the Ordinary would have to forbid theatre-going under penalty of either *ferendae* or *latae sententiae,* otherwise the delinquent could not be punished.

6 Benedict XIV, "*Omnium sollicitudinum,* Sept. 12, 1744, § 14, dub. XIII (*Coll. P. F.,* n. 347).

7 See can. 1372–1374; can. 2319, § 1, n. 4.

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b) The first clause states an exception to this general rule: the lawful superior may inflict a just penalty even without previous canonical warning or threat of punishment, if *scandal has been given or the transgression is of a particularly serious character.* This may happen if the theatre is one of the lower type and perhaps offensive also to religion. For the rest, we refer to what was said on suspension *ex informata conscientia,* which the lawgiver undoubtedly had in mind.[8]

§ 2 of can. 2222 grants the lawful superior *preventive power* and also obliges him to make use of this power in case of a *probable* crime and of a crime against which criminal action cannot be brought on account of *prescription.*[9] But this canon concerns only *clergymen.* Therefore in either of these two cases, *viz.,* of a probable[10] crime or a crime for which a penalty is prescribed, the lawful superior (also of exempt religious),

1.° May and should not promote to either minor or major orders a cleric of whose unfitness he is certain;

2.° He may and should prohibit such a cleric from exercising the sacred ministry, in order to avoid scandal;

3.° He may and should, to avoid scandal, remove such a cleric from office according to the rules laid down in can. 2147–2161.

But this preventive suspension *has not the character of an ecclesiastical penalty,* and consequently its transgression does not induce irregularity (cfr. can. 985, n. 7).

8 See can. 2186–2194; Vol. VII, p. 471 ff.

9 See can. 1704, § 2; Vol. VII, 147 f.

10 A probable crime may be called one which cannot be fully proved, yet is testified to by at least one trustworthy witness or known to the superior *extra-sacramentaliter.*

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THE JUDGE

Can. 2223

§ 1. In poenis applicandis iudex nequit poenam determinatam augere, nisi extraordinaria adiuncta aggravantia id exigant.

§ 2. Si lex in statuenda poena ferendae sententiae facultativis verbis utatur, committitur prudentiae et conscientiae iudicis eam infligere, vel, si poena fuerit determinata, temperare.

§ 3. Si vero lex utatur verbis praeceptivis, ordinarie poena infligenda est; sed conscientiae et prudentiae iudicis vel Superioris committitur:

1.° Poenae applicationem ad tempus magis opportunum differre, si ex praepropera rei punitione maiora mala eventura praevideantur;

2.° A poena infligenda abstinere, si reus perfecte fuerit emendatus, et scandalum reparaverit, aut sufficienter punitus sit vel puniendus praevideatur poenis auctoritate civili sancitis;

3.° Poenam determinatam temperare vel loco ipsius aliquod remedium poenale adhibere aut aliquam poenitentiam iniungere, si detur circumstantia imputabilitatem notabiliter minuens, vel habeatur quidem rei emendatio aut inflicta a civili auctoritate castigatio, sed iudex vel Superior opportunam praeterea ducat mitiorem aliquam punitionem.

§ 4.° Poenam latae sententiae declarare generatim committitur prudentiae Superioris; sed sive ad instantiam partis cuius interest, sive bono communi ita exigente, sententia declaratoria dari debet.

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Can. 2224

§ 1. Ordinarie tot poenae quot delicta.

§ 2. Si tamen propter numerum delictorum nimius esset poenarum infligendarum cumulus, prudenti iudicis arbitrio relinquitur aut poenam omnium graviorem infligere, addita, si res ferat, aliqua poenitentia vel remedio poenali, aut poenas intra aequos terminos moderari, habita ratione numeri et gravitatis delictorum.

§ 3. Si poena constituta sit tum in conatum delicti tum in delictum consummatum, hoc admisso, infligi tantum debet poena in consummatum delictum statuta.

Can. 2225

Si poena declaretur vel infligatur per sententiam iudicialem, serventur canonum praescripta circa sententiae iudicialis pronuntiationem; si vero poena latae vel ferendae sententiae inflicta sit ad modum praecepti particularis, scripto aut coram duobus testibus ordinarie declaretur vel irrogetur, indicatis poenae causis, salvo praescripto can. 2193.

The judge, as such, is the minister of justice and executor of the coercive power. He is bound by, and not above, the law,[11] and consequently must be guided by the text of the law, carefully weigh the number and nature of the crime, whether fully perpetrated or only attempted, and, finally, observe the rules of procedure.

1. He must consider the *law,* and, therefore:

a) Is not *allowed to increase* a fixed penalty, unless extraordinary circumstances demand a severer punishment,

11 C. 2, X, I, 2.

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e. g., the atrocity of a crime, the scandal given, etc. The increase may consist of multiplication or added intensity, for instance, suspension and detention in a house of correction, or suspension from office and benefice, etc.[12]

b) If the penal law *ferendae sententiae* is couched in arbitrary terms (*verbis facultativis*), it is left to the conscience and prudence of the judge to mete out the penalty or dictate the minimum penalty if this is fixed.[13]

c) If the wording of the penal law is compulsory (*verbis praeceptis*), the *penalty* must, as a rule, be *inflicted*. There is a precept in terms used in the subjunctive or gerundive forms: *privetur, privandi sunt, debet puniri, suspendi, removeri, etc.* Yet even in this case the legislator leaves it to the conscience and prudence of the judge, both of which qualities suppose that he decides objectively, not subjectively or under the influence of passion.

α) He may *delay* the application of the penalty to a more opportune time if he foresees greater evils from premature or hurried punishment. This depends on circumstances of time and person.[14]

β) He may abstain from inflicting the penalty if the delinquent shows that he has thoroughly reformed and repaired the scandal given, or has undergone or will probably undergo a proportionate punishment at the hands of the civil authority. This, of course, supposes a so-called mixed crime, which the civil as well as the ecclesiastical authorities provide for in their penal codes.

γ) He may *mitigate a fixed penalty* or substitute for it either a penal remedy or some penance.[15] Thus he may inflict partial instead of total suspension, instead of a fine

12 Cfr. can. 2324, 2337 etc.

13 Cfr. can. 2405, 2406, § 2.

14 In countries where Church and State are separate, interference from the latter should not easily occur; still popular commotion may bring it about; see can. 2337.

15 Of these see can. 2306 ff.

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he may decree alms, etc. But this mitigation *supposes* that a notably alleviating circumstance speaks in favor of lesser imputability on the part of the delinquent, or that he has given proof of amendment, or that a civil punishment has already been inflicted, and the ecclesiastical judge nevertheless deems it opportune to mete out a mitigated punishment. This action is justified because the ecclesiastical judge thereby emphasizes the fact that the Church has the right to exercise coercive power and to show her abhorrence of public crimes.

d) As a rule it is left to the *discretion of the superior* to *declare* that a penance has been incurred, *i.e.,* to issue a declaratory sentence. However, this sentence *must* be issued if the interested party insists, for instance, on getting satisfaction or removing suspicion, or if the public welfare demands it, for instance, in the case of a corruptor, or briber, or dangerous heretic.

2. The judge must furthermore, under can. 2224, consider the *number* of crimes committed. As a rule each crime demands its separate penalty. However, if the numer of crimes would call for too great a number of penalties, the judge should use prudent judgment. He may, therefore, inflict the heaviest penalty and, if circumstances demand it, add some penances or penitential remedies. He may, also, after having weighed the number and gravity of the crimes committed, mitigate the penalties according to the rules of equity. If an inchoate and a consummated crime have distinct penalties in law, the judge shall inflict only the penalty established for the consummated crime if this had been committed.

3. Finally, the judge *must observe the rules of procedure* according to can. 2225, as follows:

a) If a penalty is declared or inflicted by way of a

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judiciary sentence which presupposes at least a summary trial, he must observe the rules laid down in can. 1968 ff.

b) If a penalty, more especially a censure, either *latae* or *ferendae sententiae,* is to be inflicted by way of a *particular order* or precept, it must be declared to have been incurred (*latae sententiae*), or actually inflicted, *in writing* or before two witnesses, and the reasons for it given. The text says *ordinarie,* as a rule, because the *suspensio ex informata conscientia* (see can. 2193) does not require that the reasons be indicated.

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TITLE VI

WHO ARE LIABLE TO THE COERCIVE POWER OF THE CHURCH

The Code first determines the obligatory force of penal laws, as such (and the exceptions, can. 2227); then it fixes responsibility for the crime, psychologic conditions and partnership, the moment for incurring the penalty and its actual infliction, and, finally, it deals with plural and inchoate crimes.

GENERAL RULES AND EXCEPTIONS

CAN. 2226

§ 1. Poenae adnexae legi aut praecepto obnoxius est qui lege aut praecepto tenetur, nisi expresse eximatur.

§ 2. Licet lex poenalis posterior abroget anteriori, si tamen delictum, quando lex posterior lata est, iam commissum erat, applicanda est lex reo favorabilior.

§ 3. Quod si lex posterior tollat legem vel poenam tantum, haec statim cessat, nisi agatur de censuris iam contractis.

§ 4. Poena reum ubique terrarum tenet, etiam resoluto iure Superioris, nisi aliud expresse caveatur.

CAN. 2227

§ 1. Poena nonnisi a Romano Pontifice infligi aut declarari potest in eos de quibus in can 1557, § 1.

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§ 2. Nisi expresse nominentur, S. R. E. Cardinales sub lege poenali non comprehenduntur, nec Episcopi sub poenis latae sententiae suspensionis et interdicti.

1. The general rule is that those who are subject to laws or precepts are also subject to the penal sanctions attached thereto, unless they are expressly exempted. Hence

a) The *lawgiver* himself is not subject to purely ecclesiastical penalties by compulsion (*vi coactiva*), though morally speaking, or from a sense of propriety (*vi directiva*), he may be said to be subject to them. Practically it is better to say that he is not subject to his own penal laws.

b) *Rulers* of nations and their offspring and successors are immediately subject to the Roman Pontiff, who alone can issue a condemnatory or declaratory sentence against them (can. 2227, § 1).

c) *Cardinals* are immune from penal laws, unless they are expressly mentioned as subject to them. Thus in the Constitution of Pius X, "*Vacante Sede,*" (*e. g.*, n. 51) they are threatened with excommunication *latae sententiae* if they reveal the proceedings of a papal conclave. They are also mentioned in can. 2397, concerning the oath they have to take.

d) *Bishops,* also titulars, are not subject to the penalties *latae sententiae* of suspension and interdict, unless they are expressly mentioned, as in can. 2370 and also in can. 2373. Although the name "bishop" does not occur in the latter canon, it certainly applies to Ordinaries. Other penalties, like excommunication and privation of income (can. 2398) they may also incur.

e) Exempt *religious* are subject to the penalties established by common law, and as far as the common law sub-

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jects them to the coercive power of the local Ordinary.[1] *Religious who do not enjoy the privilege of exemption,* are subject to the penal laws of the Code and also to those established by the particular laws of their territory, unless their approved Constitutions modify, restrict, or enlarge the power of the local Ordinary over them.

f) As to *peregrini* and *vagi,* see can. 14.

2. Sections 2 and 3 of can. 2226 establish the *relation of a later to a former penal law and to the consequence.* A later law abrogates a former one, but a crime committed before the later law was passed is punishable according to that one which is more favorable to the delinquent. Thus, for instance, can. 2319, § 1, n. 1, is more favorable than the old law to those who have contracted mixed marriages before a non-Catholic minister; for the Ordinary may absolve them, even though they have contracted the marriage before the Code went into effect (May 18, 1918).[2]

If the later law abolishes the former entirely, or only as to its penal sanction, the penalty ceases immediately and the delinquent is therefore immune from punishment, no matter whether he has not yet been punished or has undergone part of the punishment. On the privation of active and passive vote or of office, *e. g.,* in alienation, see can. 2347. An *exception* to this last named rule (§ 3) are *censures,* which remain if contracted by reason of a former law now abolished (can. 2248, § 1).

3. An ecclesiastical penalty *binds* the delinquent *everywhere,* even after the superior who inflicted it has gone out of office. This applies to penal laws in general, for

1 See can. 616 f.; 1425, § 2. Concerning the interdict, a probable opinion formerly exempted regulars from incurring the same, if *clerus* only is mentioned; Hollweck, *l. c.,* p. 132; however, see 2269, § 2.

2 Formerly they were suspected of heresy, according to "*Apostolicae Sedis,*" n. 1.

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there are, *e. g.,* local interdicts which are merely territorial (see can. 2247, § 2). A priest suspended by his bishop from saying Mass cannot say Mass in another diocese, "*unless the penalty contains a clause to the contrary.*" Thus it may be that the bishop suspends one from saying Mass in his diocese [3] only because of scandal given there. The reason for this law lies in the fact that the coercive power emanates from the supreme lawgiver, who holds the keys of the whole Church and watches over the unity and uniformity of ecclesiastical discipline. The *Orientals*, however, are not subject to the ecclesiastical penalties established in the Code (Can. 1.).

THE CRIMINAL ACT

CAN. 2228

Poena lege statuta non incurritur, nisi delictum fuerit in suo genere perfectum secundum proprietatem verborum legis.

Since every penalty supposes a crime, it is evident that no penalty established by law can be incurred, unless the crime defined in the law has been fully committed. Hence a diagnosis must precede. For instance, if one is accused of simony in conferring or obtaining an ecclesiastical office, it must be proved that a bribe or price was offered and accepted, or that an unlawful contract was made.[4] If women violate the enclosure of men's convents, the fact of violation must be established; if the limits of

3 Whether the suspension *ex informata conscientia* ceases with the bishop's departure from office is not expressly stated in the Code (can. 2188; thus Eichmann, *l. c.*, p. 67), but implied by the warning that the penalty should be temporary only.

4 Cfr. c. 4, X, V, 3; can. 2392.

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enclosure are not clearly indicated, there can be no breach of enclosure. [5]

The means for proving criminal acts are pointed out in can. 1747–1836. Experts and ocular inspection have a place here.

PSYCHOLOGICAL AND PHYSIOLOGICAL REQUISITES OF CRIME AND CRIMINAL COÖPERATION

CAN. 2229

§ 1. A nullis latae sententiae poenis ignorantia affectata sive legis sive solius poenae excusat, licet lex verba de quibus in § 2 contineat.

§ 2. Si lex habeat verba: *praesumpserit, ausus fuerit, scienter, studiose, temerarie, consulto egerit* aliave similia quae plenam cognitionem ac deliberationem exigunt, quaelibet imputabilitatis imminutio sive ex parte intellectus sive ex parte voluntatis eximit a poenis latae sententiae.

§ 3. Si lex verba illa non habeat:

1.° Ignorantia legis aut etiam solius poenae, si fuerit crassa vel supina, a nulla poena latae sententiae eximit: si non fuerit crassa vel supina, excusat a medicinalibus, non autem a vindicativis latae sententiae poenis;

2.° Ebrietas, omissio debitae diligentiae, mentis debilitas, impetus passionis, si, non obstante imputabilitatis deminutione, actio sit adhuc graviter culpabilis, a poenis latae sententiae non excusant;

3.° Metus gravis, si delictum vergat in contemptum fidei aut ecclesiasticae auctoritatis vel in publicum animarum damnum, a poenis latae sententiae nullatenus eximit.

[5] See can. 2342, n. 2.

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§ 4. Licet reus censuris latae sententiae ad normam § 3, n. 1 non teneatur, id tamen non impedit quominus, si res ferat, congrua alia poena vel poenitentia affici queat.

CAN. 2230

Impuberes excusantur a poenis latae sententiae, et potius punitionibus educativis, quam censuris aliisve poenis gravioribus vindicativis corrigantur; puberes vero qui eos ad legem violandam induxerint vel cum eis in delictum concurrerint ad normam can. 2209, §§ 1–3, ipsi quidem poenam lege statutam incurrunt.

CAN. 2231

Si plures ad delictum perpetrandum concurrerint, licet unus tantum in lege nominetur, ii quoque de quibus in can. 2209, §§ 1–3, tenentur, nisi lex aliud expresse caverit, eadem poena; ceteri vero non item, sed alia iusta poena pro prudenti Superioris arbitrio puniendi sunt, nisi lex peculiarem poenam in ipsos constituat.

In can. 2202 the Code referred to ignorance as taking away or diminishing imputability. This is the mental or psychologic element which must be considered also in meting out penalties. Besides ignorance, there are other mental conditions, either transient or habitual, which may influence the superior or judge in inflicting penalties. These are mentioned in can. 2229 sqq. The general rule is that the penalty must be proportioned to the responsibility of the criminal.

1. Affected ignorance (*ignorantia affectata*), *i. e.*, the

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kind that is purposely fostered in order to avoid the trouble of finding out the law and to have a pretext for transgressing it, does not render one immune from incurring the penalties *latae sententiae,* no matter whether this ignorance concerns the law itself or its penal sanction,—not even if the law contains words like these: *praesumpserit, ausus fuerit, scienter, studiose, temerarie, consulto egerit, i. e.,* even though the law expressly demands a *dolus.* The reason is evident. For such ignorance is culpable and arises from a *dolus,* the degree of which is therefore not only diminished but increased. A cleric, therefore, who would *purposely* abstain from reading the penal Code or from informing himself of its provisions, could hardly be excused from *dolus,* and the penalties *latae sententiae* could be declared against him.

2. If the law contains the terms quoted above: *praesumpserit,* etc., or similar ones which require full knowledge and deliberation, every degree of diminished imputability, either of the intellect or the will, renders the offender with such lessened responsibility immune from penalties *latae sententiae;* not so much because of the objective verification of the criminal act, as on account of his subjective state of mind. For instance, one who knowingly reads a book forbidden in virtue of can. 2318, § 1, incurs excommunication especially reserved to the Apostolic See, but if he did not know that it was a heretical book, or one forbidden by Apostolic letter, he does not incur excommunication.

3. If the law *does not contain the terms praesumpserit, ausus fuerit,* etc.:

a) Crass or supine ignorance (*crassa vel supina ignorantia*) *exempts* from *no* penalty *latae sententiae.* This ignorance supposes, not so much a positive as a negative

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attitude towards the law; hence *crassa vel supina ignorantia* is imputed to one who takes little or no trouble to find out the truth. Such ignorance, of course, is imputable in proportion to the obligation one is under to acquire the knowledge in question. Less imputable is the ignorance called purely vincible, for it supposes that one has at least made an effort, even though insufficient, to overcome one's ignorance. Such ignorance (here called "*non crassa vel supina*") excuses from censures (*a medicinalibus*), but not from vindictive penalties *latae sententiae*. The reason for this difference must be sought in the intensiveness of the corrective penalties and their more individual character, whereas the vindictive penalties are intended more or less for the public weal and order, just as irregularities, the ignorance of which does not excuse from incurring them, concern the clerical decorum *in directo* and the person *in obliquo*.

b) *Drunkenness, carelessness, mental weakness, impetuous passions do not exempt* from penalties *latae sententiae*, provided the responsibility, though somewhat diminished, is still grievously culpable; thus *procuratio abortus* (can. 2350), though committed in the heat of passion, would still be subject to excommunication.

c) Grave fear by no means excuses from penalties *latae sententiae*, if the crime involves contempt of faith or of ecclesiastical authority, or public damage to souls. Hence no one is excused from the penalty laid down in can. 2314, § 1 (apostasy from faith), nor from that established in can. 2335, which forbids membership in Masonic societies which conspire against ecclesiastical and civil authority. The public welfare is jeopardized by the violation of the seal of confession (can. 2369).

§ 4, lastly, rules that a delinquent who, on account of purely vincible ignorance, does not incur censures, may

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nevertheless be punished, if expedient, by some penalty or penance. This, of course, should be guaged according to the publicity, scandal, and damage incurred.

Can. 2230 considers, first, *impuberes* as such, and then as instruments of *puberes,* whilst can. 2331 properly defines partnership in crime.

1. *Impuberes, i. e.,* boys before the fourteenth and girls before the twelfth year of age, completed, are excused from penalties *latae sententiae,* and should be punished rather by reformatory educational means than by censures and severe vindictive penalties. To the point is can. 2342, n. 2, concerning the breach of enclosure in men's convents. There women are named, but girls (*impuberes*) do not incur the excommunication, whereas religious superiors and others who admit a girl under age incur it.[6] The difference is palpable.

2. Therefore *puberes* who induce *impuberes* to violate a law or who are partners to a crime, according to can. 2209, §§ 1–2, incur the legal penalty, though the *impuberes* who are coaxed into, or coöperate in, the crime are free from any penalty *latae sententiae.* This difference is based upon responsibility, and the age limit must here be taken mathematically; because this is the more benign interpretation and more secure in the application. The maxim "*malitia supplet aetatem*" should not be applied here.

3. In cases of *partnership in crime* can. 2209, §§ 1–3 must be consulted as to the responsibility of the parties. Those who concur in a crime by conspiracy, or as accomplices or effective counsellors and coöperators, are subject to the same penalty, though only one (in the singular) is mentioned in the penal law; unless the text has a con-

[6] Yet there is a controversy concerning the point, as shall be seen under said canon.

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trary provision.[7] Others mentioned under can. 2209 are to be punished proportionately, according to the prudent discretion of the superior, unless the law provides a special penalty.

WHEN PENALTIES TAKE EFFECT

CAN. 2232

§ 1. Poena latae sententiae, sive medicinalis sive vindicativa, delinquentem, qui delicti sibi sit conscius, ipso facto in utroque foro tenet; ante sententiam tamen declaratoriam a poena observanda delinquens excusatur quoties eam servare sine infamia nequit, et in foro externo ab eo eiusdem poenae observantiam exigere nemo potest, nisi delictum sit notorium, firmo praescripto can. 2223, § 4.

§ 2. Sententia declaratoria poenam ad momentum commissi delicti retrotrahit.

CAN. 2233

§ 1. Nulla poena infligi potest, nisi certo constet delictum commissum fuisse et non esse legitime praescriptum.

§ 2. Licet id legitime constet, si agatur de infligenda censura, reus reprehendatur ac moneatur ut a contumacia recedat ad normam can. 2242, § 3, dato, si prudenti eiusdem iudicis vel Superioris arbitrio casus id ferat, congruo ad resipiscentiam tempore; contumacia persistente, censura infligi potest.

1. A penalty *latae sententiae,* whether corrective or vindictive, binds the delinquent *ipso facto* both in the ex-

7 Conspirators, can. 2331, § 2; can. 2342, nn. 1, 2; 2351; cooperators, can. 2347; accomplices, can. 2338, § 2; can. 2362, 2371, etc.

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ternal and in the internal forum, provided he is conscious of the crime. For instance, a bishop-elect who neglects to receive episcopal consecration within the time prescribed, is bound in conscience and publicly to apply to himself the penalty stated in can. 2398.

However, says the text, if defamation should actually follow the application of this penalty, the delinquent is excused from executing the penalty as long as no declaratory sentence has been issued. This clause does not state in what forum, whether the external or the internal, the delinquent is excused. The word *infamia* seems to point to the external forum, because the penitential forum appears, to us at least, not to entail defamation. Therefore we should say that in the internal forum the penalty must be observed if it can be done without the loss of good name and if the penalty is divisible.[8] Thus in the example taken from can. 2398, the bishop-elect might apply the forfeited income to charitable purposes without great risk of defamation. The second clause of can. 2398 could hardly be observed without defamation.

The text continues: and *in the external forum no one is allowed to demand this self-execution of the penalty on the part of the delinquent, unless the crime is notorious,* with due regard, however, to can. 2223, §4, which leaves the issuance of a declaratory sentence to the discretion of the superior and demands it only when the parties insist or when public welfare is at stake. Thus a priest may be interested in the declaration of a sentence against another because of the title he has to a parish.

A declaratory sentence does not constitute a penalty, but simply affirms that a penalty has been incurred, and hence throws the penalty back to the moment when the

[8] Wernz, *l. c.*, VI, n. 63, p. 74.

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crime was committed. The consequence is plain, especially with regard to fines, which run from the moment when the crime was committed.[9]

2. *No penalty can be inflicted unless it is certain that the crime has been perpetrated* and legitimate prescription has not set in, according to can. 1703–1705. Besides, although these conditions may be verified, no *censure* should be inflicted (*censura ferendae sententiae*) except after rebuke and warning have been administered to the delinquent. To that purpose also a certain term should be granted, according to the prudent discretion of the judge or superior, and only if contumacy is persisted in, should the censure be inflicted.

It may be well to add that theory at least permits one who is accused and condemned to a manifestly unjust sentence, not to heed the sentence, at least in the internal forum.[10]

MULTIPLIED AND ATTEMPTED CRIMES

Can. 2234

Qui plura delicta commisit, non modo gravius puniri, sed si, prudenti iudicis arbitrio, res id ferat, subiici etiam vigilantiae vel alii remedio poenali.

Can. 2235

Delictum frustratum aut conatus delicti, nisi tanquam distincta delicta lege plectantur, possunt con-

9 As to the effects of excommunication and suspension, see can. 2261, 2264, 2284.

10 As to the *external forum*, see can. 2219; many authors permit the manifestly innocent to shirk the penal consequences if no scandal or contempt of authority is to be feared; Eichmann, *l. c.*, p. 68.

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grua poena pro gravitate puniri, salvo praescripto can. 2213, §3.

Those who have committed *several crimes,* either of the same kind, or of different kinds, should not only be *more severely punished,* but also subjected to vigilance and other penal remedies. A *frustrated* or attempted *crime* may be punished proportionately to the actual crime, unless the attempt itself is punishable in law as a distinct crime (see can. 2213, §3.)

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TITLE VII

REMISSION OF PENALTIES

The Code certainly takes *poenarum remissio* for the authoritative removal of penalties. For by committing a crime one has incurred the bond of guilt (*vinculum culpae*), which in turn introduces another bond, *viz.*, that of penalty (*vinculum poenae.*) This juridical bond, established by the coercive power, can be solved only by the same authority. The Code does not take into consideration the cessation of penalties by the death of the delinquent and by atonement. Death dissolves everything, but not the effect of censures. Atonement extinguishes penalties, inasmuch as it has the character of a temporarily fixed penalty.[1] Thus the fasts and pilgrimages of the penitential discipline may be looked upon as temporary punishments, which cease after the lapse of time for which they were decreed. But the Code does consider prescription, by which the criminal action may be quashed (can. 2240; see can. 1703).

WHO MAY GRANT PARDON

Can. 2236

§ 1. Remissio poenae sive per absolutionem, si agatur de censuris, sive per dispensationem, si de poenis vindicativis, concedi tantum potest ab eo qui poenam tulit, vel ab eius competente Superiore aut successore, vel ab eo cui haec potestas commissa est.

1 Wernz, *l. c.*, VI, n. 82 f., p. 90 f.

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§ 2. Qui potest a lege eximere, potest quoque poenam legi adnexam remittere.

§ 3. Iudex qui ex officio applicat poenam a Superiore constitutam, eam semel applicatam remittere nequit.

§ 1. Penalties may be removed by way of *absolution* or *dispensation*. The former is applied to *censure*, the latter to *vindictive penalties*. But both presupposes jurisdiction over the person as well as over the matter at issue, because of the juridical tie contracted by penalty.

Therefore *only he can absolve or dispense* who has established or inflicted the penal law or penalty. Only, the *Pope* can absolve or dispense from all penalties, even without the valid reason [2] otherwise required for dispensations and absolutions imparted by prelates inferior to the Sovereign Pontiff. A sufficient reason is the amendment and the reparation of damage or scandal.

Ordinaries may dispense or absolve from penalties which they themselves, not the common law, have established or inflicted.[3]

The successors of these ecclesiastical authorities are endowed with the same powers as their predecessors. The *superior* ecclesiastical authority can dispense or absolve from penalties inflicted by the inferior; hence the Roman Pontiff may dispense or absolve from penalties inflicted by the Ordinaries in virtue of their ordinary power, even if the case was reserved, not by common, but by diocesan law.

Finally, those who are *commissioned* by superiors may

2 He needs no reason because of his plenitude of power *in foro externo*, but if the contrition or attrition required for absolution in the sacramental forum should be wanting, the absolution may be valid *in foro externo*, but without effect *in foro interno*.

3 *Ratione delicti* (can. 1566, § 1) the ordinary in whose diocese the crime has been committed, is competent to absolve.

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dispense or absolve in virtue of that commission within the limits of their mandate. The *Vicar-General,* as he needs a special commission to inflict penalties,[4] also needs a special commission to dispense or absolve from them.

§ 2. Those who *may exempt* from the observance of a law, may also remit the penal sanction attached to the same, and consequently render the delinquent immune from punishment. Note that the inferior, say the Ordinary, cannot exempt from common law, because *eximere a lege* supposes a legislative power not granted to the Ordinaries with regard to the common law. For this the Ordinaries, *i. e.*, all prelates inferior to the Pope, need special faculties. However, can. 81 would also seem to apply here;[5] also can. 66, § 3, which requires a faculty in order to be capable of receiving a favor or privilege. The faculty to dispense from certain laws, *e. g.*, impediments, does not include the faculty to absolve from the penalties, *e. g.*, of excommunication, but only the power to absolve from the penalty *ad hoc, i. e.*, to obtain the favor.[6]

§ 3. The *judge* who *ex officio* applies a penalty established by a superior, cannot remit the penalty once inflicted. Having rendered the sentence, his office is completed.

The judge is not above the law, but subject to it.

THE ORDINARY'S POWER WITH REGARD TO COMMON LAW

Can. 2237

§1. In casibus publicis potest Ordinarius poenas latae sententiae iure communi statutas remittere, exceptis:

4 See can. 2220, § 2.

5 Concerning censures, special provisions are made in can. 2254.

6 See can. 2265, § 2; Eichmann, *l. c.*, p. 72.

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1.° Casibus ad forum contentiosum deductis;

2.° Censuris Sedi Apostolicae reservatis;

3.° Poenis inhabilitatis ad beneficia, officia, dignitates, munera in Ecclesia, vocem activam et passivam eorumve privationis, suspensionis perpetuae, infamiae iuris, privationis iuris patronatus et privilegii seu gratiae a Sede Apostolica concessae.

§ 2. In casibus vero occultis, firmo praescripto can. 2254 et 2290 potest Ordinarius poenas latae sententiae iure communi statutas per se vel per alium remittere, exceptis censuris specialissimo vel speciali modo Sedi Apostolicae reservatis.

§ 1. The Ordinary may remit all penalties *latæ sententiae,* either corrective or vindictive, established by common law, except the following:

a) *Cases brought before the civil ecclesiastical court,* as when civil action is instituted in order to obtain damages for a crime.[7]

b) *Cases reserved to the Apostolic See,* either simply, or especially, or most especially.[8]

c) *Penalties entailing inability to hold benefices, offices,*[9] *dignities* in the Church, penalties referring to the active and passive vote and privation thereof, perpetual suspension, infamy by law, privation of advowson, and privileges or favors granted by the Apostolic See.

As to the public character of crimes, see can. 2197.

The power of Ordinaries is here restricted perhaps more than some authors were inclined to admit.[10] But the underlying reason is that given by these authors, *viz.,*

7 See can. 2210, § 1, n 2.

8 See can. 2245, § 3.

9 *Munera, i. e.,* charges of any kind, for instance, rector, lector, sexton.

10 Thesaurus-Giraldi, *l. c.,* P. I, c. 23, *ed. cit.,* p. 30.

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that too frequent recourse to the Apostolic See be not required. Besides, there is no doubt that minor crimes also are here supposed, because all the reserved censures are excluded. But the text also excludes from the power of the Ordinary a category which was formerly considered as included therein, at least if the penalty had no special clause attached.[11] The reason for this restriction is palpable: all the cases enumerated under n. 3 concern the public welfare of the Church, not merely that of the delinquent.

The term "*Ordinary*" is limited here, as the Ordinary cannot delegate another (can. 2237, § 2). But all the Ordinaries mentioned in can. 198 are included. And since the text simply says "Ordinary," the *superiors of exempt clerical orders* enjoy this power over their subjects.

§ 2 of can. 2237 refers to *occult cases* with due regard to censures (can. 2254) and occult vindictive penalties (can. 2290). Now in such cases *latae sententiae*, established by common law, the Ordinary as well as any one delegated by him may remit the penalties. An *exception* to this general rule are the censures which are reserved either *specialissimo* or *speciali modo* to the Holy See. In occult cases, the Ordinary may delegate another, as per can. 199, § 2, either for each separate case or habitually.

CONDITIONS AND MODE OF PARDON

Can. 2238

Poenae remissio, vi aut metu gravi extorta, ipso iure irrita est.

11 Thesaurus-Giraldi, *l. c.*

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Can. 2239

§1. Poena valide remitti potest praesenti vel absenti, absolute vel sub conditione, in foro externo vel interno tantum.

§2. Licet poena etiam oretenus remitti possit, si tamen scripto inflicta fuerit, expedit ut etiam eius remissio scriptis concedatur.

Can. 2240.

Ad praescriptionem actionis poenalis quod attinet, servetur dispositio can. 1703.

The remission of any penalty, whether by absolution or dispensation, if extorted by physical compulsion or grave fear, is *ipso iure* invalid. Hence serious threats to use the civil power, which the abominable *appellatio ab abusu* [12] sometimes resorted to, are without avail either in the internal or the external forum.

A penalty may be remitted not only *when the person is present,* but also when he *is absent,*[13] either unconditionally or with a condition attached, for instance, to present himself to the superior, or provided the amendment has lasted for a certain length of time. A remission may be valid either in the court of conscience only or in the external forum only.

Although a penalty may be remitted by word of mouth it is more expedient that it be done in writing, if the penalty was inflicted in writing. But writing is not required for the validity of a dispensation or absolution. As to prescription of penal actions see can. 1703 (Vol. VII of this commentary, pp. 148 sqq.).

12 Cfr. can. 2334, n. 4.

13 Of course, in *foro interno* or, rather, in the sacramental forum, personal presence is required.

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SECTION II
PENALTIES IN PARTICULAR

TITLE VIII
CORRECTIVE PENALTIES OR CENSURES

CHAPTER I

CENSURES IN GENERAL

Can. 2241

§1. Censura est poena qua homo baptizatus, delinquens et contumax, quibusdam bonis spiritualibus vel spiritualibus adnexis privatur, donec, a contumacia recedens, absolvatur.

§2. Censurae, praesertim latae sententiae, maxime excommunicatio, ne infligantur, nisi sobrie et magna cum circumspectione.

Can. 2242

§1. Censura punitur tantummodo delictum externum, grave, consummatum, cum contumacia coniunctum; potest autem ferri censura etiam in delinquentes ignotos.

§2. Si agatur de censuris ferendae sententiae, contumax est qui, non obstantibus monitionibus de quibus in can. 2233, §2, a delicto non desistit vel patrati delicti poenitentiam cum debita damnorum et scandali

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reparatione agere detrectat; ad incurrendam vero censuram latae sententiae sufficit transgressio legis vel praecepti cui sit adnexa latae sententiae poena, nisi reus legitima causa ab hac excusetur.

§ 3. Contumaciam desiisse dicendum est, cum reum vere delicti commissi poenituerit et simul ipse congruam satisfactionem pro damnis et scandalo dederit aut saltem serio promiserit; iudicare autem utrum poenitentia vera sit, satisfactio congrua aut eiusdem promissio seria, necne, illius est, a quo censurae absolutio petitur.

The term censure is derived from the Latin *censura,* which originally signified registration, much in the same sense as our modern census. The office of *censores* was created in 443 B. C. and gradually extended to the *regimen morum,* or supervision of public morals, later to the arrangements for the collection of the public revenue and the execution of public works. As censors or inspectors of public morals the *censores* were empowered to brand with disgrace (*ignominia*) those guilty of acts which, although not forbidden by any penal statute, were denounced by public opinion. The branding with disgrace was termed *notio,* or *notatio,* or *animadversio censoria,* and the disgrace inflicted by it, *nota censoria.* To inflict this note no previous judicial investigation or examination of witnesses was required, and the only effect of the *nota censoria,* in itself, was to affix a stigma to the individual. But, in addition to the mere disgrace thus inflicted, the censors could, to a certain extent, deprive the object of their displeasure of public honors and privileges, but neither the dishonor nor the degradation were necessarily permanent.[1]

1 Ramsay-Lanciani, *Roman Antiquities,* 1901, p. 198 ff.

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Ecclesiastical terminology was uncertain up to the time of Innocent III (1198–1216), inasmuch as all kinds of ecclesiastical penalties were understood by censures. But a decretal of the above-named Pontiff restricted the term *censura* to interdict, suspension, and excommunication,[2] and this meaning was thenceforth permanently established.[3] A censure then is *defined* by the Code as *a penalty by which a baptized person, delinquent and contumacious, is deprived of certain spiritual goods or goods connected with spiritual ones, until he has given up his contumacy, and obtained absolution.*

1) Censures generically belong to the class of penalties, because they contain all the marks of a *penalty*.[4] Hence, although the corrective element is foremost in censures, the character of penalty as retribution and reparation is not entirely wanting.

2) The *subject* of censures must be baptized, delinquent, and stubborn.

a) *Homo baptizatus* alone is the subject of censures; no brute[5] is capable of punishment in the proper sense. *Baptism* is necessary because the Church does not exercise her judiciary power except over those who belong to her fold.[6] Consequently not even catechumens are subject to ecclesiastical censures. On the other hand, any one who is validly baptized, no matter what religion or creed or sect he may profess, is *de iure* subject to ecclesiastical censures.[7] Baptized *non-Catholics,* because of the

2 C. 20, X, V, 40.

3 Hinschius, *l. c.*, V, 125, note 4; Hollweck, *l. c.*, p. 84, note 1.

4 See can. 2215.

5 The *anathema* sometimes hurled at irrational creatures—as we read in ancient documents—must be understood of execration and detestation, not of punishment involving guilt; Ballerini-Palmieri, *Opus Theol. Morale,* 1894, ed. 2, Vol. VII, p. 20, n. 49.

6 *Trid.*, Sess. XIV, c. 2. *de ref.*

7 *Trid.*, Sess. VII, can. 7; can. 12; Suarez, *De Censuris,* disp. V, sect. 1, n. 25 (XXIII, 156).

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indelible character of Baptism, are also theoretically subject to censures, but these are not enforced against them by reason either of opportunity, or lack of the necessary assistance, or infeasibility. Besides, there is no doubt that the legislator has only Catholics in view, at least directly.

It is hardly necessary to state that only a *living* man can be properly censured. If excommunication was at one time inflicted on the dead, it was only as a warning to the living not to give them ecclesiastical burial or offer ecclesiastical suffrages for their repose. Consequently also the absolution given to such as died with signs of penance, refers to the living and not to the dead.[8]

b) A censure can be inflicted only for a *delictum* (crime). This is described in can. 2195, and further explained in can. 2242, § 1. Only an external, grievous, consummated and stubborn crime is censurable.

External is here used in opposition, not to occult, but merely to internal sinful acts, as, for instance, an internal heresy which remains entirely within the mind and is never manifested.[9] A crime on the other hand (for instance, homicide), may be wholly occult, and yet external.

The crime must be grievous or *grave,* because the external act itself must be grievously culpable. The reason lies in the gravity of the penalty, which, ultimately meaning exclusion from the kingdom of heaven, should

8 Ballerini-Palmieri, *l. c.,* n. 48.

9 *Ibid.,* p. 64, n. 133: "*neque sufficit, quod quis, v.g., intendens haeresim confirmare, mensam percutiat aut dicat: ita est, quia per hoc non significatur haeresis exterius.*" But if one would say to himself: "I don't believe," or purposely and with heretical intent refuse to genuflect or bow (like the Greeks) to the Blessed Sacrament, he would manifest his heretical belief externally.

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not be inflicted except for such crimes as render one unworthy to enter that kingdom.[10] But it must be observed that, according to the common teaching of the schools, a censure may be threatened even for a less serious transgression, which in itself would not amount to a grievous or mortal sin, provided the matter may become serious by reason of scandal, or danger, or the purpose for which the censure is threatened. Thus a theft, the matter of which would constitute only a light fault, might cause serious loss to a church.[11] Thus, also, a *percussio levis clericorum* (see can. 2343, §4) may be placed under excommunication in order to prevent greater evil and to enforce respect for the clerical state.

The proportion between the penalty and the reason for which it is threatened must be reasonable.

The next characteristic of a crime is that it be consummated (*comsummatum sive completum in genere suo*). This is verified when the effect of the forbidden act has followed. Beyond the intention of the legislator the penal law cannot bind. For instance, the violation of enclosure is complete if the whole body has moved within the forbidden precinct (can. 2343). However, the legislator may also punish an inchoate or attempted crime. For instance, can. 2333 lays under excommunication the *prohibentes promulgationem vel executionem litteras vel acta Apostolicae Sedis.* This class of persons incur excommunication, but the Apostolic letters may be promulgated or executed notwithstanding this unjust prohibition, which is against ecclesiastical liberty. Therefore the wording and context of the law must be weighed.[12]

10 S. Thomas, *Summa Theol.*, III, Suppl., qu. 21, art. 3.

11 Suarez, *l. c.*, disp. IV, sect. 6, n. 12 f.; see can. 2326.

12 Ballerini-Palmieri, *l. c.*, VII, p. 65, n. 135 f. and n. 139.

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c) The person to be censured must be *contumacious,* in other words, crime must be connected with contumacy. Although contumacy in legal parlance is defined as contempt of court, the term has also a wider meaning, *viz.*, persistent disobedience, which is more explicitly described in can. 2242, § 2.

Persistent disobedience presupposes knowledge of the law which forbids acts under censure (can. 2209). It also supposes that the act perpetrated against the law is not only a past act, but endures as to its vicious character; because censures are corrective penalties.[13] Hence if penance is done and reparation is made, no censures can be inflicted.

When does contumacy exist? The Code, can. 2242, §2, distinguishes between a censure *ferendae* and a censure *latae sententiae.* The former requires a canonical admonition. Hence the ecclesiastical superior must, according to can. 2143, issue a formal warning, in the presence either of the chancellor or of another official of the episcopal court, or before two witnesses, or by registered letter, bidding the culprit to cease his criminal conduct or to do penance for the crime committed and to repair the damage and scandal done. Time must be given in order to await the result of the warning, and only after the term granted has expired without the desired result, may contumacy be assumed.[14] If no criminal warning was issued, the sentence, even though valid,[15] is unjust, and recourse or appeal is open to the censured. This warning may, but need not, be repeated.

The judgment as to the existence of contumacy lies with the superior. In order to incur a censure *latae sententiae,*

13 Wernz, *l. c.*, VI, n. 155, p. 164.
14 See can. 2283, § 2.
15 It would be invalid in the cases mentioned in can. 1892 and 1894; Eichmann, *l. c.*, p. 77.

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all that is required is to transgress the law or precept to which the penalty *latae sententiae* is attached, unless the culprit has a lawful reason or excuse. Consequently, there is no need of canonical admonition, since the penal law itself, threatening the penalty to be incurred *ipso facto,* contains this admonition.[16] The clause: "*nisi reus legitima causa ab hac excusetur*" must be referred to the reasons for or against imputability, as explained in can. 2199–2206 and 2229.

Contumacy may be said to *cease* (can. 2242, §3) when the delinquent repents of the crime he has committed, makes proportionate satisfaction for the damage he has caused and repairs the scandal given, or at least seriously promises to do so. Whether the repentence is sincere, the satisfaction sufficient, or the promise serious, must be judged by the one who is asked to give absolution.

Here it may be added that a promise under oath is not demanded by our text, although the Roman Ritual[17] appears to require it.

It should be clearly understood that *these marks of crime must all concur simultaneously;* if but one of them is lacking no censure is incurred.

3. The effect of a censure is *privation of certain spiritual goods* or things connected therewith. This is the proximate purpose or effect of censures, which are spiritual penalties and therefore deprive the delinquent of *spiritual benefits.* When *temporal goods* are mentioned, they must be related to spiritual goods. Thus, *e. g.,* a suspension (*qua* censure) may deprive a cleric of bene-

16 Cfr. c. 26, X, II, 28. Concerning a declaratory sentence required for a censure *latae sententiae,* see can. 2223, § 4. A censure *latae sententiae* which requires a declaratory sentence only, need not be preceded by a canonical admonition; see Suarez, *l. c.,* disp. III, sect. 10, n. 19 ff.; Ballerini-Palmieri, *l. c.,* VII, p. 82, n. 165 f.

17 Tit. III, c. 3, n. 2; see c. 15, X, V, 39.

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ficiary emoluments, but only in relation to his office, which is something spiritual. Excommunication may deprive one of exercising legitimate functions, but only in order to ecclesiastical office; it may also render one *vitandus,* but only with regard to the faithful as such. The specific benefits of which the censured are deprived are enumerated under the single headings. Although privation is the main and primary effect of censure enforcement, yet obedience and submission, repair of damage and scandal are also intended as subordinate ends.[18]

4. Censures do not cease automatically with contumacy and subsequent amendment, but *require formal absolution.* It would be scandalous, to say the least, to teach that censures cease in the court of conscience after the culprit has amended his conduct and is no longer contumacious;[19] see can. 2248 ff.

Can. 2241, §2 admonishes all concerned to make a *sober and careful use of censures,* especially of censures *latae sententiae,* and more particularly of excommunication. This warning of the Council of Trent[20] has repeatedly been emphasized. Thus missionaries were told not to be misled by civil governors into pronouncing censures in order to ascertain the temporal estates of deceased persons.[21] The S. Congregation also refused to permit Vicars Apostolic to censure those who trafficked in or used opium or arach. The reason given was that censures constitute the very nerve of ecclesiastical discipline and should therefore be used sparingly and for grave, canonical, and approved reasons only.[22]

18 Suarez, *l. c.,* disp. VI, sect. 1, nn. 1–3 (XXIII, 175).

19 Prop. 44. damn. a S. O., March 18, 1666 (Denzinger, n. 1015).

20 Sess. XXIV, c. 3, *de ref.*

21 S. C. P. F., Aug. 18, 1760 (*Coll.,* n. 434).

22 S. C. P. F., June 23, 1830; Sept. 30, 1848 (*Coll.,* nn. 815, 1085).

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Excommunications may also be inflicted on unknown delinquents, says can. 2242, §1. For although the intention must be directed to a certain subject, yet if that person is determined in one way or another, it is sufficient for the censure to bind him, even though he may be unknown as such or such, but merely as the perpetrator.[23] There is no difficulty as to a censure *latae sententiae,* because this censure is incurred by the very perpetration of the deed, but it may need a declaratory sentence. Censures *ferendae sententiae* require canonical admonition. A public edict issued either in the church or in some official publication would be sufficient.[24]

APPEAL OR RECOURSE FROM CENSURES

Can. 2243

§1. Censurae inflictae per sententiam iudicialem, statim ac latae fuerint, exsecutionem secumferunt, nec ab eis datur appellatio, nisi in devolutivo; item a censuris ad modum praecepti inflictis datur recursus, sed in devolutivo tantum.

§2. Appellatio vero vel recursus a sententia iudiciali vel praecepto comminante censuras etiam latae sententiae nondum contractas, nec sententiam aut praeceptum nec censuras suspendunt, si agatur de re in qua ius non admittit appellationem vel recursum etiam cum effectu suspensivo; secus censuras suspendunt, firma tamen obligatione servandi id quod sententia aut praecepto mandatur, nisi reus appellationem vel recursum interposuerit non a sola poena, sed ab ipsa quoque sententia vel praecepto.

23 Suarez, *De Censuris,* disp. V. sect. 2, n. 2 f. (Vol. XXIII, 158 f.)

24 *Ibid.,* disp. III, sect. 11, n. 5 (XXIII, 65).

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Ecclesiastical discipline requires that prelates in inflicting penalties for the correction and reformation of morals should not be handicapped by dilatory appeals.[25] Therefore, the Code safeguards the authority of the ecclesiastical judge by clearly eliminating censures *latae sententiae,* which require no execution of the sentence, but go into effect automatically. But a censure inflicted *a iure tantum* may here be understood because, according to can. 2217, §1, n. 3, it may require a condemnatory sentence, which would certainly mean a judicial sentence. But a censure inflicted *ab homine,* by way of a special precept, like that of the *suspensio ex informata conscientia,* is here expressly mentioned.

Note the difference between appeal and recourse; an appeal supposes a judiciary sentence, a recourse, either a decree or a decision; an appeal is permitted to a tribunal only, recourses are disposed of administratively by the Roman Congregations.[26]

§1 of can. 2243 rules:

1. That *censures inflicted* by judiciary sentence take *effect* immediately and must, as a rule, be carried out. An *appeal,* if properly lodged, has a *devolutive* effect, *i. e.,* the whole case is thrown upon the court of appeal, but the one thus censured must conduct himself as if he were censured, *i. e.,* abstain from every act of order, jurisdiction, or administration forbidden by the censure. However, this text evidently presupposes that the sentence was valid; and since the text speaks of a judiciary sentence, its validity may be impaired for three reasons; (a) if the judge had no jurisdiction at all, as, for instance, a superior who has resigned or otherwise gone out of office; (b) if an essential form was neglected, for

25 C. 13, X, I, 31. 26 Can. 1601.

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instance, the summons; (c) if the reason was unjust or insufficient, because the penalty, being a grave one, requires a just and reasonable cause for being inflicted. Whenever one of these reasons occurs, the censure does not bind. What is to be done? The whole judgment must be reversed, for an appeal proper is impossible, as can. 1880, 3° clearly states. But here it must also be noted that, although the exception of nullity may be lodged after a definite sentence (Benedict XIV, "*Ad militantis,*" n. 36), yet the exception of nullity does not, *as a rule,* impede the execution of the sentence. We said "*as a rule,*" for if the nullity is evident or notorious, or can be immediately proved, the exception quashes the effect of the sentence or execution.[27]

2. The text states that from *censures inflicted by way of precept* only *recourse,* and that *in devolutivo,* is permitted. Thus a *suspensio ex informata conscientia* admits *only* recourse to the S. C. Concilii, *in devolutivo.* But note well that only censures, not vindictive penalties, have this devolutive effect.

§2 of can. 2243 regards censures not yet inflicted or incurred, but merely *threatened.* The threat may be pronounced by a judge in the form of a judiciary sentence, although the law itself may have determined the penalty (*i. e.,* censure), or it may be pronounced by a superior in the form of a special precept, as is prescribed for non-residing pastors. A superior of exempt clerical religious may issue such a precept in an important matter of discipline. Again notice the difference between appeal and recourse with suspensive or devolutive effect:

1. *If the matter is such as to admit of no appeal or recourse with suspensive effect,* such an appeal or recourse

27 Can. 1892.

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suspends neither the judiciary sentence (or precept) nor the censure threatened but not yet incurred, even though it be a censure *latae sententiae*. No appeal is allowed in the cases mentioned in can. 1880. Recourse *in devolutivo* only is provided in can. 345, 513, §2, 1340, §3, 1395 and 1428, §3.

2. If the *matter in question admits of an appeal or a recourse with suspensive effect,* then a twofold hypothesis is possible.

a) The appellant may lodge his appeal *against the censure* only, without dodging or shirking the obligation of fulfilling the command stated in the sentence or precept. In that case the *censure is suspended,* but the obligation of complying with the substance of the sentence or precept remains. For instance, the sentence may demand restitution of stolen church property or reparation of damage caused by homicide, robbery, incendiarism,[28] or by giving up a supposed marriage or concubinage.[29]

b) If the appeal or recourse is lodged not only against the penalty *(i. e., the censure),* but also against the sentence or precept which supposedly contains both penalty and obligation, *both* are suspended. Hence the appellant is neither censured nor obliged to repair eventual damages or perform the act prescribed by the sentence or precept.

MULTIPLICATION OF CENSURES

Can. 2244

§1. Non solum diversae, sed etiam eiusdem speciei censura potest in eodem subiecto multiplicari.

§2. Censura latae sententiae multiplicatur:

28 See can. 2346; 2348; 2354; 2401.

29 See can. 2356; 2357, § 2.

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1.° Si diversa delicta, quorum singula censuram secumferunt, eadem vel distincta actione committantur;

2.° Si idem delictum, censura punitum, pluries repetatur ita ut plura sint delicta distincta;

3.° Si delictum, diversis censuris a distinctis Superioribus punitum, semel aut pluries committatur.

§3. Censura ab homine multiplicatur, si plura praecepta vel plures sententiae vel plures distinctae partes eiusdem praecepti aut sententiae suam quaeque censuram infligant.

The whole or at least the main difficulty concerning the multiplication of censures seems to arise from their effect, *i. e.*, the privation of spiritual benefits. Suarez refutes it effectively.[30] Privation is indeed the primary object or end of censures, not, indeed, mere privation, but its positive cause, and this may be multifarious. Mortal sin, for instance, deprives the soul of sanctifying grace, and, when multiplied, produces a multitude of stains.

Besides, one censure does not exhaust the power of the ecclesiastical judge, which, on the contrary, remains intact, and may, therefore, again be used against the same delinquent.

Finally, multiplied censures are intended to terrify and deter, and to lend additional weight to the authority of the law.

The multiplication of censures is necessarily bound up with the specific and numerical distinction of sins; and therefore the difficulties besetting this subject also adhere in the one here under discussion.

The Code begins by stating that censures may be multiplied, *not only specifically, but also numerically in one*

30 *De Censuris*, disp. V, sect. 2, n. 6.

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and the same subject. Thus a man may be excommunicated, suspended, and interdicted all at the same time, as we know from the common formula of absolution. Neither is there any difficulty in that, because these privations differ. The objection mentioned above is directed only against the same kind of censure. May one be twice excommunicated? The Code says, yes, and then distinguishes between censures *latae sententiae* and censures *ab homine.*

1. Censures *latae sententiae* are multiplied:

a) When *several crimes,* each of which has a censure attached, are committed by the same act or by different acts.

This is a specific distinction of crimes, although the act may be one and the same, or the acts may be morally and physically distinct. If the acts differ, the case is evident. But if the act is, at least physically, one and the same, it seems strange that two or more censures should follow. Yet if we distinguish the reasons for the sources from which the censures are established, it is but logical to assume diversity, as of causes, so of effects. Take the example of one dragging a bishop by force before a lay tribunal. There would be a violation of can. 2341 and of can. 2343, §3 (*privilegium fori* and *canonis*). A nun with solemn vows and papal enclosure, who would leave the enclosure to contract civil marriage before a non-Catholic minister, would incur four censures, *viz., under* can. 2319, §1, n. 1, can. 2341, 3, can. 2385 (as apostate), and can. 2388,—all these being specified censures inflicted for specific reasons.

b) There is also multiplication if *the same crime is repeated so that the repeated acts constitute distinct crimes.* Two characteristics distinguish acts from one another

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interruption and diversity of object. If an act is morally and physically *interrupted,* so that the posterior act is not coherent with the anterior, these acts are distinct. On the other hand, if an act lasts for some time, but is inspired by the same motive and continued under the same impetus, the act is one, for instance, a protracted beating of a clergyman.[31] When the *object* or *matter* of one criminal act is diverse, authors differ as to the multiplication of censures. For instance, if one would bring two clergymen before a lay tribunal or converse with two *vitandi* at the same time, or would kill two clerics by the same stroke, Suarez and others believe it probable that only one censure would be incurred, because the action is essentially one and constitutes but one sin.[32] The Code is not against this assumption.

c) *If a crime laid under diverse censures by various superiors* is perpetrated once or oftener, a multiplication of censures may be incurred. The reason is that the two superiors may have different reasons for decreeing the censure. However, it must be clearly understood that there is question here not only of a double or emphatic prohibition, but of a double or multiplied censure. Now can. 2247, §1 forbids Ordinaries to put under censure crimes which are already forbidden under the same penalty by the Apostolic See. Consequently the censures mentioned in the Code as reserved to the Apostolic See cannot again be inflicted by inferior prelates. Note that we here treat of censures *latae sententiae,* which need no admonition.[33] Hence the case can concern only a lay-

31 C. 27, X, V, 39.

32 *De Censuris,* disp. V, sect, 3, n. 3 ff.

33 What Suarez (*l. c.,* disp. V, sect. 3, n. 13) and Ballerini-Palmieri (*l. c.,* Vol. VII, n. 113, p. 55 ff.) say, is not to the point; and what Ayrinhac (*l. c.,* p. 93) says, appears like an evasion of the difficulty.

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man or a clergyman or religious who has different superiors. Thus if a layman has several bishops, because he has more than one domicile, the different bishops may censure him; a religious, too, may have different superiors, —the provincial or general of his institute, and the local Ordinary as far as pastoral duties are concerned.

One difficulty remains: What is meant by "*diversis censuris*"? Does it mean specifically or numerically different censures? If specifically different, it would mean excommunication or suspension or interdict. This seems to be the meaning of our text, although the Decretals,[34] from which it is apparently taken, only mention excommunication, which is said to have been incurred severally, because inflicted by several prelates.

2. The next class of multiplied censures is that of *censurae ab homine*. There is no difficulty as to the multiplication of these, because the various reasons constitute as many titles, and each sentence presupposes a clear title for a distinct pronunciamento on diverse matters judged or commanded. Therefore, if several ordinances or several sentences (which of course suppose diverse objects) have been issued under censure, censures are multiplied in proportion to the number of precepts and sentences transgressed. Besides, if the sentence or precept is divisible, and hence composed of several parts, each of which is emphasized by a special censure, the censures are also multiplied. Here the intention of the superior or judge must be clearly manifested, and besides, the admonition must be made for each and every sentence or precept and for every specific part thereof.[35]

[34] C. 42, X. V, 39; but c. 27 *ibid.* refers to diverse crimes; thus one may be interdicted by the Pope and excommunicated or suspended by the ordinary; Eichmann, p. 80.

[35] Suarez, *l. c.*, disp. V, sect. 2, n. 13.

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In asserting a multiplication of censures, either *latae sententiae* or *ab homine,* it must be remembered that all the conditions enumerated above must concur, not only in one, but in each and every censure; else one censure may be incurred, but not the other. The consequence of such verified or not-verified multiplication is important in reference to absolution.

RESERVATION OF CENSURES

Can. 2245

§1. Censurae aliae sunt reservatae, aliae non reservatae.

§2. Censura *ab homine* est reservata ei qui censuram inflixit aut sententiam tulit, eiusve Superiori competenti, vel successori aut delegato; ex censuris vero *a iure* reservatis aliae sunt reservatae *Ordinario,* aliae *Apostolicae Sedi.*

§3. E reservatis Apostolicae Sedi aliae sunt *reservatae simpliciter,* aliae *speciali modo,* aliae *specialissimo modo.*

§4. Censura latae sententiae non est reservata, nisi in lege vel praecepto id expresse dicatur; et in dubio sive iuris sive facti reservatio non urget.

Can. 2246

§ 1. Ne reservetur censura, nisi attenta peculiari gravitate delictorum et necessitate aptius providendi disciplinae ecclesiasticae et medendi conscientiis fidelium.

§2. Reservatio strictam recipit interpretationem.

§3. Reservatio censurae impedientis receptionem

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Sacramentorum importat reservationem peccati cui censura adnexa est; verum si quis a censura excusatur vel ab eadem fuit absolutus, reservatio peccati penitus cessat.

Can. 2247

§1. Si censura Sedi Apostolicae reservata sit, Ordinarius nequit aliam censuram sibi reservatam in idem delictum ferre.

§2. Reservatio censurae in particulari territorio vim suam extra illius territorii fines non exserit, etiamsi censuratus ad absolutionem obtinendam e territorio egrediatur; censura vero ab homine est ubique locorum reservata ita ut censuratus nullibi absolvi sine debitis facultatibus possit.

§3. Si confessarius, ignorans reservationem, poenitentem a censura ac peccato absolvat, absolutio censurae valet, dummodo ne sit censura ab homine aut censura specialissimo modo Sedi Apostolicae reservata.

Elsewhere,[36] in sketching the historical development of reservation, we said that reservation to the "Apostolic Lord" of the more atrocious crimes was a well-known practice, especially since the twelfth century, and was connected with pilgrimages to Rome as well as with the decline of public penance. Can. 893, §2 calls the restriction of the absolving power an *avocatio, i. e.*, a calling of certain cases before a higher tribunal. By earlier authors reservation was defined as "*restrictio iurisdictionis in odium delinquentis.*" This definition gave way to another, called the most common one by St. Alphonsus: "*restrictio iurisdictionis, ut delinquentes judicium prudentiorum*

[36] See Vol. IV, of our *Commentary*, pp. 311 ff.

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subeant." [37] This latter definition may appeal to tender souls, but historically and theologically speaking it has not much foundation, if exclusively understood of the higher and more prudent judgment to which the penitent has to submit. For there is no doubt that the grievousness or atrocity of the crime was the decisive element in reserving cases. To bring home to the delinquent the fact of the heinousness of his crime was another object of reservation. That by undertaking a pilgrimage to Rome in those days this thought was vividly presented to the culprit, goes without saying. Thus the Church did a truly social work. It appears to us that the idea of the mere prudent judgment of a case overlooks the penal character of censures and their corrective or reformatory purpose.[38] No doubt some prelates may have had misgivings or suffered from lack of necessary knowledge in treating very serious cases. But this was not true of all, nor could there have been wanting suitable clergymen to advise the bishops. The Code, in the definition quoted above, treats reservation as restrictive of jurisdiction, which is quite intelligible from a juridical point of view. However, our view of reservation seems to receive weight from can. 2246, §1.

The common-law (*a iure*) censures reserved to the *Ordinary* are the following mentioned in can. 2319; 2326; 2339; 2341 (third clause); 2342, § 4; 2350; 2375; 2388, §2. Can 2385 reserves the case of apostasy to the exempt religious superior.

Censures reserved *simpliciter* to the *Holy See* are those named in can. 2327, 2335; 2338, §1; 2338, §2; 2341 (sec-

37 *Theol. Moralis,* VI, n. 581.

38 Thus also Hollweck, *l. c.,* p. 107; Ballerini in the notes to Gury's *Theol. Moral.,* II, n. 571.

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ond clause); 2342; 2346; 2351, §1; 2370; 2371; 2372; 2373; 2387; 2388, § 1; 2392, n. 1; 2405.

Can. 2245 distinguishes

1° between *reserved* and *non-reserved censures*

2° Reserved
- 1° *ab homine*
  - a) to the one who inflicted the censure or sentence
  - b) to the former's superior, successor or delegate.

or

2° Reserved
- 2° *a jure*
  - a) to the Ordinary (81 cases or canons)
    - a) *simpliciter* (16)
    - b) *speciali modo* (13)
    - c) *specialissimo modo* (4)
  - b) to the *Apostolic See* reserved

Speciali modo reserved to the *Apostolic See* are those mentioned in can. 2341; 2318, § 1; 2322, n. 1; 2330 (and "*Vacante Sede*," n. 81); 2332; 2333; 2334; 2341 (first clause); 2343, §2, n. 1; 2343, §3; 2345; 2360, §1; 2363.

Specialissimo modo reserved to the Apostolic See are those mentioned in can. 2320; 2343, §1; 2367; 2369, §1.

§4 of can. 2245 states that censures *latae sententiae* are reserved only if the *reservation is expressly stated* in the law or precept which contains or threatens the reservation. *If there be a doubt concerning reservation, the latter need not be observed, i. e.,* any confessor may absolve therefrom.[39]

The doubt may concern either the law (*dubium iuris*) or

[39] Neither is an absolution *ad cautelam* there and then required, nor is recourse necessary, or a renewed absolution, if the doubt has afterwards been cleared away; Cappello, *l. c.*, p. 24.

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a fact (*dubium facti*). A solid doubt in regard to law is, for instance, in a case of abortion, whether the law comprises the *mandatarius* as well as the *mandans* (see can. 2350). A *dubium facti* would be whether the non-Catholic minister before whom the parties contracted a marriage, acted as minister of his denomination or merely as justice of the peace, *i. e.*, as civil magistrate. Note, however, that the doubt here mentioned does not concern the censured person as much as the one who is to absolve him from censure. Of course, if the parties did not know of the censure, there can be no contumacy, and consequently no censure.[40]

Can. 2246, §1 enjoins *moderation* in the reservation of censures, and mentions three reasons for which a censure may be reserved: (1) the specially serious or *grievous character* of the *crime,* as stated in can. 897, and inculcated by the Council of Trent;[41] (2) the necessity of properly *guarding ecclesiastical discipline,* because it may be that at sundry times and in diverse places reservation may do more harm than good, as, for instance, in times of persecution, in provinces far distant with but few ministers,[42] whilst certain tendencies and public manifestations of specified vicious inclinations may demand more radical means; (3) the necessity of offering *a remedy to the conscience of the faithful,* whose character and conduct also differ in different places, at various times, and under various conditions.[43]

§2 of can. 2246 sets forth the well-known rule that the *reservation of censures must be strictly interpreted,* be-

40 Hence it would be well to ask the parties whether they knew that such a marriage was forbidden under censure.

41 Sess. 14, c. 7, *de poenit.*

42 S. C. P. F., June 6, 1817, n. 14 (*Coll.*, n. 723).

43 Benedict XIV, "*A quo primum,*" June 14, 1757, § 8; *De Syn. Dioec.*, V, 5; see this Commentary, Vol. IV, p. 323 f.

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cause restrictions are not favors which may be stretched, and because penalties should be interpreted in the milder sense.[44] However, it is evident that when the wording of a reserved censure is plain, it must be taken in its obvious sense. Besides, a reserved censure may have a twofold aspect: It may be favorable to a certain class of persons and unfavorable to another class. Thus the *privilegium canonis* (2343) is favorable to the clerical state and may therefore be widely interpreted; but as far as it concerns those who attack clerics, it is unfavorable, and must therefore be restricted to "*percussores*" in the strict sense.[45] Hence no extension from person to person, from case to case, in other words, no analogous interpretation is permissible.

If the wording is ambiguous the interpretation of the school, and consequently any probable opinion, may be followed.[46]

§3 of can. 2246 settles a controversy concerning episcopal reserved censures. The text has two clauses, and the first contains a condition not specially expressed.

1. Reservation of a censure may (a) *prevent one from receiving the sacraments,* and such a reservation involves reservation of the sin to which the censure is attached. This is the case in excommunication; *e.g.,* can. 2319, §1, n. 1, says that parties contracting marriage before a non-Catholic minister cannot licitly receive the sacraments until the censure is removed by the Ordinary. This reservation, therefore, concerns the sin itself.

(b) Reservation may *not prevent* one from receiving the sacraments, and then the sin is not reserved, even though the censure is. Consequently, a suspended cleric

44 Reg. *Iuris* 15 and 49 in 6°.

45 Reiffenstuel, in Reg. Iuris 15, n. 9.

46 Ballerini-Palmieri, *Opus Theol. Morale,* V, n. 725, p. 397, ed. 2.

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may be absolved from the sin that was the cause of a reserved censure by any confessor, though the censure remains and, therefore, if a subdeacon, he cannot be promoted to deaconship.[47]

2. If one is excused from censure, or has been absolved therefrom, reservation of the sin ceases entirely. Hence ignorance[48] of the censure or lack of any of the conditions that are required for incurring censures, render any reservation null and void. Can. 2319, §1, n. 1, quoted above, may be to the point. Ignorance of censures, grave fear, lack of consent (for it happens that exterior consent only is given in order to avoid scandal) may excuse from censure.

Now this §3 must certainly be applied to *episcopal* cases, *i. e.,* such as a bishop reserves to himself, in virtue not of the law, but of his ordinary power. The rule here is general, not restricted to papal cases.[49]

Can. 2247, §1 *forbids Ordinaries* to attach another censure reserved to themselves to a crime already reserved to the Apostolic See. The reason for this very practical law consists partly in the superiority of the Apostolic See and partly in a desire to avoid a multiplication of censures.[50] The words *"nequit ferre"* (cannot decree) is more forcible than the text of the Holy Office, which uses *abstineant,* although even the *"nequit"* does not entail invalidity. *"Aliam censuram"* means that no other reserved censure, at least of the same kind, can be licitly added. Hence two excommunications, for instance, on can. 2318, may not be pronounced against

47 See can. 2283.

48 According to can. 2202, § 2, see also can. 2229.

49 Ballerini-Palmieri, *l. c.,* maintained this view.

50 See Reg. Iuris 54 in 6°; S. O., July 13, 1916 (*A. Ap. S.,* III, 313).

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the authors and editors of certain forbidden books.[51] A non-reserved censure, even of the same kind, might be permitted, but should rather be avoided, in order not to increase the penalties. The general wording of the text —"*alia censura*" — appears to exclude even censures of diverse kinds; — excommunication, interdict or suspension reserved to the Apostolic See may not be added by the Ordinary.[52] He may, however, add a vindictive penalty.

Here a little digression may be permitted. It concerns, strictly speaking, can. 898, but also bears upon can. 2247, § 1. We divide the text as follows:

1) Ordinaries shall abstain from reserving to themselves cases which are already reserved under censure to the Holy See.

2) They shall, *as a rule,* abstain from reserving cases reserved under censure by law. Hither belong the cases reserved by law to the Ordinaries.

3) They shall, *as a rule,* abstain from reserving cases reserved to no one, but reserved by law.

The first prohibition is unconditional; but the second and third are conditioned by the adverb *regulariter.* Hence reservations made by and to the Apostolic See should not be made episcopal reservations in any case. But cases reserved by law to the Ordinaries, or reserved to no one, have a phrase attached, *viz.*: "*as a*

51 A difficulty arises from can. 2344, § 1, n. 3, where a multiplication of diverse censures decreed or inflicted by distinct superiors is admitted. For *alia censura* has a wide meaning, embracing diverse kinds as well as things of the same kind (Barbosa, *Tractatus Varii,* Dictio 26, p. 650 ff.). S. C. EE. et RR., Nov. 26, 1602 (Bizzarri, *l. c.,* p. 14) mentions only two excommunications.

52 S. O., July 13, 1916 (*l. c.*) speaks only of reserved sins, not censures; as is evident from the rubric: "*Super casuum conscientiae reservationibus.*"

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rule." This can mean nothing else than that the bishops should not make it a rule to reserve to themselves cases already reserved to them by law, or reserved to no one by law.

This is the grammatical-verbal interpretation of can. 898. Is there any solid reason to depart from it? We cannot see any such reason. For if it is stated that it is naturally repugnant that bishops should reserve to themselves cases from which they can absolve only by delegated power, the answer is: Concerning the cases reserved to the Apostolic See *specialissimo* or *speciali modo,* there might be some shadow of a reason. But as to cases simply reserved to the Apostolic See, or reserved to the bishops by law, or reserved to no one, there cannot be any reason. For in these cases they absolve *propriâ auctoritate,* granted by law or general faculties. Besides, if the Bishop wishes to impress the faithful with the seriousness of a crime, he may bind himself, or rather shift the odium of the reservation to the Apostolic See. Lastly, it matters little whether he absolves *potestate propriâ* or *delegatâ.* It must, however, be observed that the Code strictly enjoins Ordinaries not to make cases reserved to the Apostolic See episcopal cases. This is deducible from the first proposition. But it must be added that invalidity of such reservations cannot be read into the text. The term "*abstineant*" cannot be stretched that far, nor can the "*nequit ferre*" of can. 2247, §1 be simply taken as involving invalidity. For the "*nequit*" alone does not warrant such interpretation. If the legislator had intended invalidity, he would have expressed it, as, for instance, in can. 782, § 3: "*valide uti nequeunt.*"

Legislator quod voluit, expressit; quod noluit, tacuit.

§2 of can. 2247 determines the *territorial extent and*

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force of reservation and distinguishes between a reserved censure *a iure* and one *ab homine*. Of course it is understood that this law *(a iure)* affects a diocese or province only, not the Church at large, because the common law binds everywhere. Thus diocesan statutes formerly forbade entering a saloon under suspension, to be incurred *ipso facto*. This was a censure *a iure particulari*.

a) The reservation of censures made for a particular territory—by way of a territorial law—is restricted to the limits of the respective territory, diocese or province and has no binding force outside these boundaries, even though the person censured would leave this territory in order to be absolved, in other words, if he would leave his home *in fraudem legis*.

b) If, however, an Ordinary or judge would inflict a censure and reserve it to himself by virtue of a special ordinance or condemnatory sentence (can. 2217, §1, n. 3), such a reserved censure would bind the person thus censured everywhere, so that he could not be absolved by any confessor unless the latter had obtained special faculties for the purpose. This also concerns *religious of exempt institutes*. A censure issued in virtue of the law for a whole order or exempt congregation binds in the whole of that order or congregation. If a religious superior issues a special precept or a condemnatory sentence *(ab homine)*, the person thus censured cannot be absolved by another superior, unless the latter has obtained special faculties from the respective superior or the constitutions permit.

However, can. 519 must be considered here. Hence a religious who has incurred a censure decreed as *a iure* by his institute may be absolved by any approved confessor; but if the censure is *ab homine, i. e.,*

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incurred by a special precept or condemnatory sentence, he cannot be absolved by any confessor, because can. 519 reads: "*a censuris in religione reservatis.*"

Neither can ignorance of the confessor be a pretext, for §3 of can. 2247 precludes this assumption. It says indeed that if a confessor, *unaware of the reservation,* absolves a penitent from censure and guilt, the absolution from censure would be valid, but adds: the absolution, even in case of ignorance, would be invalid if given for a censure *ab homine* or for a censure reserved *specialissimo modo* to the Apostolic See. What kind of ignorance, whether culpable or inculpable, is required, is not stated nor does the Code distinguish. Similar to ignorance is inadvertence, and therefore inadvertence also must be admitted as an excuse and the absolution be regarded as valid. [53]

The phrase "*a censura ac peccato*" should be compared with can. 2246, § 3, where it is stated that absolution from censure implies cessation of reservation of sin, provided the censure is not one which prevents the reception of the Sacraments.

Take can. 894, the false accusation of an innocent priest. This is a case reserved as a sin, or by the very nature of the offence, and, besides, it is reserved to the Apostolic See *speciali modo,* under censure, in virtue of can. 2363. The question arises whether the confessor, not knowing of, or not adverting to, the reservation when he absolves the penitent from "censure," also absolves him from the sin, so that the penitent can receive the Sacraments. A different answer is given by different authors. Under can. 894 we maintained that "neither ignorance nor doubt as to

53 Cfr. Cappello, *l. c.,* p. 25. See, for instance, can. 2338, § 1, which supposes a *dolus,* according to can. 2229, § 2, *i. e.,* full knowledge and deliberation.

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the law of reservation excuses from this reservation." This view is shared by others, *e. g.*, Ayrinhac (*Penal Legislation*, p. 310 ff.), but it is contradicted by Arregui (*Summarium Theol. Moralis*, 4th ed., no. 607), although his argumentation did not convince us. However, since can. 209 admits a probable and positive doubt as to the "*supplet ecclesia*," it is but meet that we should here supplement what we said under can. 894 (Vol. IV, p. 318), to the effect that the absolution from sin in this case (Can. 894) should be considered valid and licit.

The censure reserved *modo speciali* to the Apostolic See may be validly removed if the confessor does not know or is not aware of it. If the sin is not reserved *ratione sui*, for its own sake, but only as far as a censure is attached to it, absolution from censure also involves absolution from sin. For instance, if an apostate religious who has incurred excommunication reserved to the Ordinary (or religious superior, can. 2385), goes to a confessor who does not know of that reservation and absolves from both censure and sin, the penitent is absolved from both. For the text simply says: "*ignorans reservationem*" without qualification, and thus appears to admit ignorance of reservation of both censure and sin, and therefore no distinction need be made as to censures preventing and censures not preventing the reception of the Sacraments. This should also be applied to episcopal cases.

ABSOLUTION FROM CENSURES

It was said elsewhere that the bishops were formerly wont to send penitents guilty of enormous crimes to Rome, to present themselves to the Sovereign Pontiff in order to receive a penance or to ask for the benefit of a

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change or absolution. Personal appearance before the higher court was then required, as also absolution, *i. e.*, a formal decision. For although the purpose of a censure is to amend the delinquent, yet, since the infliction of such a penalty implies an act of jurisdiction, more generally in the external forum, it is a logical consequence that the removal of such a juridical-moral tie requires an act of jurisdiction. Hence no one, even though perfectly contrite and willing to reform, can promise himself freedom from censures incurred, unless he has a warrant from the ecclesiastical court. But since the salvation of souls is the supreme law of the Church, it follows that the external régime may be relaxed or modified in cases of imperative need or greater spiritual progress for the benefit of the *cura animarum*. Such, in brief, is the development of the penitential discipline as related to censures. Personal appearance is no longer required and the burden of being subject to censures for a space of time that would prove intolerable or dangerous to the spiritual welfare of man has been relieved. At the same time the seriousness of censures has been preserved and the heinousness of the more atrocious crimes is still brought home to recusants.

NECESSITY OF AND CLAIM TO ABSOLUTION—REVIVAL OF CENSURES

Can. 2248

§1. Quaelibet censura, semel contracta, tollitur tantum legitima absolutione.

§2. Absolutio denegari nequit cum primum delinquens a contumacia recesserit ad normam can. 2242, §3; a censura autem absolvens, potest, si res ferat, pro

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patrato delicto congruam vindicativam poenam vel poenitentiam infligere.

§3. Censura, per absolutionem sublata, non reviviscit, nisi in casu quo onus impositum sub poena reincidentiae impletum non fuerit.

1. *Necessity.* That *a censure once contracted can be removed only by a lawful absolution,* follows from the definition given in can. 2236, §1. There is, then, no other way of obtaining relief except by absolution, leaving the rest to God and the disposition of the individual.[54] Absolution is *legitima* if imparted by competent authority. Competent is the one who has inflicted the censure, or his superior, delegate, or successor (can. 2245, §2).

The text furthermore says: *"semel contracta."* A censure may be threatened by a special ordinance of the superior, as it were conditionally: "If you violate this ordinance, then etc." Such precepts cease for particular individuals with the cessation of the authority who issued them, unless indeed they were formulated in a legitimate document or given in the presence of two witnesses.[55] If the censure was not yet incurred when the superior who issued the precept goes out of office, it ceases and therefore no special authority is needed for absolution.

2. *Claim to Absolution.* As stated, the purpose of censures is the amendment of the delinquent. Consequently, *if he recedes from contumacy* or persistent disobedience, *he is entitled to absolution and it cannot be licitly withheld from him.*

Repentance alone, however, is not sufficient for purging oneself of contumacy, but satisfaction and reparation of scandal are required, according to can. 2242, §3. Hence

54 Cfr. c. 1, X, V, 41. 55 See can. 24.

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the one who absolves from censure must judge whether the acts performed by the penitent are sufficient. Besides, *he may also impose a vindictive penalty, or penance, proportionate to the crime committed, should the case require this.*

But what if the party who was offended by the criminal act would refuse to make peace or consider the satisfaction insufficient? This would not interfere with the absolution, and the latter should not, therefore, be withheld, if the delinquent has performed the works prescribed.[56]

The imposition of such a vindictive penance is left to the one who absolves from censures, and he should judge the case or situation objectively. If the one absolved should fail to comply with his obligation of assuming a vindictive penance, the absolution would nevertheless be valid.

3. *Revival* of censures. *A censure duly removed never revives.* This is the rule. However, the *absolvens* may impose a work, vindictive penalty or penance, retraction, restitution, petition for absolution or any kind of work under penalty of relapse into the censure if the imposed penance is not complied with. This is called *absolutio sub poena reincidentiae.* It is a conditional absolution, which, while it *hic et nunc* completely removes the censure and its effects, eventually depends on the fulfillment of the condition by the person who was thus absolved.

Hence, if the condition is complied with, the censure

[56] S. C. EE. et RR., Aug. 4, 1579 (Bizzarri, *l. c.*, p. 225). One had committed a violent act against a priest, who was not satisfied with the reparation made. But the delinquent had done everything prescribed in the rescript of absolution and therefore the bishop was told to absolve him. See also *Reg. Iuris* 4. et 5. in 6°.

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remains removed; but if it is not fulfilled, the censure returns (*reviviscit*). Whether a new guilt is incurred, is a controverted question. However, there can be no doubt that a new and culpable contumacy is required, since the censure has been taken away completely, and every censure requires contumacy. It may be said, therefore, that the old sentence revives with the same censure if the contumacy is verified in the second instance.[57] The reason why the censure revives is the protection of authority.[58]

The clause of reincidence must, of course, be expressly stated in law, as is the case in can. 2252, 2254, §§1, 3, or by the one who inflicts or absolves from censure.

ABSOLUTION FROM SEVERAL CENSURES

Can. 2249

§1. Si quis pluribus censuris detineatur, potest ab una absolvi, ceteris minime absolutis.

§2. Petens absolutionem, debet casus omnes indicare, secus absolutio valet tantum pro casu expresso; quod si absolutio, quamvis particularis petitio facta sit, fuerit generalis, valet quoque pro reticitis bona fide, excepta censura specialissimo modo Sedi Apostolicae reservata, non autem pro reticitis mala fide.

A censure may be incurred for various reasons and crimes, and it may be inflicted by different superiors. Although one mortal sin cannot be remitted without the

57 Cfr. Ballerini-Palmieri., *Opus Theol. Morale,* VII, n. 289; ed. 2, p. 146 ff. Different from this conditional absolution is the provisional *(absolutio ad cautelam)* which is sometimes given to receive a favor or for a certain time, and produces a limited effect; *ib.*, n. 291.

58 See c. 22, 6° V, 11: "*nec sic illudant censurae ecclesiasticae.*"

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other mortal sins weighing upon the soul, yet *one censure may be removed without the others being taken away.* This is to be explained according to can. 2244, being evident from the diverse effects which diverse censures may produce, especially since censures are intended more for the public welfare of Christian society than for the court of conscience.

Hence it is, as §2 of can. 2249 rules, that one who has incurred several *censures, when asking for absolution, must mention all the censures he has incurred; otherwise the absolution will be good only for the censure expressed in the petition.* The reason for this rule lies in the above-mentioned fact of the possibility of several censures being inflicted for various crimes and reasons by various superiors. Therefore even the power, not only the will, may be wanting in the one who absolves.

The second clause of this section reads: *If, however, absolution was imparted in general terms, even though the censured person had asked to be absolved from one particular censure, the absolution holds good for all censures which were concealed in good faith.* But this general absolution is not valid in case of censures reserved *specialissimo modo* to the Apostolic See, *nor is it valid* for censures *concealed in bad faith.*

This law contains both a positive and a negative assertion. It admits absolution for censures *bona fide reticitis,* or as they are sometimes called, *oblitis, i. e.,* censures which the penitent forgot to mention either in confession or in his petition.

The first supposition, of course, is that the one who is asked for absolution has the power, either ordinary or delegated, of absolving from the censures in question.

The second supposition is that the penitent has *bona fide*

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omitted to mention some censures incurred by him, whether reserved or not. Here the whole question turns about the will of the superior to absolve from censures which were not mentioned. The Code says implicitly that this will must be presumed if he uses a formula indicating general absolution, as is the case in the formula "*in quantum possum et tu indiges.*" Hence, if the tenor or wording of the absolution was general, the absolution frees the penitent from all censures, including those he omitted to mention.[59]

The negative clause is restrictive and, first, excludes from the absolution in general terms the *four censures most specially reserved to the Pope.* Secondly, it denies the benefit of absolution from censures that have been concealed purposely or *mala fide.* One reason for this is that it depends on the will of the superior, who is not supposed to coöperate with sinful and deliberate deception, as his power is not for destruction, but for edification. Another reason is to safeguard the dignity of censures.

Quite different from this question is that of an invalid confession, in which the censures were either mentioned or *bona fide* omitted. This question is not solved by our text.[60]

ABSOLUTION FROM SIN AND CENSURE

Can. 2250

§1. Si agatur de censura quae non impedit Sacramentorum receptionem, censuratus, rite dispositus et

59 Ballerini-Palmieri, *l. c.*, Vol. V, n. 753, p. 414 ff.

60 The more probable opinion admits the validity of the absolution from censures confessed in an invalid confession; Ballerini-Palmieri, *l. c.*, Vol. V, n. 760, p. 417.

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a contumacia recedens, potest absolvi a peccatis, firma censura.

§2. Si vero agatur de censura quae impedit Sacramentorum receptionem, censuratus nequit absolvi a peccatis, nisi prius a censura absolutus fuerit.

§3. Absolutio censurae in foro sacramentali continetur in consueta forma absolutionis peccatorum in libris ritualibus praescripta; in foro non sacramentali quolibet modo dari potest, sed ad excommunicationis absolutionem regulariter formam adhiberi convenit in eisdem libris traditam.

Since the administration of the Sacraments and their efficacy depend solely on the will and institution of Christ, whereas absolution from censures depends on the will of man, *i. e.*, the superior or positive law, it follows that absolution from sin and absolution from censures are two different acts, even though they may be performed by means of the same formula.

1. Hence *one may be absolved from sin,* and therefore be in the state of grace, yet remain under censure. This is admitted by the text in case of a censure which *does not prevent the censured from receiving the Sacraments,* provided the penitent is properly disposed for receiving the Sacrament of Penance and gives up his contumacy, according to can. 2242, §3. Thus one placed under suspension, local interdict or interdict *ab ingressu ecclesiae* (can. 2276) may validly and licitly be absolved from sin, and yet remain suspended or interdicted. Of course, if the censure entailed a prohibition of saying Mass, he could not licitly perform this function.

2. If, on the other hand, there is question of a censure which *prevents the reception of the Sacraments, absolution*

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from censure must be imparted before absolution from sin can licitly [61] *be granted.* This is the case with excommunication. The reason for this distinction lies in the separable effects of the respective censures as well as in the will of the lawgiver; see also can. 2247, §3.

3. *Formula of Absolution.* The text distinguishes *two fora,* the sacramental and the non-sacramental. The latter is again distinguished according to the kind of censures involved. Hence:

a) If absolution is given in the tribunal of penance *(in foro sacramentali),* the usual form contained in the Roman Ritual [62] should be employed.

b) In the non-sacramental forum *(in foro non-sacramentali),* either for the court of conscience or for the external forum, any formula may be used if no excommunication is implied; hence also the short formula for the confessional is permitted.

c) If, however, absolution is to be given *from excommunication,* the formula prescribed in the Roman Ritual (or Pontifical) should, as a rule, be employed.[63] *Regulariter,* therefore, admits a departure from the general rule, and in urgent cases the confessional or even the abbreviated formula may be used.

There is also in the Ritual [64] a formula for absolving a person who has been under excommunication, but has given signs of repentance before dying. The purpose of this absolution, as is evident from the same Ritual, con-

61 The text does not call for invalidity; Cappello, *l. c.,* p. 28.

62 Tit. III, c. 2 (ed. Pustet, 1913, p. 66 f.). "*Misereatur tui. . . . Indulgentiam. . . . Dominus noster. . . . Passio. . . .*" In urgent cases: "*Ego te absolvo ab omnibus censuris et peccatis in nomine Patris et Filii et Spiritus Sancti.*"

63 *Ibid.,* tit. III, c. 3 (ed. cit., p. 68 ff.).

64 Tit. III, c. 4, where *verberare corpus* means to touch the body or coffin with the (penitential) rod, which is a reminder of the *virga* of I Cor. IV, 21.

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sists in permitting ecclesiastical burial. Absolution from censures may be imparted validly in any form, written or oral, nor is it required that the party be personally present; even absent and unwilling persons may be absolved.[65]

ABSOLUTION IN THE EXTERNAL AND INTERNAL FORUM

Can. 2251

Si absolutio censurae detur in foro externo, utrumque forum afficit: si in interno, absolutus, remoto scandalo, potest uti talem se habere etiam in actibus fori externi; sed, nisi concessio absolutionis probetur aut saltem legitime praesumatur in foro externo, censura potest a Superioribus fori externi, quibus reus parere debet, urgeri, donec absolutio in eodem foro habita fuerit.

The formula of absolution, although distinct as to the two fora (sacramental and non-sacramental), does not touch the effects of absolution in either. But the case is different when we say that absolution was given in *the external forum,* and when we say it was imparted in *the internal forum,* either in the Sacrament of Penance or outside this Sacrament, but for the court of conscience. The reason for this distinction lies in the effects and the purpose of censures, which concern the public welfare of the Church, the avenging of crime, and the reparation of scandal or damage. This can more efficaciously be obtained and urged if the absolution given *in foro interno* is not admitted as sufficient in the external forum.[65] But

[65] Capello, p. 29. Laymann, *Theol. Moral.*, I, tract, 5, P. I, c. 7. P. 6 (*ed Venet.*, 1690, Vol. I, p. 91).

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our text is very cautiously worded and avoids any insinuation as to the validity of an absolution given in the internal forum which would properly require an absolution for the external forum. Take, for instance, can. 2319, §1, n. 1. A marriage contracted before a non-Catholic minister is no doubt a notorious or public crime, entailing excommunication reserved to the Ordinary. Therefore the pastor or curate who has received from the Ordinary the faculty to absolve the guilty party, should give the absolution *in foro externo* in order to make sure of its validity.[66]

The text says:

1.° Absolution given *in foro externo* affects both fora, the internal as well as the external; concerning this there never was a doubt.[67]

2.° If the absolution was given *in foro interno,* the person thus absolved may conduct himself as one absolved or freed from censure also concerning acts of the external forum, provided *the scandal has been removed.*

Returning to our case (can. 2319), a priest endowed with the proper faculties may impart absolution *in foro interno, i. e.,* either in the Sacrament of Penance or outside of it. If the couple is unknown in the place of absolution, there will be no scandal; but there might be if they were well known and would stay away from the Sacraments. Consequently, the parties may go to the Sacraments and perform other legal ecclesiastical acts, even if they were absolved only *in foro interno,* or, as we say, privately.

3.° However, continues the text, *if absolution was given*

66 And since it is an excommunication, the *formula propria* should be used according to *Rit. Rom.,* tit. III, c. 3.

67 S. Poenit., April 27, 1886, ad 4 (*Coll. P. F.,* n. 1655).

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privately only, the superiors of the external forum, before whom the censured person is bound to appear, may insist upon the censure until absolution is given in the external forum, unless evidence is furnished that absolution was granted, or may be lawfully presumed, for the external forum.

Notice (a) that the text does not imply invalidity [68] of the absolution given privately, provided of course the power or faculty was not wanting; (b) that the superior enjoying jurisdiction *in foro externo* is not obliged to urge the censure unconditionally, but only under the condition (c) that evidence is wanting or presumption. Evidence may be had from the certificate of absolution or through an official document issued by the one who absolved *in foro interno.* Presumption or circumstantial evidence would be the giving of satisfaction, also witnesses who had seen the party go to confession or heard of it.[69]

Urgere censuram means to demand that the parties conduct themselves as censured, and therefore abstain from performing any and all acts forbidden by the censure. The Ordinary is entitled to urge the censure in the case of can. 2319 and of can. 2314, §2. In cases of *occult censures,* if neither scandal nor promulgation or denunciation are involved, absolution given in the internal forum would certainly be sufficient.[70]

Regulars cannot absolve penitents from censures for the external forum, and those whom they do absolve, if denounced by the Ordinaries, must conduct themselves

68 Missionaries could absolve apostates and heretics only *in foro conscientiae,* and those thus absolved had to present themselves before the Holy Office or the Ordinary, "*si velint esse tuti in foro exteriori*"; S. O., Jan. 3, 1640; Sept. 28, 1672 (*Coll. P. F.*, nn. 98, 204).

69 Ballerini-Palmieri, *l. c.,* VII, n. 320, p. 162.

70 Laymann, *l. c.;* see can. 2237, § 2.

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as censured.[71] The reason is substantially the same: the bishop is entitled to have a guarantee of absolution and satisfaction, especially if the censure was publicly declared or is likely to cause a juridical investigation;[72]— in other words, if it should become notorious.

THOSE EMPOWERED TO ABSOLVE FROM CENSURES

The following three canons point out three distinct classes of cases. The first treats of the danger in which any priest may absolve; the second outlines the regular administration under normal conditions, and the last provides for urgent and special situations. They show how the Church adapts her laws to the exigencies of the times.

I. ABSOLUTION IN DANGER OF DEATH

Can. 2252

Qui in periculo mortis constituti, a sacerdote, specialis facultatis experte, receperunt absolutionem ab aliqua censura ab homine vel a censura specialissimo modo Sedi Apostolicae reservata, tenentur, postquam convaluerint, obligatione recurrendi, sub poena reincidentiae, ad illum qui censuram tulit, si agatur de censura ab homine; ad S. Poenitentiariam vel ad Episcopum aliumve facultate praeditum, ad normam can. 2254, §1, si de censura a iure; eorumque mandatis parendi.

The Decretals[73] demanded, as a rule, personal

71 Clement X, *"Superna,"* June 21, 1670, § 7.

72 S. C. P. F., Jan. 14, 1726 (Coll., n. 305).

73 Cfr. cc. 3, 26, 58, X, V, 39. C. 22, 6°, V, 11.

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appearance before the "Apostolic Lord" to receive his order in case of a reserved censure. At the same time they admitted exceptions in the cases of women, old or sickly persons, and especially in cases where there was danger of death. But in this latter instance the obligation of a personal visit to Rome remained, as soon as the patient recovered sufficiently, under pain of falling back into censure.[74] The Friars Preachers and Friars Minor had obtained the faculty to absolve from censures in case of impending death, but under the same conditions. Every reservation ceased after the Council of Trent, whose ruling has passed into the Code.[74a] Hence any validly ordained priest, no matter what his juridical or moral standing, may absolve in danger of death from any sin or censure.

Our text also supposes that a *special faculty* required for absolving from reserved censures is *wanting in the priest* who otherwise may enjoy ordinary jurisdiction *in foro poenitentiae,* and says:

1°. When in *danger of death*[75] one may be absolved by any priest, even though the priest has no jurisdiction or faculties to absolve from the censure in question; but

2°. *After recovery, i. e.,* after being fully restored to health, the penitent is bound to have recourse to the proper authority, under penalty of falling back into the censure

3°. If absolution has been given from a censure reserved *ab homine,* or *modo specialissimo* reserved to the Apostolic

74 C. I, *Extrav. Comm.,* V, 7 (Bened. XI, A. D. 1304). 74a Sess. 4, c. 7, *de Poenit.,* can. 882.

75 When the Archbishop of Cincinnati asked when the penitents could be said to be in danger or *in articulo* (at the point) of death the Holy Office referred him to approved authors; S. O., Sept. 13, 1859, ad 1 (*Coll. P. F.,* n. 1181). As a rule, the danger of death may be supposed when the penitent is in such a state that he has an equal chance for life or death, be the danger internal, (sickness, wounds, birth, old age) or external (war, perilous journey); Cappello, *l. c.,* p. 33.

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See, *recourse* must be had to the one who inflicted the censure, if it was a censure *ab homine*. The recourse must be had to the *S. Poenitentiaria,* or to the bishop, or to another endowed with the faculty of absolving, if the censure was one *a iure, i. e., specialissimo modo* reserved to the Holy See.

4°. This recourse implies that the penitent *abide by the order* of the respective superiors. The term "*mandatis parendi*" implies willingness and promptness to carry out the injunctions given, either orally or in writing. Generally there is attached to the rescript of absolution the clause: "*iniunctis de iure iniungendis.*" This signifies:

(a) that the censured party must give satisfaction to those who were hurt or damaged by the criminal act for which he or she was censured;

(b) that scandal be repaired if any was given;

(c) that other imposed works, such as sacramental confession or penance, be accepted.[76]

Note that only the four cases reserved *specialissimo modo (i. e., a iure)* require recourse under penalty of reincidence. All other censures reserved *a iure* to the Apostolic See, either *simplici* or *speciali modo,* as well as the cases reserved by law to the Ordinary, do not call for such recourse.

The text alludes to the bishop or other priest, *aliumve facultate praeditum.* Ordinaries, therefore, also need faculties to receive such a recourse and to impart absolution in the four cases mentioned.[77]

76 Cappello, *l. c.*, p. 80. The term "*standi mandatis ecclesiae*" has been explained as the obligation of having recourse, either personally or through the confessor, to the Roman Pontiff; S. O., Aug. 19, 1891; March 30, 1892 (*Coll. P. F.*, nn. 1764, 1788). This is expressed in the text.

77 The faculties issued May 6, 1919, for the nuncios, internuncios, and Apostolic delegates do not

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In can. 2254, §1, the rule is laid down that recourse should be made by letter or through the confessor. It also indicates the time within which recourse must be made, *i. e.*, a month from recovery.

2. ABSOLUTION WHEN THERE IS NO DANGER OF DEATH

Can. 2253

Extra mortis periculum possunt absolvere:

1.° A censura non reservata, in foro sacramentali quilibet confessarius; extra forum sacramentale quicunque iurisdictionem in foro externo habeat in reum;

2.° A censura *ab homine*, ille, cui censura reservata est ad norman can. 2245, §2; ipse autem potest absolutionem concedere, etiamsi reus alio domicilium vel quasi-domicilium transtulerit;

3.° A censura *a iure reservata*, ille qui censuram constituit vel cui reservata est, eorumque successores aut competentes Superiores aut delegati. Quare a censura reservata *Episcopo* vel *Ordinario*, quilibet Ordinarius absolvere potest suos subditos, loci vero Ordinarius etiam peregrinos; a reservata *Sedi Apostolicae*, haec aliive qui absolvendi potestatem ab ea impetraverint sive generalem, si censura *simpliciter reservata* sit, sive specialem, si *reservata speciali modo*, sive denique specialissimam, si *reservata specialissimo modo*, salvo praescripto can. 2254.

This canon regulates the ordinary administration, under normal conditions, of the penitential jurisdiction in the internal and external forum with regard to censures. It

contain this power; nor do those issued in 1920 to the Vicar-Apostolic of North Carolina.

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is *the rule,* whenever danger of death or urgent cases do not justify a departure.

1. As to *non-reserved censures.* From these *every duly approved confessor* may validly and licitly absolve in the tribunal of penance for the internal as well as the external forum; but for the latter, absolution holds good only under the condition laid down in can. 2251. If absolution is to be given outside the confessional, it must be imparted by the one who has jurisdiction over the delinquent *in foro externo.* Therefore, a pastor or curate cannot absolve from non-reserved censures outside the confessional, unless he has received delegated power to do so from his bishop.

This absolution given in *foro externo* also affects the court of conscience (can. 2251).

2. As to *reserved censures ab homine.* From these only he who has inflicted the censure, or his competent superior, or his successor or delegate, can absolve, as stated under can. 2245, §5. However, he who is entitled to impart absolution may grant it also in a strange territory, *i. e.,* even though the delinquent has set up his domicile or quasi-domicile elsewhere. This is according to the *forum delicti,* as stated in can. 1566.

3. To absolve from censures reserved *a iure* the competency is first determined according to the general principle: "he can loose who can bind," *i. e.,* he who set up the law enacting the censures can absolve from it.[78] But the supreme lawgiver reserves certain censures to the Ordinaries and to exempt religious superiors.

Therefore two points are to be observed: the *lawgiver* as far as he has enacted the censure as law, and the *reservation.* The general principle is that the *successors* of the lawgiver or those to whom the censures are re-

[78] See cc. 29, 39, X, V, 39.

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served, the competent superiors of these, and, finally, the *delegates* of either, may absolve.[79] These authorities are specially mentioned.

a) An *Ordinary* may absolve his subjects everywhere from censures reserved *Episcopo* or *Ordinario;* the *local* Ordinary may absolve also *peregrini.*

By Ordinaries must be understood

1.° All *bishops,* also titular bishops, who enjoy the privilege of choosing for themselves any confessor, and also their dependents, who by this very choice obtain jurisdiction to absolve from censures reserved to the Ordinary.[80]

2.° *Abbots or prelates nullius* who enjoy the same power, with the exception of the privilege just mentioned (can. 349), unless they are bishops.

3.° *Vicars-general, vicars-capitular* (administrators), *vicars* and *prefects Apostolic.*

4.° *The major superiors* of exempt clerical religious orders may either personally or through a delegate absolve their own subjects [81] from every censure *iure* reserved to the Ordinary.

The Ordinaries mentioned under n. 1 to 4, with the sole exception of titular bishops, may also absolve their subjects from *occult* censures reserved *simplici modo* to the Holy See.

Finally *Cardinals* enjoy the privilege of absolving from any censure, except the four *specialissimo modo* reserved to the Pope.[82]

79 *Delegatus* is referred to both superiors and successors and implicitly to the delegate of the lawgiver or *reservans* by law.

80 See can. 349, § 1, n. 1 as compared with can. 239, § 1, n. 2; but this is a personal privilege, not communicable to others, except as far as the canon permits.

81 A prelate cannot absolve one who is not his subject by reason of profession or obedience, unless the approved Constitutions give him that right.

82 Can. 239, § 1, n. 1 f.

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It goes without saying that the *Sovereign Pontiff* may, either himself or through his delegates, absolve from any censure reserved either *a iure* or *ab homine*.

b) Only the Apostolic See itself can *de iure* absolve from censures *reserved to the Apostolic See;* every inferior needs faculties, which are of a threefold kind:

1.° A *special faculty* is required for absolving from censures which are reserved to the Apostolic See *simplici modo*.

2.° A *special faculty* is required to absolve from censures reserved to the Apostolic See *modo speciali*.[83]

3.° A *most special* faculty is needed to absolve from the four cases reserved to the Apostolic See *modo specialissimo*.

3. ABSOLUTION IN MORE URGENT CASES

Can. 2254

§1. In casibus urgentioribus, si nempe censurae latae sententiae exterius servari nequeant sine periculo gravis scandali vel infamiae, aut si durum sit poenitenti in statu gravis peccati permanere per tempus necessarium ut Superior competens provideat, tunc quilibet confessarius in foro sacramentali ab eisdem, quoquo modo reservatis, absolvere potest, iniuncto onere recurrendi, sub poena reincidentiae, intra mensem saltem per epistolam et per confessarium, si id fieri possit sine gravi incommodo, reticito nomine, ad S. Poenitentiariam vel ad Episcopum

83 An Apostolic Delegate has the general and special, but not the most special, faculty; see Faculties, May 19, 1919, n. 4; Prelates regular, after the Constitution *"Apostolicae Sedis,"* 1869, could no longer—nor can they now—absolve from cases *simpliciter* reserved to the Apostolic See; *S. Poenit.*, Dec. 5, 1873 (*Coll. P. F.*, n. 1409).

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aliumve Superiorem praeditum facultate et standi eius mandatis.

§2. Nihil impedit quominus poenitens, etiam post acceptam, ut supra, absolutionem, facto quoque recursu ad Superiorem, alium adeat confessarium facultate praeditum, ab eoque, repetita confessione saltem delicti cum censura, consequatur absolutionem; qua obtenta, mandata ab eodem accipiat, quin teneatur postea stare aliis mandatis ex parte Superioris supervenientibus.

§3. Quod si in casu aliquo extraordinario hic recursus sit moraliter impossibilis, tunc ipsemet confessarius, excepto casu quo agatur de absolutione censurae de qua in can. 2367, potest absolutionem concedere sine onere de quo supra, iniunctis tamen de iure iniungendis, et imposita congrua poenitentia et satisfactione pro censura, ita ut poenitens, nisi intra congruum tempus a confessario praefiniendum poenitentiam egerit ac satisfactionem dederit, recidat in censuram.

Although the Decretals allude to legitimate impediments preventing a personal appearance in Rome, the case, as it is now formulated, is rather modern.[84] Besides the aforesaid Decretals demanded a sworn guarantee (*debita cautio sub iuramento*) before one could be absolved by a bishop or a simple priest. This more especially when the *privilegium canonis* had been violated.

The first section of can. 2254 states and circumscribes the case, §2 modifies it, and §3 mitigates the requirement of recourse.

1. In more *urgent cases any duly approved confessor*

84 See cc. 29, 58, X, V, 39; c. 22, 6°, V, 11; S. O., June 23, 1886, (*Coll.* P. F., n. 1658): "*In casibus vere urgentioribus, in quibus. . . .*"

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may validly and licitly absolve from each and every censure, no matter how and to whom it is reserved, provided it is a censure *latae sententiae.*

Which cases are *more urgent,* is then stated as follows:

a) When *these censures cannot be exteriorly observed without serious danger of scandal or loss of reputation,* which may be the case if a priest would be obliged to exercise the sacred ministry, or if a layman in good standing would have to omit his Easter Communion; to judge whether this case is verified belongs to the confessor.[85]

b) Or if it would be *difficult for the penitent to remain in the state of grievous sin for the length of time required to obtain the necessary faculty from the competent superior.*[86] Whether and under what circumstances it would be difficult for a penitent to remain in this state, must be left to the judgment of the confessor, who certainly may apply the rule: "*Poenitenti credendum est.*" Therefore, if the penitent should say, one day would be hard, we think our canon could be applied, though some authors hold that at least a week, or three or four days, are required.[87]

The *obligation of the confessor* under such circumstances is:

a) That he absolve[88] in the *tribunal of penance;* hence he cannot absolve outside the confessional, because the *forum sacramentale* is not identical with the internal forum;

85 S. O., June 23, 1886, ad 2° (*Coll.*, n. 1658).

86 This reason is an enlargement of the former; S. O., June 16, 1897 (*Coll.*, n. 1971).

87 See Cappello, *l. c.*, p. 34. Frequent Communion should now-a-days also be reckoned with.

88 The absolution is a direct one, *i. e.*, one which remits the sin by virtue of the judicial (penitential) sentence given for that sin (under censure); S. O., Aug. 19, 1891, ad 3; March 30, 1892, ad 6 (*Coll. P. F.*, nn. 1764, 1788); Arregui, *l. c.*, p. 394.

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b) That he impose *on the penitent* the strict and grievous *obligation of having recourse to the S. Poenitentiaria,* or to a bishop or other superior endowed with the necessary faculties to absolve him, and to abide by their orders;

c) That this recourse be imposed under penalty of reincidence (*sub poena reincidentiae*),[89] *i. e.,* of falling back into specifically the same censure from which he is now absolved;

d) To remind the penitent that recourse must be had *within a month,* to be reckoned probably from the day of absolution, or at least from the day when he became conscious of the obligation;

e) To tell the penitent that the recourse may be made by *letter,* in which case the proper names are to be entirely suppressed and fictitious names used, or personally, because a personal visit to Rome is not excluded;

f) For the confessor to remember that he, too, is bound to have recourse to the competent authority, unless a serious obstacle prevents him.

Here we may add two decisions of the *S. Poenitentiaria.*[90]

1.° That the recourse cannot be spared the penitent, even if the post-office authorities or civil power should open the letter, because fictitious names are given.

2.° If the penitent is a transient, whom the confessor may not meet again, it suffices that a serious promise be demanded of him to have recourse to the competent

89 This reincidence concerns censures reserved to the Apostolic See *modo simplici,* and consequently also those reserved *speciali* and *specialissimo modo;* S. O., June 17, 1891, ad 2 (*Coll.,* n. 1756).

90 S. Poenit., Nov. 7, 1888 (*Coll. P. F.,* n. 1695, ad. 5 et 6). The month is, of course, to be understood as the minimum, or, as we say, *ad urgendam,* not *ad finiendam, obligationem.*

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authorities. In this case, we incline to believe, the burden of writing should not be urged against the confessor.

§2 says the penitent is at liberty to *approach another confessor endowed with the necessary faculties* and to obtain absolution from him. This right is granted even in case the penitent has already been absolved (in urgent necessity) and has had recourse to the competent authority. But the penitent has *again* to *confess* the *censured sin* to this other confessor, in order that the latter may know the nature of the case and impose the necessary injunctions. After that absolution the penitent has merely to carry out the orders given by the second confessor and is not bound to abide by the injunctions of the superior to whom recourse was had, which may reach him later.

§3 modifies the requirement of recourse. If in some extraordinary case, it says, *recourse should be morally impossible,* the confessor may grant absolution without imposing the obligation of recourse. However, in that case another obligation must be imposed, *viz., iniunctis de iure iniungendis,* and a proportionate penance and satisfaction for the censure. This obligation is so grave that if the penitent would not comply with the penance imposed and with the demand of satisfaction *within the time fixed* by the confessor, he would fall back into the same censure.

Recourse would be morally impossible, as the Holy Office has declared, if neither the penitent nor the confessor could write, and it would be hard for the penitent to approach another confessor; or if the penitent himself was unable to write, though the confessor was, but the

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latter would not be likely to meet the penitent again, in order to give him the answer.[91]

From this favor of omitting the recourse is *excluded the case of absolutio complicis* (can. 2367); and poverty or inconvenience to seek another confessor are not admitted as an excuse.[92]

91 S. O., Nov. 9, 1898; Sept. 5, 1900 (*Coll.*, nn. 2023, 2095).

92 S. O., June 7, 1899 (*Coll.*, n. 2052).

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CHAPTER II

CENSURES IN PARTICULAR

Can. 2255

§1. Censurae sunt:

1.° Excommunicatio;

2.° Interdictum;

3.° Suspensio.

§2. Excommunicatio afficere potest tantum personas physicas, et ideo, si quando feratur in corpus morale, intelligitur singulos afficere qui in delictum concurrerint; interdictum et suspensio, etiam communitatem, ut personam moralem; excommunicatio et interdictum, etiam laicos; suspensio, clericos tantum; interdictum, etiam locum; excommunicatio est semper censura; interdictum et suspensio possunt esse vel censurae vel poenae vindicativae, sed in dubio praesumuntur censurae.

Can. 2256

In canonibus qui sequuntur:

1.° Nomine divinorum officiorum intelliguntur functiones potestatis ordinis, quae de instituto Christi vel Ecclesiae ad divinum cultum ordinantur et a solis clericis fieri queunt;

2.° Nomine autem actuum legitimorum ecclesiasticorum significantur: munus administratoris gerere bonorum ecclesiasticorum; partes agere iudicis,

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auditoris et relatoris, defensoris vinculi, promotoris iustitiae et fidei, notarii et cancellarii, cursoris et apparitoris, advocati et procuratoris in causis ecclesiasticis; munus patrini agere in sacramentis baptismi et confirmationis; suffragium ferre in electionibus ecclesiasticis; ius patronatus exercere.

These two canons enumerate the censures, then state on whom and how they may be inflicted, and, lastly, set forth the significance of certain terms connected with the effects of censures.

I. There are *three kinds of censures:*

1. Excommunication,
2. Interdict,
3. Suspension.

This enumeration is complete and has never varied since the time of the Decretals.[1] Consequently, irregularity arising from crime (*ex delicto*) is no censure, although some have asserted it, as Benedict XIV says.[2]

II. §2 of can. 2255 determines the *subject* on whom censures may be inflicted, distinguishing between physical and moral or artificial persons, laymen and clergymen, persons and places.

a) *Excommunication* can affect *only single individuals.* Therefore, if this censure is inflicted on a corporation, the meaning can only be that the members of that corporation, as far as they are guilty of, or partakers in, the censured crime, are intended.

b) The *interdict* and *suspension* may be inflicted also on a *community* as such, *i. e.,* a corporation. The difference between excommunication and the interdict,

1 See c. 20, X, V, 40; c. 1, 6°, V, 11.

2 *"Inter Praeteritos,"* Dec. 3, 1749, § 48.

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as affecting or not affecting a corporation, lies in the respective effects. The effects of excommunication concern personal spiritual benefits and favors, *i. e.*, such as touch the soul and salvation of the individual, whereas the privation entailed by suspension or interdict is not of an individual spiritual character.[3] Hence excommunication can be inflicted only on real delinquents, although they may otherwise be punished as members of the corporation; for it is not necessary that each and every person be nominally censured (can. 2242, §1). If some authors go further and say that a corporation is not capable of being excommunicated because it forms a fictitious, not a real body, and has no soul (or rather will) in common,[4] they shoot beyond the mark. For a corporation has a collective will, and is capable of rights and obligations quite different from the rights and obligations inherent in its members as private citizens or non-members.[5] We need not stretch the imagination to comprehend a corporate will. It is the will of the community as expressed by its statutes and asserted by its lawful representatives. The *fictio iuris* is therefore quite superfluous; for since corporations are endowed with rights and obligations of their own, it is but logical that they should also be liable to punishment. This idea is not precisely embodied in the Roman, English or American law of old, but it prevails in modern times.[6] On the other hand, if a collective will were denied

3 Cfr. Suarez, *De Cens.*, disp. 18, sect. 2, n. 3; Laymann, *Theol. Moral.*, l. I, tr. V, p. II, c. 1, n. 6.

4 Thus Suarez, *I. c.*, c. 5. 6°, V, 11 insinuates the real reason: *"volentes animarum periculum vitare, quod exinde sequi posset, cum nonnunquam contingeret innoxios huiusmodi sententia irretire."*

5 Wernz, *Ius Decret.*, VI, p. 24, n. 18.

6 Kenny-Webb, *Outlines of Criminal Law*, 1907, p. 57 ff.; of course, the criminal liability of a corporation has its limits; for a corporation cannot be hanged, though it can be fined.

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to a corporation, it is hardly conceivable that it could be interdicted or suspended. Hence we said that those who use this argument "shoot beyond the mark." Consequently, the real and practical difference between excommunication not affecting a community as such on the one side, and interdict and suspension as affecting a community as such on the other hand, must be sought in the effects, *i. e.*, in the personal privation of intrinsically spiritual goods which properly concern the salvation of the soul.

c) *Excommunication* and *interdict* may be inflicted also on the *laity,* whilst *suspension* is for the *clergy* only.

d) An *interdict* may be laid on a *place,* not, of course, by reason of guilt or punishment in the proper sense, but as the container of culpable subjects or connected with an indictable crime.

e) *Excommunication* is always a censure, whereas *interdict* and *suspension* may be *either censures or vindictive penalties;* if it is doubtful whether they were inflicted as a censure or as a vindictive penalty, they are presumed to be censures. Thus an interdict or suspension *in perpetuum* or *ad tempus praefinitum,* or *ad beneplacitum superioris* (can. 2291, n. 1 f.; 2298, n. 2) is a vindictive penalty.

In order to remove every doubt, the censures should be named as to persons and species, and hence terms should be used which clearly indicate the nature of the penalty according to the common usage of the Church and the schools. This is true chiefly of a censure *ferendae sententiae,* or rather, let us say, of a censure *ab homine.* For a penalty *a iure* or *latae sententiae* is already clearly marked out and only requires the verification of the criminal act. Thus a censure *latae sententiae* does not

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demand a canonical admonition, though a declaratory sentence may be necessary in certain circumstances (can. 2232). The reason for this wording lies in the necessity of an external and sufficient manifestation of the superior's will.[7]

From this it is also apparent why the legislator *presumes censures* rather than vindictive penalties. For although censures are grievous penalties, yet absolution must be granted as soon as contumacy ceases (can. 2248, §2), whereas vindictive penalties may, but must not, be removed by dispensation or relaxation. Besides, vindictive penalties may be meted out for past crimes, but censures are inflicted for delinquencies which are of a prospective and enduring nature.[8] The presumption here mentioned is that called *iuris,* but not *iuris et de iure,* and hence admits direct as well as indirect evidence (can. 1825 f.).

III. Can. 2256 *explains* the *terms* used to designate certain effects or consequences of penalties which occur in the following canons.

a) By *divine offices*[9] are to be understood those functions of power of order (*potestatis ordinis*) which have been established by divine or ecclesiastical authority and are performed only by the clergy. Such are the celebration of Holy Mass, the administration of the Sacraments and sacramentals (blessings, sepulture, public service, preaching, choir service, processions) etc.

b) *Legal ecclesiastical acts* are those of official administrators of ecclesiastical property; those of the following persons employed in the ecclesiastical court: judge, auditor, relator, *defensor vinculi* (for marriage and ordination), fiscal promotor and promotor of faith

7 Wernz, *l. c.*, VI, n. 165 ff., p. 169 f.

8 Laymann, *l. c.*, n. 3.

9 Cfr. can. 2259, § 1; private

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(for beatification and canonization), courier and beadle, lawyer and proxy; those of sponsors at Baptism and Confirmation; — the (active) voice[10] or right of voting at ecclesiastical elections, including those held by monastic chapters and chapters of religious communities and acts of actual (not habitual) exercise of the *ius-patronatus* or advowson.

Art. I

EXCOMMUNICATION

In general terms excommunication means the act of excluding or the state of being excluded from the communion of the faithful; practically speaking, the Church is the society of *the* faithful.

Being therefore, an autonomous society, the Church is logically entitled to set up conditions not only for admittance, but also for remaining in what is a juridically closed society. In other words, the Church, like any other organization, has the power to deprive unworthy members of the rights and privileges of membership. Of course, a complete or radical loss of membership is impossible, since the baptismal character is indelible. But the bonds of external communion can be severed. This punishment was hinted at very plainly when our Lord said: "If he will not hear the church, let him be to thee as the heathen and publican."[11] Excommunication was no doubt also understood when the Apostle said: "deliver such a one to Satan" and "put away the evil one from among yourselves."[12]

devotions are not included in this term; Eichmann, *l. c.*, p. 90.

10 Since the text reads *suffragium ferre*, it can only mean the active, not passive, voice (can. 19); cfr. Wernz, *l. c.*, n. 114, p. 117; Eichmann, *l. c.*, p. 90.

11 Matth. 18, 17.

12 I Cor. 5, 5, 13; II Thess. 3, 14; Kober, *Der Kirchenbann*, 1863, p. 9 ff.

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The technical name for excommunication is ἀορισμός, sometimes with the adjective "entire" or accompanied by the word *anathema*. The words "*excommunicati et ecclesia eiecti*" are used by ancient synods.[13] The effect of excommunication was separation from the community of the faithful, in order to bring the delinquent to his senses, but also to purify and protect the community itself.

Besides this entire or full separation, there came into existence, towards the beginning of the fifth century, a milder form of exclusion, which consisted in forbidding the culprit to participate in the Eucharistic supper in certain parts of the public service, and in prayer. This *minor excommunication* was often connected with public penance, but after the public penitential system in the IXth century was abated, it developed into a separate excommunication of a peculiar disciplinary character. In virtue of the Decree of Martin V, "*Ad evitanda,*" of 1418, this penalty was incurred by those who unlawfully conversed or communicated with excommunicated persons and by such as were guilty of transgressing the *privileguim canonis, i. e.,* the notorious beaters of clerics.[14]

Mention was made above of *anathema*[15] as distinct from excommunication. The term occurs in the Decree of Gratian,[16] which permits us to look upon anathema as major or full excommunication, whilst excommunication without any further addition and as distinguished from or opposed to, anathema would be identical with minor excom-

13 Thus the Synod of Antioch, A. D. 341, c. 1 (Mansi, *Coll. Concil.*, II. 1307): ἀκοινωνήτους καὶ ἀποβλήτους; those who refused to conform to the celebration of Easter as prescribed by the Council of Nicaea.

14 The text is preserved in two somewhat different wordings; see Hollweck, *l. c.*, Appendix I, p. 355; *infra*, can. 2258.

15 See Numb. XXI, 3; I Cor. XVI, 22; "*anathema, maranatha.*"

16 See c. 12, C. 3, q. 4; c. 41, C. II, q. 3; Kober, *l. c.*, p. 37.

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munication,[17] although the distinction is not very clear. Therefore Gregory IX simplified the terminology by defining excommunication pure and simple as full or major excommunication[18] and leaving "minor excommunication" untouched. *Anathema* then appears as the more solemn form of pronouncing or declaring excommunication. *Maranatha*[19] merely enhanced the outward solemnity. The *excommunicatio minor* was officially abolished by the Constitution "*Apostolicae Sedis,*" 1869, and the commentators who held that it had been abolished —at least as *censura latae sententiae et iuris*—were upheld by an authentic decision of the Holy Office.[20] The Code leaves no room for minor excommunication in whatever form.

Our text first defines the nature and species of excommunication and then determines its effects.

NATURE AND DIVISION

Can. 2257

§1. Excommunicatio est censura qua quis excluditur a communione fidelium cum effectibus qui in canonibus, qui sequuntur, enumerantur, quique separari nequeunt.

§2. Dicitur quoque *anathema,* praesertim si cum sollemnitatibus infligatur quae in Pontificali Romano describuntur.

17 C. 58, X, V, 39.

18 Kober, *l. c.*, p. 38.

19 I Cor. XVI, 22. It means: Until the Lord cometh or returneth; see Suarez, *De Cens.*, disp. IX, sect. 2, n. 4 f.

20 S. O., Dec. 5, 1883 (*Coll. P. F.*, n. 1608); Hollweck, *l. c.*, p. 114. It would be well if the old formula for "*General Absolution*" granted on some occasions would also be recast.

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Can. 2258

§1. Excommunicati alii sunt *vitandi*, alii *tolerati*.

§2. Nemo est vitandus, nisi fuerit nominatim a Sede Apostolica excommunicatus, excommunicatio fuerit publice denuntiata et in decreto vel sententia expresse dicatur ipsum vitari debere, salvo praescripto can. 2343, §1, n. 1.

§1. Excommunication is a censure excluding a person from the communion of the faithful and accompanied by the inseparable effects mentioned in the following canons.

In order to understand this exclusion it must be remembered that the Church is a juridical as well as a spiritual society, consisting of a body and a soul, similar to an individual or physical person. To the soul (*anima*) of the Church are referred sanctifying grace, the theological virtues (faith, hope, and charity), the supernatural moral virtues, as well as the gifts of the Holy Ghost. To the body *(corpus)* of the Church belong the visible members, as organized and governed by the lawful authority, also the external means conducive to the purpose of the Church, such as Sacraments and sacramentals, worship, the word of God, offices and benefices.[21]

The relation of the individual Catholic to the body of the Church is sometimes styled external communion, whilst his connection with the soul of the Church is called internal communion.[22] This latter communion is not *per se* severed by excommunication, as grace and charity can-

21 Mazzella, *De Religione et Ecclesia*, 1892, p. 344 f.

22 Reiffenstuel, V, 39, n. 55 ff., who, however, distinguishes *communio pure interna, externa et mixta*,—the two latter making up the external.

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not be taken away by the penal sword of the Church, but are lost only through grievous personal guilt. And as this guilt can be repaired by perfect contrition, it may happen that one is excommunicated and yet lives in the friendship of God. Besides, faith and hope may coëxist with mortal sin.[23] Therefore, the exclusion from the communion of the faithful concerns the external union with the Church (*corpus Ecclesiae*) only. But even this severance, as was stated at the beginning of this article, cannot be radical, otherwise an excommunicated person would have to be rebaptized, which would imply the fallacy that the character of Baptism is not indelible. Therefore an aptitudinal or habitual relation to, or bond with, the body of the Church remains even after the sentence of excommunication has gone into effect. Nevertheless it is quite true that, as St. Chrysostom says,[24] excommunication is the heaviest and severest of all penalties. For it entails spiritual poverty and helplessness and exposure to more vehement attacks from the powers of darkness, which are apt to lead to obstinacy and final despair.

This spiritual helplessness is apparent from the *effects* or consequences of excommunication. These are called inseparable from excommunication (*qui separari nequeunt*) because they always follow in its trail. They are neither modified nor extended, unlike suspension, which admits restriction.

The text is also directed against the assumption of a major and minor excommunication; and, therefore, the sentence of minor excommunication (*ab homine*) must be considered as abolished. The reason for this inseparability is easy to perceive. Actual membership in the Church is totally lost by excommunication. Nor is

[23] C. 28, X, V, 39.

[24] *Contra Gentiles;* see Hollweck, *l. c.*, p. 115.

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there any essential or juridical difference between excommunication and *anathema,* for the latter, as §2 of can. 2257 states, mainly means added solemnity, especially the solemn pronouncement of the formula of excommunication contained in the *Pontificale Romanum.*[25]

§2. Two *classes of excommunicated* persons are mentioned in can. 2258, *viz.:* those who are to be avoided (*vitandi*) and those who are tolerated (*tolerati*). This distinction is substantially, although not technically, embodied in the well-known decree of Martin V (1418), "*Insuper ad evitanda.*" Note, however, that this decree has come down in two different readings, one of them being that of the Council of Constance, as reported by St. Antoninus of Florence, the other that preserved in the acts of the Vth Lateran Council. The difference is rather substantial. For the Constance text mentions two kinds of *vitandi:* those publicly denounced and the notorious beaters of clerics; whereas the Lateran text enumerates three: the two just named and those who have so notoriously fallen into a sentence of excommunication that "no artifice can conceal it and no pretext of law excuse it."[26]

The Code, in §2 of can. 2258, rather favors the Constance text, which it considerably modifies, eliminating the notorious beaters of clerics and restricting personal denunciation to that made by the Apostolic See. Hence it says that *only those are vitandi who:*

a) Have been excommunicated nominally by the Apostolic See,

b) Whose excommunication was publicly announced, and

25 Title: "*Ordo excommunicandi et absolvendi*"; see also c. 106, C. II, q. 3, concerning the form of excommunication and anathema.

26 Hollweck, *l. c.*, Appendix I, p. 355.

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c) Who have been expressly declared to be *vitandi* in the decree or sentence.

All these marks must *concur* in order to constitute an excommunicated person a *vitandus*.

Ad a). The *Apostolic See* is here understood as defined in can. 7, *viz.:* the Roman Pontiff or the Congregations, Tribunals, and Offices of the Roman Court.

Nominatim or by name means mentioning the excommunicated person's name or describing him so that no doubt remains as to his identity.[27] If only one name is mentioned, the accomplices, followers, and protectors of the *excommunicatus* are not *vitandi,* even though they commit an act forbidden under threat of excommunication, for there is no excommunication *latae sententiae* which renders one a *vitandus*.[28]

Ad b). The excommunication must be publicly announced (*publice denuntiata*), which is achieved by an authentic edict or decree; thus publication in the "*Acta Apostolicae Sedis*" would certainly be sufficient; also publication in a diocesan newspaper, if this is the official mouthpiece of the episcopal court. Publication in ordinary newspapers cannot claim an official character, and therefore one would not have to heed such a notice.[29] Neither would a denunciation before two witnesses be a public one, so that one thus denounced would become a *vitandus*.[30]

Ad c). The sentence or decree must expressly mention the fact that the excommunicated person is to be avoided; for, as stated above, there is no excommunication *latae*

27 Thus, for instance, Napoleon was excommunicated without mentioning his name, but clearly designated; Kober, *Der Kirchenbann,* p. 259.

28 Bened. XIV, *De Syn. Dioec.,* VII, 68, 4; Hollweck, *l. c.,* p. 123.

29 This applies also to the *Osservatore Romano,* because it is not *the* official organ of the Vatican.

30 Hollweck, *l. c.,* p. 123.

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sententiae or *a iure* which *ipso facto* produces that effect. A *decree* is issued if no formal procedure is followed, because the fact of the criminal act and the contumacy are established. A *sentence* is issued after a trial.

Now, from these three combined conditions only one *exception* is made, *viz.*, that mentioned under can. 2343, §1, n. 1: for those who lay violent hands on the person of the Roman Pontiff. This is a remnant of the legislation concerning notorious beaters of clerics, but restricted to the sacred person of the Pontiff.

We may add that the distinction between *vitandi* and *tolerati* is not to be taken as intrinsically affecting the nature and consequences of excommunication. Both classes of *excommunicati* are equally cut off from the communion of the faithful, both experience the same effects, as far as religious communion is concerned.[31] The only difference regards civil intercourse, as will be seen under can. 2267.

INSEPARABLE EFFECTS

Suarez [32] notes that, although the adequate effect of excommunication is but one, namely, total exclusion from the communion of the faithful, yet in that communion may be distinguished several rights and favors. Privation of these rights, therefore, constitutes as many effects of excommunication.

The Code enumerates these effects, first, as to the

31 Suarez thought that an *excommunicatus toleratus* was still a member of the Church (*De fide*, disp. IX, sect. 1, n. 4); but Bellarmine (*De Ecclesia Milit.*, l. III, c. 6) held the correct doctrine; cfr. Mazzella, *De Religione et Ecclesia*, 1892, p. 474; Hollweck, *l. c.*, p. 115 f. A difference is noted in can. 2262, § 2, n. 2, which seems to partake of the spiritual nature.

32 *De Censuris*, disp. IX, procem. (Vol. XXIII, p. 260).

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officia divina, then as to *actus legitimi,* and, finally, as to civil intercourse.

EXCLUSION FROM DIVINE OFFICES

Can. 2259

§1. Excommunicatus quilibet caret iure assistendi divinis officiis, non tamen praedicationi verbi Dei.

§2. Si passive assistat toleratus, non est necesse ut expellatur; si vitandus, expellendus est, aut, si expelli nequeat, ab officio cessandum, dummodo id fieri possit sine gravi incommodo; ab assistentia vero activa, quae aliquam secumferat participationem in celebrandis divinis officiis, repellatur non solum vitandus, sed etiam quilibet post sententiam declaratoriam vel condemnatoriam aut alioquin notorie excommunicatus.

No excommunicated person has the right to assist at divine services; the only exception is hearing the word of God, which, therefore, is not forbidden. In the olden time even gentiles and heretics were allowed in church until the Mass of the catechumens began.[33] The sermon, though an ecclesiastical or divine office, and therefore specially mentioned in the text, is intended for instruction and correction.[34]

What *divine offices* are has been stated under can. 2256, n. 1, *viz.:* the acts of public worship performed in the name of the Church by her clergy, *e. g.,* the Holy Sacrifice of the Mass, the canonical office publicly recited by those who are obliged to recite it in virtue of can. 135 or can. 610, public prayers, processions (see can. 1290), blessings and consecrations performed according to the

33 C. 67, Dist. 1, *de consecr.* 34 C. 43, X, V, 39.

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liturgical books of the Church.[35] Many popular devotions, like the Rosary, the Stations of the Cross, etc., even if recited under the leadership of a priest, are not divine offices in the sense of our text, and therefore an excommunicated person is not debarred[36] from them.

1. Assistance at sermons or lectures (*praedicatio verbi Dei*) does not permit assistance at the divine service,[37] preceding or following, as stated in §2.

2. Since the right of assisting at *Mass* is taken away, no obligation remains to hear *Mass* on Sundays and holydays. The most that can be asserted is the imputation of *voluntarium in causa* if an *excommunicatus* should neglect to ask for absolution for a considerable time[38] (but see can. 2254).

3. Somewhat different is the obligation of reciting the *Breviary,* privately, not in choir; all authors say that this duty remains, since the clergyman is a public person, and is, as a rule, furthermore obliged by reason of a benefice.[39]

§2 *of can.* 2259 determines more precisely the extent of the exclusion from divine offices. A twofold distinction is made: between active and passive assistance, and between *tolerati* and *vitandi. Active assistance* entails a certain participation in the celebration of divine offices; such as acting as sacristan, or acolythe, or sacred minister or organist, or choir-singer, or as a witness at weddings.[40] (For the matrimonial ceremony is both a

35 Laymann, *l. c.*, I., I, tr. V, p. II, c. 1, n. 6.

36 See *Stimmen der Zeit,* July 1920, Vol. 50, p. 316.

37 Laymann, *l. c.*

38 This is what Lehmkuhl says, II, n. 892, and is *sententia communis;* see Schmalzgrueber, V, 39, n. 131; Hollweck, *l. c.*, p. 119.

39 Laymann, *l. c.*, Lehmkuhl, *l. c.* The reciting clergyman should say *"Exaudi,"* etc., instead of *"Dominus vobiscum," sub veniali.* He may also, for reasons of necessity or utility, employ a companion; Hilarius a Sexten, *l. c.*, p. 57.

40 C. 7, C. 11, q. 3. Congregational singing of liturgical songs, or

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Sacrament on the side of the contracting parties, and a sacramental because of the nuptial blessing). *Passive attendance* may be understood as inactive or inert participation, which, of course excludes the recitation of prayers in common with the other faithful.

The text then says:

a) That *passive assistance may be permitted* to a *toleratus,* and it is not necessary to expel him from the assembly, *e. g.,* from the church or chapel, although the priest who says Mass and others may know of the excommunication.

b) *Active assistance* must be denied not only to *vitandi,* but also to any one who is excommunicated, even though *toleratus, after a declaratory or condemnatory sentence* has been issued or the excommunication has become notorious. This is in keeping with can. 2232, which safeguards the good name of the delinquent as long as no sentence or notoriety renders him disreputable.

c) *Vitandi* are denied active as well as passive assistance and must be *expelled* from the place where divine services are held.[41] Should expulsion be impossible,[42] because of great inconvenience, the divine office must cease at once, unless the rubrics demand a continuance. Thus, for instance, if Mass has already proceeded to the beginning of the Canon, it must be continued until Communion, inclusively, after which the priest should admonish the culprit to depart and, in case of resistance, leave the altar immediately if this can be done without serious conse-

participation therein, would fall under active assistance.

41 The constant formula in the Decretals is: *"excommunicatis et interdictis penitus exclusis"*; cc. 43, 57, X, V, 39; c. 17, X, V, 40 and *passim.*

42 Formerly those who incited to disobedience in this regard or proved stubborn incurred the excommunication reserved to the Holy See; c. 2, Clem. V, 10.

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quences.[43] The same applies to the distribution of Communion outside of the Mass. If quarrels or other evil results must be feared in case of interruption, the divine office may be completed. On the other hand, even a priest or religious who is *vitandus* may be expelled by laymen or a policeman without fear of violating the privilege of clerical immunity.[44]

RECEPTION AND ADMINISTRATION OF SACRAMENTS AND SACRAMENTALS

Can. 2260

§1. Nec potest excommunicatus Sacramenta recipere; imo post sententiam declaratoriam aut condemnatoriam nec Sacramentalia.

§2. Quod attinet ad ecclesiasticam sepulturam, servetur praescriptum can. 1240, §1, n. 2.

Can. 2261

§1. Prohibetur excommunicatus licite Sacramenta et Sacramentalia conficere et ministrare, salvis exceptionibus quae sequuntur.

§2. Fideles, salvo praescripto §3, possunt ex qualibet iusta causa ab excommunicato Sacramenta et Sacramentalia petere, maxime si alii ministri desint, et tunc excommunicatus requisitus potest eadem ministrare neque ulla tenetur obligatione causam a requirente percontandi.

§3. Sed ab excommunicatis vitandis necnon ab aliis excommunicatis, postquam intercessit sententia con-

[43] He may finish in the sacristy or simply close the Mass there and then; Laymann, *l. c.*

[44] Cfr. c. 16, X, V, 39; Laymann, *l. c.*

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demnatoria aut declaratoria, fideles in solo mortis periculo possunt petere tum absolutionem sacramentalem ad normam can. 882, 2252, tum etiam, si alii desint ministri, cetera Sacramenta et Sacramentalia.

These two canons are closely related to each other, because both treat of the same subject, *viz.:* the Sacraments and Sacramentals. Can. 2260 determines the reception or passive use of the Sacraments, whilst can. 2261 treats of the minister or active administration of these means of grace.

1. *No excommunicated person can (lawfully) receive the Sacraments, and after a declaratory or condemnatory sentence he cannot even receive the Sacramentals.*[45] Notice the word "lawfully"; we have added it, within brackets, because it conveys the true meaning of the text; for the reception of the Sacraments by an excommunicated person would be valid, though illicit, with the exception of Penance. The reason is that the efficacy of the Sacraments in general does not depend on human or ecclesiastical will and command, but on the institution of Christ, but the validity of the Sacrament of Penance depends on jurisdiction, which may be taken away by ecclesiastical authority.[46]

The use of the *sacramentals* (can. 1144) by an excommunicated person is forbidden only after a declaratory or condemnatory sentence of excommunication has been issued. Sacramentals may be considered under a twofold aspect:

a) As acts or things of a private person or for private devotion and pious use, or

b) As sacred things purposely used for the sake of the

[45] See cc. 32, 59, X, V, 39.

[46] Laymann, *l. c.*, c. I, tr. V, p. 5, c. 2, n. 1.

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spiritual benefit which accrues to them from the blessing or consecration of the Church. As public or ecclesiastical means of devotion they are forbidden to the excommunicated. But in their private devotion they may make use of them. Thus the use of sacred images, Holy Water, the sign of the Cross is permitted them.[47]

Excommunicated persons may even enter a church privately to pray there. On the other hand, priests are not allowed to impart blessings to them, *e. g.*, bless candles, bread, etc., for them or give them the blessing *post partum;* for this would be not merely private but public worship. It may also be noted that, as excommunicated persons are obliged *sub gravi* to abstain from receiving the Sacraments (urgent cases — see can. 2252, 2254 — excepted) so ministers are bound to refrain from administering these to such persons.[48]

Concerning *ecclesiastical burial* consult can. 1240, §1, n. 2, which excludes from this sacramental all excommunicated persons against whom a declaratory or condemnatory sentence has been issued; *a fortiori,* of course, the *vitandi.*

Can. 2261, §1 *prohibits excommunicated persons from administering the Sacraments and sacramentals,* and priests from saying Mass.

Here the text expressly uses *licite* (lawfully), which undoubtedly refers to all the Sacraments, except Penance, under certain conditions explained in can. 2264. As the power of order, which is required for the administration of the Sacraments, cannot be lost, the validity is not

47 The use of the Sacramentals is permitted, not in order to obtain the fruits derived from the blessing of the Church, but to venerate them; Hilarius a Sexten, *l. c.*, p. 56. It may even be useful, *ex opere operantis,* inasmuch as this act may produce a proper disposition on the part of the excommunicated person.

48 Suarez, *De Censuris,* disp. X, sect. 1 and 2; efr. can. 855; can. 2364.

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endangered. Neither is the Sacrament of Matrimony invalid if contracted by excommunicated parties,[49] provided of course the form be duly observed. The penalties[50] inflicted on such as violate this canon are stated under can. 2333, §3. Besides, they become irregular according to can. 985, n. 7.

However, there are *exceptions* stated in our canon, and consequently the penalty and irregularity just mentioned do not affect those administering the Sacraments under such circumstances. The exceptions are:

1. *Provided the minister is not a vitandus or under a declaratory or condemnatory sentence, the faithful may, for any just reason, ask him to administer the Sacraments and sacramentals to them.* This is more especially true if no other minister is available, in which case the excommunicated minister thus asked may administer the Sacraments and sacramentals without as much as inquiring for the reason why the petitioner wishes to receive them. Hence the faithful are to judge in such cases whether the reason is just. Any reason may be called just which promotes devotion or wards off temptations or is prompted by real convenience, for instance, if one does not like to call another minister.

This mitigation—such it is even in comparison with Martin V's decree "*Ad evitanda*" — is accorded only in case the minister is not *vitandus* nor under a declaratory or condemnatory sentence, according to

2. The second exception. If the minister, *i. e.*, priest, is a *vitandus* or *excommunicated in virtue of a condem-*

49 For the parties themselves are the ministers of this Sacrament, neither would they receive it invalidly (though unworthily), if under censure; what the assisting priest has to do in such cases is explained in can. 1066.

50 Formerly deposition was decreed for the ministers; see cc. 6, 7, C. 11, q. 3; c. 109, C. 11, q. 3 somewhat mitigated; cc. 3-6, X, V, 27.

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natory or declaratory sentence, the faithful may demand from him *absolution* in danger of death, even *though other priests be present who are not excommunicated,*[51] but *other Sacraments or sacramentals they may receive* from such a priest only *if no other ministers are available.*

"*Deesse*" is not precisely synonymous with "*non adesse*" (see can. 1098, n. 2), for the former term, in classical language, means "to fail, to be wanting"; yet in connection with an object in the dative case it may also signify, "to be absent, not to be there."[52] Hence by a benign, though legitimate, interpretation we dare say that if no other non-excommunicated priests are present, an excommunicated one may administer all the Sacraments and sacramentals when there is danger of death. This interpretation is justified by the psychological condition of the sick person and affords another proof of the kindness of the Church.

EXCLUSION FROM THE SUFFRAGIA

Can. 2262

§1. Excommunicatus non fit particeps indulgentiarum, suffragiorum, publicarum Ecclesiae precum.

§2. Non prohibentur tamen:

1.° Fideles privatim pro eo orare;

2.° Sacerdotes Missam privatim ac remoto scandalo pro eo applicare; sed, si sit vitandus, pro eius conversione tantum.

We have retained in the inscription the old term (*suffragia*) common to all the acts mentioned in the text:

51 See can. 882, 2252.

52 Thus Cicero; *convivio puer defuit; bello defuisti.*

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indulgences, suffrages, public prayers. The technical term for this effect of excommunication is "*privatio communium ecclesiae euffragiorum,*" *viz.*: privation of the spiritual aids by which members of the Church assist one another in order either to atone for temporal punishments (*per satisfactionem*) or to obtain, either directly or indirectly, spiritual benefits (*per impetrationem*). If these suffrages are offered privately, by private persons in their own name, they may be applied to excommunicated persons, and therefore the canon has nothing to do with these.[53] But if they are offered in the name and by authority of the Church, they fall under the present law, because the Church wills to exclude the excommunicated from these suffrages.[54]

The text (§1) says that the *excommunicated do not partake of the indulgences, suffrages, and public prayers of the Church,* either by way of satisfaction or impetration.

a) *Indulgences* cannot be gained by, nor applied to, excommunicated persons, and no private application is possible because all indulgences flow from the treasury of the Church, over which her public authority has absolute control.

b) *Suffrages* are especially the fruits of Holy Mass, and prayers or good works, such as alms and penances, offered by way of satisfaction.

c) The *public prayers of the Church* may be understood as prayers chiefly, though not exclusively, of impetratory intercession, offered in the name of the

53 Cfr. Suarez, *l. c.*, disp. IX, sect. 1, n. 1 ff. (Vol. 23, p. 260 f.); Hilarius a Sexten, *l. c.*, p. 58; Hollweck, *l. c.*, p. 118; private *suffragia, i. e.*, such as are offered in his own name by the priest, may be performed for excommunicated persons; thus he may pray, fast, give alms, and even offer the holy Sacrifice in his own name for them.

54 Suarez, *l. c.*

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Church, such as all the liturgical prayers are: the choir service or recitation of the holy office, processions, and blessings, as far as they are contained in the liturgical books. Excommunicated persons, whether *vitandi* or *tolerati,* are excluded from all these. Navarrus [55] held that these *suffragia* could be applied by any priest, provided he was convinced that the excommunicated person was in the state of grace. This view is no longer tenable. Our text is plainly against it, but it does admit, what was quite commonly held and partly modified by previous decisions, namely, that

a) The faithful may *pray privately* for excommunicated persons, by way of impetration and satisfaction,[56] which, of course, depends solely on the acceptance of God.

b) *Priests may privately offer the Mass for a toleratus, provided no scandal is given; but for a vitandus only for his conversion.* What *private application* means is not expressly stated in our Code and would be difficult to define briefly. Private application may mean the application of the most special fruits of holy Mass, which the priest gains for himself as a private person. There cannot be any doubt that he may apply this fruit to any kind of excommunicated person.[57] As to the *fructus ministerialis,* or special fruit to be applied to one who asks for it, there is doubt. If we identify *privatim applicare* with a private Mass, it would mean that only a solemn or conventual or parochial Mass is excluded.[58] On

55 Navarrus held this view against the clear text of the *"Ad evitanda"*; Hollweck, *l. c.*, p. 119, but was opposed by Suarez (*De Cens.*, disp., IX, sect. 3, n. 2); at least Suarez excluded any direct intention.

56 Suarez, *l. c.*, disp. IX, sect. 5, n. 3: *"Dicendum est, licitum esse privatim pro excommunicato orare, propriam et personalem satisfactionem offerendo,"* and this he extends (*ib.*, n. 5) to the Memento in holy Mass.

57 See preceding note from Suarez; also Hollweck, *l. c.*, p. 118.

58 Thus Eichmann, *l. c.*, p. 94; Ayrinhac, *l. c.*, p. 124 seems to imply the same.

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the other hand, if we interpret private application as meaning the priest's own fruits, then we should have to exclude the ministerial fruit, and no stipend (in the proper sense) could be accepted for such application. The intention of the lawgiver here is uncertain. The text says that a Mass may be applied even for a *vitandus,* but only for his conversion. This was allowed for Greek schismatics by a decision of the Holy Office, which also admitted the acceptance of a stipend.[59] May we not draw the legitimate conclusion: If application of the ministerial fruit is allowed because a stipend is permitted, when the purpose is conversion, even for a *vitandus,* it is logical to say that private application implies application of the ministerial fruit and acceptance of a stipend, provided the Mass is no conventual or parochial or solemn one and scandal is avoided, for instance, by not publishing the Mass or not making it known to any one. *A fortiori* a private application, if no scandal is given, is permitted for an *excommunicatus toleratus.* The Holy Office also wishes all scandal removed in case Freemasons should order Masses and forbids the clergy to accede to the pressure and commands of such if they insist on having the Masses published in papers or invitations.[60] It goes without saying that the priest is not allowed to countenance any disobedience or disregard of censures by a too free acceptance of Mass stipends. Solemn conventual or parochial Masses cannot be lawfully offered for excommunicated persons, either living or dead. Besides, it is a rather venturesome interpretation to allow a Mass to be said for a *dead vitandus, i. e.,* one who died under such an excommunication, because the text allows it to be

[59] S. O., April 19, 1837 (*Coll. P. F.,* n. 858); see our Comment., Vol. IV, p. 143 f.

[60] S. O., July 5, 1878 (*Coll. P. F.,* n. 1495).

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done only for his conversion,[61] which after death is impossible. But for a *dead excommunicatus tolcratus* a private application, provided no scandal arises therefrom, may and is permitted.

EXCLUSION FROM LEGAL ACTS

Can. 2263

Removetur excommunicatus ab actibus legitimis ecclesiasticis intra fines suis in locis iure definitos; nequit in causis ecclesiasticis agere, nisi ad normam can. 1654; prohibetur ecclesiasticis officiis seu muneribus fungi, concessisque antea ab Ecclesia privilegiis frui.

Can. 2264

Actus iurisdictionis tam fori externi quam fori interni positus ab excommunicato est illicitus; et, si lata fuerit sententia condemnatoria vel declaratoria, etiam invalidus, salvo praescripto can. 2261, §3; secus est validus, imo etiam licitus, si a fidelibus petitus sit ad normam mem. can. 2261, §2.

Can. 2265

§1. Quilibet excommunicatus:

1.° Prohibetur iure eligendi, praesentandi, nominandi;

61 Thus Ayrinhac, *l. c.*, p. 124; the quotations from Wernz and Gasparri do not prove his assumption; our text is too clear: "*sed pro eius conversione tantum.*" Therefore, what we said in Vol. IV, p. 145 f. of this Commentary, though we made no incorrect statement, must be supplemented and completed by what we say above. We add: From this it is evident that, if absolution from censures is given, even after death, every restriction as to the application of Masses is removed.

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2.° Nequit consequi dignitates, officia, beneficia, pensiones ecclesiasticas aliudve munus in Ecclesia;

3.° Promoveri nequit ad ordines.

§2. Actus tamen positus contra praescriptum §1, nn. 1, 2, non est nullus, nisi positus fuerit ab excommunicato vitando vel ab alio excommunicato post sententiam declaratoriam vel condemnatoriam; quod si haec sententia lata fuerit, excommunicatus nequit praeterea gratiam ullam pontificiam valide consequi, nisi in pontificio rescripto mentio de excommunicatione fiat.

These three canons logically comprise the effects of legal acts, including acts of jurisdiction.

1. *Forensic and honorary* acts are those which the canon law permits the members of the Church to perform, especially in the ecclesiastical court and on ecclesiastical occasions.

a) The right of acting as *plaintiff* is denied to excommunicated persons except in their own case of excommunication, and an *excommunicatus* as well as his report or finding may be rejected as suspect; he is allowed to be neither arbiter nor counsel (lawyer).[62]

b) Excommunicated persons are not allowed to act as *sponsors* at Baptism or Confirmation, as far as stated under can. 765 f. and can. 795 f.

c) They are not allowed to act as *administrators of ecclesiastical property* or to perform *any* ecclesiastical commission, for all these are comprised by the name of ecclesiastical offices and functions.

d) They may not enjoy any *privileges or favors*

62 See can. 1654; 1754, § 2; 1795, §2; 1931; 2256, n. 2; c. 17, C. 6, q. 1; c. 8, 6°, V, 11.

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granted by the Church before they were excommunicated, no matter whether these were given by higher or inferior prelates.[63] Therefore absolution from censures, at least provisional, is added in most rescripts.

Note, however, that the text says: *fungi* and *frui,* from which it must be concluded that the prohibition only lasts until absolution from excommunication is granted, and no formal rehabilitation is required. Besides, it appears quite reasonable that forensic acts, *i. e.,* acts in the ecclesiastical court, or rather exclusion from the office of judge, lawyer, auditor, counsel, promotor, should take effect only after a declaratory or condemnatory sentence. This seems necessary for the safety and certainty of juridical procedure.[64]

2. *Acts of jurisdiction* of the external and internal forum are mentioned in can. 2264 as follows:

a) Simply excommunicated persons can perform acts of jurisdiction *validly* (not licitly); their acts are not only valid, *but even lawful,* if the faithful ask such excommunicated persons to perform them, according to can. 2261, §2.

b) Persons excommunicated by a condemnatory or declaratory sentence, and *a fortiori vitandi,* can *neither validly nor lawfully* perform acts of jurisdiction, except in danger of death, according to can. 2261, §3. Acts of jurisdiction are here expressly declared to comprise both the internal and the external forum. An act of jurisdiction is the so-called *missio canonica,* because the commission to teach or preach, according to the more common

63 The text does not especially mention (can. 2256, n. 2) papal favors; therefore also episcopal grants or favors of Ordinaries are excluded; see c. 1, 6°, I, 3; Hollweck, *l. c.,* p. 120, note 10.

64 See can. 2223, § 4, because the persons being public, the public welfare seems involved; Eichmann. *l. c.,* p. 94 f.

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doctrine, is an act emanating from jurisdiction. Consequently this mission also is lost by excommunication.[65]

However, here, too, must be applied what our text allows for those simply excommunicated without a special sentence. Therefore, if an excommunicated priest would be asked to preach or teach, he could do it lawfully.

3. Can. 2265 concerns *ecclesiastical offices and orders,* either in the active or passive sense.

a) Excommunicated persons are *excluded from the right of electing* (voting), *presenting, nominating;* but the vote or presentation (iuspatronatus) or nomination is not invalid unless made by a *vitandus* or one excommunicated by a declaratory or condemnatory sentence. If a chapter or college has the right of electing, presenting, or nominating, the act is valid or invalid according to can. 167, §2. This privation lasts until the excommunication is removed.[66]

b) *No excommunicated person may obtain any dignity, office, benefice, ecclesiastical pension, or other commission in the Church.* Here again the invalidity of the act conferring these dignities, offices, etc., attaches only to a *vitandus* or one who is under a declaratory or condemnatory sentence, as §2 states. It may be added that no dignity is excepted. "*Munus,*" which broadly signifies any office, may be understood of commissions or functions; thus, for instance, a proxy is not allowed or valid under given circumstances.[67]

65 Suarez, *De Cens.*, disp. XII, sect. 2, n. 4; Hollweck, *l. c.*, p. 121. Assistance at marriage is no act of jurisdiction; however, can. 1095, § 1, n. 1 must be consulted.

66 See can. 1470, § 4. Excommunicated Cardinals, pending the conclave or election, are not deprived of either the active or the passive vote, but only for this one occasion; ("*Vacante Sede,*" n. 29). If a curious reader should ask; but what if, by a very improbable supposition, an excommunicated cardinal should be elected Pope? Answer: he would go to confession or ask any confessor to absolve him from the censure. That is all.

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c) *No one may be licitly promoted to orders* as long as he is excommunicated. *Order* is here taken according to can. 950, *i. e.*, including all orders, even tonsure; for there is no reason why the term should be restricted to "holy" orders, nor does the context call for a milder interpretation.[68] A question might arise as to minor orders and tonsure, whether they would be invalidly conferred by a prelate who is under a declaratory or condemnatory sentence of excommunication, because these orders are not, properly speaking, Sacraments, but merely sacramentals. Comparing can. 2372 with our text, their validity can be solidly defended.

d) *No one excommunicated* by a declaratory or condemnatory sentence, including *vitandi, can obtain any papal favor, unless mention is made of the excommunication in the papal rescript.* Therefore, any favor, *e. g.*, a monsignorship, a dispensation, an indulgence, etc., granted to such a person would be invalid unless it contained the clause: "*non obstante excommunicatione* or *quacumque censura*" or a similar one.[69]

67 See c. 15, X, I, 38; c. 24, X, II, 27; Hollweck, *l. c.*, p. 121; Schmalzgrueber (V, 39, n. 154) excepted pensions, but our Code is plainly against any exception.

68 Ayrinhac, *l. c.*, p. 126, says: "No one under excommunication should be promoted to *holy* orders."

69 Cfr. the *Ordo Servandus in S. Cong. Trib. Off.*, Sept. 29, 1908, III, n. 6, where, however, only "*nominatim excommunicati*" are mentioned. The *clausulae "ex plenitudine potestatis," "ex certa scientia"* would not be sufficient; Suarez, *De Cens.*, disp. XIII, sect. 2, n. 14.

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LOSS OF INCOME FROM DIGNITY, OFFICE, etc.

Can. 2266

Post sententiam condemnatoriam vel declaratoriam excommunicatus manet privatus fructibus dignitatis, officii, beneficii, pensionis, muneris, si quod habeat in Ecclesia; et vitandus ipsamet dignitate, officio, beneficio, pensione, munere.

As the income or revenue from ecclesiastical offices is justly denied to those who are cut off from the communion of the Church,[70] it follows that the material part or income cannot be claimed by an *excommunicatus*. However, self-execution is not required until a formal sentence has been issued, and hence

1. After a declaratory or condemnatory sentence the excommunicated clergyman — for these the text has chiefly in view — remains *deprived of the fruits, i. e.,* revenues, salary, income, accruing from the dignity, office, benefice, pension, charge, which he holds in the Church.

A doubt indeed arises concerning the obligation of beneficiaries or office holders. Are they obliged in conscience (*in foro interno*) to make restitution of the fruits received from the time or moment in which the excommunication was incurred until the declaratory sentence was issued? The majority of authors say, yes.[71] However, this must be understood with due regard to can.

70 C. 53, X, II, 28.

71 Cfr. Suarez, *De Cens.*, disp. XIII, sect. 2, n. 7 ff.—A question may arise concerning a charge (*munus*), for instance, organist, sexton, etc., when paid by the government or civil authority. Would the incumbent lose the income if he were excommunicated? By ecclesiastical law he undoubtedly would; but we hardly believe that the Church would urge the forfeiture.

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2232, §1, which says that a penalty *latae sententiae* binds in both fora, but need not be observed if defamation should follow, nor can its observance be urged if the crime was not notorious. Consequently, the obligation of restitution runs from the moment the censure was incurred, but does not urge either in the internal or the external forum if loss of reputation would follow or if the crime was occult.

2. A *vitandus* loses not only the fruits, but also his dignity, office, benefice, pension, or charge, and consequently all these dignities and offices become vacant (can. 183, §1).

SOCIAL OR CIVIL INTERCOURSE

Can. 2267

Communionem in profanis cum excommunicato vitando fideles vitare debent, nisi agatur de coniuge, parentibus, liberis, famulis, subditis, et generatim nisi rationabilis causa excuset.

The faithful shall avoid social intercourse with *vitandi*. From this obligation are *exempted* those bound by matrimonial bonds, parents, children, servants, and subjects. Besides, any reasonable cause may excuse others.

The extent of this avoidance was expressed in the following verse: *"Os, orare, vale, communio, mensa negatur."* [72]

72 Cfr. the Glossa *ad verbum aliis*, c. 3, 6°, V, II; Hilarius a Sexten, *l. c.*, p. 63; Hollweck, *l. c.*, p. 124. But they also offered reasons which excused from this observance and put them in this verse: *"Utile, lex, humile, res ignorata, necesse."* *Utile* signified any spiritual or corporal utility; *lex*, the married couple; *humile*, submission or obedience, children and parents, masters and servants; *res ignorata*, ignorance of fact or law; *necessitas*, any spiritual or temporal necessity or need.

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The *os* was taken as oral and epistolary intercourse; the *orare* as communion in private prayer; the *vale* as signs of special friendship, but not of common or usual salutations; *communio* as living in the same house and having commercial intercourse; *mensa* as eating at the same table and accepting invitations to banquets. Our text, being very broad, should not cause any alarm or misgiving, as if business would come to a standstill and social ties be rent assunder.

ART. II

THE INTERDICT

It is a rather venturesome attempt to say anything definite on the origin of this so-called censure. Broadly speaking, the opinion that the personal interdict was developed from temporary suspension, and the local interdict from excommunication, seems quite tenable.[1] Like other ecclesiastical disciplines, the interdict must not be presumed to have been introduced "cut and dried," but had its normal evolution from the ninth to the twelfth centuries,[2] when it appears as an independent penalty side by side with excommunication and suspension. It cannot, however, be denied that abuses had been committed, which may perhaps be excused, but cannot be defended on a juridical basis.[3] Local interdicts presuppose unity of faith and also, we dare say, the idea that

1 See Kober, *Das Interdikt* (*Arch. für kath. K.-R.*, 1869, p. 3 ff.); Krebihl, *The Interdict, its History and Operation*, Washington 1909; Boudinhon, in *Cath. Encycl.*, Vol. VIII, p. 73 f.; Hollweck, *l. c.*, p. 126 ff.; Eichmann, *l. c.*, p. 17 f.; Hinschius, *K.-R.*, IV, 804 ff.; V, 13 ff.; 516 ff.; and the commentators on X, V, 39.

2 We find traces of a partial local interdict already in the VIth century, when certain churches of a city were closed for service: but such cases were extremely rare.

3 Boudinhon, *l. c.*

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ecclesiastical authority laid a certain claim to territorial rights. The close interpenetration of Church and State in the Middle Ages made it possible to get this penalty respected by rulers and subjects. But the disruption of religious unity led to a mitigation of that "dangerous weapon" in the sixteenth century. The last general local interdict was imposed by Paul V, in 1606, on the Republic of Venice, without results. The interdict put on several Sicilian dioceses by Clement XI, in 1713, was also without practical effect. Of modern date are the vindictive interdicts imposed on the city of Adria, in 1909, and Galatina, in 1913, which are recorded in the official bulletin of the Holy See.[4] We also know that a congregation in one of our American dioceses was laid under the interdict some years ago by the Ordinary. But the use of this ecclesiastical penalty has, in the last two centuries, been exceedingly moderate.

The Code first defines an interdict, then sets forth who may inflict it and how far it extends, describes its effects, and, finally, mentions *ingressus ecclesiae* as a kind of interdict.

DEFINITION AND DIVISION

Can. 2268

§1. Interdictum est censura qua fideles, in communione Ecclesiae permanentes, prohibentur sacris quae in canonibus, qui sequuntur, enumeratur.

§2. Prohibitio fit vel directe per interdictum personale, cum personis ipsis usus eorum bonorum interdicitur; vel indirecte per interdictum locale, cum

[4] *A. Ap. S.*, I, 765; V, 517.

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certis in locis eorundem dispensatio vel perceptio vetatur.

1. The Roman Law [5] mentions various interdicts, which, however, only remotely resemble the one described here. Formerly an interdict meant an order forbidding something to be done; but at present the term designates not only a pretorian restraint, but a particular penalty, with effects attached by common law. Hence the Code defines it as a *censure by which the faithful, while remaining in communion with the Church, are forbidden certain* [*sacred things or benefits*] enumerated in the following *canons.*

a) The generic nomenclature "*censura*" is here retained, although the interdict may also be inflicted as a vindictive penalty.[5a] In case of doubt, therefore, it is to be regarded as a censure.[6]

b) In *communione Ecclesiae permanentes* indicates an essential difference from excommunication, which does not leave union with or membership in the Church intact, but abolishes it. The interdict merely limits the practical use of that communion. Besides in an interdict the prohibition of sacred things is limited; but, unless so expressed in the law, it is unlimited in excommunication.

c) The term *fideles,* faithful, clearly insinuates that the interdict is also distinguished from suspension because the latter is inflicted on clerics only (can. 2256, §2); besides, suspension can never be local, but is always personal.[6a] This, of course, is also true of excommunication.

5 See *Inst.*, IV, 15; *Dig.*, 43, 1; 48, 22; *Cod.*, VIII, 1., see our Commentary, Vol. VIII, p. 125.

5a See can. 2291, n. 1–2.

6 Can. 2256, § 2. A purely local interdict, if such a penalty were inflicted, would not be a censure, which strictly supposes a grievous, morally imputable transgression.

6a Hilarius a Sexten, *l. c.*, p. 82.

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d) Concerning the *effects* of an interdict, the text simply says: "*sacris,*" and to determine the import of these sacred things refers to the canons which immediately follow; besides these no others are enumerated. Note that the text does not mention inseparable effects, *qui separari nequunt.* This is logical, for the interdict does not disrupt communion with the faithful, and consequently we find that the extent is not the same for each kind of interdict.

2. *Division.* An interdict is *personal* when the prohibition directly concerns the personal use of certain sacred things, *i. e.,* when persons are directly intended by the interdict;

b) It is *local* when *in recto* the place, and only indirectly the persons living in that place, are struck by this penalty. In interdicted places the administration or reception of sacred things or spiritual benefits is forbidden.

These are the two main divisions mentioned in can. 2269.

§ 2. However, the subdivisions, as they may be called and are expressly referred to in the following canons, may just as well be added here.

c) A *general personal* interdict is one laid upon a corporation as such, for instance, the entire (Catholic) population of a realm, province, diocese, parish,[7] chapter, or all the members of a religious community.

A *general local* interdict is one inflicted upon a place comprising several distinct places or juridical entities, for instance, a diocese, or province, or parish.

d) A *special personal* interdict is one imposed on

[7] Can. 2269, § 1, calls an interdict laid upon a parish a general interdict; in the old ecclesiastical law a parish was never regarded as an autonomous entity.

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specified persons, for instance, on the pastor of a parish, or the administrator of a diocese.

A *particular local* interdict is one inflicted on a specified place, taking place (*locus*) in the stricter sense of locality, for instance, a specially designated church chapel, altar, or cemetery.[8]

AUTHORITIES WHO CAN INFLICT THE INTERDICT

Can. 2269

§1. Generale interdictum tam locale in territorium dioecesis, reipublicae, quam personale in populum dioecesis, reipublicae, ferri tantum potest a Sede Apostolica vel de eius mandato; interdictum vero generale in paroeciam vel paroeciae populum, et particulare sive locale sive personale, etiam Episcopus ferre potest.

§2. Interdictum personale sequitur personas ubique; locale non urget extra locum interdictum, sed in loco interdicto omnes etiam exteri aut exempti, excluso speciali privilegio, illud servare debent.

1. A *general local* interdict which is imposed upon the territory of a diocese or realm, and a *general personal* interdict which affects the people of a diocese or realm, can only be inflicted by the *Apostolic See* or by the latter's commission.

2. A *general interdict* which is to affect either an *entire parish* as such, or an *entire congregation* as such, or a

8 See Wernz, *l. c.*, VI, p. 124, n. 218; Hilarius a Sexten, *l. c.*, p. 83; Hollweck (*l. c.*, p. 127, § 52, note 3) calls the interdict the most flexible of all censures; the Code does not entirely abolish this flexibility; but it does away with the so-called *interdictum deambulatorium* (c. 8, Clem. V, 8), which directly affected places, but virtually the persons.

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particular local or special interdict, may also be inflicted *by the bishop.*

Here the text appears to mention only an interdict *ab homine.* But there are a few interdicts which are incurred *ipso iure* [9] and therefore need only a declaratory sentence (can. 2223, §4; can. 2232, §1).

The *bishop,* and not the Ordinary, is mentioned, because the vicar-general cannot inflict such a penalty without a special mandate (can. 2220, §2). The *vicar capitular* or administrator, on the other hand, cannot be denied the right to place a parish under the interdict.[10]

Concerning the *prelates regular* of exempt religious, Suarez [11] justly observes that, although they may inflict a personal interdict by right and custom, yet custom denies them the right to impose a local interdict. For such a penalty is neither an adequate means of good government nor apt to edify the faithful.

The *bishop may inflict an interdict without the consent of his chapter or consultors* [12] and is not bound to call in a collegiate body of judges, if he proceeds in a judiciary way.[13] He may also impose it as a special order; [14] always provided that he does not overstep the power laid down in can. 2269, §1.

The question may arise whether the bishop could lay

9 The Code contains: one general interdict *modo speciali* reserved to the Ap. See (can. 2332); one personal interdict contracted *ipso iure,* but not reserved (can. 2338, § 4); two personal interdicts *ferendae sententiae,* can. 2328, 2356; one *ab ingressu ecclesiae ipso iure,* reserved to the ordinary, can. 2339; one incurred *ipso iure* but not reserved, can. 2338, § 3; one *ferendae sententiae,* can. 2329.

10 *Trid.,* Sess. 24, c. 16, *de ref.;* Wernz, *l. c.,* p. 229, n. 220.

11 *De Cens.,* disp. XXXVI, sect. 1, n. 3 (*ed. cit.,* Vol. 23, II, p. 253).

12 C. 1, X, V, 31, calls for such a consent, but custom has done away with this requirement (Suarez, *l. c.,* n. 6); nor does the Code require it.

13 He may, but is not obliged to, entrust the judges with this affair; can. 1576.

14 Can. 1933, § 4.

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all the parishes of his dioceses, taken singly, under the interdict. We think not, on the basis of the law; at any rate, it would be very imprudent.

§2 of can. 2269 indicates the *material extent* of the interdict, personal and local, as follows:

1. A *personal interdict follows the persons upon whom it is inflicted everywhere,* and since the text does not distinguish between general personal and special personal interdicts, it is evident that both kinds are included, and consequently all the effects described in can. 2274 and 2275 follow the persons interdicted.

2. A *local interdict binds only within, not outside, the boundaries of the interdicted place.* But *within the interdicted territory all, including strangers and exempt persons, are obliged to observe it.* A special privilege alone exempts from its observance. The *boundaries* must be *strictly understood,* and not, as some seem to hold,[15] as if an extension were permissible in order to prevent contempt or neglect of the interdict.

Exteri or outsiders are obliged to observe an interdict as long as they remain in the interdicted territory.

Exemption here means personal, not local, exemption. Such exemption is granted by the Code to all regulars and their novices, also to some religious in virtue of a special privilege.[16] All these exempt religious must observe the *local* interdict,[17] unless, of course, it be particular, for instance, restricted to a church or chapel. But if exemption is taken for *territorium nullius,* or active and passive exemption, no matter whether it concerns only one, or two, or several parishes, the local interdict placed on a parish of another one's jurisdiction does

15 Thus Suarez, disp. XXXVI, sect. 2, n. 3.

16 See can. 615; can. 618.

17 See cc. 4, 11, 6°, V, 7; *Trid.,* Sess. 25, c. 12 de Regg.

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not concern the exempt parish, even though this may lie like an enclave within the boundaries of the interdicted parish or territory. The jurisdiction, personal as well as local, of the interdicting prelate ceases there.[18]

The text allows an exception based on a *special privilege,* which means that only a directly granted privilege avails against a local interdict. No communication of privileges, therefore, is admissible.[19] Special privilege also signifies that freedom from interdict is not included in the general exemption.

EFFECTS OF AN INTERDICT

The effects of an interdict are separable from one another, as appears from the various exceptions made under certain conditions. The text first considers the local general and particular interdict, then the personal general and special interdict, and finally the effects of any interdict on such as are innocent of the crime for which the interdict was inflicted.

CONSEQUENCES OF LOCAL INTERDICTS

Can. 2270

§1. Interdictum locale sive generale sive particulare non vetat morientibus Sacramenta et Sacramentalia, servatis servandis, ministrare, sed prohibet in loco quodlibet divinum officium vel sacrum ritum, salvis exceptionibus de quibus in §2 huius canonis et in can. 2271, 2272.

18 Suarez takes a broader view (disp. XXXII, sect. 2, n. 12); but certainly not to the advantage of juridical precision.

19 See cc. 4, 11, 6°, V, 7; Reiffenstuel, V, 39, n. 196.

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§2. In die Nativitatis Domini, Paschatis, Pentecostes, sanctissimi Corporis Christi te Beatae Mariae Virginis in caelum assumptae interdictum locale suspenditur, et prohibetur tantum collatio ordinum et sollemnis nuptiarum benedictio.

Can. 2271

Si interdictum fuerit locale generale et interdicti decreto aliud non caveatur expresse:

1°. Permittitur clericis, dummodo non sint ipsi personaliter interdicti, omnia divina officia et sacros ritus in quacunque ecclesia aut oratorio privatim obire, ianuis clausis, voce submissa et campanis non pulsatis;

2°. In ecclesia vero cathedrali, ecclesiis paroecialibus vel in ecclesia quae unica sit in oppido, in iisque solis, permittuntur unius Missae celebratio, asservatio sanctissimi Sacramenti, administratio baptismatis, Eucharistiae, poenitentiae, assistentia matrimoniis, exclusa benedictione nuptiali, mortuorum exsequiae, vetita tamen quavis sollemnitate, benedictio aquae baptismalis et sacrorum oleorum, praedicatio verbi Dei. In his tamen sacris functionibus prohibetur cantus et pompa in sacra supellectili et sonitus campanarum, organorum, aliorumve instrumentorum musicalium; sacrum autem Viaticum ad infirmos privatim deferatur.

Can. 2272

§1. In interdicto locali particulari, si interdictum fuerit altare vel sacellum alicuius ecclesiae, nullum sacrum officium seu sacer ritus in eisdem celebretur.

§2. Si interdictum fuerit coemeterium, fidelium

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quidem cadavera sepeliri ibidem possunt, sed sine ullo ecclesiastico ritu.

§3. Si latum fuerit in certam ecclesiam vel oratorium:

1°. Si ecclesia fuerit capitularis nec interdictum sit Capitulum, valet praescriptum can. 2271, n. 1, nisi interdicti decretum praecipiat Missam conventualem celebrari et horas canonicas recitari in alia ecclesia aut oratorio;

2°. Si fuerit paroecialis, servetur praescriptum cit. can. 2271, n. 2, nisi interdicti decretum aliam ecclesiam pro interdicti tempore eidem substituat.

Can. 2273

Interdicta civitate, interdicta quoque manent loca accessoria etiam exempta et ipsa ecclesia cathedralis; interdicta ecclesia, interdicta sunt sacella contigua, non vero coemeterium; interdicto sacello, non est interdicta integra ecclesia nec, interdicto coemeterio, interdicta est ecclesia ipsi contigua, sed interdicta sunt omnia oratoria in coemeterio erecta.

1. *General Prohibition.* In a place laid either under a *general or a particular local interdict, no divine offices or sacred rites may be performed.* This is the general rule, and the terms must be employed according to their obvious meaning. Hence the celebration of Mass, the reservation of the Blessed Sacrament, preaching, administration of Sacraments or sacramentals or any ritual or liturgical function such as burials, may not take place in such places.[20] This, we said, is the rule.

20 Here again the strictly liturgical devotions are intended; consequently private devotions, such as the Rosary or the Stations of the

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2. Now follow the *modifications* which affect any local interdict, general or particular, and may therefore be called general modifications, such as were granted by the Decretals,[21] and are partly extended by the Code:

a) It is permitted to administer the Sacraments and sacramentals to the *dying*. This includes Extreme Unction [22] as well as the Viaticum and the Last Blessing. What *servatis servandis* means may be deduced from can. 2271, n. 2: the Viaticum must be privately carried to the sick according to can. 849. But the clause also hints at the rubrics as found in the Roman Missal and Ritual.[23]

b) On Christmas, Easter, Pentecost, Corpus Christi, and the Assumption (Aug. 15) the local interdict is suspended, and only the conferring of orders and the solemn nuptial blessing are forbidden. Hence solemn service with all pomp and liturgical display may be celebrated, but only on these days themselves, not during the octave.[24] When Corpus Christi is transferred to a Sunday, the Sunday is favored.

The *particular modifications* of a *general* local interdict are stated in can. 2271, provided the wording of the decree of interdict does not contain anything to the contrary, for the clergy in particular and for the faithful in general,

1. The *clergy may privately perform all the divine*

Cross, confraternities, processions led by laymen, are allowed; for the term *"divina officia"* (can. 2256, n. 2) does not include these.

21 Especially by the well-known *caput "Alma,"* c. 24, 6°, V, 11; see c. 5, X, V, 38.

22 Reiffenstuel, V, 39, n. 203.

23 *Missale Rom.*, tit. *De Defectibus*, c. VIII, n. 5; *Rit. Rom.*, tit. IV, c. 4, n. 6 f.

24 Martin V, *"Ineffabile,"* May 26, 1429, § 3, extended the privilege to Corpus Christi; this is upheld by the Code. But the extension to the Octave of Corpus Christi granted by Eugene IV (*"Excellentissimum,"* May 26, 1433) is not according to the Code, which says *"in die."* Whether the Spaniards still enjoy this favor on the feast of the Immac. Conception seems doubtful.

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offices and sacred rites in any church or chapel.[25] But this general permission is conditional, and also circumscribed as to the manner in which these functions may be held.

a) The *condition* in the strict sense is that the clerics themselves be *not personally interdicted,* for if they were, can. 2275 would take effect.

b) The *manner* in which this service may be performed is described as follows: It is a *private* celebration, from which the faithful must be excluded.[26] It must be held *januis clausis, i. e.,* behind closed doors, which indicates that the clergy only may be admitted. However, if the priest would have no cleric to serve his Mass, a layman could and should be admitted.

It must be held *voce submissa, i. e.,* in a low voice, so that it can not be heard outside the church.[27]

It must finally be held without the bells being rung (*campanis non pulsatis*). However, canonists except from this prohibition the ringing of the Angelus bell and the bell for sermons.[28]

It may be added that this prerogative is granted to the *clerical state, as such,* whence it logically follows that every clergyman may hold such services. But mere assistance without coöperation could hardly be admitted. For the text clearly states *obire,* which signifies active service.

2. For *the faithful in general* the text grants the following mitigation under certain conditions:

a) The privileged churches are the *cathedral* and *the parish churches,* even though there may be several in one

25 Cfr. c. 24, 6°, V, 11.

26 Whether or not excommunicated or interdicted; Suarez, disp. XXXIV, sect. 1, n. 21 f.

27 Suarez, *ib.,* n. 12 f.

28 C. 11, X, V, 38. Suarez, *l. c.,* n. 16 f.

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city or town, and the *church which is the only one in a town*. In this latter clause a public oratory, which enjoys all the rights of a church,[29] is included among the privileged churches. Town may be taken in the sense of civil division, nor is any certain distance from one to another here indicated. The same cannot be said of semi-public and private oratories, which are therefore excluded from this prerogative, especially since the text adds: "*in iisque solis,*" and this favor is intended for all the faithful, not for a privileged class only.[30]

b) The *divine or sacred functions* permitted are: the celebration of one Mass daily, under the restrictions mentioned below; the reservation of the Blessed Sacrament; the administration of Baptism with all its ceremonies and with sponsors; the administration of the holy Eucharist and of Penance; assistance at marriage, but without the nuptial blessing (which prohibition seems to exclude both blessings, that of the Ritual as well as that of the Missal); burial of the faithful, but excluding every solemnity, *i. e.*, external pomp of any kind;[31] blessing of the baptismal water and the holy oils; preaching the word of God.

c) The *restrictions* governing all these sacred functions are: no chanting is allowed, no display of *sacra supellex* (although, of course, the liturgical colors must be used), no ringing of bells, no playing of organs or other musical instruments; and the holy *Viaticum* must be brought to the sick privately, as is customary in our country. Hence only a low Mass is permitted, without sacred ministers, and without benediction of the Blessed

29 See can. 1191, § 1.

30 This text corrects the old law of c. 24, 6°, V, 11; what Suarez, (*l. c.*, n. 5 f.) and others, *e. g.*, Hilarius a Sexten (*l. c.*, p. 88) say, therefore, that private (*sic!*) oratories are included in this prerogative, is no longer tenable.

31 See can. 1204.

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Sacrament. The exequies are to be performed in church according to the rubrics, but without the "*Libera,*" and also without a funeral sermon.

The *effects of a particular local interdict* are enumerated as follows:

1. If an *altar or chapel* in a church has been interdicted, no sacred office or rite may be performed there; from this rule no exception is allowed, not even in favor of non-liturgical devotions, for the text is not restricted to divine offices.[32]

2. If a *cemetery* is interdicted, the bodies of the faithful may be buried there, but without any ecclesiastical rites; these rites may, however, be supplied after the interdict is raised.

3. If a *specified church or oratory* is interdicted, it makes a difference whether the sacred edifice is a conventual (capitular) or parochial one.

a) If the church belongs to a *chapter,* for instance, of canons or regulars who really form a chapter, ecclesiastical corporation, or convent,[33] the chapter may make use of the favor granted under can. 2271, n. 1, concerning the clergy, provided, however, (1.°) that the chapter is not under a personal interdict, and (2.°) that the text of the interdict does not order the conventual Mass to be celebrated and the canonical hours to be recited in another church or oratory.

b) If the church is a *parochial* one, canon 2271, n. 2,

32 A reasonable doubt as to our statement is likely to arise from the word *sacer* (*ritus*) which, if taken to mean liturgical, would not exclude private or non-liturgical devotions; yet we are inclined to take it in the wider sense of *any sacred function.*

33 The meaning is: those churches which form a chapter or convent with the obligation of a conventual Mass and choir service; see can. 610, § 1, 2, wherefore convents of Sisters who have no such obligation can not claim the privilege here granted.

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with all its favors and restrictions must be applied, unless the interdict expressly provides that another church is to be substituted for the one interdicted.

The *material extent* of local interdicts is explained in can. 2273 as follows:

1. If a city is laid under the interdict, the accessory or *contributory places also are interdicted,* including exempt places and the cathedral. This appears to be a rather wide interpretation and was expressly acknowledged as such by the Decretals,[34] where the reason is stated; *viz.,* that interdicts be not vilified or contemned.

However, it may be justly doubted (we at least cannot read into the Decretal as much as others do)[35] whether this provision can be stretched to cover two different territories with different prelates. For instance, take Kansas City, Mo., and Kansas City, Kansas, or Brooklyn and New York, between which the river forms a line of demarkation dividing the two dioceses. Hence we suppose that the accessory premises or suburbs must belong to the same diocese. Thereby we do not, of course, mean to deny that the Apostolic See could formulate an interdict so as to include the accessories of a city situated in another diocese.

Exempt religious are included and must observe the interdict even if they live in the suburbs, unless they enjoy a special privilege. The *cathedral* is especially mentioned, because some authors, by reason of a Decretal,[36] exempt it from interdicts.

2. If a church is interdicted, the *adjoining chapels* also

34 C. 17, 6°, V, II.

35 Thus Suarez, *l. c.,* disp. XXXII, sect. 2, n. 23 f.; but the cc. 17, 6°, V, II would not justify the assumption of Suarez.

36 C. 4, 6°, III, 4, which, however, as Suarez justly observes (*l. c.,* n. 22), only speaks of benefices, not of favors granted to churches.

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are interdicted, but not the cemetery, even though adjoining.[37] The term *contigua* must be taken in its obvious sense, *i. e.*, bordering on or touching the church with which they form one whole, even though perhaps a little space is left between them.

3. If a *chapel* is interdicted, the whole *church* is not interdicted, whether this chapel be in the church or adjoining it; for there may be a special reason for interdicting the chapel, and besides, no inference may be drawn from the minor to the major, from the accessory to the principal; *accessorium sequitur principale,* but not *vice versa.*

4. If a cemetery is interdicted, the *adjoining church* is *not* interdicted, even though it belongs to the cemetery; but all oratories erected on the cemetery are included.

We conclude with a remark concerning local interdicts. Canon 2271 mentions three conditions for the lawful use of the favors granted during the time of an interdict; but it omits to add another condition: "*excommunicatis et interdictis exclusis,*" which occurs in the old law.[38] Hence it may safely be concluded that there is no obligation positively to exclude the excommunicated and interdicted, except in case of can. 2259, §2 and can. 2275, n. 1. However, the clergy should take care that the interdict is not violated through their coöperation.

EFFECTS OF A PERSONAL INTERDICT

Can. 2274

§1. Si communitas seu collegium delictum perpetraverit, interdictum ferri potest vel in singulas

37 Corrects c. 17, 6°, V, II.

38 See c. 25, X, V, 33; c. 24, 6°. V, II.

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personas delinquentes, vel in communitatem, uti talem, vel in personas delinquentes et in communitatem.

§2. Si primum, servetur praescriptum can. 2275.

§3. Si alterum, communitas seu collegium nequit ius ullum spirituale exercere quod ei competat.

§4. Si tertium, effectus cumulantur.

Can. 2275

Personaliter interdicti:

1°. Nequeunt divina officia celebrare eisve, excepta praedicatione verbi Dei, assistere; passive assistentes non est necesse ut expellantur; sed ab assistentia activa, quae aliquam secumferat participationem in divinis officiis celebrandis, repellantur interdicti post latam sententiam condemnatoriam vel declaratoriam, aut alioquin notorie interdicti;

2°. Prohibentur Sacramenta et Sacramentalia ministrare, conficere et recipere, ad norman can. 2260, §1, 2261.

3°. Praescripto can. 2265 etiam ipsi adstringuntur;

4°. Carent sepultura ecclesiastica ad normam can. 1240, §1, n. 2.

1°. It is evident that these two canons are related to each other, as both are concerned with the personal interdict. Since a personal interdict may be either general or special, can. 2274 considers the possible distinction between them, which is based upon the assumption that a personal interdict may be placed upon a body as such, or upon single members of that body. In the first case a censure can hardly be assumed;[39] whilst a special per-

39 Hilarius a Sexten, *l. c.*, p. 83, according to D'Annibale, I, n. 370.

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sonal interdict in case of doubt, must be presumed to be a censure as per can. 2255, §2.

Communitas is a society less compactly organized, for instance, a parish, diocese, province.

Collegium is a more closely organized society or a corporation in the ecclesiastical and civil sense, as we say: *tres faciunt collegium.* Such are the cathedral and collegiate and monastic chapters, provided they have their own constitutions and enjoy autonomy (*societas imperfecta*). As stated above, modern laws presume that such communities and corporations are capable of committing a crime collectively, because they have a collective will. Consequently, they can also be punished collectively, and this is the fundamental supposition of an interdict.

The text says: 1.° An interdict may be placed upon *single persons* or members of *a community or college which is found guilty of a punishable crime,* and in this case the effects enumerated in can. 2275 follow. This is a special personal interdict.

2.° An interdict may be inflicted on a *community or corporation as such, i. e.,* as a community or corporation, and in this case the community *cannot exercise any spiritual right* that belongs to it as a *corporation or community.* These rights are the capitular, collegiate, or corporate rights, in as far as they are spiritual, such as the right of election,[40] postulation, nomination, presentation, etc. Thus a chapter of canons who could otherwise elect the bishop or a vicar capitular,[41] is deprived of this right when under an interdict, provided a declaratory or condemnatory sentence has been issued.[42] The same is true

40 Cfr. c. 16, X, I, 6; can. 161; can. 167.

41 See can. 432.

42 See can. 167, § 1, n. 3. Bishops are not included in an interdict, either local or personal; see can. 2227, § 2; c. 4, 6°, V, II.

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of a monastic chapter and a religious community. Neither could a parish choose its pastor, if this right belonged to the congregation according to can. 465.

Concerning our *consultors,* who ought to form some species of collegiate body, they scarcely have any truly spiritual rights, except that of electing the administrator, which would here certainly be concerned.[43] A *collegiate body of judges* who actually form a college according to can. 1576, is also included here.

3.° If the interdict has been imposed on *individual delinquents and* at the same time *on the whole community, its effects are bulked, i. e.,* the interdict produces a double effect—one affecting the community as such, *viz.,* privation of all corporate spiritual rights; the other affecting those personally interdicted (can. 2275). All this, of course, must be plainly expressed in the interdict itself, otherwise it may be presumed that the interdict is laid only upon the community as such (n. 2).

Those *personally interdicted, i. e.,* individual members of a community or corporation, or others,[44] if interdicted, suffer the following penalties according to can. 2275:

1. *They are not allowed to celebrate or assist at divine offices. Exception is made in favor of preaching,* at which they may assist. It is not necessary to expel such personally interdicted persons from an assembly gathered for divine service, provided they merely assist and take no active part in the ceremony. On the other hand, such as have been interdicted by a declaratory or condemnatory sentence, or are otherwise notoriously interdicted, must be refused all active assistance, *i. e.,* participation or coöperation in the celebration of the divine offices. From

43 See S. C. Cons., Feb. 22, 1919 (*Eccl. Rev.,* Vol. 60, p. 532 f.); for Canada and Nova Scotia, S. C. Cons., May 8, 1919 (*Eccl. Rev.,* Vol. 61, p. 165).

44 Cfr. can. 2328, can. 2356.

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this text we may conclude that personally interdicted individuals may be permitted, if necessary, to take some part in the divine service, for instance, by serving at Mass, as long as no declaratory sentence has been pronounced or the fact of their being interdicted is not notorious.[45]

2. They are *forbidden to celebrate, administer, or receive any Sacraments or sacramentals* according to can. 2260, §1, and can. 2261. Thus the faculties for hearing confessions are lost by an interdict after a declaratory or condemnatory sentence;[45a] also the right of assisting at marriages.[46]

Irregularity follows a violation of this law, according to can. 985, n. 7; the reception of orders at the hands of an interdicted bishop is punishable by suspension.[47]

3. *Rights* denied to excommunicated persons are also denied to interdicted persons to the extent stated in can. 2265.

4. Those under a personal interdict lose the right to a *Christian burial,* as explained in can. 1240, §1, n. 2.

No mention is made of *actus legitimi,* except as far as can. 2265 falls under that heading. Consequently other legal acts may be validly and licitly performed by one who is personally interdicted.

MITIGATION FOR THE PERSONALLY INNOCENT

Can. 2276

Qui interdicto locali vel interdicto in communitatem seu collegium subest, quin eidem causam dederit, nec

45 For instance, they are not known as the leaders of a faction against the Ordinary.

45a Can. 873, § 3; Can. 1095, § 1, n. 1.

46 Can. 1095, §1, n. 1.

47 Can. 2372; cfr. can. 2338, § 3; 2364.

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alia censura prohibeatur, potest, si sit rite dispositus, Sacramenta recipere, ad normam canonum praecedentium, sine absolutione ab interdicto aliave satisfactione.

Those who are laid under a local or personal interdict that concerns a community or corporation, but have not been the cause of that interdict, and are not otherwise censured, may receive the Sacraments according to the rules laid down in the preceding canons, provided they are properly disposed.

This favor is granted without any other satisfaction, and no absolution is required.

The term "*causam dederit*" [48] may give rise to doubts. Who causes an interdict, either local or personal? Suarez [49] justly observes that the culprit or delinquent must, in one way or another, be intimately connected with the place or community, so as to possess, rule or influence it. The pastor of a parish, or town, or city, is held responsible for the actions of his subjects; also kings and magistrates, especially in former days, were looked upon as responsible for the crimes committed in their respective territories. Concerning a community or corporation, a decision of a chapter would throw the burden on the whole body, because apparently approved by all. Here, then, the ringleaders would undoubtedly be those who provoked the interdict. That innocent persons sometimes suffer cannot be avoided, since the interdict is intended not so much as a punishment, but as a defence of the authority of the Church.

[48] C. 24, 6°, V, 11.

[49] *De Cens.*, disp. XXXVI, sect. 3.

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THE INTERDICT FORBIDDING ONE TO ENTER A CHURCH

Can. 2277

Interdictum ab ingressu ecclesiae secumfert prohibitionem ne quis in ecclesia divina officia celebret vel eisdem assistat aut ecclesiasticam sepulturam habeat; si autem assistat, non est necesse ut expellatur, nec, si sepeliatur, oportet ut cadaver amoveatur.

As a species of personal[50] interdict is here mentioned that "*ab ingressu ecclesiae,*" which occurs in the Decretals.[51] It may be inflicted upon laymen as well as clerics. Its effects are stated as follows:

1. Those so interdicted are *forbidden to celebrate the divine offices* in any church, even though it be not an interdicted church;

2. They are forbidden *to assist* at such offices, either passively or actively.

3. *Ecclesiastical burial* is denied them, *i. e.,* they must be buried without solemnity and without the ecclesiastical rites which are performed in church. For no doubt the burial here intended is that in the church, according to can. 1205, §2, *i. e.,* of civil and ecclesiastical princes and dignitaries, among them abbots.

This interdict *does not,* however, require that the interdicted person be expelled from a church where divine offices are being celebrated, or that these functions be interrupted or suspended on account of his presence. Neither does this interdict call for an *exhumation* of the corpse if such a person should have been buried in the church, either by fraud, violence, or ignorance.

50 Thus Suarez, *l. c.,* disp. XXXV, sect. 4, n. 3.

51 See the "*multum allegabile,*" c. 12, X, V, 38, concerning annual confession and Paschal Communion.

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Art. III

SUSPENSION OR CLERICAL CENSURE

Suspension is a mitigation of the ancient penalty of deposition and degradation, which occurs as early as the third century.[1] Its fuller development, however, commenced in the fourth century, which witnessed quite a change in public discipline, including the application of penalties to clerical offenders; removal from office, but not from the clerical ranks; privation of certain spiritual [2] and material rights; ineligibility for higher offices, whilst the bishops were denied intercourse with their fellow bishops.[3] When, in the sixth and later centuries, benefices were introduced and multiplied, it was natural that the revenues should play a conspicuous part as means of reaching delinquent clerics. Hence towards the end of the XIIth century we find a suspension from benefices beside and distinct from suspension from the exercise of orders and offices.[4] This is the status of suspension in the Decretals, to which the Council of Trent only added the suspension *ex informata conscientia*.[5] The Code has not simplified suspension.

Yet some progress is noticeable, especially as far as precision of terms and definition of the effects of different kinds of suspension are concerned.

1 See Kober, *Die Suspension der Kirchendiener*, 1862, p. 19 ff.; Hinschius, *K.-R.*, IV, 747 ff.; "*ab ordine depositus*"; *Syn. Aurel. III*, c. 19.

2 For instance, prohibition to say Mass for a certain time, *v. g.*, six months; *Syn. Aurel. III*, c. 6, 18.

3 *Syn. Aurel. III*, c. 6 (*l. c.,*): "*ab omnium fratrum caritate.*"

4 See c. 2, X, II, 20; c. 7, X, V, 19; c. 7, X, I, 6.

5 Sess. 14, c. 1, *de ref.*; see can. 2186.

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NATURE AND DISTINCTION

Can. 2278

§1. Suspensio est censura qua clericus officio vel beneficio vel utroque prohibetur.

§2. Etiam suspensionis effectus separari queunt; sed nisi aliud constet, in suspensione generaliter lata comprehenduntur omnes effectus qui in canonibus huius articuli enumerantur; contra, in suspensione ab officio vel a beneficio omnes tantum effectus alterutrius speciei.

1. *Suspension is a censure by which a cleric is forbidden to exercise the rights attached to his office or benefice, or both.*

In as far as it is a *censure,* suspension must bear the marks and conditions of censures in general.

Suspension differs from *excommunication* in this that it concerns clerics only, and its effects are separable in various degrees. Suspension differs from an *interdict* in that its effects are strictly limited to clerical rights, leaving the spiritual benefits common to all Christians, such as ecclesiastical burial, untouched.

2. Since the *effects of suspension are separable,* it is evident that they follow the various kinds of suspension in varying degrees.

a) A *general suspension* deprives a cleric of all the rights pertaining to *his office as well as his benefice;* and if the suspension is not further determined in the decree or precept of the superior or judge,[6] a general

6 As a censure it may be inflicted by a judiciary sentence or in virtue of a special precept; see 1933, § 4; on provisional suspension, see can. 2222, § 2.

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suspension is to be understood, *i. e.*, one accompanied by all the effects stated in this article.

c) A *special suspension* is twofold: from office or from benefice. The special suspension from office may be either *total* or *partial*, according as all the rights attached to the office, or some only, are taken away. The special suspension from benefice, too, may be total or partial, since the administration of the benefice may be taken away or only its revenues.

The distinction of *latae* and *ferendae sententiae* also applies to suspension. But the distinction between a *suspensus vitandus* and *toleratus* has no foundation in the Code.

EFFECTS OF SUSPENSION

Can. 2279

§1. Suspensio *ab officio* simpliciter, nulla adiecta limitatione, vetat omnem actum tum potestatis ordinis et iurisdictionis, tum etiam merae administrationis ex officio competentis, excepta administratione bonorum proprii beneficii.

§2. Suspensio:

1.° *A iurisdictione* generatim, vetat omnem actum potestatis iurisdictionis pro utroque foro tam ordinariae quam delegatae;

2.° *A divinis*, omnem actum potestatis ordinis quam quis sive per sacram ordinationem sive per privilegium obtinet;

3.° *Ab ordinibus*, omnem actum potestatis ordinis receptae per ordinationem;

4.° *A sacris ordinibus*, omnem actum potestatis ordinis receptae per ordinationem in sacris;

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5.° *A certo et definito ordine exercendo,* omnem actum ordinis designati; suspensus autem prohibetur insuper eundem ordinem conferre et superiorem recipere receptumque post suspensionem exercere;

6.° *A certo et definito ordine conferendo,* ipsum ordinem conferre, non vero inferiorem nec superiorem;

7.° *A certo et definito ministerio,* ex. gr., audiendi confessiones, vel *officio,* ex. gr., cum cura animarum, omnem actum eiusdem ministerii vel officii;

8.° *Ab ordine pontificali,* omnem actum potestatis ordinis episcopalis;

9.° *A pontificalibus,* exercitium actuum pontificalium, ad normam can. 337, §2.

Can. 2280

§1. Suspensio a *beneficio* privat fructibus beneficii, excepta habitatione in aedibus beneficialibus, non autem iure administrandi bona beneficialia, nisi decretum vel sententia suspensionis ipsam administrandi potestatem suspenso expresse adimat et alii tribuat.

§2. Si, quamvis censura obstet, beneficiarius fructus percipiat, fructus restituere debet et ad hanc restitutionem cogi potest canonicis quoque, si opus sit, sanctionibus.

A suspension may be inflicted on individual clerics or on a body of clerics as a corporation.

1. The *effects of special suspension from office* are mentioned in can. 2279, §1. It is evident from can. 145 that *office* is to be taken in the strict sense, *i. e.,* for a charge, either divinely or ecclesiastically established, conveying some of the power of order or jurisdiction,—supposing, of course, the clerical character, at least the

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tonsure. All temporal rights, such as administration, are included only in so far as they are strictly connected with the spiritual office.

If, therefore, *suspension from office* is inflicted without any further restriction,[7] it forbids the *exercise of any act of the power of order or jurisdiction, and of mere administration attached to the office itself*. But the administration of one's benefice is not withdrawn. Besides, it should be noted that the office itself is not lost, for the effect touches only the exercise of rights. Consequently, a suspended priest cannot lawfully say Mass, or administer the Sacraments, except as far as canons 2284 and 2261 permit (of which see below). Neither can a suspended prelate grant indulgences or inflict censures, under the same restriction (*i. e.*, can. 2284), for these are acts of jurisdiction.

As to acts of administration accruing to the office itself, such are mentioned under can. 262; 691, §1; 1489; 1520 f. Thus the administrators and rectors of pious associations, provided they are clergymen, lose the right of administration if suspended. Exception is made of the administration of one's own benefice, which means that a pastor may retain control of the revenues of his benefice. But if suspended, he could not administer the benefice of another pastor. Assistance at marriage is invalid only after a declaratory or condemnatory sentence,[8] or according to can. 2284.

Since, however, a *suspension from office may be only* partial,— which fact should be duly stated in the decree or sentence,— the Code distinguishes *various degrees or cases* of suspension from office.

7 For instance, if the bishop should say: "I hereby suspend you from your office," the office which the addressed cleric holds is meant.

8 See can. 1095, § 1, n. 1.

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1. Suspension from jurisdiction *(a iurisdictione)*, in general, forbids the exercise of every act of ordinary as well as delegated power of jurisdiction in the external and internal forum; hence every grant of faculties or indulgences made by a superior thus suspended is forbidden, nay, may even be invalid, according to can. 2284, also every exercise of judiciary or administrative power and every act of preaching or teaching is forbidden; and from the moment the suspension takes effect every delegation is ineffective.[9]

2. Suspension *a divinis forbids every act of the power of order which one may have received in virtue either of sacred ordination or of a privilege.* Hence all acts based upon the power of order are forbidden, *e. g.*, the administration of Sacraments and sacramentals, the celebration of holy Mass, and all the acts of order which one may exercise in virtue of a special indult or privilege, such as conferring minor orders, confirmation, consecration or blessings.[10]

3. Suspension from orders *(ab ordinibus)* forbids every act of the power of orders received by ordination. Consequently this more general prohibition includes what is specifically stated under n. 4. But powers granted by privilege or indult, *e. g.*, that of conferring minor orders, are not included in this prohibition.

4. Suspension from sacred orders *(a sacris ordinibus)* forbids every act of the power of sacred or higher orders, *i. e.*, from subdeaconship onward (can. 949).

5. Suspension from *exercising* a certain specified order *(a certo et definito ordine exercendo)* forbids only the exercise of that order. But the cleric thus suspended is

9 Attention should, however, be called to can. 209.

10 See can. 951; can. 782; can. 1147, § 1;—but no privilege is involved in can. 964.

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not allowed to confer or to receive a higher order, nor to exercise a higher order after suspension. Thus a priest suspended from the priesthood may not say Mass or impart the blessings reserved to priests, but he may impart the blessings which deacons can give. This is also true of blessings which he may impart by a special indult.[11] Thus a priest under such a suspension may lawfully distribute holy Communion, since deacons may perform this function; he may also confer Baptism, but not solemnly.[12] But a priest thus suspended may not licitly be promoted to the episcopate, or, if promoted, exercise episcopal functions. A bishop suspended from the exercise of the episcopal order cannot licitly consecrate a bishop. But a bishop suspended from the priestly order may exercise and confer all orders, with the sole exception of the sacerdotal order.

6. Suspension from conferring a certain and specified order *(a certo et definito ordine conferendo)* forbids administering only that order and none other, either higher or lower.

7. Suspension from a certain and specified ministry or office *(a certo et definito ministerio vel officio)* forbids the exercise of acts attached to that specific ministry or office. Thus if a confessor, teacher, or preacher is suspended, it means that he cannot hear confessions, or teach in an ecclesiastical capacity, or preach the word of God.[13] If a chancellor is suspended, it signifies that he cannot exercise these offices as long as the suspension lasts;[14] if a priest is suspended from the care of souls, every act con-

11 Can. 1147, n. 1, 2–4. For the necessary order is not lost, neither is the indult taken away by suspension of n. 5.

12 Can. 742, § 2.

13 See can. 2317.

14 See can. 373, § 5.

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nected with that office is forbidden, such as hearing confessions, visiting the sick, etc.[15]

8. Suspension *ab ordine pontificali* forbids the exercise of acts belonging to the episcopal order, *e. g.*, the conferring of orders, Confirmation, the consecration of churches or altars, etc.[16]

9. Suspension *a pontificalibus* forbids the exercise of pontifical acts for which mitre and crozier are required according to the liturgical laws; for these two emblems always go together.[17] Is this suspension identical with the preceding one? It would seem that if all acts proper to the episcopal order are comprised by the name pontificals, as Thesaurus and Benedict XIV expressly state,[18] the difference seems to be very slight. Thus Thesaurus says: Among these acts are enumerated: the conferring of orders,[19] the consecration of sacred vessels, churches, virgins, and chrism, Confirmation, blessing of vestments and corporals, sacerdotal acts usually performed with mitre and crozier; also the conferring of the tonsure. Some of these acts belong strictly to the episcopal order, *viz.*: the conferring of holy orders, Confirmation and consecration. How, then, is n. 8 to be distinguished from n. 9? Reference to can. 337, §2 does not solve the difficulty. To us it seems that by acts of the episcopal order are understood all acts which require, at least *per se*, the episcopal character; whilst the term "pontificals" includes purely ceremonial functions, or, as Thesaurus says, the priestly acts performed with mitre and crozier.

15 See can. 462, 464, 892.

16 See can. 951; 782, § 1; 1147, § 1.

17 *Caeremoniale Episcop.*, l. I, c. 17, nn. 4, 8.

18 *De Poenis Eccl.*, P. II, c. 5 (*ed. cit.*, p. 180); Bened. XIV, "*Ad audientiam*," Feb. 15, 1753, § 8.

19 Bened. XIV, *l. c.*, distinctly adds: also of minor orders.

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If this should be too restrictive, it may also be said, without doing violence to the text, that n. 9 comprises all acts performed with mitre and crozier, and therefore is more comprehensive than n. 8. The former interpretation appears more probable because it clearly distinguishes the two suspensions and minimizes the penalty.[20]

10. *Suspension from benefice* is the subject of can. 2280. By benefice is understood a juridical entity established by competent authority, consisting of an office and the right to receive the revenues attached to the same. As insinuated elsewhere,[21] there may be a doubt as to our country and other countries where benefices in the sense attached to that term before the promulgation of the Code are almost unknown. However, it appears that the wider range of endowment and the less strictly defined subjective perpetuity of beneficiaries clearly perceptible in the Code render it necessary to apply the term benefice to our parishes, as our pastors actually hold canonical parishes in the sense of the Code. Besides, there can hardly be any doubt that, even in our country, the income or salary of the pastor can be really distinguished from the office he holds. This suffices to assume that the term *fructus beneficii* comprises all the revenues accruing from an office which one holds. Consequently, suspension from benefice is applicable also to our country and other countries similarly situated.

The effect of *suspension from benefice* consists in *privation of the fruits or revenues of the benefice.* By this name *(fructus beneficii)* is understood all the material

20 There is only one difficulty: Are *abbots,* if suspended *a pontificalibus,* allowed to confer tonsure and minor orders on their own subjects? The answer should be affirmative; although we really doubt it, because the two emblems are, according to the Pont. Rom., required, and abbots do not possess the episcopal order.

21 See Vol. VI, can. 1411.

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or temporal income derived from the benefice, whether in specie or natural offerings, tithes, interest, produce, etc. *Not included* in these are manual Mass stipends, (to some extent) daily distributions,[22] much less patrimonial and quasi-patrimonial possessions, revenues which were due at the moment the suspension was incurred, pensions, government subsidies.

Our *Code exempts from these fruits*:

a) the dwelling or *living in the residence of the beneficiary, i. e.,* the actual accupation of the parsonage for the purpose of dwelling therein: this can in nowise be taken away from the clergyman, even though he be suspended by a declaratory or condemnatory sentence;

b) the *right of administering the benefice,* which means that he can continue to perform all legal acts required for the lawful administration, improvement, and safeguarding of his benefice.[23] However, this right, says the Code, may be taken away by a decree or sentence and given to another. But the decree or sentence must expressly state this fact. If the suspended cleric himself administers the benefice, he is entitled to an adequate remuneration for his expenses and labor.[24]

§2 of can. 2280 obliges a cleric suspended from his benefice *to make restitution of the fruits received during the time of suspension.* He has unjustly acquired something to which he was not entitled.[25] Therefore, says the text, *if he should refuse to make restitution, he may be compelled to do so by penal measures, even censures, if*

22 Cfr. can. 394 f.; but to some extent daily distributions may constitute a benefice as per can. 1410; thus also stole fees (but not in our country, where the stole fees are properly distinguished from salary).

23 The old law also took away this right; cc. 1, 16, 6°, I, 6.

24 Cfr. Hilarius a Sexten, *l. c.,* p. 73.

25 Suarez, *De Cens.,* disp. XXVII, sect. 1, n. 7.

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necessary. It is evident that, since a benefice is considered to be a juridical entity, restitution must be made to the very benefice or to the church to which it is attached. Neither can a suspended cleric dispose of the revenues at will. The obligation in conscience is retroactive up to the moment when the censure was incurred, though with the benefit mentioned in can. 2232, §1.

Since suspension from a benefice is adequately distinguished from suspension from an office, it follows that the acts forbidden to one suspended from office are not the same as those forbidden in virtue of suspension from a benefice. Consequently, not only the rights, but also the duties, attached to the office remain intact, even though the remuneration may fail. This punishment was intended, that the delinquent may, by receding from contumacy, obtain absolution and rehabilitation. But the fruits lost during the time of suspension cannot be reclaimed, unless the sentence has been declared invalid or its unjustice becomes manifest afterwards.[26]

EXTENT OF SUSPENSION

Can. 2281

Suspensio generaliter lata vel suspensio _ab officio_ aut _a beneficio_ afficit omnia officia aut beneficia, quae clericus habet in dioecesi Superioris suspendentis, nisi aliud appareat.

Can. 2282

Loci Ordinarius nequit clericum suspendere a determinato officio vel beneficio quod in aliena dioecesi

[26] Suarez, *l. c.*, disp. XXVII, sect. 2, n. 6; Wernz, *l. c.*, VI, n. 211, p. 220.

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reperiatur; sed suspensio latae sententiae, iure communi irrogata, afficit omnia officia vel beneficia in quacunque dioecesi possideantur.

Can. 2283

Quae de excommunicatione can. 2265 statuuntur, etiam suspensioni sunt applicanda.

There is implied in the first two canons a distinction which is common to all censures, *viz.: a iure* and *ab homine,* either *ferendae* or *latae sententiae* (see can. 2217). Besides this, another distinction is hinted at, *viz.:* that between *ius commune* and *ius particulare.* Both may again be *latae* or *ferendae sententiae.* Thus a particular community may enact suspension *ipso iure, i. e., particulari;* and the Ordinary, or judge, or religious superior of an exempt organization may also inflict a sentence of suspension *(ab homine, ferendae sententiae).* The suspensions *iure communi irrogatae* are contained in the Code, and besides these, no others of common law are to be heeded (can. 6, n. 5). Thereby, of course, the supreme legislator or a general council is not bound, in the sense that they could not, *iure communi,* either decree or inflict a suspension not contained in the Code.

The general principle, "*Extra territorium jus dicenti impune non paretur*" [27] is applicable here, provided the distinction between common and particular law be duly noted.

1. *A suspension that is generally worded and inflicted, concerns all offices and benefices which the cleric holds in the diocese of the superior who inflicts the suspension from office or benefice, unless the contrary is evident.*

[27] C. 2, 6°, I, 2.

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This general suspension does not apply outside the diocese, for it is supposed to be inflicted either by a particular law or by the superior, *ab homine*. Consequently if one holds an office or benefice in a strange diocese, the exercise of that office or benefice would not be curtailed by such a general suspension. The contrary intention would have to be made known by the Ordinary of the strange diocese.[28]

2. A *total suspension from office* comprises all the offices — but not the benefices — one holds in the diocese of the superior who inflicts the suspension, unless the contrary is apparent.

3. A *total suspension from benefice* extends to all the benefices—but not to all the offices—one holds in the diocese of the superior who suspends, unless, again, the contrary intention of the superior is obvious.

4. The *local Ordinary,* according to can. 2282, *cannot suspend* a clergyman *from a specified office or benefice* that belongs to *another diocese.* For this suspension supposes either a particular law or a sentence inflicted by the superior, the effect of which cannot be extended to the territory where the jurisdiction of the suspending superior ceases.[29] The contrary opinion held by some is, therefore, wrong.[30]

5. A suspension *latae sententiae* inflicted by common law, *iure communi, affects all offices and benefices,* no matter in what diocese the suspended cleric may hold them. Of course, this suspension is here supposed to be general and total without restriction.[31]

28 See c. 37, 6°, I, 6: a suspension of three years inflicted *ipso iure,* yet binding only for the diocese for which the *compromissarii* elected an *indignus,* not for the benefices he held in a strange diocese.

29 Ballerini-Palmieri, *l. c.,* Vol. VII, n. 501 ff.; p. 284 ff.; Wernz, *l. c.* VI, n. 208, p. 215.

30 This opinion was held by Suarez and Thesaurus, cfr. Wernz, *l. c.*

31 Ballerini-Palmieri, *l. c.;* Wernz *l. c.*

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According to the common opinion of canonists, a cleric suspended *ab ordine* is obliged to observe the suspension everywhere, because suspension is a personal penalty which the common law desires and demands to see respected.[32] Since in the suspension *ab ordine* is included the suspension *ab officio* or a *divinis,* it follows that a cleric suspended from office, or *a divinis,* even though suspended only *ab homine,* or by a particular law, cannot exercise his order anywhere. Consequently, can. 2280, as stated above, must be understood as follows: The suspension *ab officio* inflicted by a diocesan superior must be observed in the diocese and elsewhere, and the suspension *ab ordine* is implicitly included in the suspension *ab officio.* Otherwise we should have to give up the teaching of the school, stated above, that suspension *ab o dine* obliges everywhere, and simply state that suspension, unless decreed or inflicted by common law, is merely local, *i. e.,* diocesan.

It may be asked: How can one suspended *ab officio* in diocese A, and holding an office in diocese B, where he is not suspended, exercise his office in diocese B, since the exercise of the power of order is taken away from him by his superior? The answer is that the effects are separable, and therefore jurisdiction is not taken away in diocese B. Besides, what one cannot do by himself, he may do through a substitute, and a benefice is not affected by suspension from office.

Can. 2283, perhaps too briefly, *applies the effects of excommunication also to suspension.* The suspended cleric loses the active and passive voice and cannot be promoted to orders, as stated in can. 2265 with regard to excommunication. This is quite clear. But not so

32 Ballerini-Palmieri, *l. c.,* n. 502, p. 285.

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evident is the answer to the question whether the legislator means to attach these effects only to *general suspension.* Ancient [33] as well as modern commentators disagree on this point. A modern writer says: "Some canonists held, against the common opinion, that these effects are produced only by general suspensions from benefice; but the present law does not distinguish, and assimilates suspended clerics to excommunicated ones in this matter." [34] Therefore, according to this author, the effects enumerated in can. 2265 follow each and every kind of suspension, because the law does not distinguish. But this reasoning is not exactly to the point. For can. 2278, §2 *does distinguish* between various suspensions, and only to the *suspensio generaliter lata* must be applied all the effects enumerated in article III, ch. II, title VIII of this fifth book. Hence the argument *ex silentio* proves nothing in this matter. There is also an essential distinction between excommunication and suspension, because the effects of the former, unlike the effects of the latter, are inseparable. Therefore, only a general suspension can be assimilated to excommunication, but never a special one, be it total or partial. Besides, since penalties must be interpreted benignly and, if the text is obscure, the least must be assumed,[35] we cannot help accepting the interpretation that general suspension only is accompanied by the effects mentioned in can. 2265. A last observation may confirm this statement. Can. 2265 commences with *quilibet excommunicatus,* every excommunicated person. Analogously we should say in can.

33 Wernz, *l. c.,* VI, n. 209, p. 216, calls the opinion which holds that *every* suspension produces the effects mentioned in can. 2265, *communior,* although he himself does not share it.

34 Ayrinhac, *l. c.,* p. 149; V. Cappello, *l. c.,* p. 167 is silent; Eishmann, *l. c.,* p. 104, accepts the view of Wernz.

35 See *Reg. Iuris 49, 30, in 6°.*

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2283: every suspended cleric — which would mean, concretely speaking, that every cleric suspended *ab ordine pontificali, a pontificalibus,* or *a divinis* would also lose the active and passive voice.[36] This sounds untenable and improbable, and consequently we hold that, in can. 2283, only a *general suspension is intended, i. e.,* one worded and inflicted in general terms, comprising office and benefice, to the exclusion of every special suspension, either total or partial.[37]

MITIGATION OF THE EFFECTS

Can. 2284

Si incursa fuerit censura suspensionis quae vetat administrationem Sacramentorum et Sacramentalium, servetur praescriptum can. 2261; si censura suspensionis quae prohibet actum iurisdictionis in foro seu interno seu externo, actus est invalidus, ex. gr., absolutio sacramentalis, si lata sit sententia condemnatoria vel declaratoria, aut Superior expresse declaret se ipsam iurisdictionis potestatem revocare; secus est illicitus tantum, nisi a fidelibus petitus fuerit ad normam mem. can. 2261, §2.

Here the modification stated in can. 2261 is extended to suspension.

1. If a suspension is incurred that forbids the *administration of Sacraments and sacramentals,* as is the case in suspensions *ab officio* and *a divinis,* the suspended cleric

36 The loss of the active voice was not denied by Schmalzgrueber; V, tit. 39, n. 298.

37 The texts quoted in Card. Gasparri's edition for can. 2283 mention suspension, but leave it doubtful whether a general or special suspension had been incurred; this is especially the case with c. 8, X, I, 4. We do not, however, deny that the text apparently favors the opinion rejected above.

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may lawfully administer them only in case he is legitimately requested by the faithful; nor is he obliged in this case to ask for the reason of the demand. This favor, however, supposes that no condemnatory or declaratory sentence has been pronounced against him. For after such a sentence the faithful could not lawfully demand of him the administration of the Sacraments or sacramentals, nor could he lawfully accede to the request, except in case of danger of death, when other ministers were wanting.

2. When the suspension, *e. g., ab officio, a iurisdictione, a definito et certo ministerio (audiendi confessiones)* forbids an *act of jurisdiction* either in the internal or external forum, the act performed under such censure is *invalid,* if a condemnatory or declaratory sentence has been pronounced or if the superior has expressly declared that the power of jurisdiction is withdrawn; but if no such sentence or such express declaration has been made, the act of jurisdiction is valid, even though *illicit.* Nay, it even becomes lawful if the minister has been legitimately asked by the faithful. In danger of death the act of jurisdiction which is exercised in the form of sacramental absolution is valid and licit, even though other priests or ministers are available (can. 2261).

SUSPENSION OF COMMUNITIES

Can. 2285

§1. Si communitas seu collegium clericorum delictum commiserit, suspensio ferri potest vel in singulas personas delinquentes vel in communitatem, uti talem, vel in personas delinquentes et communitatem.

§2. Si primum, serventur huius articuli canones.

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§3. Si alterum, communitas prohibetur exercitio iurium spiritualium quae ipsi, uti communitati, competunt.

§4. Si tertium, effectus cumulantur.

History proves that a community may be suspended.[38] That it is juridically possible follows from the fact that a community, as such, may be guilty of crimes and, consequently, liable to punishment. Special rights are attached to corporate bodies and may be suspended for a time. As a crime (for instance, appropriation or embezzlement of church property or disobedience to lawful authority) may be perpetrated by single members of a community, as members, or by the community as such (for instance, by a capitular decree), or by single members *and* the community simultaneously, it follows that a community or corporation can be suspended in three different ways.

1. If *single members* of a community (also male religious[39]) are suspended, all the effects which that suspension involves, follow, and therefore what has been stated in connection with canons 2278-2284 must here be applied.

2. If the *community or corporation* as such is suspended, all its spiritual corporate rights, *i. e.,* spiritual rights which the community as such enjoys, are suspended. To this class belong especially the rights of

38 Cathedral, collegiate, and religious chapters, *sede vacante,* proved detrimental to the property of the prelates or church, and were therefore suspended; c. 40, 6°, I, 6; c. un. 6°, III, 8.

39 Of female chapters the Canon Law says nothing, although some abbesses overstepped the limits of their power, examples of which may be found in c. 10, X, V, 38; c. 12, X, I, 33, in which latter chapter an abbess is said to have suspended her clerics from office and benefice. Neither are female religious suspended.

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election, presentation, nomination; also, we presume, that of corporate representation at processions, and therefore also the right of precedence. All these are suspended (see can. 2275); but the right to administer property is not stopped. It also appears logical to deny the right of exercising pontifical functions, if such belong to a suspended community.

3. If *single members and the community as such* are suspended, the effects are bulked, according to can. 2275.

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TITLE IX

VINDICTIVE PENALTIES

Can. 2286

Poenae vindicativae illae sunt, quae directe ad delicti expiationem tendunt ita ut earum remissio e cessatione contumaciae delinquentis non pendeat.

Can. 2287

Ab inflictis poenis vindicativis datur appellatio seu recursus in suspensivo, nisi aliud expresse in iure caveatur.

Can. 2288

Exceptis poenis degradationis, depositionis, privationis officii aut beneficii, et nisi urgeat necessitas reparandi scandalum, prudentiae iudicis remittitur, si reus talis sit ut prima vice post vitam laudabiliter peractam deliquerit, poenae ordinariae per sententiam condemnatoriam inflictae exsecutionem suspendere, ea tamen conditione ut, si reus intra proximum triennium aliud delictum eiusdem vel alterius generis commiserit, poenam utrique delicto debitam luat.

Can. 2289

Poena vindicativa finitur eius expiatione vel dispensatione ab eo concessa qui legitimam habeat dispensandi potestatem ad norman can. 2236.

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Can. 2290

§1. In casibus occultis urgentioribus, si ex observatione poenae vindicativae latae sententiae, reus seipsum proderet cum infamia et scandalo, quilibet confessarius potest in foro sacramentali obligationem servandae poenae suspendere, iniuncto onere recurrendi saltem intra mensem per epistolam et per confessarium, si id fieri possit sine gravi incommodo, reticito nomine, ad S. Poenitentiariam vel ad Episcopum facultate praeditum et standi eius mandatis.

§2. Et si in aliquo casu extraordinario hic recursus sit impossibilis, tunc ipsemet confessarius potest dispensationem concedere ad normam can. 2254, §3.

Every society is instituted for the welfare of its members, but also for the sake of its own existence and weal. This lies in the nature of society. The Church, too, must necessarily provide for the salvation of souls, this being her supreme law. But as a human society consists of men, not of angels, it is evident that the Church has to wield a sword in order to exact obedience if other means fail. This privilege belongs to her as an autonomous society. Self-respect and self-preservation prescribe means that savor of atonement and public reparation. Such means are called vindictive penalties, because their primary end is to avenge the public order. It is not necessary to recall the penitential system, which had very much of a public character up to the twelfth century. Neither is it necessary to remind the reader of the historical fact that, during the time of religious union, the vindictive measures were more numerous and more

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effectively enforced than now, and that in the course of later centuries they became fewer and more spiritualized. Still the present number is far from insignificant.

1. *Vindictive penalties,* says can. 2286, *are intended directly for the expiation of crimes, and consequently their relaxation does not depend on the mere cessation of contumacy.* The reason for this statement has been given above. These penalties are called *vindictive* because their object is to avenge the social and juridical order of the Church. They are *penalties* because inflicted by lawful authority by way of privation, as plainly appears in all the penalties enumerated in canons 2291 and 2298.

Note that vindictive penalties may be either *latae* or *ferendae sententiae.* Those *latae sententiae* require no judiciary trial.[1] A declaratory sentence is indeed required, *i. e.,* one to ascertain the criminal fact, but this does not mean that the delinquent would not be obliged to execute the sentence on himself if he knew himself to be guilty of a crime on which the law puts a certain penalty. Can. 2232, § 1, expressly says that vindictive penalties have the same obligation attached to them as corrective penalties. There are, however, exceptions to this self-execution; see can. 2290.

2. *Appeal* or *recourse from vindictive penalties is admitted,* and this appeal has a *suspensive,* not merely a devolutive effect, unless the law contains an express provision to the contrary. This, of course, must be understood of such penalties as are inflicted *ab homine* or *a iure,* but *ferendae sententiae;* because when the law

1 Can. 2223 f. and can. 2290, § 1 distinctly mention a vindictive penalty *latae sententiae;* wherefore we cannot agree with Eichmann, *l. c.,* p. 109, that vindictive penalties can be inflicted only after a trial; see also Thesaurus-Giraldi, *l. c.,* p. 1, c. 5, p. 5, who admits such a penalty *latae sententiae;* especially ineligibility for office.

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declares a penalty to be incurred *ipso iure*,[2] there is no recourse or appeal with suspensive effect possible.[3] The suspensive effect, to repeat what was said before, means that, pending the recourse or appeal, the delinquent is not bound to consider or to conduct himself as convicted or guilty, either in the internal or in the external forum.

3. *Suspension of the sentence* is a mitigation introduced in legal terms by the Code. It may be called a conditional pardon, such as is granted by judges on condition of good behaviour in future, and has been used in civil codes.[4] In our can. 2288 it is called a *suspension of the execution of a condemnatory sentence* by which an ordinary penalty is inflicted. An ordinary penalty is one which is determined in law or by custom[5] and does not exceed the proportion of imputability, scandal, and damage (see can. 2218). The judge may prudently apply this benefit of the law to a delinquent who had led an irreproachable life before, but now has committed a punishable crime for the first time. Suspension of sentence

a) Is a *conditional* suspension or pardon, for *if the delinquent commits the same or a different crime within three years* (from date of the conditional pardon) *he has to pay the penalty originally decreed as well as the penalty determined for the new crime*. But the suspended penalty is not retroactive; or, at least the text is silent about its retroactive character.

b) *The benefit of conditional pardon cannot be applied* by the judge if: 1°. the penalty of degradation, deposition, privation from office or benefice has been inflicted, or

2 See can. 2343, § 1, n. 2: *est ipso iure infamis.*

3 Thesaurus-Giraldi, *l. c.*, p. 39; p. 1, c. 25.

4 Thus the *Regolamento* of Gregory XVI, art. 36, § 4; art. 49; Wernz, *l. c.*, VI, n. 85, p. 93.

5 Schmalzgruber, V, 37, n. 11.

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if 2°. there is need of repairing public scandal, because vindictive penalties are intended for the maintenance of the public order.

4. *Cessation of penalties.* Since the object just mentioned can be obtained by atonement or *expiation,* it is evident that, if satisfaction is made, the penalty should cease. This is readily understood if the penalty was a fixed one, as happens when a fine is imposed, or if the penalty is limited to a certain time, after the lapse of which it ceases.[6] Prescription cannot be alleged, inasmuch as criminal action only, not penalty, is liable to prescription.[7] But in many cases expiation has a relative meaning, which depends upon the acceptance of the ecclesiastical authority, who must decide whether atonement is sufficient.

Therefore, besides expiation, can. 2289 mentions a more specific manner of releasing the penalty; *viz.: by dispensation.* As dispensation in general is a relaxation of the law, so here it is the remission of a penal law or sentence. Such a relaxation can proceed only from the authority which has the power to enact penal laws or inflict vindictive penalties.[8] This, however, must be judged according to can. 2236. Consequently:

a) *A dispensation can be granted only by the prelate* who inflicted the penalty and, therefore, a penalty inflicted by *common law* can be remitted only by the *Pope;* a penalty inflicted by a *particular law* or statute can be remitted by the one who enacted that particular law,

6 Thesaurus-Giraldi, *l. c.,* p. 41.

7 See can. 1703–1705.

8 Of little practical value is the distinction between *absolution* and *dispensation,* as if the former proceeded from the judiciary, the latter from the legislative power (thus Hollweck, *l. c.,* p. 141 according to Thesaurus-Giraldi, *l. c.,* p. 21); yet there is a difference between the two, inasmuch as absolution is an act of justice *(actus iustitiae),* whereas dispensation is a favor *(actus gratiae).*

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i. *e.*, concretely speaking, by the local Ordinary,[9] or in the case of exempt religious communities, by the competent superior who enjoys this power according to the constitutions.

b) A penalty inflicted by a superior *ab homine* can be dispensed with by himself;

c) And, since the *successor* in office has equal power, he, too, can dispense; the same, of course, is to be said of *delegates*.

d) But a *judge* who merely applies the penal law or precept cannot dispense from penalties, since his office ceases with the sentence and his power is thereby exhausted.[10]

All other extensions of these principles, proposed by authors,[11] must be limited to the rules stated above; but the Code has adopted some of the modifications providing for urgent cases (see can. 81).

5. *Extended power* is given to confessors for *more urgent occult cases*. What occult or secret crimes are has been explained in can. 2197, 4°. This power is limited as follows:

a) It is not only *conditioned* upon *secrecy and urgency*, but the observance of the vindictive penalty, which is supposed to be *latae sententiae*, must, at least probably, cause the loss of good name to the delinquent and scandal to the people. Of the existence of this condition the petitioner may judge, and his testimony must be believed. Take, *e. g.*, suspension from office for a certain time, or refusal to accept a dignity offered, of which the confessor might know nothing.

9 Not by the metropolitan, nor even by the Apostolic Delegate, unless the latter has obtained delegated power; but his delegation generally concerns only matters *a iure*, not *ab homine*.

10 Wernz, *l. c.*, VI, n. 88 f.; p. 93.

11 Thesaurus-Giraldi, *l. c.*, p. 29 ff.

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b) The power granted to confessors is *limited* also in this sense, that the confessor in the confessional—therefore not merely *in foro interno*—can only *suspend* the obligation of observing the vindictive penalty imposed by law, and must hold the penitent to the duty of *having recourse* to the proper authority in writing, through the confessor, within *one month* from the date of confession, if this can be done without serious inconvenience. This recourse must be had, without mentioning names, to the S. Poenitentiaria or to the bishop, if he enjoys the necessary faculties. The penitent must then abide by their orders.

c) *If in an extraordinary case recourse is impossible,* the confessor is empowered to grant the dispensation, according to can. 2254, §3.

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CHAPTER I

VINDICTIVE PENALTIES COMMON TO ALL THE FAITHFUL

Can. 2291

Poenae vindicativae quae omnes fideles pro delictorum gravitate afficere possunt, in Ecclesia praesertim sunt:

1°. Interdictum locale et interdictum in communitatem seu collegium in perpetuum vel ad tempus praefinitum vel ad beneplacitum Superioris;

2°. Interdictum ab ingressu ecclesiae in perpetuum vel ad tempus praefinitum vel ad beneplacitum Superioris;

3°. Poenalis translatio vel suppressio sedis episcopalis vel paroecialis;

4°. Infamia iuris;

5°. Privatio sepulturae ecclesiasticae, ad normam can. 1240, §1;

6°. Privatio Sacramentalium;

7°. Privatio vel suspensio ad tempus pensionis quae ab Ecclesia vel ex bonis Ecclesiae solvitur, vel alius iuris seu privilegii ecclesiastici;

8°. Remotio ab actibus legitimis ecclesiasticis exercendis;

9°. Inhabilitas ad gratias ecclesiasticas aut munia in Ecclesia quae statum clericalem non requirant, vel ad gradus academicos auctoritate ecclesiastica consequendos;

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10°. Privatio vel suspensio ad tempus muneris, facultatis vel gratiae iam obtentae;

11°. Privatio iuris praecedentiae vel vocis activae et passivae vel iuris ferendi titulos honoris, vestem, insignia, quae Ecclesia concesserit;

12°. Mulcta pecuniaria.

Can. 2292

Poenalis suppressio aut translatio sedis episcopalis est Romano Pontifici reservata; sedis autem paroecialis, a locorum Ordinariis decerni nequit, nisi cum consilio Capituli.

Can. 2293

§1. Infamia est vel iuris vel facti.

§2. Infamia iuris illa est quae casibus iure communi expressis statuitur.

§3. Infamia facti contrahitur, quando quis, ob patratum delictum vel ob pravos mores, bonam existimationem apud fideles probos et graves amisit, de quo iudicium spectat ad Ordinarium.

§4. Neutra afficit delinquentis consanguineos aut affines, firmo praescripto can. 2147, §2, n. 3.

Can. 2294

§1. Qui infamia iuris laborat, non solum est irregularis ad normam can. 984, n. 5, sed insuper est inhabilis ad obtinenda beneficia, pensiones, officia et dignitates ecclesiasticas, ad actus legitimos ecclesiasticos perficiendos, ad exercitium iuris aut muneris

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ecclesiastici, et tandem arceri debet a ministerio in sacris functionibus exercendo.

§2. Qui laborat infamia facti, repelli debet tum a recipiendis ordinibus ad normam can. 987, n. 7, dignitatibus, beneficiis, officiis ecclesiasticis, tum ab exercendo sacro ministerio et ab actibus legitimis ecclesiasticis.

Can. 2295

Infamia iuris desinit sola dispensatione a Sede Apostolica concessa; infamia facti cum bona existimatio apud fideles probos et graves, omnibus perpensis adiunctis et praesertim diuturna rei emendatione, fuerit, prudenti Ordinarii iudicio, recuperata.

Can. 2296

§1. Si agatur de rebus ad quas assequendas capacitas iure communi statuitur, inhabilitatis poenam infligere una Sedes Apostolica potest.

§2. Iura iam quaesita non amittuntur ob supervenientem inhabilitatem, nisi huic addatur poena privationis.

Can. 2297

Mulctas pecuniarias iure communi inflictas, quarum erogatio non sit eodem iure praefinita, aliasque iure peculiari statutas vel statuendas, Ordinarii locorum erogare debent in pios usus, non vero in commodum mensae episcopalis aut capitularis.

This chapter enumerates,— *demonstrative,* not *taxative,* as the word *praesertim* indicates,— some vindictive pen-

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alties which may be imposed on any delinquent Catholic in proportion to the gravity of his crime (see can. 2218).

Four species of penalties are explained in special canons: transfer, infamy, disability, and fines.

1. The *interdict,* as far as it is imposed upon a community or corporation, is either local or personal, but it is to be considered as a vindictive penalty only if inflicted *either forever, or for a certain time,* or *ad beneplacitum superioris.* For if it is imposed merely for the time being, namely, until contumacy ceases, it is a censure. For the rest, the effects do not differ in either case.

2. The interdict *ab ingressu ecclesiae* forbids, according to can. 2277, entering the church, but only when divine offices are celebrated; during the sermon or at other times the church may be entered.

3. *Penal transfer* or *suppression of an episcopal see* or *parochial residence* differs from the administrative transfer of benefices mentioned in can. 1421 f. Besides stress must be laid on see, or residence, for it means a transfer from one place to another, not extinction. Suppression, however, involves extinction, and in that case a union with another diocese or parish would have to follow; this is called *unio extinctiva* (can. 1419 f.).

According to can. 2292 penal suppression or transfer of an *episcopal see* is reserved to the *Roman Pontiff, i. e.,* the S. C. Consistorialis (can. 248). But a *parochial residence* may be transferred or suppressed by the *local Ordinary,* provided he has asked the advice (he does not need the consent) of his chapter (with us, the diocesan consultors).

4. There is a twofold infamy distinguished in can. 2293: one of law, the other of fact.

a) *Infamy* of law *(iuris)* is that expressly stated in

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common law as a penalty for certain crimes;[12] it is legal conviction of a crime.

b) Infamy of fact *(facti)* exists when one, by reason of a crime committed, or on account of bad character, has lost his good reputation with upright and serious Catholics. Whether and when this is the case, is for the Ordinary to decide. Generally speaking, apostates, bigamists, adulterers contract *infamia facti.* But the facts must be proved, not merely asserted, and, as in criminal cases, at least two trustworthy witnesses are required.[13]

c) The effects of *legal infamy* are stated as follows:

1°. Legal infamy may be inflicted as a *penalty,* as per can. 2291, n. 4.

2°. Legal infamy involves *irregularity* according to can. 984, n. 5, and therefore no layman affected by it can receive the tonsure or any order without an apostolic dispensation.

3°. Legal infamy entails *disability* or disqualification for any ecclesiastical benefice, pension, office, dignity; if conferred, the act is invalid (can. 2391).

4°. It *disqualifies* the infamous person from performing any *legal ecclesiastical act* of the kind mentioned in can. 2256, n. 2, especially sponsorship.[14]

5°. It *disqualifies* the infamous person from *exercising any ecclesiastical right or charge, e. g.,* the right of election, presentation, or nomination,[15] or such charges as are involved in the offices of notaries, defenders, pro-

12 These crimes are mentioned in canons 2314, § 1, n. 2, 3; 2320; 2328, 2343, § 1, n. 2; § 2, n. 2; 2351, § 2; 2356; 2357, § 1; 2359, § 2.

13 Cfr. I Tim. 5, 19; can. 1939–1946.

14 See canons 765, n. 2; 766, n. 2; 795, n. 2; 796, n. 3.

15 See canons 167, § 1, n. 3; 1470, § 4.

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curators or attorneys, counsel, administrators,[16] and, we suppose, also church trustees.

6°. An infamous person must be prevented from *coöperating in sacred functions,* such as serving at Mass, carrying the canopy, cross, or censer, playing the organ at divine service, etc.

d) *Infamia facti* produces the following effects:

1°. It constitutes a canonical *impediment* for receiving orders, but does not render one irregular (can. 987, n. 7).

2°. It *disqualifies* one from *lawfully* (not validly) *accepting ecclesiastical dignities, benefices, or offices.*

3°. Infamous persons may not *exercise any function of the sacred ministry* which may ordinarily be performed by laymen, as stated above.

4°. They must be repelled from exercising *actus legitimi* as explained under can. 2256, n. 2. Those who are manifestly infamous must also be refused the Holy Eucharist (can. 855, §1).

Note that *neither legal infamy* nor *infamy of fact affects the blood relations or legal relations of the infamous subject.* Therefore, the *consanguinei* and *affines* of an infamous person are not included in this penalty, nor do the effects of infamy affect them. On the other hand, a pastor may incur the infamy of his *familiares* and blood relations and be removed in an administrative way on this account (can. 2293, §4; can. 2147, §3, n. 3.).[17]

e) *Cessation of infamy.*

16 See canons 373, § 3; 1571, § 3; 1589, § 1; 1657, § 1; after a condemnatory or declaratory sentence they are excluded from being witnesses or experts; can. 1757, 1795, 1931; but not from being plaintiffs, at least no such exclusion is stated; Eichmann, *l. c.,* p. III.

17 Can. 1755, § 2, n. 2, must be applied to both kinds of infamy, and hence a witness who is afraid of causing infamy to himself or to his relatives is not obliged to answer on the witness stand.

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1°. Legal infamy or *infamia iuris* can be removed only by an *Apostolic dispensation;* this is true with one exception, *viz.:* occult urgent cases, for in these can. 2290 may be applied.[18]

2°. Infamy of fact *(infamia facti)* ceases by *rehabilitation* of one's good name, *i. e.,* by regaining one's lost reputation with upright and serious Catholics. This depends upon particular circumstances, continued good behavior, and, above all, on the judgment of the Ordinary.

An observation on *civil infamy* may not be superfluous. The Roman law[19] branded several crimes with infamy *(infamia notati)*. Its regulations were partly adopted and partly modified by the common law.[20] However, the modern civil legislation on this subject, though based upon the Roman law, at least in Latin countries, has never been formally adopted by the Church. Consequently, when we speak of *infamia iuris* in ecclesiastical language, this must be strictly understood of Canon Law only. It does not follow, however, that civil infamy, which generally consists in the withdrawal of civic rights, at least for a time, does not produce canonical infamy of fact (*infamia facti*).[21] Therefore bishops, as custodians of discipline, should not lose sight of the particular laws of their respective countries. In England and many States of the U. S., all disqualifications, such as disability to serve as witness or juror, have been abolished.[22] Notwithstanding this abolition of the effects of infamy, however, certain crimes are still known as infamous and should therefore be taken as a directive norm for

18 See also can. 1948, § 1: *correptio iudicialis* cannot be substituted in case of infamy.

19 Cfr. Dig. 3, 2, *de his qui infamia notantur.*

20 Cfr. cc. 2, 17, C. 6, q. 1; c. 5, Dist. 51; c. 4, x, IV, 21; c. 5, 6°, V, 9.

21 Wernz, *l. c.,* VI, p. 112, n. 105.

22 *New International Encycl.,* 1904, Vol. X, *s. v.* "Infamy."

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ecclesiastical presumption, more especially when admission to the clerical state is in question.

5. *Privation of ecclesiastical burial,* according to the rules laid down in can. 1240, §1.

6. *Privation of the sacramentals,* for instance, churching of women, nuptial blessing, blessing of homes.

7. *Privation or temporary suspension of pensions* which the Church is wont to pay, or which come from ecclesiastical property; also *withdrawal of some other ecclesiastical rights or privileges.* Therefore, state pensions or pensions paid by private persons or companies, although they may have an ecclesiastical name or be under ecclesiastical guidance, do not fall under the heading of ecclesiastical pensions.[23] A right that may be withheld is that of presentation, a privilege, that of a private oratory or a special seat in church.

8. *Exclusion from legal ecclesiastical functions,* such as sponsorship, proxy, lawyer (see can. 2256, n. 2).

9. *Disability* to obtain: (a) ecclesiastical favors, for instance, dispensations or privileges; (b) charges which do not presuppose the clerical state, for instance, notary, administrator, beadle, sexton, etc.; (c) academic degrees which are conferred by church authorities, either by ecclesiastical institutes[24] in the ordinary way, or by favor, *i. e., honoris causa.*

Can. 2296, on disability, has two sections. The first supposes that disability may be established by common law *(iure communi)* or by a particular law, as also *ab*

23 Eichmann, *l. c.,* p. 112.

24 Degrees conferred by secular universities are not excluded; nor are academic degrees which are conferred by ecclesiastical institutions, but in virtue of civil or State authority, for the text says: *auctoritate ecclesiastica.* Hence if a college or university has obtained a State diploma enabling it to grant B.A. or M.A. or Ph.D., etc., it may be legitimately acquired and retained.

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homine. Disability by common law, as, for instance, with regard to orders and advowson,[25] can be inflicted only by the Apostolic See. But if a particular law or diocesan statute should attach special qualities to a certain charge held in the diocese (for instance, church trustee), the disqualification can be established by the local Ordinary.[26]

§*2 of can. 2296* states that *rights* already acquired, *e. g.*, the right of a private oratory, *are not taken away by a supervening disability.* Disqualification, therefore, concerns only the future, not the past. However, the text adds quite logically: *"Nisi huic addatur poena privationis";* for if the penalty of privation is added and doubled, it is evident that charges, rights, favors, academic degrees may also be taken away; for it lies in the nature of privation that a man cannot be deprived of what he does not possess.

10. *Privation or temporary suspension of a charge, faculty,* or *privilege already obtained.* Concerning cases in which the Ordinary may dispense, see can. 2237. If privation requires a declaratory sentence, infamy excuses from its observance (can. 2232, §1), unless the crime is notorious. If the sentence of privation has been validly issued and carried out, the office becomes vacant (can. 183, §1).

11. *Withdrawal of the right of precedence, of the active and passive voice,* of the right of using honorary titles, of wearing robes and insignia granted by the Church, for instance, pontifical emblems and prelatical garb.[27]

12. *Pecuniary fines* began to be imposed in the seventh century and became quite frequent after the Germanic

25 Can. 948 ff., 1453, 2383, 2394.
26 See can. 2237 concerning public and occult cases.
27 See canons 325; 349, § 1, n. 2; 405; 407; 409.

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laws were applied.[28] But abuses soon crept in and became so scandalous that the Council of Trent thought it necessary to limit such fines.[29] The Code admits them for canons, for ecclesiastical judges, lawyers, and procurators, against unlawful alienators, unjust copyists or officials of diocesan courts who have to do with official documents, and those who overcharge in demanding taxes.[30]

The Code (can. 2297) regulates the *use* of fines as follows: Pecuniary fines inflicted by *common law,* but not determined by the same as to the manner in which they are to be employed, also fines established or to be inflicted by *particular law,* must be spent by the Ordinaries for *charitable purposes,* never for enriching the episcopal or capitular fund. Although payment could be enforced by ecclesiastical censures (can. 2198), the secular arm would hardly lend its aid in the matter.

28 Kober, in the *Tübinger Quartalschrift,* 1881, p. 3 ff. On pecuniary fines see c. 41, X, V, 3; c. 14, X; V, 6; c. 2, X, V, 26; c. 7, X, V, 36; Hollweck, *l. c.,* p. 154, § 85.

29 *Trid.,* Sess. 25, c. 3, *de ref.*

30 See canons 395, § 2; 413; 1625, § 2; 1666; 2347, n. 2; 2406, § 2; 2408.

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CHAPTER II

VINDICTIVE PENALTIES FOR CLERICS

Can. 2298

Poenae vindicativae quae clericis tantum applicantur, sunt:

1°. Prohibitio exercendi sacrum ministerium praeterquam in certa ecclesia;

2°. Suspensio in perpetuum vel ad tempus praefinitum, vel ad beneplacitum Superioris;

3°. Translatio poenalis ab officio vel beneficio obtento ad inferius;

4°. Privatio alicuius iuris cum beneficio vel officio coniuncti;

5°. Inhabilitas ad omnes vel ad aliquot dignitates, officia, beneficia aliave munera propria clericorum;

6°. Privatio poenalis beneficii vel officii cum vel sine pensione;

7°. Prohibitio commorandi in certo loco vel territorio;

8°. Praescriptio commorandi in certo loco vel territorio;

9°. Privatio ad tempus habitus ecclesiastici;

10°. Depositio;

11°. Privatio perpetua habitus ecclesiastici;

12°. Degradatio.

Can. 2299

§1. Si clericus beneficium inamovibile obtineat,

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eodem in poenam privari potest solum in casibus iure expressis; si amovibile, etiam ob alias rationabiles causas.

§2. Clerici obtinentes beneficia, officia, dignitates, possunt etiam aliquo tantum ministerio cum iisdem coniuncto, ex. gr., ministerio praedicandi, confessiones audiendi, etc., prohiberi ad certum tempus.

§3. Nequit clericus privari beneficio aut pensione cuius titulo ordinatus fuit, nisi aliunde eius honestae sustentationi provideatur, salvo praescripto can. 2303, 2304.

Can. 2300

Si clericus gravia scandala praebeat et monitus non resipiscat, nec scandalum queat aliter removeri, potest interim privari iure deferendi habitum ecclesiasticum; quae privatio, dum perdurat, secumfert prohibitionem exercendi ministeria quaevis ecclesiastica et privationem privilegiorum clericalium.

Can. 2301

Ordinarius nequit praescribere ut clericus certo in loco, extra fines suae dioecesis, commoretur, nisi accedat consensus Ordinarii illius loci vel agatur de domo poenitentiae seu emendationis clericis non solum dioecesanis, sed etiam extraneis destinata, aut de domo religiosa exempta, Superiore eiusdem consentiente.

Can. 2302

Tam praescriptio quam prohibitio certo in loco commorandi et collocatio in domo poenitentiae aut in domo

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religiosa, praesertim si diu duraturae sint, imponantur tantum in casibus gravibus, in quibus, prudenti Ordinarii iudicio, eae poenae necessariae sint ad clerici emendationem aut scandali reparationem.

Can. 2303

§1. Depositio, firmis obligationibus e suscepto ordine exortis et privilegiis clericalibus, secumfert tum suspensionem ab officio, et inhabilitatem ad quaelibet officia, dignitates, beneficia, pensiones, munera in Ecclesia, tum etiam privationem illorum quae reus habeat, licet eorum titulo fuerit ordinatus.

§2. Sed hoc ultimo in casu, si clericus vere indigeat, Ordinarius pro sua caritate, quo meliore modo fieri potest, ei providere curet, ne cum dedecore status clericalis mendicare cogatur.

§3. Poena depositionis infligi nequit, nisi in casibus iure expressis.

Can. 2304

§1. Si clericus depositus non det emendationis signa et praesertim si scandalum dare pergat monitusque non resipiscat, Ordinarius potest eum perpetuo privare iure deferendi habitum ecclesiasticum.

§2. Haec privatio secumfert privationem privilegiorum clericalium et cessationem praescripti can. 2303, §2.

Can. 2305

§1. Degradatio in se continet depositionem, perpetuam privationem habitus ecclesiastici et reductionem clerici ad statum laicalem.

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§2. Haec poena ferri solummodo potest propter delictum in iure expressum, aut si clericus, iam depositus et habitu clericali privatus, grave adhuc scandalum per annum praebere pergat.

§3. Alia est *verbalis* seu *edictalis*, quae sola sententia irrogatur, ita tamen ut omnes suos effectus iuridicos statim habeat sine ulla exsecutione; alia *realis*, si serventur sollemnia praescripta in Pontificali Romano.

Some penalties formerly employed, even against clerics, such as branding, bodily chastisement *(fustigatio)*, exile, imprisonment and permanent confinement in monasteries, are not mentioned in the Code.[1]

This enumeration of twelve species of penalties seems not to be complete, but applies to clerics only *(clericis tantum)*.

1°. Prohibition of exercising the sacred ministry except in a *specified church.* Thus a clergyman may be told to say Mass in a certain chapel or church only, or preach only in a certain church of a city, whilst all others are forbidden to him.

2°. *Perpetual suspension,* or *suspension for a specified term* or *ad beneplacitum superioris,* in which latter case the superior may shorten or lengthen the time.

3°. *Transfer* from a better office or benefice to an inferior one, which is always odious and, therefore, savors

1 Perforation of the tongue and the galleys (after degradation, especially of the so-called *diaconi selvaggi)* were also sometimes used. Such are not exactly in accordance with our present, rather sentimental, notions of the penal code, and are, therefore, discarded. On the other hand, it must not be forgotten that bishops and popes, and also abbots, as *temporal lords* of their respective territories, when employing such penalties, acted like other monarchs according to the custom of *their* times; Hollweck, *l. c.*

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of degradation and, of course, involves loss of jurisdiction in the territory from which the transfer is made.[2]

4°. *Privation of one or the other right* connected with a benefice, *e. g.,* administration of the same, or with an *office, e. g.,* the exercise of preaching or hearing confessions, or, for bishops, the granting of faculties or free appointment to offices.

5°. *Disability for all or certain dignities, offices, benefices, and clerical charges,* which also extends to religious offices.[3] Here can. 2296, §2 must be applied, although one may find there an analogy which is inadmissible in penal matters. The analogy, however, consists not in the application of the penalty, but only in the competency to inflict it. Consequently the Ordinary cannot decree disability for holding offices already possessed or acquired,[4] but only disqualify the delinquent for the future, *i. e.,* debar him from obtaining other dignities, offices, benefices, charges which may be held by clergymen. Besides, also in case of clergymen, can. 2296, §1, must be applied, so that only the Apostolic See can inflict this penalty if it is stated in common law. Only the Apostolic See can dispense in public cases of *inhabilitas latae sententiae.*[5]

6°. *Privation* of benefice or office, with or without pension, which is followed by a vacancy in the office or benefice itself, provided it be decreed *ipso iure* or after a regular trial.[6] This is called *penal* privation, because there is another, *viz.,* the administrative one, treated in can. 2147 ff. Here *can. 2299* must be added, which

2 See canons 2162-2167: 183; 873, § 3.

3 See can. 2413.

4 Here it may be added that the *ius ad rem,* for instance, by accepting an election, is a real right and consequently included.

5 Can. 2237, § 1, n. 3; Thesaurus-Giraldi, *l. c.,* P. I, c. 28 (*ed cit.,* p. 49)

6 See can. 183, § 1; can. 192.

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further determines the penalty in question as follows:

a) An *irremovable beneficiary* — our irremovable rectors are here included — can be deprived of his benefice (or pastorship) only in cases expressly stated in law;[7] a *removable beneficiary,* on the other hand, may be deprived of his benefice also for other reasonable causes, such as protracted disobedience or neglect of pastoral duties, and those mentioned in can. 2182.

b) Clergymen who are in possession of benefices, offices, or dignities may be forbidden to exercise part of their *ministerial functions for a special term;* for instance, they may have to abstain from preaching or hearing confessions, or from administering their benefice, or from exercising the functions of their dignity. Of course, this must be clearly expressed, for instance, by withdrawing the faculty of hearing confessions, etc. That with the total withdrawal of all faculties the office also is withdrawn, is evident.

c) A *cleric cannot be deprived of the benefice or pension which constitute his titulus ordinationis,*[8] *except in the cases mentioned in can. 2303 and 2304.* If the Ordinary should deprive a cleric of the benefice or pension to which he has been ordained, the Ordinary must provide a decent support, for instance, by offering the cleric another position or pension, or maintaining him in a charitable house. In cases of deposition this latter obligation on the part of the Ordinary ceases to be one of

7 *Latae sententiae;* see canons 2396, 2397, 2398, 2366.
Ferendae sententiae; canons 2314, § 1, n. 2; 2331, § 2; 2340, § 2; 2343, § 2; n. 3, 2354, § 2; 2359, § 2; 2368, § 1; 2345; 2346; 2350, § 2; 2381, n. 2.
Facultative; canons 2324, 2336, § 1, 2; 2355; 2359, § 2; 2360, § 2; 2394 n. 2, 2403; 2405.

8 See can. 979.

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justice and becomes one merely of charity (can. 2303, §2). In cases of degradation both titles, of justice as well as charity, cease to oblige the Ordinary (can. 2404).

7°. *Prohibition to live in a certain place or territory.*

8°. *Command to stay in a certain place or territory.* Concerning these two penalties canons 2301 and 2302 must be consulted.

a) The Ordinary *cannot order such a cleric to live in a certain place outside his own diocese.* For his jurisdiction is territorially circumscribed, and only if the Ordinary of the other diocese gives his formal consent, may the clergyman thus ordered to live in a strange diocese remain there. If there should be an *interdiocesan house of correction or detention,* the Ordinary may send a cleric there, because it is supposed that all the bishops concerned have an agreement among themselves to that effect. If the Ordinary wishes to inflict on a cleric the punishment pronounced in n. 8, with the command to stay, for the time being, in a *religious house that belongs to an exempt institute,* he can do so only with the *consent of the respective superior.* For with regard to this matter the local Ordinary has no power over exempt houses in his diocese, though with *non-exempt houses* he can deal more imperiously, although it would not be against the dictates of natural equity if he would first consult the religious superior, for religious houses are not reform schools or houses of correction.

b) The command to stay in a certain place or in a house of correction or a religious house, especially for a considerable time, *should not be imposed except for weighty reasons,* such as the necessary amendment of the clergyman or the repairing of scandal. The Ordinary is the judge, but he should give the cleric a fair hearing and not

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simply "shut him off," as one Archbishop did in a case brought before the S. Congregation.[9]

9°. *On prohibition to wear the ecclesiastical dress* enough has been said under can. 136. It refers, of course, to the usual clerical garb and tonsure (can. 213, §1), not the vestments used in the sacred ministry.

Concerning this penalty, can. 2300 makes the following regulations:

a) *Temporary privation* of this right *can only be inflicted* if the scandal given by the cleric is really serious, after admonition has proved useless,[10] and the scandal [11] cannot be removed in any other way.

b) As *long as the privation lasts,* its effects are:

α) The clergyman thus punished is not allowed to perform any act of his ecclesiastical ministry. The text does not declare the invalidity of such acts, *e. g.,* of jurisdiction exercised in the confessional, or assistance at marriage, nor the loss of the respective office; therefore, the least is to be taken.

β) This privation entails the loss of the clerical privileges or rights mentioned in can. 118-123.

10°. *Deposition,*[12] one of the oldest and at the same time, heaviest ecclesiastical penalties, consists in the pri-

9 S. C. EE. et RR., March 6, 1841 (Bizzarri, *l. c.,* p. 532) instructed the archbishop to leave the priest in peace or give him a fair hearing. A kind of long exile or prohibition to stay in one's diocese might cause a conflict with the civil authorities; for ordinaries have no right to forbid one to stay in a certain place from the viewpoint of civil law.

10 On admonition, see can. 2143.

11 Notice the plural *scandala,* which may mean diverse or protracted or repeated scandals.

12 See Kober, *Die Deposition und Degradation,* 1867: formerly deposition and degradation were identical, and entailed loss of office and benefice together with disqualification, but the privileges *fori* and *canonis* remained. After the XIIth century, however, deposition was clearly distinguished from degradation, which later only implied loss of the clerical privileges, see c. 10, X, II, 1; c. 7, X, V, 20; c. 27, X, V, 40.

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vation of all the titles that a clergyman may possess, except the clerical state itself and its essential privileges. Its effects are more minutely described in can. 2303 as follows:

a) The *obligations* inherent in the order received, as well as the clerical *privileges remain.* Therefore, even a deposed cleric, if he has been ordained subdeacon, must recite the Breviary and remain unmarried (can. 132, 135), and retains the prerogatives mentioned in can. 118-123.

b) A deposed cleric is *ipso facto suspended* from office;

c) He is *disqualified* for any office, dignity, benefice, pension or any ecclesiastical charge *(munus);*

d) He is *deprived of all the offices, dignities, benefices, pensions, and charges that he holds, even though he has been ordained on the title of benefice or pension.* However, in case of the benefice or pension being the title on which the clergyman was ordained, the *Ordinary should act charitably towards a needy cleric* and provide him with the necessary support, so that he may not be compelled to beg his living and so disgrace the clerical state.

No juridical claim can be asserted against this charitable support. Even if the clergyman belongs to a clerical aid society, which is based on mutual agreement and contributions, he can in justice claim diocesan support, because he still belongs to the clergy and is supposed to be still incardinated. For our text, can. 2303, §2, only mentions the two canonical sources of support: benefice and pension. These, however, are essentially distinct from a clerical aid society. On the other hand, it must also be noted that the Ordinary, in case such a society should furnish the means for an indigent clergyman,

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would not be obliged to exercise charity towards him. Besides, the by-laws or constitutions might contain other regulations precluding a deposed clergyman from the benefit of support.

The *mode of inflicting* the penalty of deposition is indicated in can. 2303, §3: *"It cannot be inflicted except for crimes expressly stated in the Code."* However, the Code knows no penalty which would be incurred *ipso iure* or *latae sententiae*.[13] But cases *ferendae sententiae* are mentioned.[14] If the Ordinary wishes to depose a clergyman, he has to proceed in the judiciary way, and constitute a collegiate body of five judges,—otherwise the trial is null and void.[14a] In cases where deposition is inflicted, can. 1948, §1 and can. 2288 must be applied.

11°. *Perpetual privation of the clerical garb* is a more serious penalty than even deposition. For, as can. 2304, §2 states, *it implies privation of all clerical privileges and releases the Ordinary from even the charitable obligation of providing the necessary support for an indigent cleric.* But, as the same can. 2304, §1 says, this penalty can only be inflicted,

a) If the cleric has been previously deposed;

b) If he shows no signs of repentance, but rather continues to give scandal;

c) If he does not heed the admonitions addressed to

13 The Decretals are ambiguous, so that some, for instance, Thesaurus-Giraldi (P. I, c. 27), could speak of a deposition *latae sententiae;* see c. 3, X, V, 27; c. 1, § 2, 6°, V, 4; c. 5, 6°, V, 9; c. un. Extrav. Comm., V, 6. Hollweck, *l. c.*, p. 158, § 91, note 1, denies that such a penalty *latae sent.* can be read into the old law.

14 See can. 2314, § 1, n. 2; 2320; 2322, n. 1; 2328; 2350, § 1; 2354, § 2; 2359, § 2; 2379; 2394, n. 2; 2401; a canonically deposed cardinal loses the active voice: *"Vacante Sede,"* n. 31.

14a Can. 1576, §1, n. 2.

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him.[15] All these conditions must concur in order to permit the Ordinary to inflict this penalty. The trial must be conducted in the same way as for deposition.[16] This also applies to religious superiors who have to proceed in such cases.[17]

12°. *Degradation,* the last and severest of all clerical penalties, consists in the *reduction of a cleric to the lay state.* This seems to be impossible on account of the indelible character imprinted by the Sacrament of Holy Orders, but since a real distinction was introduced between deposition and degradation in the XII century, it was but logical to maintain the severest penalty for those who had juridically degraded themselves.

a) The *effects* of degradation, according to can. 2305, §1, are: deposition, perpetual privation of the clerical dress, and reduction to the lay state. These effects follow *both kinds* of degradation, the verbal as well as the real *(verbalis seu edictalis et realis),* as the difference between the two lies only in the mode of application. *Verbal* degradation requires merely a judicial sentence, whereas *real* must be accompanied by the ceremonies described in the Roman Pontifical.[18] Note that even a degraded cleric is bound to observe celibacy.[19]

b) This penalty is *ferendae sententiae* only, since no case of *latae sententiae* is mentioned in the Code. Therefore the text (can. 2305, §2) says: "*ferri potest,*"

15 Can. 2143.

16 Can. 1576, § 1, n. 2.

17 Can. 670.

18 P. III: "*Degradationis Forma,*" which contains the doleful ceremonies of degradation, commencing with the rite for degrading a Pope and ending with that for tonsured clerics. This ceremony, as stated in the Pont. Rom., presupposes that the clergyman was tried and sentence was given, and, besides, that he is offered to the local ordinary for this act of humiliation.

19 Cfr. can. 213, § 2; but the obligation of reciting the Breviary ceases; can. 138.

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it may be inflicted for crimes mentioned in the law;[20] or if the cleric, being already deposed and deprived of the clerical garb, continues for one year to give scandal. Attention must again be drawn to can. 1576, §1, n. 2, which requires five judges to pronounce sentence, and to can. 1948, §1, which forbids substituting the judicial warning in this case, and to can. 2288, which excludes a suspension of the execution of the sentence.

20 These cases, besides the one mentioned in the second clause of can. 2305, § 2, are canons 2314, § 1, n. 3; 2343, § 1, n. 3; 2354, § 2; 2368; 2388, § 1.

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TITLE X

PENAL REMEDIES AND PENANCES

The title is divided into two chapters, the first of which treats of penal or preventive remedies, the other of penances. This order is logical, since penal remedies are more closely related to penalties proper than the so-called penances. For penal remedies cause some deprivation or pain to normally constituted persons, and this is essential to any penalty. All such remedies leave a stain upon the moral character of the person subjected to them. They presuppose a punishable crime or at least blameworthy conduct, which might lead to more serious breaches of the penal laws. Therefore penal remedies, as stated, partake of the nature of penalties. This applies also to the mode by which they are inflicted. Some of them are mentioned in the decrees of the Council of Trent,[1] others were introduced by later disciplinary laws and now appear formally sanctioned in the Code.[2] To each of the penal remedies we shall add the respective canons referring to them.

1 Trid., Sess. 13, c. 1, *de ref.*

2 S. C. EE. et RR., June 11, 1880 (*Coll. P. F.*, n. 1534); see also Wernz, *l. c.*, VI, p. 257, n. 253 f.; Eichmann, *l. c.*, p. 121.

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CHAPTER I

PENAL REMEDIES

Can. 2306

Remedia poenalia sunt:
1°. Monitio;
2°. Correptio;
3°. Praeceptum;
4°. Vigilantia.

Can. 2307

Eum qui versatur in proxima occasione delictum committendi vel in quem, ex inquisitione peracta, gravis suspicio cadit delicti commissi, Ordinarius per se vel per interpositam personam moneat.

Can. 2308

Si ex alicuius conversatione scandalum vel gravis ordinis perturbatio oriantur, est locus correptioni, ab Ordinario per se vel per interpositam personam, etiam per epistolam faciendae, peculiaribus accommodatae conditionibus personae et facti de quo agitur.

Can. 2309

§1. Tam monitio quam correptio potest esse vel publica vel secreta.

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§2. Correptio vel monitio publica fiat vel coram notario aut duobus testibus, vel per epistolam ita tamen ut de receptione et tenore epistolae ex aliquo documento constet.

§3. Correptio publica fieri tantum potest adversus reum de delicto convictum vel confessum; et est iudicialis, si fiat a iudice pro tribunali sedente vel ab Ordinario ante processum criminalem.

§4. Correptio iudicialis vel habetur loco poenae vel fit ad augendam poenam, praecipue si agatur de recidivo.

§5. De monitione et correptione, etsi secreto factae fuerint, constare debet ex aliquo documento in secreto archivo Curiae asservando.

§6. Tam correptio quam monitio fieri potest semel vel pluries, pro Superioris arbitrio et prudentia.

Can. 2310

Monitionibus et correptionibus incassum factis, vel si ex eisdem effectum sperare non liceat, datur praeceptum, quo quid agere quidve evitare praeventus debeat, accurate indicetur, cum poenae comminatione in casu transgressionis.

Can. 2311

§1. Si casus gravitas ferat et praecipue si agatur de eo qui in periculo versatur relabendi in idem crimen, eum Ordinarius submittat vigilantiae.

§2. Vigilantia praecipi quoque potest ad augendam poenam, praecipue in recidivos.

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Penal remedies are intended as means of preventing a more serious breach of the public order and discipline of the Church and thus of rendering the application of penalties in the strict sense either remote or superfluous. The Code distinguishes *four kinds* of preventive remedies: warning, correction, order or precept, and surveillance.

1 *Warning may be given either by the Ordinary himself or by another person at his request, in case one is in the proximate occasion of committing a crime,* or *in case of a person who has fallen under serious suspicion of having committed a crime, investigation already made justifying such a suspicion.* The *occasion* is proximate if dangerous company, especially in the same house, proves a stumbling block to the person's virtue.[3] The *investigation* must be made according to can. 1936-1946. How to proceed is laid down in can. 2309, and is the same as for

2. The *rebuke* or *correctio, which is administered to a person whose conduct causes scandal or a serious disturbance of the public order* (*e. g.,* bigamy and concubinage). The warning may be given by the Ordinary personally or through another trustworthy person, orally or by letter. But it should be so worded as to suit the conditions of the respective person and case; which means that the social and individual character and position of the person in question should be considered as well as the nature of the case. For there are cases that necessitate great delicacy and prudence.

The *manner* in which both *warning and rebuke* must be administered is set forth in can. 2309, as follows:

[3] As in mixed marriages, frequenting of suspected theatres and families, etc.

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a) The warning or rebuke may be either *public* or *secret.* If secret, it is rather paternal and generally given in writing or through an intermediary,[4] who, however, must be commissioned by the Ordinary, *i. e.,* by the diocesan bishop, or the prelate *nullius,* or the exempt religious superior, but not the vicar-general, unless he has received a special commission for this purpose. The reason is that penal remedies partake of the nature of penalties, concerning which, according to can. 2220, §2, the vicar-general is not competent in virtue of his office. He may, however, like the dean or pastor, be employed as *persona interposita.*

b) *Public correction* or admonition must be made either before a notary, who in this case may also be the chancellor,[5] or in the presence of two witnesses, who may be discreet laymen, or by letter, which should be registered. If by letter, a record must be kept, showing that it was delivered,[6] and an abstract of the contents must be preserved in the diocesan chancery or court.

c) A *public rebuke* — not a warning — can be served only when the delinquent has been convicted of, or confessed, a crime. It is a judiciary rebuke *(correptio iudicialis)* [7] if administered by the judge sitting in tribunal or by the Ordinary (not the vicar-general unless he has a special mandate) before the criminal procedure has taken a legal turn.

d) A *judiciary rebuke* may take the place of a criminal penalty or may be added to the criminal penalty, especially in case of relapse.

e) Both *admonition and correction,* if made *secretly,* must be recorded in writing and an abstract of the records

4 S. C. EE. et RR., June 11, 1880, n. 6.

5 Can. 372, § 3.

6 The receipt for the registered letter should be inserted *in actis.*

7 See can. 1947–1953.

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kept in the secret archives of the diocesan court, because they may be needed as documents for criminal procedure.

f) Both *warning and rebuke* may be administered once or oftener, as the superior shall judge prudent. Although the word *peremptory* should be employed for the sake of greater efficacy, yet the rebuke or warning could not be impugned if this term were omitted, because the Code contains nothing to that effect, but insists only on registration.

3. A *precept,* order, or injunction *is a special command of the bishop, accompanied by threats of punishment in case of disobedience.*[8] It may be served after a warning or a rebuke has proved ineffective or if it is likely that these two, warning and rebuke, will not produce the desired effect. Therefore, in this latter case, the warning and rebuke may be omitted, and the bishop — not the vicar-general — may proceed at once to issue an injunction. This, no doubt, depends on the psychological condition of the delinquent (obstinacy, hot temper) and on the nature of the delinquency, whether the scandal or neglect is great and wide-spread or not. The precept must *contain* as clear and distinct a statement as the case permits, of what the *praeventus*[9] must do or avoid.

4. *Surveillance or vigilance,* as a separate and distinct penal remedy, is entirely new,[10] though the well known *Motu proprio* of Pius X, "*Sacrorum antistitum,*" Sept. 1, 1910, appointed a vigilance committee against modernistic tendencies. Here it has the character of a special penalty, and according to the order of enumeration, is the severest

8 S. C. EE. et RR., *l. c.,* n. 1, 1880, n. 7, which furnished the substance of our text.

9 *Praeventus* in the text implies that one has been served with an anticipated or informal accusation.

10 S. C. EE. et RR., *l. c.,* n. 1 says: "*Ordinario iudici pastorale onus incumbit . . . super eorundem vitae rationem vigilando*"; but this is a general obligation, not a penal remedy.

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of the penal remedies. It is doubtless the most disagreeable one, especially in our country, although even the civil law employs police vigilance.

Can. 1311 says that a *very serious case may demand vigilance, especially if a person is exposed to the danger of relapse into the same crime.* Under such conditions the Ordinary may place the person in question, whether he be a layman or a cleric, under special supervision. But he may also increase the penalty, particularly for *recidivi.*

It may be added that, since injunction and surveillance are severer penal remedies than warning and rebuke, the procedure required for the latter *a fortiori* also applies to the former.

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CHAPTER II

PENANCES

Can. 2312

§1. Poenitentiae in foro externo imponuntur ut delinquens vel poenam effugiat, vel poenae contractae absolutionem aut dispensationem recipiat.

§2. Ob delictum aut transgressionem occultam nunquam poenitentia publica imponatur.

§3. Poenitentiae non tam secundum quantitatem delicti, quam secundum poenitentis contritionem moderandae sunt, pensatis qualitatibus personarum et delictorum adiunctis.

Can. 2313

§1. Praecipuae poenitentiae sunt praecepta:

1°. Recitandi determinatas preces;

2°. Peragendi piam aliquam peregrinationem vel alia pietatis opera;

3°. Servandi peculiare ieiunium;

4°. Erogandi eleemosynas in pios usus;

5°. Peragendi exercitia spiritualia in pia aut religiosa domo per aliquot dies.

§2. Poenitentias Ordinarius pro sua prudentia addere potest poenali remedio monitionis et correptionis.

Penance, in the external forum, means penal satisfaction and may be compared, to some extent, to an apology.

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The Code first determines the effect or object of penances and then enumerates some special kinds.

1. *Penances are imposed, in the external forum, in order that the delinquent may escape a canonical penalty, properly so-called, or that he may obtain absolution or dispensation from a penalty already imposed.*

Hence a penance may be decreed,[11] even if no censure *latae sententiae* has been incurred on account of ignorance. Besides the willing assumption of a penance is indicative of willingness to recede from contumacy[12] and renders one worthy of a dispensation, even though the latter depends entirely on the superior's good pleasure. In former times public penances were applied quite frequently; but they could be redeemed,[13] and this led to many abuses, so that, about the thirteenth, and especially in the fourteenth century, public penances fell entirely into desuetude. However, although public sacramental penances are abolished, yet some public penances may even now be imposed. But the Code clearly states (can. 2312, §2) that no *public penance can ever be imposed for an occult crime or transgression,* even though the penitent should be willing to undergo it. This text is negatively worded and therefore admits of a conversion of terms, *scil.*: A public penance may be imposed for a public crime.[14]

The kind of penance imposed should be *proportionate,* not so much to the gravity of the crime, as to the disposition of the delinquent. And in meting it out, due regard should be paid to the *qualities* of the *person* concerned and the *nature of his crime.*[15]

11 Can. 2229, § 3, n. 1.
12 Can. 2224, § 3.
13 See X, V, 38 of the Decretals and the commentators thereon.
14 For instance, apologizing to a congregation for marrying before a non-Catholic minister.
15 See cc. 7, 8, X, V, 38.

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2. The principal *penances,* though not the only ones, are:

a) To recite certain prayers, *e. g.,* the penitential psalms, or the Stations of the cross, or the Rosary;

b) To make a pilgrimage to a certain shrine—provided the penitent has the means to do so and is physically able,— or to perform other devotional works, such as taking care of the church or altar;

c) To observe special fasts, if one's work or family permits;

d) To give alms for charitable purposes;

e) To retire for some days into a religious house.

These penances may be imposed by the Ordinary (but not by the vicar-general) and they may be inflicted either judicially or extra-judicially.[16]

[16] See can. 1933, § 4.

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PART III

PENALTIES FOR INDIVIDUAL CRIMES

The Code now proceeds to the consideration of the penalties to be inflicted for specified crimes. The nature of the latter furnishes a basis for classifying the former. It is not the kind of penalty, as was the case in the Constitution "*Apostolicae Sedis,*" of 1869, but the character of the transgression that constitutes the formal basis of division. The Code contains all the penalties now applied, whilst the aforesaid Constitution only dealt with censures: excommunication, suspension, and interdict. This exhaustive treatment of ecclesiastical penalties[1] renders a return to former sources as such (though not, of course, as historical and interpretative aids) quite superfluous. Therefore we shall refer to former laws in the footnotes rather than in the text, except in as far as they contribute to a clearer understanding of the present discipline. Note that some terms and subjects, which seem to require an explanation, have been treated in former volumes of this Commentary.

1 See can. 6, n. 5; can. 2219; can. 2226, § 2, 3.

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TITLE XI

CRIMES AGAINST FAITH AND UNITY

It is quite natural that a society which claims to be the one Church instituted by Christ, should direct its first penalty against crimes that subvert its very foundation, *i. e.*, divine and Catholic faith. Belief in the divine mission and the dogmas of the Church is attacked and shattered by apostasy, heresy, and schism, to which must be added every suspicion uttered publicly and the denial of propositions which, though not formally dogmas, are closely connected with the deposit of faith. Special danger to the faith arises from the perusal of writings that attack the Church and her teachings. Finally, the practice of faith is relaxed, and faith itself jeopardized, by too free intercourse with non-Catholics, either in sacred things or socially.

APOSTASY, HERESY, AND SCHISM

Can. 2314

§1. Omnes a christiana fide apostatae et omnes et singuli haeretici aut schismatici:

1°. Incurrunt ipso facto excommunicationem;

2°. Nisi moniti resipuerint, priventur beneficio, dignitate, pensione, officio aliove munere, si quod in Ecclesia habeant, infames declarentur, et clerici, iterata monitione, deponantur;

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3°. Si sectae acatholicae nomen dederint vel publice adhaeserint, ipso facto infames sunt et, firmo praescripto can. 188, n. 4, clerici, monitione incassum praemissa, degradentur.

§2. Absolutio ab excommunicatione de qua in §1, in foro conscientiae impertienda, est speciali modo Sedi Apostolicae reservata. Si tamen delictum apostasiae, haeresis vel schismatis ad forum externum Ordinarii loci quovis modo deductum fuerit, etiam per voluntariam confessionem, idem Ordinarius, non vero Vicarius Generalis sine mandato speciali, resipiscentem, praevia abiuratione iuridice peracta aliisque servatis de iure servandis, sua auctoritate ordinaria in foro exteriore absolvere potest; ita vero absolutus, potest deinde a peccato absolvi a quolibet confessario in foro conscientiae. Abiuratio vero habetur iuridice peracta cum fit coram ipso Ordinario loci vel eius delegato et saltem duobus testibus.

§1. All apostates from the Christian faith and all heretics and schismatics:

1°. Incur excommunication *ipso facto,* and

2°. Unless they repent, *shall be deprived* of any benefice, dignity, pension or other charge which they may hold in the Church, and be declared *infamous;* clerics, after repeated warning, *shall* be deposed;

3°. If apostates, heretics or schismatics have joined a non-Catholic sect, or publicly professed themselves members thereof, they are by this very fact *(ipso facto)* infamous; clerics, after having been warned without result, must be degraded and their offices thereby become vacant.

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1) What the terms apostates, heretics, schismatics mean, has been explained in can. 1325, §2. All three presuppose valid baptism. By *apostates* are here understood all who have gone astray from the Christian faith *(devii a fide)*.[2] For the rest it matters not whether the apostate has espoused Paganism, Judaism, Mohammedanism, or atheism, or whether he is a mere unbeliever. Therefore also *Freethinkers* must be included in the term, because they reject all authority in matters of faith.[3] Concerning *Spiritists* there is room for doubt. For although it is quite evident that Spiritism as a sect is heretical,[4] or rather tantamount to apostasy, because it retains hardly anything specifically Christian, yet it is possible, nay probable, that some of its followers may persuade themselves that they are Catholics, and can not, therefore, be classified among those mentioned in can. 2205, §3. The benefit of doubt may be applied to them (can. 209).

Heretics, according to can. 1325, §2, are such as deny obstinately one or more articles of faith. It is not necessary to join a non-Catholic sect in order to be a heretic in the sense of §1, n. 1.

Schismatics refuse obedience to the Roman Pontiff and therefore are outside the communion of the faithful.

2 *Apost. Sedis,* I, 1: *"Omnes a christiana fide apostatas, et omnes ac singulos haereticos, quocumque nomine censeantur, et cuiuscumque sectae existant, eisque credentes, eorumque receptores, fautores ac generaliter quoslibet illorum defensores."*—I, 3: *"Schismaticos, et eos, qui a Romani Pontificis pro tempore existentis obedientia pertinaciter se subtrahunt, vel recedunt."* S. Thom., II–II, q. 12, art. 1: *"a fide christiana recessio"*; Paul III, *"Cum ex apostolatus,"* Feb. 15, 1559, § 2.

3 Thus also Avanzini, *De Constitutione Apostolicae Sedis,* ed. 6, 1883, p. 4; Ballerini-Palmieri, *Opus Theol. Morale,* Vol. VII, n. 422, p. 219 (ed. 2).

4 S. O., July 28, 1847; Aug. 4, 1856 (*Coll. P. F.,* nn. 1018, 1128); Pennacchi, *Commentaria in Const. Ap. Sedis,* 1883, Vol. I, p. 83.

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This separation, too, may take place with or without forming or clinging to schismatic doctrines. Since the Vatican Council, schism is generally connected with heresy. For pure schism, *i. e.*, mere disobedience to the lawful head of the Church, without at least a speculative positive doubt in her divinity, is not easily possible, except in individuals.[5]

The crime of *apostasy, heresy, or schism* must be *exteriorly manifested,* either in words, writings, or acts which betray defection from the Christian Church, denial of some article of faith, or separation from the unity of the Church, according to can. 2195, §1; because merely internal apostasy, heresy, or schism do not belong to the external forum and therefore are not intended here.[6] From merely internal transgressions, even though they be grievously sinful, any confessor may absolve.

2) The *penalties here enunciated are twofold*: censure and vindictive penalties; besides, a distinction is drawn, according to can. 2207, n. 1, by reason of dignity, between laymen and clerics.

a) The *censure inflicted is excommunication incurred ipso facto,* which *per se* requires not even a declaratory sentence. Only if, in the prudent judgment of the superior, the public welfare should require such a sentence, it must be pronounced.[7] The *bonum publicum* certainly demands it in the case of clergymen. Note that the term *moniti* (§1, n. 2) does not refer to the in-

5 Thus the Greek schismatics, the Jansenists, and the "Old Catholics" are no less heretics than schismatics; also the National Italian Catholics; see D'Annibale, *In Constitutionem Ap. Sedis,* ed. 1894, p. 34.

6 See Hollweck, *l. c.,* p. 162; D'Annibale, *l. c.,* says it does not matter whether the words or facts betraying the crime were heard or witnessed by bystanders; they are public if they *could* have been heard or seen (*l. c.,* p. 24).

7 See can. 2223, § 4; also can. 2232.

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curring of the censure. Consequently, no canonical warning or admonition is required.[8]

b) The *vindictive penalties* inflicted are:

For *laymen: privation of all offices and pensions* they may hold in the Church, and *infamy*.

For *clerics: privation* of every benefice, dignity, pension, office, or charge which they may hold; also *infamy* and, after a fruitless warning, *deposition*.

A *warning* must precede these vindictive penalties, and we suppose the warning must be administered according to can. 2143, *i. e.*, before an official of the diocese or two witnesses, or by registered letter. The *infamy* inflicted on both laymen and clergymen, and the *deposition* pronounced against clerics, are *ferendae sententiae*.[9]

Deposition requires a second warning after the first one has been served, with the threat of privation and infamy.

3). The vindictive penalties are rendered *more severe* in two cases, which may be distinct, but may also occur by one and the same act: *sectae acatholicae nomen dare* or *publice adhaerere*.

A *sect* means a religious society established in opposition to the Church, whether it consist of infidels, pagans, Jews, Moslems, non-Catholics, or schismatics.[10] To become a member of such a society *(nomen dare)* means to inscribe one's name on its roster. Of course, it is presumed that the new member knows it is a non-Catholic society, otherwise he would not incur the censure. If he hears of the censure after he has become a

8 Pennacchi, *l. c.*, I, p. 101 f.

9 See can. 2223, § 3. Formerly these penalties were incurred *ipso iure*, Hollweck, *l. c.*, p. 162 f.

10 D'Annibale, *l. c.*, p. 79.

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member, and promptly severs his connection, the penalty is not incurred.[11]

The text also provides for cases of informal membership. *Publice adhaerere* means to *belong publicly* to a non-Catholic sect. This may be done by frequenting its services without any special cause or reason, or by boasting of being a member, though not enrolled, by wearing a badge or emblem indicative of membership, etc. Those guilty of such conduct, whether laymen or clerics, render themselves infamous *(infamia iuris latae sententiae)* and consequently can. 2294, § 1 must be applied to them.[12] A *cleric must, besides, be degraded* if, after having been duly warned, he persists in being a member of such a society. All the offices he may hold become vacant, *ipso facto,* without any further declaration. This is tacit resignation recognized by law,[13] and therefore the vacancy is one *de facto et iure.* It need hardly be added that excommunication follows in each case, although the vindictive penalties only are mentioned in 2° and 3°.

It may not be amiss to add that the penalties decreed for apostasy, heresy, and schism, presuppose malice *(dolus)* as explained above in can. 2200. Consequently, if one would retain the Christian faith interiorly, but act exteriorly as an apostate or heretic,— which would be detestable hypocrisy,— he would not incur the penalties *in foro interno,*[14] but *in foro externo* the presumption

11 Can. 2202, § 1; Hollweck, *l. c.,* p. 170.

12 Privation of benefices, etc., mentioned in can. 2314, § 1, n. 2, is not repeated in n. 3, because included in the *infamia iuris.* Note that *irregularity* is attached to this infamy; can. 984, n. 5.

13 Can. 188, n. 4.

14 Therefore any confessor may absolve him in the sacramental forum; Hollweck, *l. c.,* p. 163, note 5.

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would be against him, and the proof of his internal defection would be incumbent on the one who asserted it, according to can. 2200, §2.

§2 Treats of absolution in the internal and external forum, and of abjuration.

1°. *Absolution from excommunication,* mentioned in §1, is *reserved to the Apostolic See speciali modo,* as far as it is to be imparted in the *court of conscience* only. Concerning this absolution, the rules laid down in can. 2248–2254 must be consulted; in cases of reasonable doubt, can. 209. Ordinaries need a special faculty to absolve from this censure.[15]

2°. Absolution in the *external forum* may be imparted by the *local Ordinary* (but not by the vicar-general, without special commission) *in the following circumstances:*

a) If the crime of apostasy, heresy, or schism has been in any way brought before the external court of the local Ordinary;

b) If the delinquent is repentant, and

c) If he abjures his error in juridical form and complies with all other prescribed conditions.

Ad a) Juridically the crime is before the external court of the local Ordinary if a summons has been duly issued. However, since the Code adds: "*quoquo modo ad forum deductum,*" we may adopt the opinion of St. Alphonsus, that it would be sufficient if the crime had been proved to the ecclesiastical judge by at least one witness.[16] This is all the more acceptable since our text admits *voluntary confession,* which certainly can be made in writing or

15 Apostolic Delegates enjoy this faculty; see *Index Facultatum,* May 6, 1919, n. 4.

16 Putzer, *Comment. in Facult. Apost.,* ed. 4, p. 24, n. 17.

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through another person. This is nothing else but the *sponte comparere,* to appear of one's own accord, before the Holy Office or the local Ordinary,— a formula found in former decisions.[17]

Ad b) Repentance is supposed to be effected by a spontaneous accusation, but it also means that a relapse should be dealt with more severely, although the Code does not make it a condition of absolution.[18]

Ad c) Abjuration must be made according to the formula contained in the Roman Pontifical and Ritual.[19] It is a *juridical* abjuration if made before the local Ordinary or his delegate *and* at least two witnesses. Hence the vicar-general, or the rural dean, or any other priest may be delegated for the purpose. Note, however, that religious superiors; as such, even though exempt, cannot receive this juridical abjuration, because it appertains to matters of faith, in which they are not competent,[20] though, of course, they may act as delegates of the local ordinary.

Here it may be proper to call attention to the regulations issued by the Holy Office concerning the manner of absolution in cases of doubtful baptism.[21] The same S. Congregation has ruled that boys and girls under fourteen years of age need not pronounce the abjuration, but

17 S. O., June 21, 1672; Jan. 3, 1648 (*Coll. P. F.,* nn. 31, 98). Hence, in case of converts being received, the priest (pastor or assistant, curate) may simply take down in writing the confession of the convert and write a letter to the bishop, informing him that he witnessed the voluntary confession and asking for delegation to receive the abjuration in the presence of two witnesses.

18 S. O., Jan. 21, 1627, *l. c.*

19 *Pont. Rom.,* P. III, tit. "*Ordo ad Reconciliandum Apostatam, Schismaticum vel Haereticum.*" *Rit. Rom.,* tit. III, cap, 3; S. O., Aug. 28, 1861 (*Coll. P. F.,* n. 1221).

20 Can. 501, § 2.

21 S. O., July 20, 1859 (*Coll. cit.,* n. 1178); also to be found in the priest's New Ritual, published by various editors, under the title *Reception of Converts.*

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should make a simple profession of faith, after which they may be reconciled to the Church.[22]

These are the *servanda de iure, viz.:* assurance of Baptism, sacramental confession, and a wholesome penance.[23]

4) *After being absolved in the external forum, the penitent may be absolved from his sin by any confessor in the court of conscience*[24] (can. 2251). *Why absolution in foro externo is required,* can be gathered from certain decisions of the Holy Office. The reason is that the penitent might otherwise, if his crime became notorious or public, be prosecuted by the Holy Office or the local Ordinary. Hence he should be given a certificate of absolution.[25] This is all the more important, since the other penalties are not lifted by this absolution, which refers only to excommunication. Therefore a *dispensation* from the vindictive penalties should be imparted, according to can. 2289.[26] A layman, for instance, who held a title or decoration or order of knighthood from the Pope, would have lost that dignity, and therefore a dispensation would be required. However, it appears conformable to the mind of the legislator that the Ordinary, who can absolve from the heavier penalty (excommunication), should also be entitled to dispense from the vindictive penalty.

22 S. O., March 8, 1882 (*Coll. cit.*, n. 1566.)

23 S. O., July 30, 1806 (*ib.*, n. 688).

24 It is hardly necessary to add that the local Ordinary may do all this personally. Attention may be drawn to can. 199, § 1, concerning *delegation;* for the power mentioned in can. 2314, § 2, is ordinary, and may therefore be delegated. Wherefore the Ordinary may habitually delegate any priest to receive so-called juridical abjurations before two witnesses. This may be done at a synod or when issuing the so-called faculties.

25 S. O., Jan. 3, 1640; May 7, 1822 (*Coll. P. F.*, nn. 98, 771).

26 Said canon refers to can. 2236, which requires papal dispensation.

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SUSPICION OF HERESY

Can. 2315

Suspectus de haeresi, qui monitus causam suspicionis non removeat, actibus legitimis prohibeatur, et clericus praeterea, repetita inutiliter monitione, suspendatur a divinis; quod si intra sex menses a contracta poena completos suspectus de haeresi sese non emendaverit, habeatur tanquam haereticus, haereticorum poenis obnoxius.

Suspicion, in the psychological sense, is doubt, coupled with a positive leaning to one side; — in our case, towards a heretical doctrine. In law it may be expressed by presumption or circumstantial evidence. It is, therefore, a judgment formed about some one without sufficient evidence on the ground of certain *indicia*.

Three kinds of suspicion are generally distinguished: light, vehement, and violent. *Light* suspicion admits of no conclusion, because it is based on absolutely insufficient *indicia*. *Vehement* suspicion rests on effective signs and conclusions. *Violent* suspicion amounts to morally certain proof.[1]

The Decretals,[2] from which the notion "suspicion of heresy" is taken, have in view vehement suspicion, and no doubt this is here to be understood. Light suspicion often amounts to no more than rash judgment, whilst violent suspicion is to be considered as a positive proof, and therefore rather falls under can. 2314. That the

[1] Suarez, *De Fide*, disp. XXIV, sect. 2, n. 1 (*ed. Paris.*, 1858, t. 12, p. 592).

[2] See c. 14, X, II, 23; c. 10, X, V, 34.

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limits between vehement and violent suspicion cannot be very clearly set off, is owing to the nature of circumstantial evidence.

Formerly jurisprudence used to resort to an expedient which seemed to ward off vehement as well as violent suspicion. It was the so-called *purgatio canonica,* or canonically admitted proof of one's innocence of an imputed crime. The reception of Holy Communion or the celebration of Mass were accepted as such proofs. But these means gave way to a more juridical means of purging oneself of suspicion, the *iuramentum purgatorium,* an oath administered by the judge in order to disperse a suspicion.[3]

Our canon, too, mentions a removal of heresy, or rather of the cause that gave rise to suspicion. But in what this removal consists, is not expressly stated. This is quite natural, for the different cases of suspected heresy permit a different way of removing suspicion.

The Code declares the following persons as suspect of heresy:

1. The propagators of heresy and those who participate with non-Catholics *in divinis* (Can. 2316);

2. Those who contract marriage under the condition of having their offspring educated in a non-Catholic sect and those who have their children baptized by non-Catholic ministers or educated in a non-Catholic denomination (can. 2319);

3. Those who desecrate sacred hosts or species (can. 2320);

4. Those who appeal from the Pope to a general council (can. 2332);

[3] Reiffenstuel, C. V, tit. 34, n. 1 ff.

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5. Those who remain under sentence of excommunication for more than a year (can. 2340);

6. Those who administer or receive the Sacraments simoniacally (can. 2371).

As may be seen from this list, each species of suspicion here enumerated may be removed in a different way: by formal retraction, by withdrawing the condition and complying with Catholic principles, or by protesting against what was done or received, for instance, returning the money received from simony, or giving up the sacred species. We do not, however, hesitate to say that the judge may in each case demand a guarantee of genuine amendment, in fact, he should do so, unless he is convinced of the sincerity of the penitent. Neither would the judge exceed his power if he would require an oath or a statement in presence of two witnesses.

We now proceed to the penalties the Code inflicts on those suspected of heresy.

a) They must, first, be *warned,* according to can. 2307, to remove the cause of suspicion. A reasonable time should be granted for this purpose in the canonical warning.

b) If the warning proves fruitless, the suspected person must be *forbidden* to perform any ecclesiastical *legal acts,* according to can. 2256. If he is a cleric, he must be suspended *a divinis,*[4] after a *second warning* has been left unheeded.

c) If, *after the lapse of six months,* to be reckoned from the moment the penalty has been contracted, the person suspected of heresy has not amended, he must be *regarded as a heretic, amenable to the penalties set forth in can. 2314.* Whilst the penalties enumerated under

4 See can. 2279, § 2, n. 2.

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(b) are *ferendae sententiae,* to be inflicted according to can. 2223, §3, the penalties stated under (c) are *a iure* and *latae sententiae.*[5]

Note that, since the *ferendae sententiae* penalties require a canonical warning and a clear statement of the time granted, the moment from which the penalty is contracted can be almost mathematically determined.

COÖPERATION IN HERESY

Can. 2316

Qui quoquo modo haeresis propagationem sponte et scienter iuvat, aut qui communicat in divinis cum haereticis contra praescriptum can. 1258, suspectus de haeresi est.

This crime is singled out as a species for itself, and the penalty is taken partly from older sources and partly from the Bull "*Apostolicae Sedis.*[1]" Two distinct cases are contained in our canon, and the penalty is the same as for those suspected of heresy.

1. Whosoever *spontaneously and knowingly assists in any way in the propagation of heresy, is himself suspected of heresy.* Under this heading fall, according to "*Apostolicae Sedis,*" all those who believe the errors of heretics, or who receive, protect, and defend heretics. There is little doubt[2] that our text includes all these,

5 See can. 2217, § 1, 2. Where the phrase *similia verba* indicates that though the terms *a iure* or *latae sententiae* are not expressly used, equivalent terms, as in our canon 2315: *habeatur tanquam haereticus, haereticorum ponis obnoxius,* mean the same.

1 *L. c.,* see note under can. 2314.

2 This seems to be indicated also in the notes of Card. Gasparri to this canon.

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provided, of course, they act of their own accord and knowingly. Hence

a) *Credentes* are such as externally profess the errors of heretics, *e. g.*, by asserting that Luther or Döllinger were correct in their views, even though they may not know the particular errors of these leaders.[3]

b) *Receptores* are those who receive and shelter heretics, especially with the intention of hiding them from the ecclesiastical authorities.[4]

c) *Fautores* are such as favor heretics because of their heresy, by omitting to denounce them when required or demanded by their office, or by giving support to non-Catholic propaganda, This latter way of propagating heresy is followed by public and private persons who write for heretics, praise their methods and objects, recommend their work and give it material support, always provided that the heresy itself is the object of their mental and material favors.[5]

d) *Defensores* means those who defend heretics for the sake of heresy, orally, in writing, or by acts of defence proper. All such persons are suspected of heresy if they act of their own accord and knowingly. *Sponte* is opposed to compulsion and fear, and therefore implies full deliberation and a free will not hindered by any extrinsic or intrinsic impediment, such as fear of losing an office, or one's reputation, or customers. *Scienter* is opposed to ignorance, the object of which here is heresy, and means that these promotors or propagators of heresy must be

3 D'Annibale, *l. c.*, p. 24; Avanzini, *l. c.*, p. 8, n. 5, who justly observes that they may not be heretics if they profess these errors only in a mechanical way.

4 D'Annibale, *l. c.*, p. 12, n. 12; this was important in former times on account of the office of inquisitors; Hollweck, *l. c.*, p. 165.

5 D'Annibale, *l. c.*, p. 24, n. 32: *"intuitu haeresis"*; Hollweck, *l. c.*, p. 164 f.

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aware that they are helping *heresy as such.* Besides, as *iuvare propagationem* seems to imply an effective propaganda, it may be said that these *fautores,* etc., must produce an effect. However, this is rarely wanting if the support is a material one.[6]

2. Those *who communicate with heretics in divinis* are themselves suspect of heresy. Here we refer to can. 1258, where the necessary explanation has been given.[7]

3. These and all others suspected of heresy incur the penalty stated in can. 2315.

TEACHING AND DEFENDING CONDEMNED DOCTRINES

Can. 2317

Pertinaciter docentes vel defendentes sive publice sive privatim doctrinam, quae ab Apostolica Sede vel a Concilio Generali damnata quidem fuit, sed non uti formaliter haeretica, arceantur a ministerio praedicandi verbum Dei audiendive sacramentales confessiones et a quolibet docendi munere, salvis aliis poenis quas sententia damnationis forte statuerit, vel quas Ordinarius, post monitionem, necessarias ad reparandum scandalum duxerit.

This canon is a modified repetition of a passage in the Constitution *Apostolicae Sedis.*[1] We say modified, because the penalty of excommunication *latae sententiae*

6 *Ibid.* an example: those who contribute to non-Catholic propaganda are guilty of coöperation.

7 See Vol. VI of this Commentary, p. 192 ff.

1 § II, 1: *"Docentes vel defendentes sive publice, sive privatim propositiones ab Apostolica Sede damnatas sub excommunicationis poena latae sententiae; item docentes vel defendentes tanquam licitam praxim inquirendi a poenitente nomen complicis, prouti damnata est a Benedicto XIV. in Const. Suprema 7. Julii 1745; Ubi primum 2. Julii 1746; Ad eradicandum 28. Septembris 1746."*

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is changed into another. Besides our canon mentions *doctrine,* while the aforesaid papal constitution referred to *propositions.* Materially speaking there can hardly be any difference between doctrines and propositions, except that the former is a somewhat wider term comprising formulated propositions as well as errors which have not yet been cast into theses.

The text says: *All who obstinately teach or either publicly or in private defend a doctrine that has been condemned by the Apostolic See or by an ecumenical council, but not as a formal heresy, are to be excluded from the ministry of preaching the word of God or hearing confessions, and from the office of teaching. This in addition to the penalties which the sentence of condemnation decrees against them and the penalties which the Ordinary, after a due warning, may consider necessary in order to repair the scandal given.*

1. The *persons* here intended are those who *teach* or *defend* condemned doctrines. To *teach* means to communicate something to others who are ignorant thereof, with the intention of convincing them.[2] To *defend* signifies to take some one under one's protection, especially if he is attacked. Hence a mere assertion, proposal or profession of a condemned doctrine would not be a defence.[3] The defence, however, must be of the false doctrine itself; to protect a person who was condemned would not be a defence in the sense of our canon.

2. A false doctrine may be taught or defended either in public or privately. The defence is *public* if done in a public place, such as a pulpit, or a school, or an open

2 Thus Hollweck, *l. c.,* p. 166, note 3. D'Annibale, says (*l. c.,* p. 71): "*docere est, nescientibus tradere*"; but this is too wide a definition.

3 Hollweck, *l. c.;* D'Annibale, *l. c.;* Pennacchi, *l. c.,* I, 458 f.

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meeting. It is *private* if individuals are approached in conversation by chance or appointment. It makes no difference whether the teaching or defending is done in writing or orally.[4]

3. The *object* of this teaching or defence must be a *doctrine condemned by the Apostolic See or by a general council,* though not as a formal heresy. By *Apostolic See,* of course, is understood the whole Roman Court, consisting of the Sacred Congregations, Tribunals, and Offices (can. 7), more especially the Holy Office, which is the competent judge in matters of faith. A *general council,* according to can. 222, must have the Roman Pontiff as its head.

The term *doctrine,* as already observed, is somewhat wider than "propositions," used in the "*Apostolicae Sedis.*" Propositions are brief sentences, generally taken from the works of suspected authors, cast into the form of a canon, and accompanied by a theological censure or note, the grading of which has become almost stereotyped, which is a great advantage because it admits of a precise theological-moral classification [5] of objectionable doctrines.

A proposition is *haeretica* if opposed to a truth clearly proposed by the Church as *de fide.*

A proposition is *erronea* if opposed to the theological teaching commonly held in the Church, though not proposed as *de fide.*

[4] Hollweck, *l. c.;* D'Annibale, *l. c.* p. 71. *Public* may also imply a person in a public capacity, and *private* a person in private position, although this significance is not directly intended in the text; but neither is it excluded, for, as a rule, a public person exercises more influence than a private person.

[5] See Franzelin, S. J., *Tractatus de Divina Traditione et Scriptura,* ed. 4, 1896, p. 141 ff., sect. II, scholion to thes. XII; Pennacchi, I, 149 ff.

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A propositio temeraria differs from an *erronea* only in degree; it is less offensive than an erroneous proposition because less repugnant to the teaching of the Church.[6]

A proposition is called *male sonans* if its wording may be taken in a good sense, yet, according to common parlance within the Church, sounds very suspicious.[7]

Piarum aurium offensiva is a proposition which is opposed to the common belief or sentiment of the faithful.

We may safely say that all these propositions,— with the exception of *haeretica,* which belongs to heresy proper, — are included in the text. But as the term *doctrine* is employed, it should be clearly understood that, when a doctrinal system as such, like Modernism, is condemned, no specific propositions need be mentioned as condemned.

In chronological[8] order the following propositions and doctrines fall under can. 2317:

a) The errors of Wiclif and Hus, as censured in the Constitution of Martin V, "*Inter cunctas,*" of Feb. 22, 1418;

b) The errors of Luther — in so far as they are not formally heretical — as condemned by Leo X, "*Exsurge Domine,*" of June 15, 1520;

c) The proposition condemned by Clement VIII, June 20, 1602, styling as false, rash, and scandalous the assertion that confession and absolution could be made by letter or message;

d) The 45 propositions condemned by the Holy Office in its decrees of Sept. 24, 1665 and March 18, 1666;

6 Cfr. "*Auctorem fidei,*" prop. 26.

7 *Ibid.*, prop. 44, 45.

8 See Avanzini, *l. c.*, p. 117 ff.; they are also found in Denzinger's *Enchiridion.*

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e) The 65 propositions condemned by the Holy Office on March 4, 1679, as "scandalous and pernicious in practice";

f) The 68 propositions of Michael de Molinos, condemned by the Constitution of Innocent XI, "*Coelestis Pater,*" of Nov. 20, 1687, partly as heretical, partly as suspected, erroneous, scandalous, etc.;

g) One proposition condemned by Alexander VIII, Aug. 24, 1690, and 31 condemned by the same Pope, Dec. 7, 1690;

h) The 101 propositions of Paschasius Quesnel, condemned by Clement XI, in the Bull "*Unigenitus,*" Sept. 8, 1713 and again in the "*Pastoralis Officii,*" Aug. 28, 1718;

i) Five propositions condemned by Benedict XIV, "*Detestabilem,*" Nov. 10, 1752;

k) 85 propositions of the Synod of Pistoja, condemned by Pius VI, "*Auctorem fidei,*" Aug. 28, 1894;

l) Finally, the errors of the Modernists, in so far as they are not formally heretical.[9]

The errors censured in the Syllabus of Pius IX and Pius X's "*Lamentabili*" must be judged according to the censure attached to each.[10]

4) The *penalties* attached to the transgression of this law, for clergymen, consists *in the withdrawal of their faculties.* Laymen guilty of this delinquency must be removed from the teaching office *(a quolibet docendi*

9 Pius X, "*Praestantia Scripturae,*" Nov. 18, 1907 (*Anal. Eccl.*, XV, 435); "*Sacrorum Antistitum,*" Sept. 1, 1910 (*A. Ap. S.*, II, 701 ff.).

10 Concerning the Syllabus of Pius IX,— which Card. Gasparri omits from his notes,— the question whether it is a dogmatic definition belongs to the theologians; here it enters only in as far as a doctrine condemned by the Apostolic See is concerned.

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munere), which includes all professorships in schools, colleges, universities, etc.

The clause "*salvis aliis poenis quas sententia damnationis forte statuerit*" concerns the future, not the past. The "*Exsurge Domine*" of Leo X (§4) enumerates several such penalties, and the Motu proprio of Pius X, "*Praestantia scripturae,*" contains the same clause in almost identical words. But these penalties must be considered as abrogated, according to can. 6, n. 5, otherwise there would be a flagrant contradiction, and hence *statuerit* must be taken as the future.

If the *Ordinary* deems it necessary to add other penalties, he must *first issue an admonition,* according to canons 2143 and 2309. He is not obliged to inflict other penalties, but may do so if he deems it expedient (see can. 2223).

PENALTIES IN REGARD TO FORBIDDEN BOOKS

Can. 2318

§ 1. In excommunicationem Sedi Apostolicae speciali modo reservatam ipso facto incurrunt, opere publici iuris facto, editores librorum apostatarum, haereticorum et schismaticorum, qui apostasiam, haeresim, schisma propugnant, itemque eosdem libros aliosve per apostolicas litteras nominatim prohibitos defendentes aut scienter sine debita licentia legentes vel retinentes.

§ 2. Auctores et editores qui sine debita licentia sacrarum Scripturarum libros vel earum adnotationes aut commentarios imprimi curant, incidunt ipso facto in excommunicationem nemini reservatam.

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§ 1. Those who *publish books written by apostates, heretics, or schismatics, incur the excommunication reserved speciali modo to the Holy See, after the book has been effectively published. The same penalty is incurred by those who defend such books or others nominally forbidden by Apostolic letter, or who knowingly read or retain them without due permission.*

§ 2. *Authors and publishers who print books of Sacred Scripture, or annotations and commentaries thereon, without due permission, incur the excommunication reserved to no one.* After what was said elsewhere[1] a few remarks may suffice.

1. The *persons* who incur this penalty are:

a) The *editores* of the books named, by which term are to be understood the author himself as well as the publisher, but not the printers and their co-workers. The editors, whether they undertake the publication in their own name, or under an assumed name, or anonymously, incur the penalty only after the edition is complete and for sale, *opere publici iuris facto.*

b) Those who *defend*[2] books forbidden under this canon or *read or retain* them *without the necessary permission and knowingly, i. e.,* being aware that they are forbidden.

2. The *books* forbidden here under the penalty stated in §1, are those of *apostates, heretics,* and *schismatics,* which not merely propose, but defend apostasy, heresy, or schism. The defence may concern only one heretical doctrine. The term "*book*" must here be strictly interpreted and hence can. 1384, § 2 cannot be applied.

1 See Vol. VI of this Commentary, p. 428 ff.

2 By defending the contents, or protecting the book from being destroyed or given up; Eichmann, *l. c.,* p. 132.

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Consequently pamphlets, magazines, leaflets, papers, etc., are not comprised under this penal sanction. Besides, the "books" must be forbidden by *Apostolic letter,* wherefore decrees of the Holy Office or any other S. Congregation forbidding certain books do not fall under this heading, even though the decree may have been issued "*facto verbo cum SSmo.*" On the other hand it does not matter whether these Apostolic letters are issued in the form of a brief, or bull or encyclical letter, or any other.

3. The *penalty* is excommunication reserved *speciali modo* to the Apostolic See; it is incurred *ipso facto, i. e.,* by the fact of having published such a forbidden book, or defended, read, or retained it, according to the explanation given in Title XXIII, Book III.

Here it may be added that the Ordinary may, in virtue of can. 1402, grant permission to read and retain books forbidden by common law (can. 1399) or by a decree of the Apostolic See (Holy Office), but he cannot grant permission to read and retain books forbidden by Apostolic letter.

§ 2. Another category of books is mentioned in § 2 of can. 2318: the *authors* and *publishers* of books of *Sacred Scripture* or of annotations and commentaries thereon,[3] if printed without due permission.[4] All these incur *excommunication* reserved to no one, from which any confessor may absolve, according to can. 2253, 1°.

MIXED MARRIAGES AND NON-CATHOLIC EDUCATION

Can. 2319

§ 1. Subsunt excommunicationi latae sententiae Ordinario reservatae catholici:

3 Cfr. can. 1385, § 1, n. 1; 1391; 1399; 1400.

4 This means to have them printed for publication or sale, not

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1°. Qui matrimonium ineunt coram ministro acatholico contra praescriptum can. 1063, § 1;

2°. Qui matrimonio uniuntur cum pacto explicito vel implicito ut omnis vel aliqua proles educetur extra catholicam Ecclesiam;

3°. Qui scienter liberos suos acatholicis ministris baptizandos offerre praesumunt;

4°. Parentes vel parentum locum tenentes qui liberos in religione acatholica educandos vel instituendos scienter tradunt.

§2. Ii de quibus in § 1, nn. 2-4, sunt praeterea suspecti de haeresi.

This canon states four different cases, all of which have to do with family life in relation to the Catholic faith. Common to all four is the penalty of *excommunication latae sententiae, reserved to the Ordinary.* Three of them, besides, fall under the *suspicion of heresy,* which must be judged according to can. 2316.

1. Those who *contract marriage before a non-Catholic minister,* against can. 1063, §1, *incur the aforesaid excommunication,* but do not become suspected of heresy. It is, of course, immaterial whether one or both parties belong to the Catholic faith. For the rest, we refer to can. 1063 and its explanation.

2. *Those who contract marriage with the implied or express agreement that all or some of the children shall be educated outside the Catholic Church, incur the aforesaid excommunication and, besides, are suspected of heresy.* This crime is against can. 1061, §1, n. 2, which requires a promise that all the offspring shall be

for one's own use; in the latter case, the censure would *not* be incurred.

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educated in the Catholic Church in case of a mixed marriage. Of course, if two Catholics should marry under the same condition, they, too, would incur the penalty.

The text mentions a twofold agreement (*pactum*), one express and the other implied. *Express* contracts or agreements are those the terms of which are openly uttered and avowed at the time of the making. *Implied* are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform, and upon this presumption makes him answerable to those who suffer from his non-performance. This distinction refers only to the mode of proof.[1] Yet it will serve our purpose; for the agreement must be either a legal or an informal one, *i. e.*, a mutual promise or consent by two or more persons. An express agreement would be one made in legal and written terms, as the so-called reversals usually are. An implied contract would be an agreement or promise made by one of the parties to comply with the conditions, though iniquitous, of the civil law that the boys should follow the religion of the father and the girls that of the mother.[2]

A mere reluctant silence on the part of the Catholic party, inspired by the desire not to cause a disturbance, could not be styled an agreement. On the other hand, regret after the promise was made would not save the Catholic party from incurring the censure. Neither would the promise made to have only the first-born boy educated in a non-Catholic sect offset the effects of this canon. Finally, it may be observed that the text says:

1 See Harriman, *Contracts*, 1901, § II.

2 Pius VIII, "*Litteris altero*," March 25, 1830 (*Coll. P. F.*, n. 811).

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"*extra catholicam Ecclesiam,*" which implies total exclusion of the Catholic religion and its principles. It involves either omission of Catholic education, *i. e.*, indifferentism, or a positively sectarian or infidel training.

3°. *Those who knowingly dare to offer their children to non-Catholic ministers for baptism incur excommunication reserved to the Ordinary and, besides, are suspected of heresy.*

a) Here the parents are intended, because the text says: "*suos liberos,*" *their* children. Therefore, if a midwife or nurse should commit this crime without the knowledge of the parents, the latter would not be subject to this penalty. On the other hand, the word "*suos*" cannot be interpreted as if the parents would not incur the penalty if they commanded or even permitted such an act. Here Regula Iuris 72 in 6° finds application: "What one does through another, is as if he did it himself." Can. 2209, §3, also applies and consequently the coöperation must be judged according to this canon. But a nurse or midwife would not incur the penalty, even though she was guilty of such an unqualified interference with parental rights of her own accord.

b) The words "*scienter praesumpserint*" must be interpreted according to can. 2229, §2. Therefore any notable lessening of responsibility, either on the part of the intellect or of the will, would render one immune from incurring the penalty *latae sententiae*. A case to the point is that mentioned in a decision of the Holy Office.[3] Some Irish mothers, for fear of pecuniary fines, had presented their children to Protestant ministers. They committed a grievous sin, but did not incur the

[3] S. O., Nov. 29, 1672, ad 2 (*Coll. P. F.*, n. 205).

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penalty stated in our canon.[4] If the parents were deceived as to the true denomination of an intruding sectarian, imputability would be wanting, and consequently the penalty would not be incurred.

4. *Parents or those who hold their place, if they knowingly offer children to be educated or brought up in a non-Catholic denomination, incur the aforesaid penalty of excommunication and are suspected of heresy.*

a) Here not only parents, but also *guardians or tutors,* are included. It is irrelevant whether the guardians are legally appointed, or have assumed authority over the children of their own accord, or with the connivance and approval of the parents.

b) The *act* which is here declared punishable, is that of *educating* or bringing up the child *in a non-Catholic religion.* This may be done either in sectarian schools, properly so-called, or by means of private tutors and teachers, either systematically or without method. The public schools of our country are not supposed to be sectarian.

c) The adverb *scienter* presupposes that the anti-Catholic tendency of the school or teacher was known to the parent or guardian.[5]

4 We know of tricks played on poor Italian mothers by unscrupulous proselytizing ministers, who offered twenty lire to be allowed to baptize a baby.

5 See can. *2229,* § *2.*

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TITLE XII

CRIMES AGAINST RELIGION

The delinquencies enumerated in this title are directed partly against the Catholic faith and partly against the religious sentiments common to all whose religious and, we might add, natural instincts are not entirely perverted. All of them offend against the inborn respect of the faithful for the sacred things which are closely connected with religion.

DESECRATION OF CONSECRATED SPECIES

Can. 2320

Qui species consecratas abiecerit vel ad malum finem abduxerit aut retinuerit, est suspectus de haeresi; incurrit in excommunicationem latae sententiae specialissimo modo Sedi Apostolicae reservatam; est ipso facto infamis, et clericus praeterea est deponendus.

The crime here mentioned was perpetrated by fanatics imbued with the heretical tendencies of the Manichæans, against whom the papal inquisitors proceeded severely, but not without encountering difficulties on the part of some Catholics. These outcasts abused the sacred hosts for magic and diabolical purposes, trying them on products and animals.[1] But the Inquisition alone could not

1 Hadrian VI, "*Dudum*," July 20, 1522 (*Bull. Luxemb.*, 1727, I, 625).

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eradicate this evil. Hence the popes decreed severe penalties against all such malefactors of whatever dignity, condition, or age, provided they had attained the twentieth year.[2] The penalty of being delivered to the secular authority, which generally inflicted capital punishment, was at first condoned if the culprits confessed the crime of their own accord. But Clement XIII abolished this mitigation.[3] Clerics were formerly degraded and then delivered up to the secular power. Our Code decrees as follows: *Whoever throws away the sacred species, or carries them away for evil purposes, or retains them, is suspected of heresy, incurs excommunication latae sententiae, reserved modo specialissimo to the Apostolic See; he is ipso facto infamous, and, if a cleric, shall be deposed.*

In explaining this canon we shall follow the Constitution of Benedict XIV.

1. Whoever *(qui)* means any person, layman or ecclesiastic, of the highest as well as lowest rank or dignity, and no privilege, exemption, or indult shall protect one guilty of such a crime.[4]

2. The text says, furthermore, that the crime must be committed with *consecrated species*. The aforesaid Constitution mentioned sacred hosts, thereby intimating that consecrated wine, *i. e.*, the Sacred Blood, is not so easily exposed to sacrilege. Our text includes both bread and wine, provided they are consecrated. When consecration may be legitimately presumed, Benedict XIV de-

2 Innocent XI, "*Ad nostri Apostolatus*," March 12, 1677; Alexander VIII, "*Cum alias*," Dec. 22, 1690, embodied in Bened. XIV, "*Ab augustissimo*," March 5, 1744.

3 "*Gravissimum*," March 6, 1759, § 6 (*Continuatio Bull., ed. Prati*, 1842, I, 114).

4 From this excommunication are exempted cardinals, but not bishops; see can. 2227, § 2.

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scribes as follows: if hosts or particles are preserved in a repository, tabernacle, pyxis, or ostensorium, the legal presumption is that they are consecrated. The same presumption holds if a communicant should take a particle of the host out of his mouth after Holy Communion. Against this presumption conclusive and evident proofs are admitted, which means that at least two first-class sworn witnesses must prove the contrary, *viz.*, that the hosts were not consecrated. Such a proof, unless the minister who presumptively consecrated the sacred species should testify under oath to the contrary, could hardly be furnished; and therefore the presumption might just as well be called *iuris et de iure*.[5]

3. The acts by which this penalty is incurred are described as: *abiicere, abducere, retinere.* The first designates the act of intentional throwing away or spitting out. Accidental vomiting, sickly or sudden jerking or coughing does not, of course, constitute irreverence. The second term (*abducere*) denotes a carrying away of the sacred host, either violently (by robbery) or secretly, together with the sacred vessels or without them. The sacred species may be *retained* in places where they should not be kept, *i. e.*, in private homes, on one's own person, always supposing that this, like *abducere,* is done for an evil purpose. For the *abiicere* no evil purpose is required; the act alone is sufficient to constitute the crime in question. An *evil purpose* is legally presumed if the sacred species are carried away or retained. If these two acts are proved it is not necessary to prove

5 See can. 1825 f.

6 The purpose would also be evil if the sacred species were stolen or retained in order to hand them over to heretics, infidels, Freemasons, etc., or if they were used for superstitious purposes, for witchcraft or magic; Hadrian VI, "*Dudum.*"

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the bad intention.[6] Therefore the defendant himself must prove conclusively that he had no bad intention. Thus Benedict XIV in the aforesaid Constitution.

4. The *penalties* are somewhat mitigated, inasmuch as the delivering up of the culprit to the secular arm is not mentioned, and degradation (in case of clergymen) is changed into deposition *ferendae sententiæ*. The infamy mentioned in our Canon is that of law *(infamia iuris)*, with all the effects mentioned in can. 2294, §1.

VIOLATION OF THE LAWS OF BINATION AND FASTING

Can. 2321

Sacerdotes qui contra praescripta can. 806, § 1, 808 praesumpserint Missam eodem die iterare vel eam celebrare non ieiuni, suspendantur a Missae celebratione ad tempus ab Ordinario secundum diversa rerum adiuncta praefiniendum.

Priests who dare to say Mass twice a day against the ruling of can. 806, §1, *or who presumptuously say Mass without fasting, contrary to can.* 808, *should be suspended by the Ordinary from saying Mass for a time, the duration of which should be determined by circumstances.*

Enough has been said concerning bination and fasting in connection with previous canons. As to the penal character, we may add:

1°. The term *presumption* is attached to both transgressions, and consequently can. 2229, §2 must be here applied. Any reason, therefore, of (not affected) ignorance, or fear, or physical incapacity, would diminish imputability. But since the penalty is not *latae sententiae*, these reasons do not entirely exempt one from incurring it. One decision of the Holy Office indeed reads that

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fear of scandal or astonishment would not justify a priest in saying a second Mass if he had broken the fast.[1] However, since our text expressly adds the term *praesumpserint,* it evidently admits a diminution of imputability and implies that the transgression must be a rash one.

2°. Suspension, even though only temporary, belongs to the class of *vindictive* penalties (can. 2298, n. 2), and consequently requires a judiciary procedure.[2] Its *duration* is to be measured by circumstances. These may be serious, on account of scandal or bad example, but may also depend on the need of priests, local conditions, etc.[3]

SAYING MASS AND HEARING CONFESSIONS BY PERSONS NOT PRIESTS

Can. 2322

Ad ordinem sacerdotalem non promotus:

1°. Si Missae celebrationem simulaverit aut sacramentalem confessionem exceperit, excommunicationem ipso facto contrahit, speciali modo Sedi Apostolicae reservatam; et insuper laicus quidem privetur pensione aut munere, si quod habeat in Ecclesia, aliisque poenis pro gravitate culpae puniatur; clericus vero deponatur;

2°. Si alia munia sacerdotalia usurpaverit, ab Ordinario pro gravitate culpae puniatur.

Persons not in sacerdotal orders, who pretend to say Mass or hear sacramental confession, ipso facto incur the excommunication reserved speciali modo to the Apostolic See.

1 S. O., Dec. 2, 1874 (*Coll. P. F.,* n. 1425).

2 Can. 1933, § 4; however, it may form a reason for suspension *ex informata conscientia.*

3 If avarice were the motive of

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A layman performing such acts must, besides, be deprived of any pensions and offices he may hold in the Church, and be punished with other penalties, according to the gravity of the crime; a cleric is to be deposed.

Benedict XIV, in his Constitution "*Sacerdos in aeternum,*" mentions several papal documents (of Paul IV, Sixtus V, Clement VIII, and Urban VIII) which contain penalties decreed against such atrocious sacrileges. It is a usurpation of the highest power given to man, and is deservedly punished with great severity, not only with excommunication, but also with the delivery of the culprit to the secular arm, and degradation.[1] Our Code has modified the penalties according to the exigencies of the times.

1°. The persons intended here are all *who have never been promoted to the order of the priesthood.* Hence all laymen who are not of the clerical rank, as well as all clerics from the first tonsure to deaconship, inclusively.

The question may arise: How are we to prove that one is not of the priestly order? This, according to the aforesaid Constitution of Benedict XIV, may be settled by demanding of the incriminated person the testimonials of his ordination. For, according to our Code, can. 1010, §2, every cleric must be given a paper certifying the order he has received. Besides, the episcopal court must keep the records. Consequently, information, even in a private or confidential (*i. e.*, extrajudicial way) may furnish the necessary proof for ordination required in our case. If no such written proof could be found, at least two witnesses would have to testify under oath to

bination, or intemperance of breaking the fast, the circumstances would be serious.

1 Of these, Bened. XIV, "*Quam grave,*" Aug. 2, 1757, treats *in extenso.*

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the ordination or the fact that the defendant is a priest.[2]

3°. The *acts* here punished are two: pretending to say Mass and hearing sacramental confession.

a) *Simulatio* is an act by which one pretends to be what he is not. A Mass said by any person lacking the priestly power is no Mass at all,[3] no matter whether the person has the intention to say Mass or not. However, as Benedict XIV says, the sacrilegious act must have proceeded at least as far as the elevation of the host and chalice, or one of these acts inclusively. Whether or not the words of consecration were pronounced does not matter. Neither does it constitute a diminution of criminal imputability if Mass was said only once.

b) *Hearing sacramental confession* is also included in our canon. The text does not say: *simulaverit;* hence the mere act of hearing sacramental confession is sufficient to constitute the crime. What is a sacramental confession? It is the penitent's accusation of his sins made to a competent priest in order to obtain absolution. A confession made for the sake of obtaining consolation or counsel would not be sacramental, nor would it be sacramental if the penitent knew that the person to whom he made his confession lacked the priestly character.[4] But the formula of absolution need not be pronounced.[5]

2 Whether an *invalidly ordained* priest would incur this censure, is not quite certain; hence the benefit of doubt may at least be admitted in favor of non-incurrence.

3 See Lehmkuhl, *l. c.*, II, n. 44: "*fictum esse actum, qui externe ita ponatur, ac si omnia ad valorem requisita adsint, sed animo, seu sine interna voluntate et intentione.*" But here the intention is lacking objectively or fundamentally, not subjectively, at least not *in recto.*

4 Arregui, *Summarium Theological Moralis,* 1919, ed. 4, p. 367.

5 Bened. XIV, "*Sacerdos in aeternum,*" § 8.

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4°. The *penalties* inflicted are: (a) excommunication *latae sententiae* reserved *speciali modo* to the Holy See. The phrase here is not accompanied by any extenuating or modifying word, such as *praesumpserit, scienter,* etc.; (b) all the other penalties are *ferendae sententiae.* This is also true of the punishments to be inflicted arbitrarily, *i. e.,* proportionately to the seriousness of the criminal act, when persons who are not priests *usurp the exercise of other priestly functions.* Of this kind would be blessings reserved to priests if given by laymen.[6]

BLASPHEMY AND PERJURY

Can. 2323

Qui blasphemaverit vel periurium extra iudicium commiserit, prudenti Ordinarii arbitrio puniatur, maxime clericus.

Whoever blasphemes or commits perjury, outside of an ecclesiastical trial, may be punished according to the prudent judgment of the Ordinary, especially if the culprit is a cleric.

Two religious crimes, blasphemy and perjury, are here connected, because both are an offense against the immediate object of religion.

1. Blasphemy is defined as contumelious speech against God. It is *heretical* if His existence or His attributes are impugned or denied. It is simple if the contumelious utterance consists of mere imprecations. Blasphemous words may also be uttered against the Saints, because, as God is praised in his Saints, so also

[6] See can. 1147, § 3; 1342, § 1.

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may He be blasphemed in his Saints.[1] But it is controversial among theologians whether blasphemy, in the proper sense, can be committed by gestures, signs, or acts, for instance, spitting against heaven, treading on the crucifix, etc.[2]

a) Our text appears to include every species of contumelious utterance, whether by speech or gesture, provided the intention of blaspheming can be deduced from the act according to the common usage of the people and country.[3] An indication may be found in the expression "*absque contumelia Creatoris,*" which doubtlessy includes gestures and acts.

b) The *penalty is left to the Ordinary,* who may decree a public penance or any other ecclesiastical penalty, provided, of course, the offense was an external and a public act.[4] For although it is not essential to the notion of crime that it be public, yet a public penance could not be imposed for an occult crime.

Heretical blasphemy belongs exclusively [5] to the ecclesiastical court. *Simple blasphemy* belongs to the mixed forum, *i. e.,* the ecclesiastical as well as the secular courts may prosecute it. In England and in most of the United States blasphemy is still a statutory crime, but prosecutions for the offence have become very rare.[6]

2. *Perjury* is here understood as the contrary of an oath, and, therefore, a violation of truthfulness as well as a breach of a promise made under oath (see can.

1 C. 2, X, V, 26; Reiffenstuel, *ib.,* n. 15.

2 C. 2 just quoted only mentions: *linguam in blasphemiam relaxare;* thus also S. Thom., II-II, q. 13, art. 2; Ballerini-Palmieri, *l. c.,* II, n. 370.

3 Thus Hollweck, *l. c.,* p. 193; Arregui, *l. c.,* n. 202; Eichmann, *l. c.,* p. 136; see also Rom. II, 14; I Tim. VI, 1; Tit. II, 5.

4 Cfr. can. 1933, § 1; can. 2312, § 2; for former penalties, see c. 2, X, V, 26; Pius V, "*Cum primum,*" April 1, 1566, § 33.

5 Reiffenstuel, V, 26, n. 27.

6 Blackstone-Cooley, *Commen-*

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1316 ff). There is no doubt that both kinds of perjury are here included and intended, provided only that the oath be *extrajudicial*, *i. e.*, not taken with reference to an ecclesiastical trial.

Experts, witnesses, counsel, proxy, judges, who take the oath before or at the trial, therefore, are punishable in case of perjury according to can. 1743, §3; 1757, §2, n. 1; 1795, §2. Any other perjury, committed either by private persons or officials, except in reference to an ecclesiastical trial, is also punishable. If it occurs in a secular court, and the latter metes out a sufficient penalty, the ecclesiastical court may be satisfied.[7] The secular courts punish perjury if at least two trustworthy witnesses attest the falsity of the perjured statement.[8] This procedure may serve as a norm for Ordinaries in proceeding against perjurers. The penalty, being vindictive, requires some sort of judiciary trial.

Clerics should, of course, be tried in the ecclesiastical court and be punished more severely than laymen. Formerly penalties against laymen guilty of perjury were of varying severity. Thus a fast of forty days on bread and water, and seven years of ordinary penance, which meant at least two fast-days a week, were to be meted out according to a Pseudo-Fabian decree.[9] Clergymen were to be deposed, and in case of obstinacy, degraded.[10] These severe penalties show how the Church abhors this crime, which is not only an offense against religion, but undermines public trust and confidence.

taries, IV, 59; *New International Encyclopedia*, 1904, Vol. III, 163.

7 Can. 1933, § 3.

8 Kenny-Webb, *Outlines of Criminal Law*, p. 280 ff.

9 C. 18, C. 6, q. 1.

10 C. 7, Dist. 50; c. 9, C. 3, q. 5; c. 10, X, II, 1.

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TRAFFICKING IN MASS STIPENDS AND DEFRAUDATION

Can. 2324

Qui deliquerint contra praescriptum can. 827, 828, 840, § 1, ab Ordinario pro gravitate culpae puniantur, non exclusa, si res ferat, suspensione aut beneficii vel officii ecclesiastici privatione, vel, si de laicis agatur, excommunicatione.

What canons 827, 828, 840, §1, forbid has been explained elsewhere,[1] and we have nothing to retract. We only add that (a) every species of trafficking in Mass stipends, (b) every curtailment of the number of Masses offered and accepted, (c) every fraudulent subtraction from the alms given for Masses when sending the intentions to others, is here included. The *penalty is left to the judgment of the Ordinary, who shall take into consideration the seriousness of each case,* especially the number and amount of stipends, the scandal given, and whether or not the culprit is a habitual offender. If the case is important and the transgressor is a *clergyman, suspension or privation of benefice or ecclesiastical office would not be an exorbitant penalty.* Hence the Ordinary could suspend the clergyman from both office and benefice. But the vindictive penalty of privation could only be *either* of benefice *or* of office, not of both together. *Laymen* who transgress these laws, *e. g.,* booksellers and other merchants, can be punished by excommunication.

What we said elsewhere[2] concerning pious frauds we

1 See Vol. IV of this Commentary, p. 186 ff.

2 See Vol. VI of this Commentary, p. 614, note 1.

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here repeat, but with a restriction. If $100 are offered for Masses, without any further determination, 100 Masses must be said; neither would the priest satisfy his obligation if he said or sang twenty high Masses of his own accord. Only in case of a parish—this is our restriction—where the priest sings a Mass every day of the week and the donors know that the ordinary stipend for such a Mass is five dollars, might the priest be justified in saying only twenty Masses for $100.

SUPERSTITION AND SACRILEGE

Can. 2325

Qui superstitionem exercuerit vel sacrilegium perpetraverit, pro gravitate culpae ab Ordinario puniatur, salvis poenis iure statutis contra aliquos actus superstitiosos vel sacrilegia.

Whoever practices superstition or perpetrates a sacrilege, shall be punished by the Ordinary in proportion to the gravity of the offense. The penalties provided by law against certain superstitious acts and sacrileges are not touched by this canon.

1. *Superstition* is defined by St. Thomas [1] as an excess of religious worship or a vicious, ignorant, and abnormal form of belief and practice. Our canon considers not so much the speculative or purely mental excess as its practical expression, *i. e.*, superstitious observance. This may be defined as an inadequate means to produce certain effects in a more or less preternatural way, generally by invoking the assistance of creatures or the

1 *Summa Theol.*, II–II, q. 92, art. 1; S. C. P. F., Feb. 9, 1760 (*Col* n. 424).

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powers of darkness. In the Decretals[2] a special title was devoted to this subject under the name of *sortilegia.* This is subsumed under divination or manifestation of secret and hidden things by means of signs and with the help of demons. A long list of various species, divided according to the signs or means employed, is given by the commentators: *geomantia,* if the earth was consulted, *aeromantia,* if the air; *hydromantia,* if water; *pyromantia,* if fire; *haruspicium,* if the entrails of animals; *auspicium,* if the flight of birds; *augurium,* if the twittering and chirping of birds; *pedomantia,* if the feet, and *chiromantia,* if the hands were inspected; *omina,* if the voices of men; *onyrocritica,* if dreams; *physiognomia,* if the whole body was inspected; *spatulamantia* if the *spatula;*[3] *metoposcopia,* if the forehead; *pythonia,* if the demon tells something through living men who are his tools; *necromantia,* if dead bodies are consulted; *astrologia,* if heavenly bodies are observed, not in a scientific, but superstitious way. We quote these names to show that the number of fools has not yet decreased. For all these forms of witchcraft, sorcery, magic, etc., are more or less practiced to-day by *Spiritists.* We may include here the use of the *ouija board,* unless it is handled for mere pastime—a most dangerous diversion.[4] Also certain medical practices which promise health to those who use certain signs or apply certain herbs in a specified way. As to *hypnotism,*

2 Lib. V, tit. 21; see the commentators on the same, especially Reiffenstuel and Schmalzgrueber.

3 The term is not quite clear; "*in spatula divinare*" (Du Cange, *Glossarium,* VI, 632) seems to signify to divine from the shoulder or hips or brawn of a pig.

4 See the works of J. Godfrey Raupert: *Modern Spiritism, The Dangers of Spiritualism, The New Black Magic* (last chapter on the Ouija Board); J. Liljencrants, *Spiritism and Religion;* T. F. Coakley, *Spiritism, the Modern Satanism;* Lapponi-Gibbs, *Hypnotism and Spiritism,* 1915.

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it is not forbidden in itself, nor can it be styled a superstitious observance if practiced by scientific and conscientious physicians, and if no extraordinary effects are expected or promised. The *penalty* for these transgressions is arbitrary, but must be inflicted according to the rules laid down in can. 2223.

2. *Sacrilege* is a violation of sacred things, *i. e.*, things destined for divine worship either by consecration or blessing (can. 1497, §2). It is *personal,* if a sacred person is violated externally;[5] *local,* if a sacred place is subjected to irreverence or scorn, such as suffices to desecrate a holy place (can. 1154); *real,* if sacred things are violated, such as the sacred species, consecrated utensils or images, etc.

3. All these sacrileges are here intended. The *penalty is left to the Ordinary,* though, as our canon says, *the penalty for crimes specified* in the Code remains intact, *e. g.:*

a) *Personal* sacrilege against clerics is procecuted by our Code in can. 2241, 2243, as far as the clerical privileges are concerned. The *sacrilegium carnale* is punished, especially as far as illicit or invalid marriage is concerned, in can. 2358, 2388.

b) *Sacrilegium locale* is especially punished in can. 2320, 2328, 2329. But the *ius asyli* is no longer[6] prosecuted by a special penalty, and therefore the first clause only of our canon takes effect;

c) *Sacrilegium reale* has special punishments assigned to it in can. 2320, 2345, 2346 (ecclesiastical property). The clause "*salvis poenis,*" etc., means that the Ordinary should not inflict arbitrary punishment. He may, but

5 External action is required in order to constitute a crime; can. 2195, § 1.

6 "*Apostolicae Sedis,*" n. 18; "*Immunitatem asyli ecclesiastici, ausu temerario, violare iubentes aut violantes*"; *(exc. latae sent. R. P. reservata).*

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is not bound to punish in cases where the law has not provided a special penalty.

TRADING IN FALSE RELICS

Can. 2326

Qui falsas reliquias conficit, aut scienter vendit, distribuit vel publicae fidelium venerationi exponit, ipso facto excommunicationem Ordinario reservatam contrahit.

Those who manufacture false relics or knowingly sell or distribute them or have them exposed to the public veneration of the faithful, ipso facto incur excommunication reserved to the Ordinary.

The preliminary questions as to the authenticity of relics have been explained under can. 1283-1285. No doubt the sad experiences made in Italy, especially since 1870, contributed to the making of this penal canon.

1. *Manufacturers* of relics are persons who make relics of common bones or other things pertaining to the Saints.[1] It does not matter whether these relics are direct (from the body) or indirect (from objects related to the Saints). It seems probable that, if part of a genuine relic were mixed with common things, there would be no manufacture of false relics in the sense of our canon, at least it would be doubtful and the benefit of doubt should be sustained.

2. Those who *knowingly sell false relics* are such as are fully aware that no authentic document exists or has ever existed. If can. 1285, §1 would have to be

1 Selling of true relics is forbidden as simony and sacrilege and to be punished according to can. 2325; but no excommunication is attached.

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applied, because of social disturbance, the relics could not be simply styled false; but in that case the local Ordinary should be consulted; excommunication, however, would not follow.

3. Those who *distribute* false relics *knowingly, i. e.,* knowing that they are not genuine. It does not matter whether this is done by official or private persons. Thus a *custos s. supellectilis* may be as guilty as a simple-minded woman.

4. Those who *knowingly expose or cause such false relics to be exposed* may be the ecclesiastical or the civil authorities, who command such exposition. If an inferior, say a sexton or lay-brother, were ordered to expose them, his coöperation would have to be judged according to can. 2209. If he does not know the relics are false, he is entirely excused; but if he has doubts, he should try to make sure, though while in doubt he would escape excommunication, according to can. 2229, §2.

TRAFFICKING IN INDULGENCES

Can. 2327

Quaestum facientes ex indulgentiis plectuntur ipso facto excommunicatione Sedi Apostolicae simpliciter reservata.

Those who make profit from indulgences incur the ipso facto excommunication simply reserved to the Apostolic See.

The history of this canon runs back to the Reformation, but the traffic in indulgences and other spiritual favors is as old as the term simony. Pius V made special efforts to eradicate this evil,[1] and yet it lives on;

1 "*Etsi Dominici,*" Feb. 8, 1567; "*Quam plenum,*" Jan. 2, 1570,

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else the "*Apostolicae Sedis*" [2] and the Code would not have deemed it necessary to provide a special penalty for the modern followers of Simon Magus. The Code has considerably modified the former text; for, while the constitution of St. Pius V ("*Quan plenum*") and Pius IX included all kinds of spiritual favors, the *Code strictly limits the penalties to indulgences.*

The penalty provided in our canon is incurred by all who derive material profit from indulgences. Hence the mere announcement or promise of indulgences is sufficient, if money or other material profit, such as promotion, protection, aid, has been received and accepted. The essential thing is the simoniacal intention; whether the indulgence was really gained, does not matter. The mere fact that a *questus* (lucre, gain) was obtained by promulgating, preaching, or promising an indulgence, either papal or episcopal, is sufficient to establish the criminal fact.

It does not matter whether one does it himself or through another, or whether the purpose is good or bad, or the cause charitable.[3]

It was held before the promulgation of the Code that bishops do not incur this penalty.[4] This view must now be abandoned; for, according to can. 2227, §2, bishops are declared immune only from suspension and the interdict *latae sententiae,* but not from excommunication. Therefore, with the exception of Cardinals, all prelates may incur this censure. Neither is there any

where other spiritual favors besides indulgences are mentioned.

2 II, 11: "*Omnes qui quaestum facientes ex indulgentiis aliisque gratiis spiritualibus, excommunicationis censura plectuntur Constitutione S. Pii V. Quam plenum, 2. Januarii, 1569.*"

3 This is expressly stated in the aforesaid Constitution of Pius V.

4 Thus D'Annibale, *l. c.,* p. 92, n. 137.

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reason why they should be exempt, since indulgences are granted or promulgated by prelates.

DESECRATION OF GRAVES AND CORPSES

Can. 2328

Qui cadavera vel sepulcra mortuorum ad furtum vel alium malum finem violaverit, interdicto personali puniatur, sit ipso facto infamis, et clericus praeterea deponatur.

Whosoever desecrates corpses or graves to commit theft, or from some other evil motive, is to be punished with the personal interdict, is ipso facto infamous, and if a cleric, should be deposed. The Christian religion as well as nature inculcate reverence for the dead and their resting places. The violation of a tomb was regarded as a crime under the Roman law and visited with the severest penalties. Those convicted of removing a body or digging up human bones were, if persons of the lowest rank, condemned to capital punishment; if of higher condition, they were banished to an island or condemned to work in the mines.[1] A chapter of the Decree of Gratian declares them infamous.[2] This *penalty* is here repeated and involves *infamia iuris.* The other two penalties, *viz.,* the *personal interdict,* which may be inflicted on laymen and clerics, and deposition for clergymen, are *ferendae sententiae.*

No distinction is made between kinds of bodies or graves. Consequently, the body of a criminal is as sacred, in this respect, as that of a respectable citizen.

1 L. 11, Dig. 48, 12 *de sepulchro violato;* infamy stated in h 1, *ibid.*

2 C. 17, C. 6, q. 1.

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Neither is it necessary that the grave be blessed. To violate it is a crime against a universal religious sentiment. The motive must be *theft* (for instance, to steal the appurtenances of a corpse, such as jewelry or precious metal) or some other wicked purpose, such as revenge, hatred, or superstition. While the keeping of bodies for anatomical purposes is legitimate,[3] stealing them, even though done for the sake of science, is an indictable offence [4] and falls under our canon.

DESECRATION OF CHURCHES AND CEMETERIES

Can. 2329

Ecclesiae vel coemeterii violatores, de quibus in can. 1172, 1207, interdicto ab ingressu ecclesiae aliisque congruis poenis ab Ordinario pro gravitate delicti puniantur.

Those who cause a church or cemetery to be desecrated or violated by acts described in canons 1172 and 1207, *should be punished by the Ordinary with the interdict forbidding them to enter the church and with other penalties proportionate to the gravity of the crime.*

The acts referred to are set forth in canons 1172 and 1207 and need no repetition. The penalty is *ferendae sententiae,* but stated preceptively, which means that the Ordinary is not entirely free to inflict it or not (can. 2223).

In connection with this canon and can. 2326, we may add that our Code is silent on an excommunication

3 Eichmann, *l. c.,* p. 144.

4 Blackstone-Cooley, *Comment.,* II, 429, note 7: "It being considered a practice contrary to common decency, and shocking to the general sentiments and feelings of mankind."

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latae sententiae simply reserved to the Holy See which was formerly imposed for carrying away relics from the catacombs of the City of Rome without the permission of the Cardinal Vicar.[1]

1 This penalty was mentioned in the *"Apostolicae Sedis,"* II, § 15, but it has now a merely historical value. The curious reader is referred to the commentaries on said Constitution.

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TITLE XIII

CRIMES AGAINST ECCLESIASTICAL AUTHORITIES, PERSONS AND THINGS

The term *ecclesiastical* comprehends whatever the Church makes use of by constitutional provision, either divine or human, and whatever she holds by legitimate titles. Constitution spells authority and therefore is here treated first (can. 2330-2340). Then comes the inviolability of clerical persons, including religious, or rather a specially privileged class of religious (can. 2341-3344), and, lastly, ecclesiastical property, which is safeguarded against unjust usurpation and incompetent administration (can. 2345-49).

TRANSGRESSIONS OF LAWS CONCERNING PAPAL ELECTION

Can. 2330

Quod attinet ad poenas statutas in delicta quae in eligendo Summo Pontifice committi possunt, unice standum const. Pii X *Vacante Sede Apostolica*, 25 Dec. 1904.

All laws touching papal election are abrogated except the Constitution of Pius X, "*Vacante Sede Apostolica*," Dec. 25, 1904, which remains in full force.[1] This Constitution also regulates the penalties decreed against offenders.

1 See the text in Card. Gasparri's (large) edition, pp. 685 ff., cap. VI. To this may be added "*Commissum Nobis*," Jan. 20, 1904, concerning

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1. Those who commit *simony*[2] in the election of a Pope *ipso facto* incur *excommunication,* reserved to the future Pope, who shall declare the fact that the penalty has been incurred and who alone can absolve from this crime. However, the validity of the election can not be assailed on this score.

2. The same penalty is incurred by those, either cardinals, clerics, or laymen, who during the *lifetime of the Pope* and without his advice,[3] enter into negotiations with regard to *the election of his successor,* or promise to give their vote (with or without effect or counter promise) or dare to hold private meetings in order to deliberate and decide on the subject of the election.

3. The same penalty (excommunication) is incurred by cardinals, the secretary of the sacred college, and conclavists or others who in any way take part in the conclave, who under whatever pretext accept from any civil power the charge of proposing the so-called *Veto* or *Exclusiva,* even in form of a mere wish, or manifest it either to the S. College as a body or to single cardinals, whether in writing or orally, directly or indirectly, by insinuation or hints, or in any manner whatsoever, as long as the conclave lasts. This penalty extends to every kind of intervention or intercession or any form of interference that may come from any lay power of whatever rank or condition.

4. Cardinals who *enter into ante-election agreements,* or hold meetings or pledge themselves to give their vote to a certain person, henceforth incur the sentence of excommunication.

the *Veto* or *ius exclusivae,* and the Motu proprio "Cum proxime" of Pius XI (*A. A. S.,* XIV, 6).

2 See can. 727.

3 *Tractare* means systematic negotiation with serious intent, not mere gossip or passing remarks.

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5. *During the conclave* the following transgressions are punished:

a) Cardinals who are not present at the balloting *(scrutinium)* after the bell has rung, incur the penalty of *excommunication latae sententiae* unless they are sick.[4]

b) *Epistolary intercourse* with the outside world is strictly forbidden during a conclave, more especially any communication through newspapers or magazines. The transgressors of this law incur *excommunication latae sententiae*. This penalty concerns not only the cardinals, but all conclavists.[5]

c) Every *violation of the secrecy of the ballot* is forbidden under the same penalty. This affects the cardinals only, and covers every communication, whether direct or indirect, that concerns the balloting or transactions of the congregation of cardinals, or the acts and decrees of the same, either before or during the conclave.[6]

DISOBEDIENCE AND CONSPIRACY

Can. 2331

§ 1. Qui Romano Pontifici vel proprio Ordinario aliquid legitime praecipienti vel prohibenti pertinaciter non obtemperant, congruis poenis, censuris non exclusis, pro gravitate culpae puniantur.

§ 2. Conspirantes vero contra auctoritatem Romani Pontificis eiusve Legati vel proprii Ordinarii aut contra eorum legitima mandata, itemque subditos ad inobedientiam erga ipsos provocantes, censuris aliisve poenis coerceantur; et dignitatibus, beneficiis aliisve muneribus, si sint clerici; voce activa et passiva atque officio, si religiosi, priventur.

4 *"Vacante Sede,"* n. 37.
5 *Ibid.*, n. 50.
6 *Ibid.*, n. 52.

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This canon regards two crimes which differ from each other not specifically, but in degree, namely disobedience and conspiracy.

1. *Disobedience. Those who obstinately refuse to obey the Roman Pontiff or their own Ordinary, when these authorities legitimately command or forbid something are to be punished in proportion to the gravity of their guilt, censures not excluded.*

a) *Obedience* presupposes the right to command and the obligation to obey. Hence there must be a tie or relation between superior and inferior. This is established either juridically or morally. In the *juridical order* the Roman Pontiff is the head and ordinary pastor of all the faithful, clergy and laity; the local Ordinary is the ecclesiastical governor of his territory and of those subject to him by reason of domicile or quasi-domicile. The superiors of exempt religious orders wield their power over those who are subject to them by reason of profession. In the *moral* order there are still other superiors, who govern their subjects by reason of the domestic power, but these are not considered in our canon.[1] For although the vow of obedience binds religious to their superiors, yet it is the moral power rather than the juridical (exercised in the external forum) that establishes the mutual relationship. But all religious, superiors and inferiors, are alike subject to the Roman Pontiff (can. 499, §1).

b) By *Roman Pontiff* there must be understood the supreme head of the Church as a religious and supernatural society. Consequently, disobedience to the Pope

1 The text says *ordinarius*, which must be understood according to can. 198, § 1, and can only be applied to superiors of exempt clerical institutes. Therefore, this canon does not concern non-exempt religious organizations with regard to their own superiors, but may concern them with regard to the local ordinary or prelate regular.

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as a temporal ruler is not included.[2] The supposition here is that the Pope is the legitimate occupant of St. Peter's chair.[3]

c) *Ordinarius proprius,* as stated above, means one who has subjects of his own. The clergy are especially obliged to exhibit reverence and obedience to their bishops (can. 127). The faithful living in the diocese are also obliged to obey the bishop, as their pastor. Exempt religious here are those subject to their own prelates or to the superiors of autonomous communities. To strange bishops and strange prelates or superiors the clergy and religious pay respect, but not obedience.[4]

d) Like a law, a precept, too, may be *positive* or *prohibitive,* according as it commands men to do or to omit something. The objective norm for all precepts is that what they order *must be legitimate.*

Legitimacy is measured, not by personal qualities or powers, but by the object of the precept. Since, however, every law is a participation in the eternal law, and every exercise of human power is therefore confined within the limits of that law, it follows that even the papal power has certain boundaries:

α) The *Pope* can command nothing that runs counter to the natural and divine law, though he may interpret or determine it. But he is not bound by the common law of the Church, although it is commonly presumed that he will order nothing that would exceed his power.

β) *Ordinaries,* including *exempt religious superiors,* cannot command anything that would clash with the common law. Neither are they allowed to command beyond what is established by particular law; at least, they are supposed to keep within proper limits.[5] *Re-*

2 D'Annibale, *l. c.,* p. 33, n. 44.
3 Hollweck, *l. c.,* p. 196.
4 C. 11, C. 11, q. 3.
5 Politics do not fall under the

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ligious superiors are not allowed to command anything against the common law of the Church, and a religious would not act disobediently if he refused to obey a command contained neither in the rule nor in the Constitutions of his order.

γ) Disobedience must be *obstinate,* which presupposes knowledge and free will, and, besides, a warning, according to can. 2307 or 2143; for obstinacy must be proven.

δ) The penalty is arbitrary, *pro gravitate culpae,* and *ferendae sententiae.*

2. A *conspiracy* is an agreement by two or more persons to effect an unlawful object, whether as the ultimate aim or only as a means to the same.[6] The aim of conspiracies as a rule is twofold: subversion of the ecclesiastical authority and incitement to rebellion against it.

a) This canon is aimed at those who enter into a *conspiracy against the authority of the Roman Pontiff, or his legate, or their own Ordinary, or against the lawful commands of these authorities,* as far as their power reaches, either legislative, or judiciary, or coercive, and as far as these authorities keep within the limits of their power. For such conduct is subversive of the hierarchic order and spells resistance to God.

Personal invectives, libelous writings, and defamation of the person as such, do not constitute a conspiracy. If a cathedral or religious chapter proposes amendments to its statutes or constitutions, this is not conspiracy. The *Gravamina Nationis Teutonicae*[7] were not considered a conspiracy, although they very closely resembled one. But if the threefold power named above is attacked by mutual agreement, and resisted, there is a conspiracy.

list of objects to which the power of the ordinary extends. Neither can superiors forbid their subjects to have recourse to the Holy See.

6 Kenny-Webb, l. c., p. 273.

7 See Funk, *Manual of Church History,* II, 88, 165.

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b) *Provoking or inciting subjects to disobey the aforesaid authorities also constitutes the crime here mentioned.* But those who provoke or incite others to disobedience may be single individuals, agreement or conspiracy not being required. How far guilt may be imputed to them is to be determined according to can. 2209.

c) The *penalty* for conspiracy and incitement to disobedience is: the conspirators must be restrained by censures and other penalties; *clerics* must be deprived of their dignities, benefices, and other charges; *religious* must be deprived of the active and passive voice, and of their offices. Formerly clerics guilty of this crime were deposed and delivered to the *curia.*[8]

APPEAL TO A GENERAL COUNCIL

Can. 2332

Omnes et singuli cuiuscunque status, gradus seu conditionis etiam regalis, episcopalis vel cardinalitiae fuerint, a legibus, decretis, mandatis Romani Pontificis pro tempore exsistentis ad Universale Concilium appellantes, sunt suspecti de haeresi et ipso facto contrahunt excommunicationem Sedi Apostolicae speciali modo reservatam; Universitates vero, Collegia, Capitula aliaeve personae morales, quocunque nomine nuncupentur, interdictum speciali modo Sedi Apostolicae pariter reservatum incurrunt.

The theory that a general council is above the Pope now appears absurd. It was called ridiculous by Pius

8 Cfr. c. 18, C. 11, q. 3; a horrible imprecation is contained in c. 14, C. 11, q. 3 (Pseudo-Anterus): "*inobediens spirituali animadversione truncatur, et eiectus ab Ecclesia rabido daemonum ore discerpitur.*"

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II [1] — not by Aeneas Silvius Piccolomini —, but in those sad times of schism even well-meaning men like Gerson looked upon it as the only anchor available on a troubled sea. To-day, of course, the error is neither excusable nor intelligible. It was proscribed several times [2] and our Code fixes its penalty.

1. The *persons* who incur the penalty here stated are:

a) Single *individuals,* of whatever state (lay or clerical), rank or condition, even royal persons, bishops, and cardinals.

b) *Corporations,* such as universities (also faculties), colleges, chapters, and other artificial persons, no matter what their name (congress, senate, parliament).

2. It makes no difference whether the *general council* appealed to, is in session, or to be held in future.[3] For appeal means recourse to a higher instance, and the fundamental error involved here is that there exists a higher tribunal than the Pope, and the injury is therefore committed against the supreme judge.

3. The *appeal must be made from laws, decrees, or ordinances issued by a Pope* actually governing the Church. The text includes *laws,* which the "*Apostolica Sedes*" had omitted: therefore all *laws,* also privileges and favors, *decrees,* either dogmatical or disciplinary, *ordinances,* for instance, provisions or appointments, or judiciary sentences in particular cases, provided these have emanated from the Roman Pontiff, as such, not as

1 "*Execrabiltis,*" Jan. 18, 1459.

2 Julius II, "*Suscepti regiminis,*" July 1, 1509; Bened. XIV, "*Altissimo,*" June 26, 1745, § 1; "*Apostolicae Sedis,*" § 1, n. 4:

"*Omnes et singulos, cuiuscumque status, gradus seu conditionis fuerint, ab ordinationibus seu mandatis Romanorum Pontificum pro tempore existentium ad universale futurum Concilium appellantes, nec non eos, quorum auxilio, consilio vel favore appellatum fuerit.*" *Conc. Vatic.,* IV, 3.

3 Since the text of the "*Apostolicae Sedis*" had "future," a council held *hic et nunc* seemed to be excluded; Pennacchi I, 412.

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a temporal ruler [4] or an international judge. The canon does *not* include decisions or ordinances issued by the S. Congregations and Tribunals.

Some [5] have raised a difficulty concerning an appeal from a law, decree, or ordinance of a Pope who has died after having issued said law, etc., and therefore seems not to exist any more. However, this is a rather subtle interpretation and certainly nullifies the intention of the lawgiver. Besides, it entails the absurdity that after the death of a Pontiff his laws, decrees, and ordinances could be appealed. Finally, such laws, etc., are intended not only for the lifetime of the Pope. Most probably the phrase "*pro tempore exsistentis*" was inserted in view of a possible resignation. An appeal from laws, decrees, or ordinances already abrogated would be senseless.

4. The *penalties* are:

For the *individuals* mentioned in the first clause (1, a), *excommunication* incurred *ipso facto* and reserved *speciali modo* to the Apostolic See; besides, suspicion of heresy.

b) For *corporations,* as such, mentioned in the second clause (1, b), the interdict *ipso facto,* reserved to the Apostolic See. Single members of the corporation, however, do not incur this censure.[6] If they are partakers or accomplices, they, as individuals, incur excommunication, but not the interdict.[7] Thus the members of a parliament or senate may vote against appeal to a council, and in that case they would not incur the penalty, even though the minority had appealed in their name; the single members

4 D'Annibale, *l. c.*, p. 34, n. 47.
5 Pennacchi *l. c.*, I, 409 f.
6 Thus Hollweck, *l. c.*, p. 197, note 8; Eichmann, *l. c.*, p. 150.
7 See can. 2209; can. 2219: a more benign interpretation.

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would be excommunicated, not interdicted, nor would the whole body be interdicted.

CIVIL INTERFERENCE WITH PAPAL COMMUNICATIONS (PLACET)

Can. 2333

Recurrentes ad laicam potestatem ad impediendas litteras vel acta quaelibet a Sede Apostolica vel ab eiusdem Legatis profecta, eorumve promulgationem vel exsecutionem directe vel indirecte prohibentes, aut eorum causa sive eos ad quos pertinent litterae vel acta sive alios laedentes vel perterrefacientes, ipso facto subiaceant excommunicationi Sedi Apostolicae speciali modo reservatae.

The kings of England and France in the XIIth century, constitutional monarchies and free republics alike were afraid and jealous of the papal power and endeavored to blockade its influence by submitting documents emanating from the Roman Curia to their personal inspection and approbation.[1] This is called the royal *placet,* although the text here has a somewhat wider meaning.

Three kinds of offenders incur the penalty here named: those who recur in order to impede, those who prohibit, and those who by word or deed terrify others.

1. The *recurrentes* are those who seek or ask the

1 Paschal II (1099-1118) already complained against the King of England that he would admit neither papal nuncios nor letters without his royal *placet;* see E. Friedberg, *Die Grenzen zwischen Staat und Kirche,* Tübingen, 1872, p. 729. Friedberg is strong in denouncing "papal absolutism," yet he does not defend the retention or introduction of the *placet,* because it does not fit in with the modern State (*Rechtsstaat*) and renders clashes with the Church more frequent; *ib.,* p. 799 f.

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service and aid of others. The mode of recourse is not determined. It may be formal or informal, *i. e.*, by appeal in civil law or by a mere petition.[2] All Catholics, whether laymen or ecclesiastics, are here included, excepting the Cardinals (can. 2227, §2).

The *terminus ad quem* of the *recursus* is the lay or civil power *(laica potestas)*. This term supposes real power, as wielded in our country by the president, governors, congress, and judges.[3]

The *terminus a quo* is recourse calculated "*to impede letters and documents (acta) coming from the Apostolic See or from its legates.*"[4] Apostolic letters are bulls, briefs, or motu proprios, or letters of recommendation, such as we often read in the *Acta Apostolicae Sedis*. *Acta* are decisions, decrees, admonitions, summonses, or any kind of rescripts issued either by the Pope himself or by the Roman Court,[5] according to can. 7.

Impedire means to impede or prevent some one from doing or obtaining something. The term implies that the one thus impeded is unwilling to bear the obstacle.[6] Since this word is connected with Apostolic letters, etc., which are already issued (*profecta*), it can only refer to the reception or transmission of such.

2. The *prohibentes* are not clearly determined, and the term itself is somewhat ambiguous. For *prohibere* in Latin may mean to *prevent* or *impede* as well as to *prohibit* or *forbid*. It appears to us that Pennacchi[7] has stated the correct meaning when he says that the act of

2 D'Annibale, *l. c.*, p. 42, n. 61; Hollweck, *l. c.*, p. 198.

3 Hollweck, *ibid.*

4 By legates are understood *nuntii, internuntii, delegati apostolici*, as the title of ch. V, tit. VI, book II, indicates; see can. 265-267.

5 S. O., Jan. 13, 1892 (*Coll. P. F.*, n. 1777).

6 D'Annibale, *l. c.*, p. 41, n. 60.

7 *Comment.*, I, 285 f.; also D'Annibale, p. 49, n. 74.

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prohibition must proceed from some one in power. The prohibition of *promulgating and executing papal documents* may be direct or indirect. It is *direct,* if the competent magistrate forbids divulgation of such documents by a formal law, decree, bill, or sentence. It is *indirect,* if effective means are employed to hinder the promulgation or execution in a round-about way, for instance, by forbidding a courier to enter a city or town, or by commanding a postmaster not to transmit or deliver a papal document.

Promulgation may here be taken in the juridical sense, *i. e.,* the making known of a papal letter in the usual form, which is now by insertion in the *Acta Apostolicae Sedis.* However, this interpretation appears to us improbable, since in that case only the Vatican Printing Office, or, at most, the Roman civil authorities would be concerned. Therefore we believe that promulgation here has the meaning of divulgation or making known. The Vatican Press, where the *Acta Apostolicae Sedis* are printed, is extra-territorial and the Italian government is supposed to respect the Law of Guarantees.

Execution means carrying into effect, and must be more particulary referred to the *Acta* of the Apostolic See. Here the "*placet*" might enter; for it means inspection and approval of a papal document by the civil government before it may be published and carried into effect. It is called "*exequatur*" if it concerns appointments. Of course, where both *placet* and *exequatur* are ratified by concordats, the penalty is not incurred.[8]

3. Those who, on account of papal letters or documents, *injure or intimidate persons concerned in these documents, or other persons,* are called *laedentes.* The

8 D'Annibale, *l. c.,* n. 73.

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injury must be real, not merely verbal, and the insults serious, *e. g.*, beating.

The *perterrefacientes* are those who grievously and seriously scare the interested persons into disobedience. The fear must be such as would influence a man of strong character.[9] The *persons concerned* are those for whom the documents are intended,— bishops, clerics, laymen, as well as others who are concerned with the publication and execution of the same.[10]

4. The *penalty* provided for such offenders against papal, *i. e.*, sovereign authority, is *excommunication reserved speciali modo to the Apostolic See and incurred ipso facto*. The question is: *When is the fact verified* so that excommunication is incurred?

As to the *recurrentes,* D'Annibale[11] says, the excommunication is not incurred by them unless the lay or civil power has published a bill impeding the publication or execution of papal documents, because a recourse is an attempt and must be judged as such. This is according to our Code, can. 2212-2213.

As to the *prohibentes,* the same author says that the controversy among canonists exempts them from incurring the penalty, in case of a doubt of law or fact, because the benefit of doubt is always favorable to the defendant or guilty.[12]

As to *laedentes* and *perterrefacientes,* their guilt depends on the fact; if the injury is done or the fear ex-

9 *Ibid.;* thus threats of damage or defamation may scare a normally firm person.

10 *Ibid.*

11 *L. c.*, p. 50, n. 74.

12 The *prohibentes,* therefore, would not incur the censure if the effect did not follow *(effectu non secuto)*. Lehmkuhl, on the other hand, says: "*Recursus sufficit, etsi recurrens passus sit repulsam*" (II, 933). Hollweck (*l. c.*, p. 198) distinguishes: If the recourse was rejected *a limine,* the penalty is not incurred; but if the motion is made and seconded, though it does not carry, the effect is verified and therefore the penalty is incurred.

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ercised, with the intent mentioned, *viz.*: to forbid the promulgation or execution of papal documents, this suffices to incur the penalty, no matter whether the effect intended did or did not follow. Neither is there any contradiction involved here, for the three classes are quite distinct from one another.

VIOLATION OF THE LIBERTY AND RIGHTS OF THE CHURCH

Can. 2334

Excommunicatione latae sententiae speciali modo Sedi Apostolicae reservata plectuntur:

1°. Qui leges, mandata, vel decreta contra libertatem aut iura Ecclesiae edunt;

2°. Qui impediunt directe vel indirecte exercitium iurisdictionis ecclesiasticae sive interni sive externi fori, ad hoc recurrentes ad quamlibet laicalem potestatem.

This canon comprises two rather inadequately distinguished violations of ecclesiastical liberty and rights. The one is a positive violation of any kind of rights, comprising the whole range of ecclesiastical liberty explained below. The other is a specific kind of violation, *viz.*: of jurisdiction *(appellatio ab abusu)*.[1]

1 The *appel comme d'abus* cannot be clearly traced historically; but the fact is that, after the Pragmatic Sanction of 1438, it became a juridical institute of the French Parliament and appeared in the Gallican Articles (1682) as well as in the Organic Articles of Napoleon (1802); see Friedberg, *l. c.*, p. 486 ff. *England*, too, had its *Praemunire*, the statutes of which were framed by Edward I (1272-1307) and sharpened by Richard II (1377-1399); see Blackstone-Cooley, *Comm.*, IV, 103 ff. On the *Writs of Prohibition*, which are similar to the *appellatio ab abusu*, see Blackstone, III, 113; Friedberg, *l. c.*, 738 ff.

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1. *Those who issue laws, ordinances or decrees against the liberty and rights of the Church incur excommunication latae sententiae reserved speciali modo to the Apostolic See.*

a) *Edere* means to pass a law; in this country any bill that passes both houses of Congress and is not vetoed by the President, is a law. An ordinance *(mandatum)* is an order issued by a particular court or magistrate, especially for the arrest or capture of a criminal; also a summons, warning, or injunction. A *decree* may be taken as a decision issued by a court, for instance, a supreme or district court, also a municipal ordinance either commanding or forbidding something. However, these decrees and ordinances must have a general character, and not refer merely to a particular case,[2] unless this should form a precedent.

All those, then, who coöperate in issuing or effectively enacting laws and decrees detrimental to the Church, must be considered guilty of the crime here denounced. But, in parliamentary language, several acts are required to make a law: the bringing in of a bill, seconding the motion, voting on it, passing it through the house or houses and, finally, signing or vetoing it. Are all these equally guilty? The answer is that, if the bill becomes a law, all are guilty who have in any effective way contributed to this end.[3]

Concerning decrees and ordinances, all those are guilty who shape and issue them, but not minor officials who

2 D'Annibale, *l. c.*, p. 46, n. 68. Read, for instance, St. 16, Ric. 2, c. 5: "If any one shall purchase or pursue in the court of Rome or elsewhere, any translations of prelates, processes, sentences of excommunication, bulls, instruments, or any other things whatsoever against the King, his crown, his dignity, or his realm . . . he shall be put out of the King's protection and his lands and goods forfeited to the King," etc.

3 Hollweck, *l. c.*, p. 206; D'Annibale, *l. c.*, p. 46, n. 68.

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merely write or typewrite, print or publish the text, or sheriff or marshals who serve it.

b) The *liberty and rights of the Church* must be curtailed or set at naught in these laws, ordinances or decrees. The *Church* here is the *universal Church,* as such, although, as one distinguished commentator truly says,[4] it may happen that the whole Church is affected if a particular church is injured, for instance, by forbidding certain religious to exist in a certain province or diocese, or prohibiting processions and missions in a country. The *liberty* of the Church means her right to exist and to spread according to her nature and constitution (can. 100). Violations of this liberty are enumerated in can. 2333, 2334, 2336. Of course, there can hardly be serious talk about liberty where the *native and independent rights* of the Church are either entirely taken away or curtailed. Native rights are the right to preach the Gospel, can., 1322; to educate and train the clergy, can. 1352; to found and maintain her own schools, can. 1375; to possess her own cemeteries and property, can. 1206 and can. 1495; to enjoy the judiciary and coercive power, canons 1553 and 2214. These are essential rights. Acquired rights, if not directly connected with these native rights, are necessary only *ad melius esse.*

2. Those *who, in order to impede the exercise of ecclesiastical jurisdiction in the internal as well as external forum, either directly or indirectly have recourse to any secular* (lay) *power, incur excommunication latae sententiae reserved modo speciali to the Apostolic See.*

As is evident from the text, there is but one leading thought in it; or, in other words, one compound sentence,

4 Hollweck, *l. c.,* p. 206, § 137, note 1.

5 Hollweck, *l. c.,* p. 207.

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not two, as in the "*Apostolicae Sedis.*"[6] Dissecting this one statement the following salient points may be distinguished.

a) The leading subject is "*recourse to any lay power.*" What *recourse* means has been explained above: it is to seek help, or redress, or protection against real or imaginary wrongs. However, the recourse must produce an effect, *viz.*, the act of impeding. If, therefore, the secular power refuses to entertain the recourse, the penalty is not incurred. But if the lay power would issue an injunction, even though it remained without effect, the penalty would follow.[7]

The term *quaelibet laicalis potestas* is wider here than in can. 2333, and may signify not only public, but also private power,[8] in as far as this really has power in the juridical sense, be it legislative, judiciary, executive or administrative. Whether this includes the domestic power, such as a father has over his children, a husband over his wife, seems doubtful; all the more so since the *appellatio ab abusu,* which is here intended, was addressed to the magistrates. Yet even private power may really impede the exercise of ecclesiastical jurisdiction, especially in the internal forum, and whenever it does so, it is undoubtedly included.

b) The subject or aim of such recourse must be *to impede the exercise of ecclesiastical jurisdiction.* The power of *jurisdiction* extends over all acts that emanate from, or presuppose, this government, as far as

6 § I. "6. *Impedientes directe vel indirecte exercitium iurisdictionis ecclesiasticae sive interni, sive externi fori, et ad hoc recurrentes ad forum saeculare eiusque mandata procurantes, edentes, aut auxilium, consilium vel favorem praestantes.*"

7 Hollweck, *l. c.*, p. 200, note 10.

8 See c. 4, 6°, III, 27; however, what we state in the text may be doubtful, although D'Annibale (*l. c.*, p. 42, n. 60) sets it forth as *sententia communior.*

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they are distinguished from the power of order. All acts of order, strictly speaking, are therefore to be eliminated from this text, such as the celebration of Mass, the holding of religious services, saying public prayers; in fact, we believe, all acts of divine office. Our canon refers only to acts of jurisdiction, though these may, of course, presuppose the power of order. It does not matter whether the jurisdiction is *ordinary* or *delegated,* of the internal or the external forum, sacramental or non-sacramental, exercised criminally or civilly, or by way of administration, such as appointment to, or removal from, offices or benefices.

To *impede* means to cause one to quit working against his will. An obstacle may be put in the way in the very beginning, or when the sentence is to be executed. Take, for instance, the case of the removal of a pastor under can. 2156. If the investigation is prevented *in limine* by lay interference, the procedure is nipped in the bud; whereas, if the sentence of removal has been given, and the pastor does not move nor leave his residence, the execution only is stopped.

An impediment may be placed in the way of a process either directly or indirectly. *Direct* interference is that used against one who is entitled to exercise jurisdiction, by either resisting or nullifying his acts. *Indirect* intervention is that used against the Ordinary or others who exercise jurisdiction by threatening or molesting their relatives, friends, dependents, agents, servants, in order to intimidate, prevent or stop the giving or carrying out of a sentence.[9]

c) The *penalty* for such interference is *excommunication* for laymen as well as clerics of every degree and rank, with the exception of cardinals (can. 2227, §2).

[9] D'Annibale, *I. c.*, p. 41 f.; n. 60.

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Clerics and religious who transgress the penal laws of can. 2334 and 2335 are, besides, subject to the following penalties.

Can. 2336

§ 1. Clerici qui delictum commiserunt de quo in can. 2334, 2335, praeter poenas citatis canonibus statutas, poena suspensionis vel privationis ipsius beneficii, officii, dignitatis, pensionis aut muneris, si qua forte in Ecclesia habeant; religiosi autem privatione officii et vocis activae ac passivae aliisque poenis ad normam constitutionum plectantur.

§ 2, see *infra*, p. 346.

This penalty is *ferendae sententiae,* but does not supersede or supplant the excommunication stated in can. 2334. Those who inflict it, are obliged to do so according to can. 2223, and there is no choice except between general suspension and privation of benefice, office, dignity, pension, or any position the culprits may hold in the Church. *Religious* must be deprived of their office and of the active and passive vote; they should also be punished according to the penal rules of their own constitutions.

FREEMASONRY

Can. 2335

Nomen dantes sectae massonicae aliisve eiusdem generis associationibus quae contra Ecclesiam vel legitimas civiles potestates machinantur, contrahunt ipso facto excommunicationem Sedi Apostolicae simpliciter reservatam.

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Those who enlist in Masonic sects or other associations of the same kind, which plot against the Church or against lawful civil authority, ipso facto incur the excommunication simply reserved to the Apostolic See.

The text distinguishes two kinds of pernicious societies, although both have the same purpose, and the purpose alone is sufficient to merit the penalties decreed in the text.

1. *Freemasons* are here understood as a sect with compact organization and set rules or constitutions. Their origin, to judge from their own writings, seems to be rather obscure, but is generally assigned to the year 1717. England is the birthplace of Freemasonry.[1] There is no doubt that secrecy is the essence of this institution, that symbols and allegories which are traced to the beginning of religion are conspicuous in the genuine sect of Freemasons. It is also admitted that their outspoken advocacy of a sort of freedom which brooks no law except the ego has prompted civil governments to forbid them long [2] before Clement XII issued his Constitution "*In eminenti,*" April 28, 1738, which Benedict XIV ratified and renewed in "*Providas,*" March 18, 1751, and other papal constitutions and decrees repeated or modified, as will be seen in the course of these comments.

By *Masonic sects* were understood societies whose members were bound by an oath to keep everything secret, and who had their own ritual as well as organization. Their aim was clearly characterized by their underground activities. However, though the first papal constitutions, up to the time of Pius IX, stress secrecy,

1 A. Preuss, *A Study in American Freemasonry*, 1908, pp. 346 ff.

2 Thus its lodges were proscribed in 1735 by an edict of the States of Holland, and Louis XIV forbade them in France, 1737; Preuss, *l. c.*, p. 372.

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we find a departure from this "essential" element of Masonry in 1846. For a decree of the Holy Office, Aug. 5, 1846, reads thus: When secret societies are spoken of in the papal constitutions, all those are to be understood which pursue a special aim against the Church or government, no matter whether or not they demand an oath of secrecy.[3] Henceforth this practice was adhered to by the Roman court, as later decisions prove. Consequently, the dependent clause in our text which begins with "*quae contra Ecclesiam —*" must be referred to Masonic sects, as a distinctive note. It is implied that every Masonic sect has this aim in view. But this is a mere presumption, which can be overthrown by facts. And the facts can be ascertained only by an inspection of the resp. constitutions and by-laws; for the ritual alone would barely give a satisfactory answer. This we thought necessary to state in order to avoid confusion. It goes without saying that the "*Grand Lodges*" of America, the English Lodges of the York and Scottish Rite, as well as the Grand Orient and Supreme Council of France and Italy and elsewhere[4] belong not only to the Masonic sect, as here intended, but are condemned sects. For there can be little doubt that they aim at subverting Church and State. The nations involved in the world war need have no doubts as to this sad and well-established fact.

2. Which are the other *associations of the same kind* mentioned in our text? Note the word *association,* which is different from sect, the term employed in the "*Apostolicae Sedis.*"[5] Association admits of a wider

3 *Coll. P. F.*, n. 1350, note 2.
4 Preuss, *l. c.*, p. 378 ff.
5 § *II.* 4. "*Nomen dantes sectae Massonicae, aut Carbonariae, aut aliis eiusdem generis sectis, quae contra Ecclesiam vel legitimas potestates seu palam, seu clandestine machinantur, nec non iisdem sectis favorem qualemcumque praestantes;*

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range. It does not necessarily mean a "closed" or compact society, with statutes or by-laws, but merely a union of individuals for a definite purpose. From this viewpoint *l'Internationale,* Communists, Nihilists, Bolshevists, etc., may be included in the term.

3. The aim or end of these societies must be, as the text says, *"plotting either against the Church or the legitimate civil power."* Therefore, if by a happy inconsistency any Masonic sect would reverse this aim, it would not incur the penalty provided by this canon.

a) *Machinari* signifies to contrive, but is generally used in the bad sense of plotting or contriving with an evil design, scheming maliciously, as we say in the impediment of crime: *uno machinante.* Here it means any written, oral or actual agitation or concerted propaganda and incitement against Church or State.[6] However, it must be understood that such plotting must be the aim of the society or association as such, not merely of individual members. For no society can be held responsible for acts which single members perform as private citizens. Therefore, the constitutions or statutes or by-laws or a secret oath or simple promise must bind — not oblige, for no obligation can arise from illicit promises — the members to pursue that aim.

b) The plotting must be directed *either* against the Church *or* against the lawful civil authority,— one of them being sufficient.

The *Church* is plotted against if the whole Church, not merely particular parts of it, is attacked in her dogmas and disciplinary or administrative laws, in her hierarchy and ministers.[7] One plots against the *lawful civil power*

earumque occultos coryphaeos ac duces non denunciantes, donec non denunciaverint."

6 Hollweck, *l. c.,* p. 171, note 7.

7 Leo XII, *"Quo graviora,"* March 13, 1825. For instance, the book of

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by stirring up the people and overthrowing the legitimate government, as was the case in Portugal of late. The question when a government is *lawful,* may cause some trouble to the international, national, and individual conscience. The international and national consciences — if there is such a thing — are closely interwoven.

Broadly speaking, a government must be held legitimate if it is recognized by other nations, either formally by an act of declaration, or informally by establishing or re-establishing diplomatic relations.[8] But the individual conscience cannot be settled by a "League of Nations" or by diplomatic relations or commercial treaties. Take, for instance, the case of the Portuguese or the French Royalists, or the Castilian-Catalonian pretensions, not to speak of the former Papal States.[9]

4. Which sects or associations are intended by our canon?

a) There can be no doubt that the *Masonic* lodges, as they originated in England and were transplanted to the U. S., in 1729, *i. e.,* the "Ancient and Accepted Scottish Rite" as well as the "Grand Orient of France," have all the earmarks of a sect, as here intended. And by the way it may be stated that *Orientals* also, (Ruthenians, Greeks, Armenians, Syrians, etc.), who belong to such a sect incur the censure here mentioned.[10]

b) What about the *"Independent Order of Good Templars"?* If it is true that this society is closely allied with the Freemasons, nay even presupposes Masonry of a high degree,[11] there can be no doubt that

J. D. Buck. *The Genius of Freemasonry,* 1907 (Preuss, *l. c.,* p. 423 ff).

8 See Westlake, *International Law,* 1910, Part I: Peace, pp. 50 ff.

9 In such cases the benefit of doubt should be accorded, and therefore the censure is not incurred.

10 S. O., Aug. 6, 1885 (*Coll. P. F.,* n. 1640).

11 See Preuss, *l. c.,* p. 421, note.

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it is included in the name of Masonic sects, provided its aim is plotting against Church and State. It may be added that the Holy Office,[12] although severely forbidding them, has not declared the Good Templars liable to the excommunication pronounced in the "*Apostolicae Sedis.*"

c) The same is true with regard to the "*Odd Fellows,*" the "*Sons of Temperance*" and the "*Knights of Pythias.*"[13] But although these four lodges are not formally condemned, and therefore do not constitute "condemned sects," yet if they either secretly or openly pursue a subversive aim, as defined in our canon, they certainly incur censure.

d) To the associations with a pernicious aim of plotting must now[14] be reckoned the Nihilists, the Communists, the radical Socialists, and others of the same kind.

e) The *Fenians* of Ireland and England were especially singled out as falling under the censure.[15]

5. The last-named sect gave rise to several questions concerning *absolution.* The bishops were advised as follows:

a) They should gravely enjoin on *confessors* the duty of admonishing the penitents not to enroll in secret societies, nor to frequent the meetings of these societies, nor to favor them in any way.

b) The confessors should refuse absolution to the obstinate *(pertinacibus), i. e.,* those who insist on remaining members of the secret society in question.

12 S. O., Aug. 9, 1893 (*Coll. P. F.*, n. 1845): "*Dilata*" but the answer never came.

13 S. O., Aug. 20, 1894 (Putzer, *Comment.*, ed. 4, p. 235).

14 D'Annibale, *l. c.*, p. 79, n. 117 excludes: Old Catholics (of course!), Communists, Socialists, the so-called Internationale, Nihilists.

15 S. O., July 2, 1845; July 5, 1865; Jan. 12, 1870 (*Coll.*, nn. 998, 1870), also cremation societies if affiliated with Freemasons; S. O., May 19, 1886, ed. 1 (*ib.*, n. 1657).

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c) Those genuinely repentant should be absolved from the excommunication incurred.[16]

There are difficulties in demanding the *eiuratio* or abjuration of secret societies, on account of the serious temporal disadvantages often involved. The Bishop of St. Hyacinth petitioned the Holy Office *in casu*,[17] and received the following answer:

Repentant members of such societies may be admitted to the Sacraments if: 1°. they really withdraw from the secret societies in question; 2°. if they promise never to take part in any secret or public act and not to pay the dues or fees; 3°. if they repair the scandal given as well as they can; 4°. if they are really disposed to withdraw their name from the roster as soon as it can be done without serious loss.

d) A later decision of the Holy Office[18] again touched the question. The *eiuratio*, it says, may be performed before the confessor, no matter whether the fact of membership be notorious or not, provided the members of forbidden societies actually withdraw from membership, forswear and reject the sect at least in presence of the confessor, and repair the scandal they have given as well as they can.

Since the censure is one *simply reserved*, Ordinaries need a general faculty to absolve from it.[19] This may be imparted to confessors. But *regulars* cannot absolve from this censure in virtue of their privileges.[20]

Concerning *occult cases*, see can. 2237, §2, which permits Ordinaries to absolve from occult cases. This

16 S. O., Aug. 1, 1858 (*Coll. P. F.*, n. 1116).

17 S. O., March 7, 1883 (*ib.*, n. 1593); the decision of Jan. 19, 1896, is not inserted in this collection, probably on account of its very particular character.

18 S. O., Aug. 3, 1898 (*Coll.*, n. 2014).

19 Can. 2253, n. 3.

20 S. Poenit., Dec. 5, 1873 (*Coll. P. F.*, n. 1409).

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faculty may be communicated to others (see can. 199, §1). A case is occult as long as the name is not published or the membership publicly known, or known only to a few reticent persons. But those who frequent Masonic meetings, wear Masonic emblems, and show themselves as adepts in Masonry,[21] cannot be called secret Masons. Since the *very fact* that *they have enrolled in such a sect* is sufficient for incurring the censure, it may be that one would say: I did not know the true character of this society. He may be looked upon as penitent and may be really penitent. However, be it as it may in rare individual cases, such ignorance seems hardly possible after all the papal constitutions and warnings that have been published. On the other hand, since a general rule can hardly be stated, the benefit of doubt may be accorded to one who asserts that he was really ignorant and is now penitent.[22] Hence can. 209 and can. 2247, §3 may be applied.[23]

Can. 2336

For § 1 see *supra*, p. 339.

§ 2. Insuper clerici et religiosi nomen dantes sectae massonicae aliisque similibus associationibus denuntiari debent Sacrae Congregationi S. Officii.

Clerics and religious who join (*nomen dantes*) the Masonic sect and other similar associations must be denounced to the Holy Office. Consequently religious superiors are not allowed to meddle in such cases, because they concern matters of faith, according to can. 501, §2.

21 S. O., June 27, 1838 (*ib.*, n. 868).

22 S. O., Aug. 1, 1855 (*ib.*, n. 1116).

23 That can. 2254 may also be applied is evident.

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But they may denounce delinquents either to the local Ordinary or to the Holy Office directly, provided there is proof, not mere suspicion based on gossip. No canonical warning or judiciary hearing of witnesses is permitted.

INCITEMENT OF PRIESTS TO INSUBORDINATION

Can. 2337

§ 1. Si parochus, ad impediendum exercitium ecclesiasticae iurisdictionis, ausus fuerit turbas ciere, publicas pro se subscriptiones promovere, populum sermonibus aut scriptis excitare aliaque similia agere, pro gravitate culpae, secundum prudens Ordinarii iudicium, puniatur, non exclusa, si res ferat, suspensione.

§ 2. Eodem modo puniat Ordinarius sacerdotem qui multitudinem quoquo modo excitet ad impediendum ingressum in paroeciam sacerdotis legitime nominati in parochum aut oeconomum.

The proximate source of §1 of this canon is the decree "*Maxima cura,*" of Aug. 20, 1910, which formerly regulated the administrative removal of pastors. The material source is nothing less than the documents which protested against the "appeal from abuses." There is a chapter in the Pseudo-Decretals which forbids under severe penalty the inciting of a congregation against its pastor and says the disturber should be punished like a revolutionary, *i. e.*, "expelled from the whole people.[1]" The custom of appealing to the civil court became common in France and was imitated in other countries, as

[1] C. 7, C. 11, q. 3 (*Capitula Martini Brag.*, Migne, 130, 584).

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may be gathered from Innocent VIII's complaint.[2] The so-called Liberal clerics of the time of Pius IX followed the same tendency. It was but natural, therefore, that the "*Maxima cura,*" which facilitated the removal of pastors, should contain a penal paragraph for such as would not obey the command of removal. Hence the wording of can. 18, §1 in the "*Maxima cura*" commences with "*ad renunciationem et amotionem impediendam*" and ends with "*puniantur,*" — to which our canon adds: "*non exclusa, si res ferat, suspensione.*"

A pastor who, in order to impede the exercise of ecclesiastical jurisdiction, dares to perpetrate the following or similar acts must be punished in proportion to the gravity of his guilt by the Ordinary according to his own prudent judgment, if necessary, even with suspension. The acts thus punishable are:

a) Exciting the people;

b) Promoting public subscriptions for himself, or

c) Rousing the people by sermons or writings, etc.

The *intention* must therefore be to place an *obstacle in the way of the exercise of ecclesiastical jurisdiction.* The text does not say that the exercise must be just. Of course, if jurisdiction has ceased, there can be no attack against it. Thus if a resigned or suspended[3] bishop should attempt to exercise jurisdiction, this canon would not apply. On the other hand, no matter how unjust the exercise or its motive may be, obedience is required. For to adjust matters in a revolutionary way is worse than the suffering of one innocent person. Besides, there are plenty of legal ways and means to get justice done, such as recourse, appeal, etc.

2 "*Officii nostri,*" Jan. 25, 1491, § 2 (*Bull. Luxemb.*, I, 449).

3 See can. 2284: after a declaratory or condemnatory sentence.

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"*Ausus fuerit*" supposes full knowledge and approval, according to can. 2229, §2. Therefore, if a pastor was mentally depressed, the penalty should not be meted out. Also, if others perpetrated the forbidden acts against his will. But if the others acted thus at his instigation or with his approval, either public or secret,[4] he would be liable to punishment.

The *acts* forbidden include all kinds of demagogic demonstrations. Worst of all is *turbas ciere,* for this means to set a large and promiscuous crowd into commotion. The *penalty* for this crime is arbitrary and *ferendae sententiae. Suspension* both from office and benefice may be applied in more serious cases unless the Ordinary limits it to one (can. 2279).

This section of canon 2337 is strictly limited to *pastors,* and to all who go by that name, either irremovable or removable, including *quasi parochi,* etc., according to can. 451, §2. The "*Maxima cura*" (can. 30) excepted *oeconomi* and temporary vicars, but the Code undoubtedly includes *vicarii paroeciales,* provided they have full parochial powers.[5]

§ 2 of can. 2337 establishes the penalty to be meted out by the Ordinary to offending *priests.* This is a wider term, including any priest of the secular clergy as well as of religious orders. *Priests, then, who in any way stir up the populace to impede or prevent a fellow-priest who has been lawfully appointed as pastor or oeconomus from entering the parish, must be punished in like manner.* Here the incitement to insubordination is described

4 Innocent VIII, "*Officii nostri,*" § 2; *Reg. Iuris 72 in* 6°. Collecting "affidavits," as such, in order to prove one's innocence, is not, we believe, forbidden by this law; but if the affidavits would amount to a great number and be accompanied by a protest against removal, "promoting public subscriptions" would certainly be verified.

5 This seems to follow from § 2 of our canon.

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rather indefinitely *(quoquo modo)*, without reference to the effect.

Ingressus means the taking possession of an office to which one has been appointed. If accompanied by ceremonies, it is sometimes called *installation*. But the appointment must have been lawfully *(legitime)* made. The legitimacy may be affected by the person who makes the appointment. Thus an appointment made by a Vicar-General without special commission from the Ordinary would be illegitimate (can. 152). A suspended or resigned bishop could not legitimately appoint a pastor or curate. Again, validity may suffer on account of the office not being vacant by law, concerning which see canons 150, §1, 151 and 183. The lack of a written document (can. 159) does not invalidate an appointment.

The *penalty* stated is the same as in §1. Hence it is arbitrary, but obligatory, in the sense of can. 2223. Suspension, either general or special, total or partial, may be inflicted.

Religious, too, may be thus punished, provided they be pastors or priests, according to can 616, §2.

DISREGARD OF RESERVATION AND OF PENALTIES

Can. 2338

§ 1. Absolvere praesumentes sine debita facultate ab excommunicatione latae sententiae specialissimo vel speciali modo Sedi Apostolicae reservata, incurrunt ipso facto in excommunicationem Sedi Apostolicae simpliciter reservatam.

§ 2. Impendentes quodvis auxilium vel favorem excommunicato vitando in delicto propter quod excommunicatus fuit; itemque clerici scienter et sponte in

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divinis cum eodem communicantes et ipsum in divinis officiis recipientes, ipso facto incurrunt in excommunicationem Sedi Apostolicae simpliciter reservatam.

§ 3. Scienter celebrantes vel celebrari facientes divina in locis interdictis vel admittentes ad celebranda officia divina per censuram vetita clericos excommunicatos, interdictos, suspensos post sententiam declaratoriam vel condemnatoriam, interdictum ab ingressu ecclesiae ipso iure contrahunt, donec, arbitrio eius cuius sententiam contempserunt, congruenter satisfecerint.

§ 4. Qui causam dederunt interdicto locali aut interdicto in communitatem seu collegium, sunt ipso facto personaliter interdicti.

Three of these four sections repeat in a somewhat modified form parallel enactments of the *Apostolicae Sedis.*"[1]

1. The first section punishes with excommunication *ipso facto* and *simply reserved to the Apostolic See* all who without the necessary faculty *dare* to absolve any one from excommunication *latae sententiae,* either most especially or especially reserved to the Apostolic See.

1 *Absolvere autem praesumentes sine debita facultate, etiam quovis praetextu, excommunicationis vinculo Romano Pontifici reservatae innodatos se sciant, dummodo non agatur de mortis articulo, in quo tamen firma sit quoad absolutos obligatio standi mandatis Ecclesiae, si convaluerint.*

§ II. 16. Communicantes cum excommunicato nominatim a Papa in crimine criminoso, ei scilicet impendendo auxilium vel favorem.

§ II. 17. Clericos scienter et sponte communicantes in divinis cum personis a Romano Pontifice nominatim excommunicatis et ipsos in officiis recipientes.

§ VI. 2. Suspensionem ab Ordine suscepto ipso iure incurrunt, qui eumdem ordinem recipere praesumpserunt ab excommunicato vel interdicto nominatim denunciatis, aut ab haeretico vel schismatico notorio: eum vero, qui bona fide a quopiam eorum est ordinatus, exercitium non habere ordinis sic suscepti, donec dispensetur, declaramus.

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Here the phrase "*quovis praetextu*" is omitted, and instead of it there is inserted "*sine debita facultate.*" This involves contempt or disregard of the *papal authority,*[2] which is entitled to limit the power of inferior prelates. Notice the word *praesumentes* and compare can. 2229, §2, also can. 2247, §3, concerning ignorance of reservation, except of censures *specialissimo modo* reserved to the Apostolic See. Of course the cases of necessity and death, mentioned in canons 2252 and 2254, are excepted from the penalty here stated.

2. The second section regards the *communicatio cum vitandis* and implies disregard for the coercive power, contempt of the common penal law, and coöperation in crime. The first clause of the paragraph concerns all, laymen as well as clerics, whilst the second is directed to clerics only.

a) Those *who offer any aid to or favor an excommunicatus vitandus in the crime for which he was excommunicated, ipso facto incur the excommunication simply reserved to the Apostolic See.* To lend a helping hand *(auxilium impendere)* properly means to assist in committing a crime,[3] but this cannot be the meaning here, as the crime is supposed to have been already committed. What is meant, therefore, is participation in a crime for which one was excommunicated, or, as it used to be called, *in crimine criminoso.* Furthermore, the help must be given to one who was nominally declared *vitandus* by the Apostolic See. Hence we are dealing with a clearly determined case,[4] and consequently, the aid here intended is confirmation in evil, assisting in publishing a defence of the crime denounced, or material

2 See c. 1, Clem. V, 7.

3 Cfr. cc. 3, 6, 17, C. 11, q. 3; c. 29, X, V, 39.

4 Such were the cases of Hubert Reinkens (1873) and Romolo Murri.

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support in order to enable the culprit to escape from the ecclesiastical court.

Favor is a somewhat wider term and includes any favor, either spiritual or temporal, by vote, recommendation, presence, also negatively, *e. g.,* the omission of a denunciation to which one is in duty bound. In this sense also counsel or advice is included.[5] But all that is, as we said, strictly to be referred to the reason for which one was nominally declared *vitandus*. Hence mere social intercourse, as described in can. 2267, is not forbidden; nor would those otherwise not allowed to have intercourse with a *vitandus* incur the penalty here stated for this act, even though it were forbidden. Hence the *excommunicatio minor* is entirely obsolete.

b) The second clause of §2, can. 2338, punishes with the same excommunication incurred *ipso facto* and *simpliciter* reserved to the Apostolic See all *clerics who knowingly and of their own accord communicate with a vitandus in divinis and receive him in divinis officiis.*

This text is a modified reproduction of older sources.[6]

1°. By *clerici* are understood all clerics,[7] religious as well as secular, of every rank and dignity. There is no reason[8] whatever why prelates inferior to the Pope should not be included, except cardinals.

2°. The *vitandus* here mentioned must be a *cleric,* for mere participation *in divinis* is not sufficient to incur the penalty, but *admission* to the performance of divine office is required. Therefore, if the rector of a church

5 D'Annibale (*l. c.,* n. 152) and Pennacchi (I, 1045, ff.) hold otherwise; yet D'Annibale (*l. c.*) says: "*Excommunicato propter furtum persuadeat* [*sic!*] *ne restituat.*" This is called in Italian *battibecchio* — a hair-splitting, unfounded altercation about a word or phrase.

6 See c. 18, X, V, 39; "*Apostolicae sedis*" (quoted above).

7 Can. 2227, § 2.

8 Weak is the reasoning of Pennacchi I, 1053. What we say is upheld also by D'Annibale, p. 99, n. 152; Hollweck, *l. c.,* p. 337 note 2.

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would administer holy communion to a *clericus vitandus,* or would bury him, or admit him to hear Mass, the penalty would not be incurred. But if he would admit him to say Mass, or to administer the Sacraments, he would be amenable.[9]

3°. The text clearly states admission to, and participation in, *divinis officiis*. This removes all doubt[10] as to the nature of the offices intended. They are the divine offices mentioned in can. 2256, n. 1. Consequently mere official acts, such as administrative or judiciary functions, are not included. Preaching, though an act emanating primarily from jurisdiction, presupposes the clerical character, and is therefore, at least indirectly, enumerated among the divine offices.[11] It follows that *clerici vitandi* should not be allowed to preach.

4°. The participation and admission here forbidden must be rendered knowingly and spontaneously (*scienter et sponte*). Therefore can. 2229, §2 must be consulted.

§ *3 of can. 2338* punishes disregard of the local interdict and of the ecclesiastical censures incurred by clerics. The wording of our text, which is based on ancient sources[12] and on the "*Apostolicae Sedis,*" is less liable to misinterpretation than the older laws on the subject.

1. The *local interdict* (can. 2268 ff.) is first safeguarded. Those *who knowingly celebrate or have others celebrate divine offices in interdicted places, ipso iure incur the interdict prohibiting them from entering any church until they have given due satisfaction to him whose sentence they have disregarded.*

a) The *persons* to be understood here are *clerics* only, as all commentators maintain, because clerics alone are

9 D'Annibale, *l. c.*

10 *Ib.*, note 8; Hollweck, *l. c.*, p. 337, note 7.

11 Can. 2259, § 1.

12 See c. 7, C. 11, q. 3; c. 18, X, V, 39; c. 18, 6°, V, 11.

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supposed to be celebrants.[13] *All* clerics are included, also exempt religious.[14] Exception, of course, must be made in favor of *bishops,* but not of Ordinaries as such, in virtue of can. *2227,* §2. Bishops therefore do not incur this penalty.

b) By *officia divina* are understood the offices named in can. 2256, n. 1.

c) The *penalty* is not incurred if *ignorance* can be pleaded, *i. e.,* any kind of ignorance except affected.[15] Nor is the penalty incurred when the celebration and permission of the celebration occur in places, though interdicted, where celebration is allowed according to common law, as stated in can. *2270* f. On the other hand, it does not matter whether the local interdict was imposed by law, by the Apostolic See, or by the bishop.

d) Consequently, the judge as to whether *the satisfaction is sufficient or not,* is the authority who has pronounced the interdict; he may also *absolve* from this penalty.

2. *Those who admit to the celebration of divine offices forbidden under censure such clerics as have sustained a declaratory or condemnatory sentence of excommunication, interdict or suspension,* incur the same interdict from entry into the church, under the same condition of sufficient satisfaction.

a) The term *admittentes* includes all clerics, higher or lower, with the exception of bishops (can. *2227,* §2). Prelates regular or their subjects, also chaplains, and custodians of clerical rank, are also included.[16]

b) Those *admitted* are clerics under *censure.* Hence

13 D'Annibale, *l. c.,* p. 135, n. 218; see can. 1260.

14 C. 8, 6°, V, 7. Regulars caused trouble in regard to maintaining the interdict.

15 Can. 2229, § 2; but *sponte* must not be read into the text except as far as the canon quoted allows.

16 D'Annibale, *l. c.,* p. 136, n. 220; Hollweck, *l. c.,* p. 338, note 2.

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a vindictive penalty is excluded. Besides, the censure of either excommunication or (personal) interdict or suspension must have been either *declared* or incurred by a *condemnatory sentence.* On the other hand, it matters nothing whether this sentence was declared or issued in a condemnatory way by the Pope, or by the bishop, or by a religious superior.

c) *Scienter* must be connected with *admittentes,* and therefore can. 2229,,§2 is applicable. But light fear or compulsion would not be sufficient to escape the penalty.[17]

b) The *penalty* for both transgressions enumerated in §3 of our canon is the interdict *ab ingressu ecclesiae,* as defined in can. 2277.

If the cases mentioned in can. 2261, §2 and §3, or in can. 2270, are verified, a cleric may be admitted to the administration of the sacraments without incurring a penalty.

§4 of can. 2338 states that those *who were the cause of a local interdict, or of an interdict laid upon a community or corporation, are ipso facto personally interdicted.* The cause or reason is described in a Decretal of Boniface VIII as identical with, or at least correlated to, guilt, malice, or fraud.[18] Hence the persons affected are the principals in a crime, or the instigators or ringleaders, for instance, in a parish disturbance interdicted by the bishop. The consequence, of course, is that the privation attached to the personal interdict, as stated in can. 2275, takes effect. This is so true that, even if a privilege had been granted of not observing the interdict, it would not avail the person privileged if he were the cause of the interdict.[19]

17 C. in 6°, V, 7.

18 C. in 6°, V, 7: c. 24 *Alma,* 6°,V, 11.

19 What "*causam dare*" implies, see above page 214; it undoubtedly refers to the author or originator or ringleader of procedure forbidden by the Church under penalty of interdict.

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EXTORTION OF CHRISTIAN BURIAL

Can. 2339

Qui ausi fuerint mandare seu cogere tradi ecclesiasticae sepulturae infideles, apostatas a fide, vel haereticos, schismaticos, aliosve sive excommunicatos sive interdictos contra praescriptum can. 1240, § 1, contrahunt excommunicationem latae sententiae nemini reservatam; sponte vero sepulturam eisdem donantes, interdictum ab ingressu ecclesiae Ordinario reservatum.

What a Christian burial consists in is explained in can. 1204. It comprises the transfer of the corpse to the church, the exequies held in church, and burial in the graveyard. The principle that governs Christian burial is this: With those with whom we have had no communication in life, we should not communicate in death.[1] Since the Church honors those who died in her communion, and punishes those who despised her in life, it is an attempt against her authority to extort a favor which she refuses. A ceremonious or at least decent burial has ever been coveted by all whose sense of honesty and decency has not been entirely stifled. Therefore, societies, confraternities, and guilds surround the burial rite with much splendor. The Church is plainly entitled to show her respect for her faithful members and to refuse the honors of a Christian burial to those who disobeyed her. The privation of Christian burial is a penalty. Our canon says:

Those who dare to command or to compel (the Church authorities) *to give a Christian burial to infidels,*

1 C. 2, X, III, 28.

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apostates from the faith, heretics, schismatics, or other excommunicated or interdicted persons, contrary to the rule laid down in can. 1240, §1, incur the excommunication latae sententiae reserved to no one in particular.

1. The terms "*mandantes*" and "*cogentes*" are taken from the "*Apostolicae Sedis,*" where, however, the phrase *ausi fuerint* is omitted. Commentators on the aforesaid Constitution are divided as to the intent of this command — whether it exclusively affects persons in authority, more particularly the public power, or private persons also.[2] A *mandans,* broadly speaking, is one who begs or orders some one else to do something in his name.[3] This, however, does not necessarily suppose public authority; any one may be a *mandans,* as any one may be a *mandatarius,* unless forbidden by law. Besides, there is no question here of protecting or defending a right, which was forfeited *a priori.* Therefore no appeal or recourse, as in can. 2333, is required or supposed, as if a violation of one's right had taken place.

Note that the text is not disjunctive, *i. e.,* either — or. The word *seu* may just as well be taken in the sense of juxtaposition or opposition.[4] Therefore, the *cogentes* are closely related to the *mandantes* and may even be taken as differing from them merely by the means they employ. For whilst *mandare* means begging or commanding one to do something in another's name, *cogere*

2 § *IV. 1. Mandantes seu cogentes tradi ecclesiasticae sepulturae haereticos notorios aut nominatim excommunicatos vel interdictos. ..*

§ *VI. 2. Scienter celebrantes vel celebrari facientes divina in locis ab Ordinario, vel delegato iudice, vel a iure interdictis, aut nominatim excommunicatos ad divina officia, seu ecclesiastica sacramenta, vel ecclesiasticam sepulturam admittentes, interdictum ab ingressu Ecclesiae ipso iure incurrunt, donec ad arbitrium eius, cuius sententiam contempserunt, competenter satisfecerint. (Apost. Sedis).*

3 Pennacchi, *l. c.,* II, 65 f.; Hollweck, *l. c.,* p. 214, note 31; D'Annibale, *l. c.,* p. 12, n. 12.

4 Disjunctive are *vel—vel; aut—aut; seu* or *sive,* in classical language, denotes *and if, or if, even if, although.*

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signifies to induce or impel one to do something by compulsion, grave fear, or serious threats.[5] Therefore, the *mandantes or cogentes* may be public or private persons, for instance, an assistant commanded or compelled by the pastor, dean, vicar-general, or bishop, or a mayor or governor, or a patron or private citizen, especially of the influential kind.[6] The term *ausi fuerint* presupposes knowledge and free will.[7]

2. The *object* of this command or compulsion must be *ecclesiastical burial,* which, as stated above, comprises three acts.

The question arises: Are all three acts equally essential to the burial service, so that if one of them were omitted, the penalty would not be incurred? It is an ancient controversy, which act precisely was forbidden or intended by the penal law. The more common opinion accepted the burial place as intended by the legislator, not the liturgical ceremonies and prayers. However, notwithstanding this being the common opinion before the promulgation of the Code, it must now, we think, be abandoned. For can. 1204 is decidedly against such an interpretation, and we cannot depart from the significance of a term so clearly defined by the legislator himself and then used without any further explanation. Therefore, we take Christian burial as defined in can. 1204, but will add an explanation. In our country the transfer of the body under liturgical prayer is not in vogue. Besides, it not infrequently happens that the body is not buried from the church. It may even be that it is buried in a non-Catholic cemetery, and

5 Pennacchi, *l. c.,* II, p. 68. Thus also Eichmann, *l. c.,* p. 159; what Cappello, *l. c.,* p. 137, says, is meaningless.

6 Gravediggers, pallbearers, and other participants are not included.

7 Pennacchi, *l. c.,* II, p. 68 ff.; Hollweck, *l. c.,* p. 214, note 5.

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though this is contrary to the will of the Church (can. 1205, §1), no penalty is imposed. Consequently nothing remains of ecclesiastical burial but the exequies, or funeral services strictly so-called, *i. e.*, the blessing before Mass, the Mass, and the *absolutio*. This no doubt constitutes the essence of Christian burial.[8] If only the grave can be blessed, as is the case where all are buried in a common graveyard, the *locus sepulturae* cannot be understood in our text. Times are different now, and unless we wish to maintain that this canon applies only to Catholic countries under normal conditions, we must admit that Christian burial here signifies merely the exequies, *i. e.*, the blessing of the corpse before and after Mass, and the exequial Mass itself.

3. The persons *whose bodies are not allowed to be given Christian burial,* are:

a) *Unbaptized persons* or infidels. Concerning babies to be buried with their mother, we believe that the benign interpretation can safely be held, without incurring the penalty. The phrase *ausi fuerint* at least permits such an assumption.

b) *Apostates from the faith,* provided their apostasy was notorious;

c) *Heretics and schismatics,* provided they notoriously belonged to a non-Catholic sect or schismatic body;

d) Other *excommunicated* or *interdicted persons,* after a condemnatory or declaratory sentence.

According to canons 19 and 2219, § 1, the interpretation of such laws as this is both strict and benign. Therefore the burial of the other persons named in can. 1240, §1, n. 3-6 would not fall under the penal sanction of can. 2339. However, if, *e. g.*, a Freemason had pro-

8 Thus also Eichmann, *l. c.*, p. 159. Note should be taken of can. 1212 and 1241.

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voked a declaratory sentence, according to can. 2335, not only the prohibition, but the penalty also would take effect. Otherwise it is a mere prohibition.

4. Whilst so far only the *mandantes seu cogentes* were considered in connection with Christian burial, the second clause of can. 2339 *punishes also those who, of their own accord, give a Christian burial to the persons enumerated above.* These, being *clerics,* incur the *interdict which prohibits them from entering any church,* and it is *reserved to the Ordinary.*

The Ordinary of exempt clerical religious may here be understood to be their superior or the local Ordinary, inasmuch as burial concerns divine worship. Hence can. 616, § 2, is applicable here, but the penalty is incurred only if the ecclesiastical authority has granted ecclesiastical burial (*i. e.,* funeral rites, as stated above, not merely interment) *sponte, i. e.,* with full knowledge and freely, without being compelled by any one; therefore, even light fear would excuse him from the penalty.

PERSEVERANCE IN CENSURE

Can. 2340

§ 1. Si quis, obdurato animo, per annum insorduerit in censura excommunicationis, est de haeresi suspectus.

§ 2. Si clericus in censura suspensionis per semestre perseveraverit, graviter moneatur; et si, exacto a monitione mense, a contumacia non recesserit, privetur beneficiis aut officiis, si qua in Ecclesia forte habeat.

This canon contains two sections, one of which concerns excommunication, the other suspension.

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1. *Whoever stubbornly remains under a sentence of excommunication for one year, is suspected of heresy,*[1] because it may be presumed that he spurns the Church, more especially the power of the keys, and therefore doubts an article of faith.[2] However, it is a simple presumption, not one *iuris et de iure,* and therefore any plausible reason, or an offer to prove that he was prevented from asking for absolution, would suffice to purge the culprit from the suspicion of obstinacy.

Obduracy also supposes a warning, which must take the form of a canonical admonition.[3] The law does not distinguish between an excommunication *a iure* and one *ab homine,* much less between a *vitandus* and a *toleratus.* Can. 2385 provides that an apostate from a religious organization, after a year or 13 months,[4] becomes suspect of heresy, if he does not return or take steps to be dispensed from his vows, or have himself secularized.

2. A *cleric who remains for six months under the censure* (not vindictive penalty) *of suspension, must be seriously admonished; if he does not give up his contumacy within a month from the date of the warning, he is to be deprived of his benefice or the offices he may hold in the Church.*

Although this text mentions only suspension, and, therefore, concerns only clerics, yet the penalty stated in §1 is not thereby quashed. Consequently, if a cleric should have contracted excommunication besides suspension, he would also incur the suspicion of heresy. The text requires a canonical warning, to be given according to can. 2309; otherwise contumacy cannot be presumed.

1 See *Trid.,* Sess. 25, c. 3, *de ref.;* C. 7, 6°, V, 2.

2 Reiffenstuel, V, 39, n. 7.

3 Schmalzgrueber, V, 39, n. 195; see can. 2309.

4 See can. 642, § 1, 2.

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A doubt may arise as to what kind of suspension is here intended, general or special. Can. 2278, § 2 seems to point to a general suspension, and therefore, a special suspension from either office or benefice, or a partial one, would not seem to fall under this canon.[5]

VIOLATION OF THE PRIVILEGIUM FORI

Can. 2341

Si quis contra praescriptum can. 120 ausus fuerit ad iudicem laicum trahere aliquem ex S. R. E. Cardinalibus vel Legatis Sedis Apostolicae, vel Officialibus maioribus Romanae Curiae ob negotia ad eorum munus pertinentia, vel Ordinarium proprium, contrahit ipso facto excommunicationem Sedi Apostolicae speciali modo reservatam; si alium Episcopum etiam mere titularem, aut Abbatem vel Praelatum *nullius,* vel aliquem ex supremis religionum iuris pontificii Superioribus, excommunicationem latae sententiae Sedi Apostolicae simpliciter reservatam; demum si, non obtenta ab Ordinario loci licentia, aliam personam privilegio fori fruentem, clericus quidem incurrit ipso facto in suspensionem ab officio reservatam Ordinario, laicus autem congruis poenis pro gravitate culpae a proprio Ordinario puniatur.

The *privilegium fori* has been explained under can. 120. Here the penal sanction is stated, which concerns only the actual violators, not the framers or makers of laws contrary to the personal immunity of the clergy.[1] The latter are comprised by can. 2334, n. 1.

5 Thus Eichmann, *l. c.*, p. 160; c. 8, X, I, 14 as well as other commentators; Schmalzgrueber (V, 39, n. 197) simply says suspension, without further determination.

1 The *"Apostolicae Sedis,"* I, 7,

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The present canon distributes the clergy into three classes, with a special penalty for the aggressors of each.

I. *Excommunication reserved modo speciali to the Holy See is incurred ipso facto by those who dare to drag before a lay judge (civil court) cardinals, legates of the Apostolic See or higher officials of the Roman Court concerning affairs which belong to their office, or their own Ordinary.*

1. "*Trahere ad iudicem laicum*" means to compel one to appear before a lay judge, who has no jurisdiction over clerics, who have a judge of their own. But *trahere* (to drag) must not be understood literally, as if it required physical compulsion, *e. g.*, by a policeman.

The act declared punishable in this canon begins with the summons and ends with the final sentence and its execution. However, the term also has the definite meaning of an accomplished fact. Therefore, a mere judiciary summons, if unheeded or retracted, would not constitute the crime here intended. Even if a subpoena[2] should have been issued, the crime would not be established if the defendant would not appear.[3] Denouncing a clergyman to the State's attorney would not fall under this canon, though it might be classified as an inchoate crime.[4] On the other hand, the mere fact of being called and compelled to take the witness stand, is sufficient,[5] for this is a judiciary act and supposes a tribunal. Neither does it matter whether the clergy-

says: "*Cogentes sive directe, sive indirecte iudices laicos ad trahendum ad suum tribunal personas ecclesiasticas praeter canonicas dispositiones: item edentes leges vel decreta contra libertatem aut iura Ecclesiae.*"

2 A subpoena is a judicial writ commanding a party or witness to appear in court under penalty; *Stimson's Law Dictionary, s. v.*

3 This is evident from the "*Quantavis diligentia,*" of Pius X, Oct. 9, 1911 (*A. Ap. S.*, III, 555): "*qui ad tribunal laicorum vocent ibique adesse publice compellant.*"

4 See can. 2212; Eichmann, *l. c.*, p. 164.

5 See Vol. II, p. 63 f. of this Commentary.

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man wins or loses the suit, or is remunerated or compensated.

The Code here again employs the words "*ausus fuerit,*" which suppose a knowledge of the unlawfulness of the act proscribed. One must know that the person thus called to court is a cleric in possession of his clerical privileges;[6] also that there is a privileged court for Catholic clergymen. If inculpable ignorance existed on this point, the plaintiff would not incur the penalty. If he knew of the *privilegium fori,* but not of the penalty here stated, his responsibility would be diminished.[7] From this it may logically be deduced that lower officials who arrest a cleric and hale him into court because the laws of the country demand it, are immune from this penalty. But private citizens, who effectively denounce, summon, subpoena or bring suit against a clergyman cannot escape the penalty, *suppositis supponendis,* as just stated. It makes no difference whether the judge before whom a cleric is haled sits in the civil or in the criminal court, for no distinction is made.

2. The *persons* who must not be brought into the civil courts are:

a) The *cardinals* of the Holy Roman Church, because they are of princely rank and constitute the immediate senate of the Pope;

b) The *legates of the Apostolic See,* whether nuncios, internuncios, or Apostolic delegates; for can. 265 appears to include this threefold class as representatives of the Pope;

c) The *higher officials of the Roman Court.* These are not specifically determined, but may be described as follows:

6 See can. 123, 2304, 2305.

7 See can. 2202.

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For the Holy Office, the *assessor* and the *commissarius;*

For the Congregatio Consistorialis, the *assessor* and the *substitutus;*

For the Congregatio de Sacramentis, the *praelatus a secretis* and the three *subsecretarii;*

For the Congregatio Concilii, the *praelatus a secretis* and the *subsecretarius;* and similarly for the other congregations, which are made up in the same way. If we do not mention the Cardinal Prefect, who also belongs to the higher officials, it is because cardinals are expressly exempted as such.

The *Tribunals* of the Holy See comprise:

The *Poenitentiaria,* with the cardinal Poenitentiarius, the regent, the secretary, and the substitute;

The *Signatura Apostolica* with its secretary;

The *Romana Rota* with its auditors, *promotor iustitiae,* and *defensor vinculi.*

The *Offices* comprise:

The *Cancellaria Apostolica* with its regent and substitute;

The *Dataria Apostolica* with its subdatary and prefect;

The *Camera Apostolica* with the vice-camerlengo, auditor general, and treasurer general.

None of these higher officials may be brought before a lay court *on account of affairs which pertain to their office.* This phrase does not refer to the cardinals or legates, but to the officials just named. The importance of the matter and their close relation to the Pope requires a higher sanction for their immunity.[9]

8 The "*Sapienti consilio*" of Pius X, June 29, 1908 refers to *administri maiores,* who are identical with the *officiales maiores (A. Ap. S., I,* 78 ff.).

9 If these higher officials were cited before a lay judge for matters of a private character, inheritance, property, affairs of relatives,

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d) One's own *Ordinary* is here classed with the highest persons, and offenders against this enactment are threatened with severe penalties because the Ordinaries are immediate representatives of the Pope, upon whom their jurisdiction depends. Therefore an attack against them is a qualified offence by reason of the implied contempt of a higher authority.[10] Note that the text simply says *"Ordinary," without the addition: "local."* Therefore, if a religious of an exempt clerical order should dare to hale his own superior into a civil court, he would incur the penalty stated above. To bring any of these personages before a lay court requires permission from the Apostolic See.[11]

II. *Excommunication latae sententiae, simply reserved to the Apostolic See,* is incurred by those who dare to drag before a lay judge *another bishop* (*i. e.,* not their own Ordinary), or *a titular bishop, or an abbot nullius or prelate nullius, or one of the major superiors of religious of papal institutes.* Who these major superiors are, is plainly stated in can. 488, n. 8. If such persons are to be brought into court, the permission of the Apostolic See must be obtained.[12]

III. Those who dare to bring before a lay court *any other persons endowed with the clerical privilege, the privilegium fori,* are, if permission has not been obtained from the local Ordinary, to be punished as follows:

1. A *cleric* who dares to bring another cleric before the lay court *ipso facto* incurs *suspension from office reserved to the Ordinary;*

2. A *layman* must be punished by his own Ordinary according to the gravity of the guilt.

the penalty stated in the first clause would not be incurred, but one of the following (2) clauses would be applicable according to the hierarchical rank: titular bishops, clergymen, (to which latter also belong monsignori).

10 See can 2207, n. 1.

11 See can. 120, § 2.

12 *Ibid.*

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The *other persons* here meant are those not specially mentioned under I and II; hence all clerics of secular rank, from vicar-general down to those who have received the first tonsure; of *religious* superiors all those who do not go by the name of higher superiors (generals, provincials and those who hold power equal to provincials), *i. e.*, all religious except those mentioned, of male as well as female organizations, and their novices.

A difficulty remains concerning *exempt clerical religious*. These must obtain permission from the *local* — not the religious — superior in order lawfully to hale either a secular or religious cleric into court. But to whom is the suspension reserved? As the text does not here repeat the "*loci*" of the first clause, it follows that the Code means their own superior, not the local Ordinary, to whom they are not subject. There is no contradiction in this. For the obtaining of permission is a matter of public discipline for the whole diocese, but a reservation that belongs to the Order is of mere ecclesiastical jurisdiction. The suspension from office is to be understood according to can. 2279, §1.

What we have said elsewhere [13] concerning concordats and custom, can safely be applied to our country.

PAPAL ENCLOSURE

Can. 2342

Plectuntur ipso facto excommunicatione Sedi Apostolicae simpliciter reservata:

1°. Clausuram monialium violantes, cuiuscunque generis aut conditionis vel sexus sint, in earum monasteria sine legitima licentia ingrediendo, pariterque

[13] Vol. II, p. 64.

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eos introducentes vel admittentes; quod si clerici sint, praeterea suspendantur per tempus pro gravitate culpae ab Ordinario definiendum;

2°. Mulieres violantes regularium virorum clausuram et Superiores aliique, quicunque ii sint, eas cuiuscunque aetatis introducentes vel admittentes; et praeterea religiosi introducentes vel admittentes priventur officio, si quod habeant, et voce activa ac passiva;

3°. Moniales e clausura illegitime exeuntes contra praescriptum can. 601.

This whole canon concerns regulars and nuns only; therefore, even exempt religious of male congregations, and all female religious with simple, even though perpetual, vows are not affected by it. The text treats first of the enclosure of nuns, then of that of regulars, and, finally, of nuns unlawfully leaving the cloister.[1]

I. Those *who, no matter of what rank or condition or sex they be, violate the enclosure of nuns by entering their monasteries without lawful permission; likewise those who introduce or admit such violators, ipso facto incur the excommunication simply reserved to the Apostolic See. If they are clerics,* they shall, besides, be *suspended* for a time to be determined by the Ordinary according to the gravity of the crime.

1. The *enclosure* is the whole space contained within the precincts of a monastery, and assigned as such.[2]

1 *Apostolicae Sedis,* § II, n. 6, 7: *Violantes clausuram monialium cuiuscumque generis aut conditionis, sexus vel aetatis fuerint, in earum monasteria absque legitima licentia ingrediendo; pariterque eos introducentes vel admittentes; itemque Moniales ab illa exeuntes extra casus ac formam a S. Pio V. in Constitutione "Decori" praescriptam. Mulieres violantes Regularium virorum clausuram, et Superiores aliosve eas admittentes.*

2 Gibalini, S. J., *Disquisitiones*

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Note that the limits once drawn cannot be arbitrarily changed. The constant practice of the Roman Court demands that the bishop superintend the enclosure of nuns;[3] to him also must be referred any change of the limits.

2. The *violantes* are here determined, first, as *ingredientes,* which means that the law[4] of enclosure is trespassed by one entering the limits or threshold with his whole body, and without *the necessary permission.* This is given and determined by can. 600, which permits the local Ordinaries and superiors regular, the confessor or his substitute, the actual rulers and their wives and suite, and Cardinals to enter the precincts for certain reasons there stated. Besides, the superiors may also admit, if necessary and with the permission of the local Ordinary, physicians, surgeons, and workingmen. These, therefore, are permitted to enter and do not incur the penalty of this canon, provided the conditions set forth in can. 600 are verified. Where there is a case of violation of the enclosure, *neither descent* (birth), nor *social condition,* or *sex* makes any difference. But age does. For the Code does not add *aetatis* and therefore *impuberes,* according to can. 2230, do not incur the penalty here mentioned, although they, too, are forbidden to enter the enclosure.

3. *Introducentes* or *admittentes.* The former term signifies effective invitation, or leading the way by opening the gate (private entrance), provided the introducing person (one of the nuns) is on the inside and

Canonicae de Clausura Regulari, Lugduni 1648, p. 51; D'Annibale, *l. c.,* p. 82, n. 123.

3 We could allege many decrees of the S. C. EE. et RR., which we have perused in Rome; but the papal constitutions suffice.

4 Older laws; Carth. III, can. 33 etc., (Gibalini, *l. c.,* p. 5; Hollweck, *l. c.,* p. 221 f.); c. un. 6°, III, 16; *Trid.,* Sess. 25, c. 5, *de regg.*

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really coöperates in the induction of a forbidden person.

To *admit* means: not to prohibit or not to close the entrance if this is necessary and can easily be done. This, some authors say, is the duty of the superioress and portress only.[5] Others extend it to all persons (nuns) who can and may easily prevent an unlawful entrance.[6] Of course, the rules of politeness, shyness, and circumstances may keep one from mentioning the law of enclosure if this has already been trespassed, and in this case certainly the censure would not be incurred.

Those who merely counsel or command the violation, for instance, an Ordinary who would unjustly order it, would not incur excommunication.[7]

II. The *enclosure of* regulars is violated by *women* entering it, by *superiors and others, whoever they be, who introduce or admit women of whatever age.* All these incur the *ipso facto excommunication simply reserved to the Apostolic See.* The *religious who introduce or admit women, must be deprived of the office they hold and also of the active and passive vote.*

1. What is to be understood by the name of enclosure has been stated above.[8] However, what Suarez says, seems to be very reasonable and more adapted to the real condition existing in monasteries of male religious: "What is to be understood by the name of cloister, and where it ends, must be judged from the locality, form,

5 Gibalini, *l. c.*, p. 165; D'Annibale, *l. c.*, p. 83, n. 123.

6 Pennacchi, *l. c.*, I, 742; Hollweck, *l. c.*, p. 225, note 12.

7 D'Annibale, *l. c.* However, this must be rightly understood; for religious superiors who would command it, would not escape the penalty; such an interpretation would render the law ridiculous and nullify its effect.

8 Ferraris, *Prompta Bibliotheca*, s. *v.* "*Conventus*," art. III, n. 9 f; cemeteries, courtyard, cells, dormitories, refectory, infirmary, kitchen, also gardens if joined to the monastery, the sacristy if it has only an entrance from the enclosure, but not the choir of the church; thus also D'Annibale, p. 85, n. 127.

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and custom, and especially from the *declaration of the prelate,* which must be in conformity with the respective constitutions and religious discipline."[9] This, we say, is a very reasonable interpretation, because not all monasteries are built the same way, or surrounded by the same conditions. But one thing is certain, *viz.:* that the prelate is not at liberty to change the limits of the enclosure arbitrarily. They must be determined once for all and may be changed only in case of real necessity, and then permanently, not *ad hoc, i. e.,* merely to escape the law. Such a procedure would render the supreme legislator ridiculous and the object of enclosure nugatory.[10] An enclosure for regulars, no matter how small it be, must be definitely assigned. This is the will of the lawgiver, and it is most reasonable.

2. The violators here intended are *women,* not men. Exempted from this rule are the wives of actual rulers and their suite. In the U. S. there are no such rulers *(qui supremum actu tenent principatum;* can. 598, §2); if any come as visitors from foreign countries, a president's or governor's wife accompanying them might be admitted.[11]

3. Here again the *introducentes* and *admittentes* are mentioned, and the term is more clearly explained. They are the *superiors and others.* The name *superior* comprises all superiors, whether higher or lower, general, provincial or local. The procurator and other officials go here by the name of "others." By *alii* were formerly understood only religious,——— clerics, lay brothers, or

9 *De Relig.,* c. I, c. 7, n. 2 (*ed. Paris.,* 1860, Vol. XVI, 41).

10 The purpose is: *servanda castitas, scandalum praecavendum et necessarius spiritus recollectionis.*

11 Yet it would be no rigorous interpretation to say that since such rulers do not actually rule in our country, their wives may therefore be excluded.

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novices, not outsiders.[12] This interpretation was justified by the text of the "*Apostolicae Sedis.*" But as the Code adds: "*quicunque ii sint,*" we believe that a wider interpretation is now justified, *i. e.*, any one who knowingly and freely introduces or admits women into the enclosure, whether he be a lay janitor or a hired man, or an employee of the monastery. Those, however, who have nothing to do with the monastery, are excluded, because they have no right either to introduce or to admit others.

Note the phrase *cuiuscunque aetatis,* no matter of what age these women be, old or young; also those between twelve and seven years of age; and, we believe, also infants, *viz.,* girls who have not yet reached the age of seven. It is quite true that the commentators on the "*Apostolicae Sedis*" exempted those not yet seven years of age, because not capable of guilt.[13] But it should be noted that said Constitution employs the clause "of whatever age" under the enclosure of nuns, but omits it under the enclosure of men. Our text on the other hand connects this clause with the *introducentes,* and hence we maintain that it was done purposely, so that no women or girls of whatever age may be introduced by the religious under penalty of excommunication. Neither does the fact that these infants (*septennio minores*) are not capable of guilt affect the merit of the question; for the guilt is referred to the *introducentes.* Of course, if the *introducentes* can not distinguish a boy from a girl — which mistake is possible — no censure is incurred.

Note that the *purpose* of entering, introducing or admitting any one to the enclosure, whether good or bad,

12 Thus D'Annibale, *l. c.*, p. 85, n. 128; Hollweck, *l. c.*, p. 229, note 5.

13 Thus, we say, by general interpretation; for the S. C. EE. et RR. included also *pueros et puellas;* March 16, 1593; June 10, 1650: *Regesta* of the respective years, Reg. fol. 118, fol. 260; see can. 2230.

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does not change the nature of the law or quash the penalty.

The *penalty* for *religious* is privation of their offices and of the active and passive vote. This also concerns the superiors, of whatever rank, as is evident from former papal Constitutions.[14]

But since it is *ferendae sententiae,* which certainly requires a declaratory sentence, it follows that concerning exempt religious the declaration would have to be given by their respective immediate superior, otherwise by the Congregatio Religiosorum, to which such cases might be brought.

Simple religious *must* be deprived of their office and ballot by their immediate superior.

Concerning dispensation and absolution in occult cases see can. 2237, §3.

III. *Nuns with solemn vows,* who *leave the enclosure* against the law, as stated in can. 601, *ipso facto incur the excommunication simply reserved to the Apostolic See.*

To leave the enclosure means to put the whole body outside the limits assigned, no matter for how long a time or for what purpose.[15] The reasons which permit this are imminent danger of death or fear of a very serious evil. The former law mentioned as reasons: fire leprosy, and epidemics.[16] This may safely be extended to

14 Pius V, "*Regularium,*" Oct. 24, 1506, § 4; Grebory XIII, "*Ubi gratiae,*" June 13, 1575, § 3; Bened. XIV, "*Regularis disciplinę,*" Jan. 3, 1745, § 5.

15 We read many and curious cases of leaving brought to the S. Congregation; a nun gathering apples on a tree, a limb of which she climbed and thus happened to find herself outside the wall;— *acquiescent;* a nun climbing the housetop, which seemed more serious;— at least provisional absolution. But *unlawful* here implies acting knowingly against the law, and therefore cases like those just mentioned should not cause scruples.

16 Epidemic may be justly taken for a contagious or even infectious disease, such as consumption, even influenza; there is also the necessity of undergoing an operation.

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earthquakes and sudden invasions, or serious danger to virtue.

Absolution in occult cases may be granted by the local Ordinary according to can. 2237, §2. But in public cases bishops can absolve only if they have a general faculty (can. 2253, n. 1).

VIOLATION OF THE PRIVILEGIUM CANONIS

Can. 2343

§ 1. Qui violentas manus in personam Romani Pontificis iniecerit:

1°. Excommunicationem contrahit latae sententiae Sedi Apostolicae specialissimo modo reservatam; et est ipso facto vitandus;

2°. Est ipso iure infamis;

3°. Clericus est degradandus.

§ 2. Qui in personam S. R. E. Cardinalis vel Legati Romani Pontificis:

1°. In excommunicationem incurrit latae sententiae Sedi Apostolicae speciali modo reservatam;

2°. Est ipso iure infamis;

3°. Privetur beneficiis, officiis, dignitatibus, pesionibus et quolibet munere, si quod in Ecclesia habeat.

§ 3. Qui in personam Patriarchae, Archiepiscopi, Episcopi etiam titularis tantum, incurrit in excommunicationem latae sententiae Sedi Apostolicae speciali modo reservatam.

§ 4. Qui in personam aliorum clericorum vel utriusque sexus religiosorum, subiaceat ipso facto excommunicationi Ordinario proprio reservatae, qui praeterea aliis poenis, si res ferat, pro suo prudenti arbitrio eum puniat.

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This canon contains two censures which the "*Apostolicae Sedis*"[1] placed under distinct headings. Here they are combined under the one species of personal inviolability, or the so-called *privilegium canonis*, the historical basis of which has been explained elsewhere.[2]

"*Violentas manus iniicere*" is a remnant of the famous old canon, "*Si quis suadente diabolo.*" Malicious intent is presumed if the action is such as to hurt and offend the person against whom it is directed.

1. *Violent* implies that the person be really injured.

a) A bodily offence is one committed against the physical nature or constitution of a man *(in corpus)*. To this class belong all acts of felonious murder, manslaughter, maiming,[3] assault, battery and wounding. Tantamount to felonious assault would be the administration of poison or other noxious things which inflict grievous bodily harm.[4] As to wounding, the skin must be broken; a mere scratch is no wound.[5]

b) Personal, physical injury may also be committed by interfering with one's liberty *(in libertatem)*. Thus capturing or imprisoning or detaining a person against his will must be styled violence. For "to deprive another person of his liberty will usually involve either

1 § 5. "*Omnes interficientes, mutilantes, percutientes, capientes, carcerantes, detinentes, vel hostiliter insequentes S. R. C. Cardinales, Patriarchas, Archiepiscopos, Episcopos, Sedisque Apostolicae Legatos, vel Nuncios, aut eos a suis dioecesibus, territoriis, terris seu dominiis eiicientes, necnon ea mandantes vel rata habentes seu praestantes in eis auxilium, vel favorem.*" § II, 2: "*Violentas manus, suadente diabolo, injicientes in Clericos, vel utriusque sexus Monachos, exceptis quoad reservationem casibus et personis, de quibus iure vel privilegio permittitur, ut Episcopus aut alius absolvat.*"

2 See Vol. II, p. 58 of this Commentary.

3 Maiming from mayhem; thus to cut off a finger or even to knock out a front tooth would be mayhem; Kenny-Webb, *l. c.*, p. 135.

4 *Ibid.*, p. 137; D'Annibale, *l. c.*, p. 35, n. 50.

5 Kenny-Webb, *l. c.*

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touching or threatening to touch him."[6] Detention may be such as to shut one up in his room or home.[7]

c) A person may also suffer bodily harm in his *dignity*, or official condition, or social position. Thus pursuing a man, ejecting him from his own property, house or premises constitutes a physical injury, provided it is done in a hostile spirit, even though no immediate contact is involved between the assailant and the assailed. Thus merely spitting at a person, or bespattering him with mud or rotten eggs, etc., would constitute an indictable offence; also stopping a horse or automobile with hostile intent or striking the horse or shaking the vehicle so as to throw out the rider, would be considered a hostile act.[8]

2. The action must not only be violent, but also *injurious*, *i. e.*, affect the person contumeliously against his own will and be perpetrated with knowledge of the injury done. Consequently:

a) *Self-defence* is not injurious, for the injured must impute it to his own conduct if he is injured in the act of aggression. Hence self-defence is permitted if practiced *hic et nunc* and the amount of force used does not exceed the immediate need. This is also extended to the defence of one's wife, mother, sister, and daughter.[9]

b) *Knowledge of injury* is absent if the violence is committed against a cleric who is not known as such. Therefore, if a cleric has been reduced to the lay state,[10] the penalty would not be incurred, even though he would

6 *Ibid.*, p. 143.

7 D'Annibale, *l. c.*, p. 71, n. 109; p. 35, n. 50.

8 Kenny-Webb, *l. c.*, p. 142; D'Annibale, *l. c.*, p. 35, n. 50.

9 C. 3, X, V, 39. Defence of one's property (Kenny-Webb, *l. c.*, p. 144) is not acknowledged in Church law; Hollweck, *l. c.*, p. 219, note 3.

10 See can. 136, § 3; 141 § 2; 211, § 1, 2; 640; 2305, § 1; 2387.

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wear the clerical dress with a big tonsure on his head. If one would try to strike at James, a cleric, but hit Brutus, also a cleric, he would incur the penalty, because the privilege is not individual, but attached to the clerical state.[11] But no penalty is attached to the corrective striking or beating of children, provided the chastisement is reasonable and the instrument one not likely to inflict serious bodily harm, and provided the *percussus* be not *in sacris*.[12] Some authors [13] also exempt the case of sudden anger or wrath; which may be accepted, provided can. 2206 is verified. An involuntary striking or wounding or even killing of a cleric must be judged according to can. 2203, §2, and is generally immune from penalty. Finally, it may be stated that only the actual perpetrator is punishable and instigators or counselors are not included in this penalty.

After this somewhat lengthy exposition we have but to explain the penalties, which are graded according to the dignity of the offended person, as per can. 2207, n. 1.

1. Those who lay violent hands on the *person of the Roman Pontiff:*

a) incur the *excommunication latae sententiae reserved modo specialissimo to the Apostolic See* and are *ipso facto vitandi* (can. 2285);

b) they are also *infamous ipso iure* (see can. 2293, 2294, §1), but this infamy no longer [14] passes to the relatives and descendants of the offender.

c) A *cleric* guilty of this crime must be *degraded,* which is *ferendae sententiae.*

11 Thus also D'Annibale, p. 74, n. 110.

12 C. 54, X, V, 39; Kenny-Webb, p. 100.

13 S. Alphonsus, VII, 575; D'Annibale, *l. c.*

14 Formerly it did; see c. 17, C. 6, q. 1; c. 22, C. 11, q. 1; c. 5, 6°, V, 9; c. 1, Clem. V, 8, because it was treated as treason; the histories of Leo III, Gregory VII, and Boniface VIII furnish examples.

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2. Those who lay violent hands on a *Cardinal or legate of the Roman Pontiff (or Apostolic delegate)*

a) incur *excommunication latae sententiae* reserved *speciali modo* to the Apostolic See;

b) are *ipso iure infamous,*

c) *must be deprived of their benefices, offices, dignities,* pensions, and every ecclesiastical charge they may hold.

3. Those who lay violent hands on a *patriarch, archbishop, bishop (diocesan or titular)* incur *excommunication latae sententiae* reserved *modo speciali* to the Apostolic See.

4 Those who lay violent hands on the person of *other clerics* or religious of either sex *ipso facto* incur the *excommunication* reserved to their *own Ordinary,* who may inflict additional penalties if in his prudent judgment he should deem it proper or if the case demands it.

This last section calls for a few remarks.

1. *Clerics* are all men dedicated to the divine mysteries by at least the first tonsure (can. 108, §1), unless, as already stated, they have been reduced to the lay state.

2. *Religious,* in the sense of the Code (can. 488, n. 7), are all those who have taken the three vows and live in an approved religious institute. The same privilege is also accorded to religious associations, according to can. 680. The novices (but not the postulants) of both kinds of organizations enjoy the same favor, but not *hermits,* who live for themselves, though with the approval of the ecclesiastical authority and wear a religious habit, nor secular tertiaries.[15]

15 D'Annibale, p. 73, n. 108, expresses a doubt concerning such hermits as had received the religious habit at the hands of a bishop; but these are not religious.

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3. Whether the so-called *percussio* be *enormis,* or *mediocris,* or *levis,* the Ordinary may absolve from it. And the Ordinary of exempt religious is their superior major general, provincial, guardian, rector, or conventual prior, all of whom may absolve from any kind of *violatio canonis.* If the superior himself should be guilty of such an excess, he may give his confessor the faculty to absolve him. In case of non-exempt religious, the Ordinary in whose diocese the *percussor* lives as a member of a religious family, is competent to absolve him.[16]

PUBLIC VERBAL INJURIES

Can. 2344

Qui Romanum Pontificem, S. R. E. Cardinalem, Legatum Romani Pontificis, Sacras Congregationes Romanas, Tribunalia Sedis Apostolicae eorumque Officiales maiores, proprium Ordinarium publicis ephemeridibus, concionibus, libellis sive directe sive indirecte, iniuriis affecerit, aut simultates vel odia contra eorundem acta, decreta, decisiones, sententias excitaverit, ab Ordinario non solum ad instantiam partis, sed etiam ex officio adigatur, per censuras quoque, ad satisfactionem praestandam, aliisve congruis poenis vel poenitentiis, pro gravitate culpae et scandali reparatione, puniatur.

Pseudo-Isidore ascribes to Pius I a text resembling our canon.[1] This Decretal was to protect bishops against insidious attacks, contumelies, calumnies and all kinds

16 If the case should be brought to a trial before the ordinary, the latter would become competent to absolve also exempt religious *ratione deliciti.*

1 C. 18, C. 11, q. 1.

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of verbal injuries. Clement III (1187-1191) complained of a cleric who deprecated the "office and benefice" (sic!) of the Roman Pontiff or the Roman Church in the presence of many.[2] No doubt this latter Decretal is the material source of our canon. But the Roman law, too, contained a title "*De Iniuriis et Famosis Libellis*," and punished especially injuries against higher personages.[3] The English law treats the *scandalum magnatum* as a heinous crime.[4] It is but natural that the Code should protect dignitaries of the Church against possible and probable attacks.

1. The *persons* here mentioned are: the Roman Pontiff, the Cardinals, the papal legates, the Roman Congregations, the Tribunals of the Roman Court and their higher officials, as explained above,[5] and one's own Ordinary; therefore also the superiors of exempt clerical institutes, provided the attack comes from one of their own members.

2. The *acts* which are declared liable to punishment are: *iniuriis afficere* or *simultates aut odia excitare* against their acts (documents), decrees, decisions, sentences.

a) *The word injuries* is here to be taken strictly in the sense of verbal injuries. An injury is an act done against law or right.[6] An injury, says Labeo, may be inflicted either by deeds or words. To the latter class the Roman lawyers gave the name *convicium*, either singular or plural. The canonists speak of them under the title *De Maledictis*[7] and divide *maledictum* into detraction, calumny, and blasphemy. The last-named crime, however, does not concern the present subject,

2 C. 1, X, V, 26.
3 Dig. 47, 10.
4 Blackstone-Cooley, *l. c.*, III, 123.
5 See can. 2341.
6 L. 1, Dig. 47, 10: *iniuria ex eo dicta est, quod non iure fiat.*
7 Tit. 26, lib. V.

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for blasphemy is a strictly religious crime. There is a slight difference of opinion between canonists and moralists as to the definition of detraction and calumny. The commentators[8] on the above-named title define detraction as any defamation of a person in his absence, and calumny as an insult made in the face of the person. The moralists[9] define detraction in general as an unjust violation of the good name of a neighbor who is absent. Under this general notion they subsume simple detraction, which they call imputation of a real but unknown crime; calumny they call imputation of a false crime or a crime not committed by the person to whom it is attributed. In English we style all detractions slanders if spoken, and libels if written. A libel is a writing or picture which either defames an individual or injures religion, government or morals. Defamatory or private libel is a crime which not only is a tort, but is often treated as such in actual practice.[10] Since the Church has doubtless taken the body of her criminal law from the old Roman law, it is not too much to say that the civil law, as understood at present, should be consulted as to the constituent elements of slander and libel.[11] Therefore we may assume that the injuries in question should be of an actionable character, and it is the function of the judge to decide whether the deed, word or writing impugned is capable of bearing the alleged defamatory meaning.

b) *Simultates vel odia excitare* are wider terms and difficult of precise definition. The former properly means aversion, a secret grudge, or animosity. But how

8 See Reiffenstuel, V, 26, n. 3. Blackstone-Cooley, *l. c.*, III, 112 ff.
9 See Arregui, *l. c.*, n. 427.
10 Kenny-Webb, *l. c.*, p. 297;
11 Hollweck, *l. c.*, p. 277, note 1.

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a judge can determine secret thoughts is hard to understand. *Odia* is more tangible, because it signifies the manifestations of hatred, for instance, imprecations, threats, outbursts of irreverent speech, etc. However, no objective criticism on the value and truth of these documents is here intended. Neither would ridicule or a jocose travesty constitute an offence. Notice well that animosity and hatred are connected with official documents issued by the above-named persons, while *iniuria afficere* may be referred only to distinguished persons, because dignity or official character is impaired by injuries.

3. The *means* by which slander and libel may be conveyed to others are: magazines, speeches, pamphlets, etc.

a) *Ephemerides* are periodicals published regularly, *i. e.*, at stated times, principally magazines; newspapers are not comprised in the term.

b) *Conciones* may be either lectures, or discourses, or sermons, or catechetical instructions, in which a subject is treated systematically.

c) *Libelli* are pamphlets of some size, *i. e.*, booklets, not mere leaflets.

d) All these may contain an injury, or excite animosity or hatred, either directly or indirectly. Directly if a specified person or body, for instance, a congregation, is assailed; *indirectly* if, *e. g.*, the Roman Court would be called corrupt or immoral, or if a diocese or episcopal see were insulted. Directly may also refer to a specified crime imputed, for instance, bribery; indirectly would then mean by *innuendo* a certain tendency or class of crimes.

4. The *penalty* is stated as follows: the Ordinary should not only proceed upon complaint or indictment,

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but should prosecute offenders officially (criminally) by censures if necessary. He may also inflict other suitable penalties and penances, as the gravity of the crime and the reparation of scandal may demand.

USURPING AND RETAINING PROPERTY AND RIGHTS OF THE ROMAN CHURCH

Can. 2345

Usurpantes vel detinentes per se vel per alios bona aut iura ad Ecclesiam Romanam pertinentia, subiaceant excommunicationi latae sententiae speciali modo Sedi Apostolicae reservatae; et si clerici fuerint, praeterea dignitatibus, beneficiis, officiis, pensionibus priventur atque inhabiles ad eadem declarentur.

The Roman Church from the earliest times possessed property, which went by the name of patrimony of St. Peter, and was scattered over the Italian peninsula, Sicily and Sardinia, nay even in Spain and France. In the course of the eighth century this property received the form of a Roman Duchy and was enriched by Pippin's donations. Civil and political strifes of the Roman, Tuscan, and Spoletan nobility and the interference of the Teutonic rulers in Italian and ecclesiastical affairs shaped the Duchy on the Tiber into a politico-ecclesiastical State, for which the popes, the born defenders of forsaken Rome, fought tenaciously against foreign invaders. Thus out of the material patrimony of St. Peter, conjointly with the civil-ecclesiastical authority of the Roman pontiffs, grew what is known as the *temporal dominion* of the popes. This is the immediate object of our canon, which is taken in a modified form

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from the "*Apostolicae Sedis.*"[1] A year after the promulgation of this Constitution (1870) *Italia Unita* became a *fait accompli* at the cost of the Papal States. *The Law of Guarantees* was devised to smooth the worst features of that inexcusable usurpation. Under its provisions the Pope was to continue to enjoy the Apostolic Palaces of the Vatican and the Lateran, with all the buildings, gardens, and plots connected with them, as well as the Villa of Castel Gandolfo with all its appurtenances and dependencies; also the museums, library, and artistic and archæological collections therein contained.[2] Of the *iura* or sovereign rights the law guaranteed the inviolability of the person of the Sovereign Pontiff, also his right, active and passive, of embassy with all the privileges (extraterritoriality and immunity) attached thereto; also, if he pleases, to have his own post office and telegraph service or to entrust it to the Italian government, free of charge. This is the condition of the papacy at present, at least on paper. Remonstrances, of course, were not wanting, and the present canon, although modified, is a reminder to the royal and parliamentary offenders. We shall not attempt to enter into an interpretation of this canon, as it deals with a delicate subject, which the Roman Court alone can handle adequately. Only one observation: the term *bona et iura Romanae Ecclesiae* may have a wider sense, inasmuch as all property and all rights, wherever found, may be concerned, provided they are held in the name of the Roman Church, as a legal corporation.[2]

1 § I, 12. *Invadentes, destruentes, per se vel per alios civitates, terras, loca aut iura ad Ecclesiam Romanam pertinentia; vel usurpantes, perturbantes, retinentes supremam iurisdictionem in eis nec non ad singula praedicta auxilium, concilium, favorem praebentes.*

2 Art. 6; see Prior, *Is the Pope Independent? or Outlines of the*

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Those who usurp or detain, personally or through others, property or rights belonging to the Roman Church,[3] *incur excommunication latae sententiae, reserved modo speciali to the Apostolic See.* If the guilty ones are *clerics* they *must be deprived of their dignities, benefices, offices, and pensions, and be declared incapable of holding such.* This clerical penalty is *ferendae sententiae.*

The question has been asked: Does the present King of Italy fall under the excommunication formulated in this canon? He is not a usurper, but merely one who detains or holds or occupies property that was usurped by another, and in this sense authors maintain that "to retain" means the same as "not to restore,"[4] But is there a moral imputability? We hardly believe so; for the King alone could not restore the Papal States.[5] Deputies and senators are not responsible as individuals.[6]

USURPATION AND SECULARIZATION OF CHURCH PROPERTY

Can. 2346

Si quis bona ecclesiastica cuiuslibet generis, sive mobilia sive immobilia, sive corporalia sive incorporalia, per se vel per alios in proprios usus convertere et usurpare praesumpserit aut impedire ne eorundem fructus seu reditus ab iis, ad quos iure pertinent, percipiantur, excommunicationi tandiu subiaceat, quandiu bona ipsa integre restituerit, praedictum im-

Roman Question, 1907, p. 127 f.

3 But it would be improper to identify this property with the Roman See (Ayrinhac, p. 275); our text means only the *Roman* Church, understood as a political and ecclesiastical corporation, distinct from the Catholic Church at large.

4 Thus D'Annibale, p. 67, n. 100, note 6.

5 Thus also Eichmann, *l. c.,* p. 170.

6 D'Annibale, *l. c.*

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pedimentum removerit, ac deinde a Sede Apostolica absolutionem impetraverit; quod si eiusdem ecclesiae seu bonorum patronus fuerit, etiam iure patronatus eo ipso privatus exsistat; clericus vero, hoc delictum committens vel in eodem consentiens, privetur praeterea beneficiis quibuslibet, ad alia quaelibet inhabilis efficiatur et a suorum ordinum exsecutione, etiam post integram satisfactionem et absolutionem, sui Ordinarii arbitrio suspendatur.

This canon aims at protecting the right claimed in can. 1495. It is not necessary to repeat what we said there. The spoliation of Church property forms an old and oft-recurring chapter in the annals of secular and ecclesiastical history from the time of the Merovingians to the wholesale secularization of churches and monasteries towards the end of the eighteenth and the beginning of the nineteenth century. The cupidity of men is insatiable, but its exercise against the Church has ever been followed by visible, though perhaps slow, punishment, inflicted either on individuals or on whole nations. The law inflicts a severe punishment (1°) *on those who, either personally or through others, dare to appropriate to their own use and usurp ecclesiastical property of whatever kind, be it movable or immovable, corporeal or incorporeal* and (2°) upon *those who dare to prevent either individual or corporate ecclesiastical persons from receiving the fruits or income due to them.*

1. The first class is that of *convertentes* and *usurpantes.* The text is essentially a repetition of the Tridentine[1]

1 *Trid.*, Sess. 22, c. 11: "*Si quem clericorum vel laicorum . . . bona, census ac iura . . . fructus, emolumenta, seu quascumque obventiones, quae in ministrorum et pauperum necessitates converti debent, per se vel alios, vi vel timore incusso, seu etiam per suppositas personas clericorum aut laicorum, seu quacumque arte aut quocumque quaesito*

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anathema against the unrightful holders of ecclesiastical property. We should expect that usurpation would be mentioned first and then appropriation; for *usurpare* means to occupy something as owner after having taken it away from the real proprietor. But the Council reverses the order, thus intimating that *convertere* and *usurpare* constitute one juridical act or criminal deed. This, indeed, appears to be the meaning of the Tridentine text, which emphasizes the alienation of ecclesiastical property from its real purpose. This may be embezzlement proper, or secularization, *i. e.*, turning ecclesiastical property to profane or worldly uses. *Embezzlement* is committed by a servant or employee. Hence it is clearly stated that only clerics may be guilty of this crime. *Secularization* is proper to lay persons, especially the powerful and influential, who appropriate church goods to their own use.[2]

Whether this act of unlawful appropriation be committed by the usurpers *themselves* or *through others,* is immaterial. Therefore the *mandantes* are here concerned, who act through others.[3] *Per alios* may have another meaning. Take this case, for instance: A buys from B a piece of church property, which B had purchased at an auction from the government that had robbed a religious community, but turned the misappropriated property to public, not private, uses. Has A incurred the censure? Yes, answered the Holy Office.[4] Since these cases are not rare, it may be of

colore in proprios usus convertere, illosque usurpare praesumpserit, seu impedire, ne ab iis ad quos iure pertinent, percipiantur, is anathemati tamdiu subjaceat. . . ."

2 See D'Annibale, *l. c.*, p. 60, n. 91; Gallemart, *Conc. Trid.*, 1780, II, 654; Hollweck, *l. c.*, p. 238 takes *usurpantes* and *convertentes* as *distinct terms.*

3 But not the *consulentes.*

4 S. O., July 8, 1874 (*Coll. P. F.*, n. 1420).

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interest to state the practice of the S. Poenitentiaria.[5] Its decisions turn about municipal authorities, mayors, and aldermen and naturally concern a country where wholesale spoliation of religious communities had taken place. The substance of these decisions is:

a) As long as these authorities do not appropriate such property to their own uses, they do not incur the censure, no matter how they may have coöperated in the unjust spoliation. Neither do those incur the censure who freely receive such property through the "liquidateur."

b) Such authorities, mayor, aldermen, etc., are bound to make restitution *singillatim, i. e.*, each one for himself; as to the liquidators, it is not quite certain whether they are obliged to restitution.

c) Those who buy confiscated property and turn it to their own use, incur the censure;

d) With the exception of the last-named class (c) the confessor should not regard the aforesaid persons as public sinners;

e) Concerning the ecclesiastical burial of such persons, the local Ordinary must judge in each individual case.

f) The buyers *(emptores)* of church property illegitimately confiscated are bound to make restitution, but may easily obtain a "composition" or agreement with the Ordinary or Apostolic Delegate, who receive special faculties to this effect from the S. Poenitentiaria.

A kind of embezzlement no doubt forbidden under censure is keeping back, or occupying and retaining, money

[5] Jan. 3, 1906; March 8, 1906; May 9, 1906; June 7, 1906; Sept. 17, 1906 (*Anal. Eccl.*, XV, 128 ff.) Apostolic Delegates enjoy the faculties to absolve in such cases (*Index Facult.*, n. 9).

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and property belonging to the Holy Land, provided, of course, it is turned to one's own use.[6]

Clerics of every rank incur the censure if they misappropriate money or property destined for the maintenance of divine worship or the support of ministers.[7]

Bona ecclesiastica are defined in can. 1497 as such as pertain either to the universal Church, or to the Apostolic See, or to another artificial person, *i. e.*, ecclesiastical corporation, or which are under ecclesiastical ownership and control. This property may be *movable* (precious and sacred things), or *immovable* (such as lands). It may be *corporeal* or *incorporeal*. The former term comprises all goods which can be seen and handled, whilst *incorporeal* property is that which cannot be seen as such, for instance, leases, patent rights, literary or copyrights, incorporeal hereditaments.[8] An incorporeal property would also be the secret of manufacturing a certain trade article. All these properties, provided they belong to an ecclesiastical corporation or entity, are here included. It is not quite correct[9] to say that *loca pia* do not fall under this category. For such institutions (hospitals, orphanages, homes for the aged, the poor, etc.), if erected by the local Ordinary as a juridical person,[10] are ecclesiastical entities and the present canon applies to them.

2. The next class of fraudulent detainers of church property are the *impedientes* (see can. 2333), *viz.*:

6 S. O., June 28, 1876 (*Coll. P. F.*, n. 1457.)

7 Wernz, *l. c.*, VI, n. 336, p. 333. The amount required to incur the censure would certainly have to be considerable, $100 or $200; see Hollweck, p. 156, note 18. Thieves and robbers do not incur the censure under this heading; Pennacchi, *l. c.*, II, 368; but may be punished according to can. 2325.

8 Blackstone-Cooley, *l. c.*, II, 16; bonds and stocks rather belong to corporal property.

9 Thus Hilarius a Sexten, *l. c.*, p. 142.

10 Can. 1487, § 1.

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those who authoritatively and effectively prevent others from coming into their own. When we say "authoritatively" we do not, however, mean to imply that only public authority in the strict sense is to be understood. Our church trustees, *e. g.*, are not public authorities in the strict sense, but only representatives of private corporations, yet they exercise a certain authority and may, therefore, really "impede." The preventing may be done by threats, violence, sequestration, suspension of payment, lawsuits,[11] etc.

Fructus seu reditus are natural products, such as the tithes from animals, land, trees, etc., formerly paid to the clergy or the Church. *Reditus* refers particularly to revenues or salaries, such as the income from a benefice. Not comprised under this name or canon are the stole fees and the so-called *incerti, i. e.*, fees for dispensations, expediting documents, etc.[12] For these are especially mentioned under can. 2349.

But these fruits and revenues must belong *iure* to ecclesiastical persons. The legal title to them is established by the fact that one is a duly appointed minister of an ecclesiastical corporation and has not forfeited his right by illegal acts punishable in law by temporary or perpetual suspension or privation of one's benefice.

3. The *penalty* is

a) *Excommunication latae sententiae, reserved to the Apostolic See until full restitution has been made, the impediment removed, and absolution imparted.*

Since, as stated above, compensation or agreement is easily admitted, it is evident that such an act would

11 Hollweck, *l. c.*, p. 237, note 16. To this class belong also advowson and governmental retention of salaries.

12 Can. 463, § 1; can. 1507.

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entitle one to absolution, provided the confessor has the necessary faculties.

b) The *patron of a church or property* who is guilty of acts forbidden by this canon, *is, besides, ipso facto deprived of the ius patronatus,* and his church or benefice becomes one of free appointment.

c) A *cleric* who has *committed the crime here mentioned or*[13] (by effective confiscation or detention) *has consented to the same, must be deprived of all his benefices and declared incapable of obtaining any benefice in future.* Besides, he must be *suspended from the exercise of his orders* for a period to be determined by his Ordinary, even after he has given full satisfaction and obtained absolution. All these clerical penalties, with the exception of excommunication, are now *ferendae sententiae,* and therefore require the usual admonition and sentence.

"*Ausus fuerit*" (can. 2229, § 2) implies knowledge that the property was an ecclesiastical one, and also free-will. Therefore, can. 2229, §2 must be consulted.

ILLEGAL ALIENATION

Can. 2347

Firma nullitate actus et obligatione, etiam per censuram urgenda, restituendi bona illegitime acquisita ac reparandi damna forte illata, qui bona ecclesiastica alienare praesumpserit aut in iis alienandis consensum praebere contra praescripta can. 534, § 1, et can. 1532:

1°. Si agatur de re cuius pretium non excedit mille

[13] The cleric, in virtue of his office, is obliged to protect the church property entrusted to him; a protest from him would be sufficient to render him immune from penalty; Hollweck, *l. c.*, p. 239, note 23.

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libellas, congruis poenis a legitimo Superiore ecclesiastico puniatur;

2°. Si agatur de re cuius pretium sit supra mille, sed infra triginta millia libellarum, privetur patronus iure patronatus; administrator, munere administratoris; Superior vel oeconomus religiosus, proprio officio et habilitate ad cetera officia, praeter alias congruas poenas a Superioribus infligendas; Ordinarius vero aliique clerici, officium, beneficium, dignitatem, munus in Ecclesia obtinentes, solvant duplum favore ecclesiae vel piae causae laesae; ceteri clerici suspendantur ad tempus ab Ordinario definiendum;

3°. Quod si beneplacitum apostolicum, in memoratis canonibus praescriptum, fuerit scienter praetermissum, omnes quovis modo reos sive dando sive recipiendo sive consensum praebendo, manet praeterea excommunicatio latae sententiae nemini reservata.

Alienation has been explained elsewhere.[1] Here the *penalties* are set forth. Those who *alienate church property, or consent to such alienation, despite the law laid down in can.* 534, § 1 and can. 1532:

1°. Must be fittingly punished by the lawful ecclesiastical superior, if the value of the alienated property *does not exceed 1000 francs* (lire);

2°. If the value *exceeds 1000 francs,* but does not reach *30,000*:

a) The *patron* must be deprived of the *ius patronatus;*

b) The *administrator* must be removed from his office;

c) The *religious superior* or *oeconomus* (procurator) must be deprived of his office and declared incapable of holding any other office, and may also be otherwise punished by his superiors in proportion to his guilt;

1 See can. 534, 1530–1533 (Vol. III and VI of this Commentary).

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d) The *Ordinary* and *other clerics* who hold an office, benefice, dignity, or charge in the Church, are bound to pay the double amount to the church or charitable institution which they injured by alienation;

e) *Other clerics* must be suspended for a period to be fixed by the Ordinary.

3°. If, according to the aforesaid canons, the *beneplacitum apostolicum* was required, but was *knowingly neglected,* all those guilty of the crime, those who gave and those who received as well as those who merely gave their consent (if this was needed), incur the *excommunicatio latae sententiae* reserved to no one.

Our canon states that *no obligation* arises from an illegal alienation because the act is *null* and void in the internal as well as the external forum. Furthermore, those who *acquire* church property by illegal alienation, are bound to *make restitution* and *repair the damage* sustained by the ecclesiastical owner of the property.

But what about Ordinaries and clergymen (2, d) who have to pay the *duplum?* There is no doubt that *duplum* is here to be taken in comparison with the sum illegally alienated. Therefore, if 20,000 francs were illegally alienated, the Ordinaries guilty of the crime would have to repay 40,000 francs, and if the damage suffered by illegal alienation would not be covered by this latter sum, they would have to pay more.

But who shall enforce these penal laws, since, with the exception of the censure, they are all *ferendae sententiae?* The immediate superior, and therefore the Apostolic See with regard to autonomous prelates, and the local Ordinary with regard to the inferior clergy.

Attention must be drawn to the terms *praesumpserit* and *scienter praetermissum* (consult can. 2229, § 2).

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Fear of loss, or deterioration, or real need, or any kind of ignorance would excuse one from the penalties above mentioned.

NEGLECT TO EXECUTE PIOUS BEQUESTS

Can. 2348

Qui legatum vel donationem ad causas pias sive actu inter vivos sive testamento, etiam per fiduciam, obtinuerit et implere negligat, ab Ordinario, etiam per censuram, ad id cogatur.

The Church always insisted upon the strict fulfillment of last wills (can. 1493, 1515) and considered it criminal to delay their execution. Those who retained pious offerings or bequests were cast out of the Church as infidels and called "killers of the poor" *(necatores pauperum)*.[1] Our canon rehearses, though in a milder form, the ancient legislation by providing that *those who have received a legacy or donation for a pious cause, or a fiduciary bequest, be it inter vivos or by last will, and neglect to fulfill or execute it, should be compelled to do so, if necessary, even by censures.* One penalty mentioned in the Decretals is privation of the executorship and loss of every interest and commission accruing from such an office. But a canonical warning must precede. Another penalty is the use of censures, which also requires a canonical admonition.[2] The time within which the bequest must be executed or liquidated, is one year from the date of the last will or testament becoming known, or, as we would say, probated. This law concerns, as the sources clearly state, the secular as well as the

1 C. 9, 11, C. 13, q. 2.

2 Cc. 3, 6, 17, X, III, 26.

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regular clergy.[3] Of course, as far as formalities are concerned, the civil law must be obeyed. But if that law would confiscate or forbid bequests for church purposes, the heirs would nevertheless be bound in conscience to do what they could to comply with the will of the testator.

REFUSAL TO PAY STOLE FEES AND TAXES

Can. 2349

Recusantes praestationes legitime debitas ad normam can. 463, § 1, 1507, prudenti arbitrio Ordinarii puniantur, donec satisfecerint.

Whilst it would be simony to demand a temporal remuneration for the administration of the Sacraments, as such, yet the legitimacy of stole fees for the support of the ministers has always been upheld by the Church, and the custom of paying such fees has been called praiseworthy.[1] Can. 2349 says these *stole fees* (for baptisms, marriages, funerals) and the *taxes* due according to law for civil or voluntary jurisdiction and execution of Apostolic rescripts must *be paid by the faithful.* Those who *refuse* to pay may be *punished by the local Ordinary* until they comply with their obligation. Of course, to those unable to pay, the sacred ministry must be rendered free of charge (can. 463, § 4).

3 Thesaurus-Giraldi, P. II, *s. v.* "*Testamenta*," *ed. cit.*, p. 423 f.).

1 See c. 42, X, V, 3. Some refused to pay on account of heretical tendencies, most probably the Petrobrusians and followers of Arnold of Brescia.

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TITLE XIV

CRIMES AGAINST LIFE, LIBERTY, PROPERTY, GOOD NAME

ABORTION AND SUICIDE

Can. 2350

§ 1. Procurantes abortum, matre non excepta, incurrunt, effectu secuto, in excommunicationem latae sententiae Ordinario reservatam; et si sint clerici, praeterea deponantur.

§ 2. Qui in seipsos manus intulerint, si quidem mors secuta sit, sepultura ecclesiastica priventur ad normam can. 1240, § 1, n. 3; secus, arceantur ab actibus legitimis ecclesiasticis et, si sint clerici, suspendantur ad tempus ab Ordinario definiendum, et a beneficiis aut officiis curam animarum interni vel externi fori adnexam habentibus removeantur.

This canon comprises two criminal acts, both related to homicide, *viz.:* abortion and suicide.

1. *Abortion* was widespread among the Greeks and Romans of pagan antiquity. The Christian Church treated it severely.[1] The Roman Law condemned persons of the lower ranks of society who committed abortion to the *metalla, i. e.,* the fiscal mines, and those of higher rank to exile.[2] The ecclesiastical law up to the sixteenth

1 See Eschbach, *Disquisitiones Physiologico-Theologicae,* 1901, p. 277 ff. The synods of Elvira, Ancyra, etc., mention infanticide, which is identical with abortion in the popular sense.

2 L. 8, Dig. 48, 8; l. 38, § 5, Dig. 48, 19: *"Qui abortionis aut*

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century classified abortion with homicide.[3] A decisive step in the penal legislation concerning this offense was taken by Sixtus V, in his Constitution "*Effraenatum,*" Oct. 29, 1588, which was modified considerably by Gregory XIV in his Constitution, "*Sedes Apostolica,*" May 31, 1691. Sixtus V had inflicted the excommunication reserved to the Apostolic See, made no distinction between *foetus animatus* and *inanimatus, formis* or *informis,* and included all accomplices. Gregory XIV reserved the excommunication to the bishop, and restricted the crime to *foetus animatus.* This was the law of the Church until 1869, when the "*Apostolicae Sedis*"[4] was issued by Pius IX, which made no distinction between *foetus animatus* and *inanimatus,* whilst, on the other hand, it condemned only the *procurantes* and reserved the censure to the Ordinary.

But the question whether the mother was included was left undecided and opinions continued divided on this point. Our text settles *this* question by saying: Those *who procure abortion,— the mother not excepted, — after the effect has followed, incur the excommunication latae sententiae, reserved to the Ordinary; clerics must, besides, be deposed.* This text is identical with that of the "*Apostolicae Sedis*" except as to the clause: "*matre non excepta,*" and in that it makes the penalty for clerics *ferendae sententiae.*

1. Now, what is abortion? Authors differ in defining this crime. We accept the following definition: Abortion is the expulsion of a human fetus from the womb

amatorium poculum dant, etsi dolo non faciant, tamen qui mali exempli iis est, humiliores in metallum, honestiores in insulam amissa parte bonorum relegentur." The woman is expressly mentioned in l. 8, *l. c.*

3 C. 20, C. 2, q. 5; c. 8, C. 32, q. 2; cc. 5, 20, X, V, 12.

4 § III, n. 2; "*Procurantes abortum, effectu sequuto.*"

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before it is capable of living separately.[5] This supposes the existence of a human fetus, from the time it can really be called a fetus, to about the seventh month of pregnancy. For after the seventh and up to the ninth month the act of bringing forth a fetus is styled premature birth, not abortion proper, because the fetus at that stage has viability, even though it be precarious. But fetus may also mean the embryonic stage of development from the time of conception to about the sixth week of pregnancy.[6]

The distinction between *foetus animatus* and *inanimatus* had been given up since the "*Apostolicae Sedis*" with regard to censure, but not as to vindictive penalties, and especially irregularity. Yet even now it is safely held and taught that ejection of the semen immediately after the copula does not fall under censure, because conception is not as yet certain. Neither would the ejection of so-called molae (false conceptions) be subject to censure, even though these were ejected with the intention of procuring abortion. As a general rule it may be stated that any act committed within twenty-four hours of conception is not to be construed as abortion, even though done with that intention.[7]

Abortion is called *accidental* when it is brought about involuntarily, in consequence of a fall, overexertion, or natural dislocation. It is *criminal* when induced voluntarily for selfish reasons and by forbidden means. It is *artificial* when induced for medical-therapeutic reasons. But the latter species may be criminal according to sound

5 See *Encyclopedia Americana*, 1920, I, 45; also Eschbach, *l. c.*, p. 274; Pennacchi, II, 34.

6 See Vol. IV of this Commentary, p. 50 f.

7 Hilarius a Sexten, *l. c.*, p. 218; Hollweck. *l. c.*, p. 252, note 8. The consequence is that syringing after the *copula*, though perhaps done with criminal intent, does not fall under censure.

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moral principles,[8] and hence the above division is not fully adequate.

2. The different kinds of abortion must be judged by the act that produces abortion. This is called *procuratio* and its agents *procurantes*. To procure an abortion means to bring it about purposely and intentionally.[9] This may be done in a twofold way: (a) by seeking abortion directly and for its own sake, in which case it is purely and simply *criminal*, or (b) as a means to a higher end, for instance, to preserve the life of the mother. In both cases abortion is sought and intended directly as a means to an end.

Mandantes are those who order an abortion to be committed and in whose name it is perpetrated, for instance, the mother who commands the physician to perform an operation the direct effect of which is abortion; or the father or seducer, provided, of course, the woman consents; for it is she who has to give the final permission — always provided she is in a physically and mentally normal condition. The *mandantes* are without doubt to be reckoned among the *procurantes*.[10]

Whether the *mandatarius*, *i. e.*, he who executes the order or command, must be classed with the *procurantes*, is a controverted question. The executor of the will or command of another does not act in his own name, although, as one commentator most justly observes in our case, he truly and properly procures abortion.[11] We say

8 *Encyclopedia Americana*, *l. c*; Eschbach, *l. c.*, p. 274 ff. distinguishes an involuntary or casual and a voluntary abortion; this from a theological viewpoint. Hollweck, *l. c.*, says: directly philosophical and only indirectly physiological.

9 *Procurare est studiose et ex industria aliquid quaerere;* Pennacchi, II, 34; D'Annibale, *l. c.*, n. 159.

10 Pennacchi, *l. c.*, II, 36; D'Annibale, *l. c.*, p. 103, n. 161; Hollweck, *l. c.*, note 6.— Misleading is the superficial statement: "Some deny it" (Ayrinhac, *l. c.*, p. 288).

11 *La Nouvelle Revue Théolo-*

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the question is controverted, because such well-known commentators on the "*Apostolicae Sedis*" as Pennacchi [12] and D'Annibale [13] deny that the *mandatarius* incurs the censure. Therefore the benefit of a real doubt may safely be granted to such, thereby exempting them from the censure.

Those who *advise* or *favor abortion,* and druggists or physicians who prepare drugs conducive to abortion, do not incur excommunication. The same is true of those who beat a pregnant woman for any other motive except that of procuring abortion.[14]

3. *Effecto secuto* means that the attempt must be effective. Whether the effect (abortion) is procured by means of drugs or instruments, or by burdens imposed on the pregnant woman does not matter.[15] A moral cause, for instance, voluntary fright or fear intentionally brought to bear upon a woman, may produce an abortion. But there must always be a *causal connection* between the means used and the effect intended. Hence if an abortion were produced by a fall, or a scare, or by sickness, even though the woman had taken a drug to insure it, the censure would not be incurred. If it is doubtful what caused abortion, the fall, etc., or the drug, some authors deny [16] that the censure is incurred, while others [17] assert that it is.

These few comments may suffice to disperse at least some doubts. The principal fact to be kept in mind is that the *mother* is no longer exempt from incurring the

gique, Vol. XI, n. 350, quoted by Pennacchi, II, 36.

12 *L. c.*

13 *L. c.;* see also Hilarius a Sexten, *l. c.,* p. 219 f.

14 Pennacchi, *l. c.,* p. 35.

15 Sixtus V, "*Effraenatum,*" § 2; D'Annibale, *l. c.,* p. 102, n. 159.

16 D'Annibale, *l. c.,* p. 102, n. 160; Hilarius a Sexten, *l. c.,* p. 220.

17 Lehmkuhl, *l. c.,* II, n. 970. The state of doubt permits can. 209 to be applied.

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censure. She may, however, be immune from censure, if can. 2205, § 2 is verified. For grave fear would render her immune from censure, inasmuch as a censure is a purely ecclesiastical penalty.

Now a brief remark concerning *artificial abortion.* It has become almost a dogma among authors [18] that craniotomy and embryotomy, though grievously unlawful and forbidden, do not fall under the censure of can. 2350. Craniotomy consists in crushing the fetus and taking it out piecemeal. Another kind of artificial abortion is called *medical* and consists in the expulsion of an immature fetus on account of a too narrow pelvis. All authors hold as theologically certain that it is never allowed to procure or intend an abortion as such *(uti finis)* or as means to an end, for instance, to preserve the life of the mother, if the means cause abortion directly *(per se)* and cannot preserve the life of the mother except by causing abortion.[19] Two, or rather three, decisions of the Holy Office confirm this view: "It cannot be safely taught in Catholic schools," says one of them, "that any kind of surgical operation is allowed which will directly kill the fetus; even if acceleration of birth is not possible on account of the narrowness of the female organs, it is never allowed to cause or provoke an abortion." [20] But where is the censure? We answer: If the physician performs the operation of his own accord, without being commanded or asked by those concerned, he certainly incurs excommunication.[21] But if he merely acts as *mandatarius,* he does not incur the censure.

18 Hilarius a Sexten, *l. c.*, p. 218 calls it *fere communis theologorum sententia.*

19 Eschbach, *l. c.*, p. 390 ff.; Coppens, *Moral Principles and Medical Practice,* 1897, p. 65 ff.

20 S. O., May 28, 1884; July 24, 1895; May 4, 1898 (*Coll. P. F.*, nn. 1618, 1906, 1997).

21 Thus also Eichmann, *l. c.*, p. 176.

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II. *Suicide.* Those who *deliberately commit suicide,* are *to be deprived of ecclesiastical burial,* according to can. 1240, § 1, n. 3, where the necessary remarks have been made on funerals. Those who command the ecclesiastical burial of a suicide do not incur excommunication, because they are not mentioned in can. 2339. If there is doubt whether a suicide was accidental or deliberate, the former is to be presumed. But if there is doubt whether the suicide was committed with deliberation or in the state of mental aberration, malice or intentional suicide should be presumed, according to can. 2200, § 2. However, the statement of a physician or of relatives as to the physical condition of the deceased may safely be accepted. [22]

If one who attempts to commit suicide survives, *he must be denied all legal ecclesiastical acts* (can. 2256, n. 2). *Clerics* guilty of such an attempt *must be suspended* for a period to be fixed by the Ordinary, and, besides, *must be removed from any benefice or office connected with the care of souls, both in the internal* and *external forum.* Therefore such clerics, after a declaratory sentence issued by the Ordinary, can no longer function as chaplains, confessors, assistants or curates, pastors or Ordinaries.

DUELLING

Can. 2351

§ 1. Servato praescripto can. 1240, § 1, n. 4, duellum perpetrantes aut simpliciter ad illud provocantes vel ipsum acceptantes vel quamlibet operam aut favorem

22 See Hollweck, *l. c.,* p. 253, note 2; Eichmann, *l. c.,* p. 177. The same is true if the suicide gave signs of repentance before dying; can. 1240, § 1.

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praebentes, nec non de industria spectantes illudque permittentes vel quantum in ipsis est non prohibentes, cuiuscunque dignitatis sint, subsunt ipso facto excommunicationi Sedi Apostolicae simpliciter reservatae.

§2. Ipsi vero duellantes et qui eorum patrini vocantur, sunt praeterea ipso facto infames.

A duel is a combat with deadly weapons, without or with fatal result, between two persons who have deliberately agreed on the conditions of the fight.[1] A duel is *private* if it takes place by private agreement between the parties and their friends: *public,* if sanctioned by the lawful authority for a public purpose. The purpose may render it lawful or unlawful. If the purpose is a good one, as the prevention of an impending war, for instance, the duel could not be styled unlawful. If held only to satisfy public curiosity, however, like the gladiatorial combats of the Romans, it is wrong and forbidden.

Here we are concerned with *private duels.*[2] Our text, in terms almost identical with that of "*Apostolicae Sedis,*" *subjects to ipso facto excommunication, simply reserved to the Apostolic See,* the following persons:

1. *Those who participate in a duel, i. e.,* a single combat fought according to rules laid down by private agreement as to time, place, and weapons, no matter whether the intended result is fatal or not. Therefore, the so-called *Mensuren* of students and officers are included.[3]

1 Hill, *Ethics,* ed. 8, p. 210 — except the clause, "with or without fatal result," which had to be added on account of the so-called *Mensuren.*

2 Public duels are no longer in vogue.

3 § III, 3. *Duellum perpetrantes aut simpliciter ad illud provocantes, vel ipsum acceptantes, et quoslibet complices, vel qualemcumque operam aut favorem praebentes, nec non de industria spectantes, illudque permittentes, vel quantum in illis est, non prohibentes, cuiuscumque dignitatis sint, etiam regalis vel imperialis.*

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2. Those *who challenge* others to a duel, as just described, no matter whether the duel takes place or not or whether the challenge was accepted or not, provided only it was meant seriously.[4]

3. Those *who accept a challenge* thus issued.

4. Those *who offer any assistance or favor* to duellists, for instance, by acting as seconds, witnesses, physicians,[5] and those who rent a place, or carriage, or automobile for that purpose.

5. Those *who purposely witness* a duel as spectators. The penalty is not incurred if they merely pass by, or watch the duel from a nearby place, provided they are not hired for that purpose.[6]

6. Those *who, no matter of what dignity they be, permit or fail to prevent a duel as far as lies within their power.* To this class belong the rulers of peoples, if they can impede duels; the magistrates as individuals, under the same condition; and, we believe, also policemen, if the law prohibits duelling; nay, even private citizens, if they can interfere without serious inconvenience; the latter, however, may easily be excused on account of the odium they might expose themselves to.

Note that the *provocantes* and *acceptantes* incur excommunication even though the duel does not take place; whilst the others named in numbers 4 to 6 incur it only if the duel really comes off.[7]

The duellants and their seconds (*duellantes et patrini*) also incur the *infamy of law,* and hence contract *irregularity* with regard to orders (can. 984, n. 5; 985, n.

4 S. C. C., Aug. 9, 1890 (*Coll. P. F.*, n. 1739).

5 If the physician is present by chance, he does not incur the censure, but if he is hired for the purpose, he does; S. O., May 28, 1884 (*Coll. cit.*, n. 1617, ad 1).

6 *Ib.*, ad 2 et 3. No confessor is allowed to be purposely present; *ib.*

7 D'Annibale, *l. c.*, p. 77; n. 115; Pennacchi, *l. c.*, I, 549 f.; Hollweck, *l. c.*, p. 254 f.

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5). *"Mensuren"* are not excepted from this rule.[8]

Lastly, *ecclesiastical burial must be denied to those who die in a duel or from a wound received in a single combat,* unless they give signs of repentance before they die (can. 1240, § 1). But those who command or extort ecclesiastical burial for duelists do not incur excommunication; but those who would grant such a request freely and of their own accord, would incur the interdict, as per can. 2339.

COMPULSION IN REGARD TO THE CLERICAL OR RELIGIOUS VOCATION

Can. 2352

Excommunicatione nemini reservata ipso facto plectuntur omnes, qualibet etiam dignitate fulgentes, qui quoquo modo cogant sive virum ad statum clericalem amplectendum, sive virum aut mulierem ad religionem ingrediendam vel ad emittendam religiosam professionem tam sollemnem quam simplicem, tam perpetuam quam temporariam.

Excommunication reserved to no one is ipso facto incurred by:

1. *All, no matter what their dignity, who in any way compel a man to embrace the clerical state;*

2. *All who in any way compel a man or a woman to enter the religious state or to make religious profession, be it solemn or simple, perpetual or temporary.*

This law, substantially taken from the Council of Trent,[1] guarantees the freedom of clerical and religious vocation.

8 S. C. C., Aug. 9, 1890 (*l. c.*, n. 1739).

1 Sess. 25, c. 18; see Bened. XIV, *"Si datam,"* March 4, 1748.

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1. The *persons* here intended are all Catholics of the male or female sex, parents or strangers, of the highest and lowest civil or ecclesiastical dignity[2] or condition: parents, relatives, pastors, confessors, teachers, chaplains,[3] superiors, superioresses, etc., etc.

2. *Cogentes quoquo modo* means to compel or force one in any way, directly or indirectly, by threats, reverential fear, compulsion, persuasion, promises, etc., whether these means be used directly or through intermediary persons.[4]

3. The *purpose* must be to compel the other to choose a state for which he or she has or feels no vocation.

a) The *clerical* state begins with the first tonsure (can. 108, § 1), and hence the excommunication is incurred when that order is received.

b) The *religious state* is entered at the beginning of the novitiate, not postulancy, because this latter is not required for clerical organizations, and, besides, only novices enjoy the privileges of religious. To compel any one to *make profession* of any kind here mentioned, renders one liable to the penalty.

ABDUCTION OF WOMEN

Can. 2353

Qui intuitu matrimonii vel explendae libidinis causa rapuerit mulierem nolentem vi aut dolo, vel mulierem

2 Except Cardinals, on account of can. 2227, § 2.

3 If a chaplain of Sisters preaches to academy girls that the only salvation for them is the convent, he is certainly not far from incurring the censure, and should be removed at once.

4 If a girl is sent to a convent to be educated, there is no harm in that; but if the avowed purpose is to make her a nun against her will, the excommunication is incurred after she has entered.

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minoris aetatis consentientem quidem, sed insciis vel contradicentibus parentibus aut tutoribus, ipso iure exclusus habeatur ab actibus legitimis ecclesiasticis et insuper aliis poenis pro gravitate culpae plectatur.

This and the next four canons deal with crimes *mixti fori, i. e.,* such as fall also within the competency of the lay court and are prosecuted by the same. Exception, of course, should be made of clerics, on account of the *privilegium fori.*

Any man who abducts a woman against her will, by violence or deceit, either with the intention of marrying her or for the sake of gratifying his sensuality; or who abducts a girl not yet of age, even though she is willing, without the knowledge and against the will of her parents or guardians, is ipso iure excluded from legal ecclesiastical acts (can. 2256, n. 2) *and should be punished in proportion to his guilt.*

It is evident that this penal enactment, *latae sententiae,* not only regards abduction (*raptus*) as an impediment, but abduction in general, the condition being, however, that the abductor be a man. The purpose of the law is to protect the liberty and security of women.

MIXED CRIMES

Can. 2354

§ 1. Laicus qui fuerit legitime damnatus ob delictum homicidii, raptus impuberum alterutrius sexus, venditionis hominis in servitutem vel alium malum finem, usurae, rapinae, furti qualificati vel non qualificati in re valde notabili, incendii vel malitiosae ac valde notabilis rerum destructionis, gravis mutilationis vel vul-

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nerationis vel violentiae, ipso iure exclusus habeatur ab actibus legitimis ecclesiasticis et a quolibet munere, si quod in Ecclesia habeat, firmo onere reparandi damna.

§ 2. Clericus vero qui aliquod delictum commiserit de quibus in § 1, a tribunali ecclesiastico puniatur, pro diversa reatus gravitate, poenitentiis, censuris, privatione officii ac beneficii, dignitatis, et si res ferat, etiam depositione; reus vero homicidii culpabilis degradetur.

1. *Laymen* are *ipso iure excluded from legal ecclesiastical acts* and *any charge* they may hold in the Church, save the *obligation of indemnity,* if:

a) They have been lawfully condemned for *homicide;*

b) Or for the *abduction* of *impuberes* of either sex;

c) Or for *slavery* proper or white slavery;

d) Or for *usury,* as far as punishable by civil law;

e) Or for *rapine* or violent theft;

f) Or for *theft,* either qualified (for instance, in churches or public buildings: burglary) or unqualified (fraudulent misappropriation against the will of the owner) [1] *in re valde notabili,* that is, of a thing of considerable value, either materially or by reason of art or antiquity;

g) Or for *arson* or *malicious destruction* of considerable property, either out of a spirit of wanton cruelty or wicked revenge;[2]

h) Or for serious *mutilation,* wounding, or battery.

2. If a *clergyman* has committed any of the aforementioned crimes, he *must be punished by the ecclesiastical court* in proportion to the gravity of his guilt

1 Cfr. Kenny-Webb, *l. c.,* p. 220. 2 *Ib.,* p. 163.

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with penances, censures, privation of office and benefice, and, in more serious cases, with deposition; if he is guilty of culpable homicide, he must be degraded.

Note, however, that these penalties are to be meted out only after the culprits have been *condemned* by a *legitimate court,* after a trial conducted according to the laws and customs of the country, and after the time for appeal has elapsed.

PRIVATE VERBAL INJURIES

Can. 2355

Si quis non re, sed verbis vel scriptis vel alia quavis ratione iniuriam cuiquam irrogaverit vel eius bonam famam laeserit, non solum potest ad normam can. 1618, 1938 cogi ad debitam satisfactionem praestandam damnaque reparanda, sed praeterea congruis poenis ac poenitentiis puniri, non exclusa, si de clericis agatur et casus ferat, suspensione aut remotione ab officio et beneficio.

Can. 2344 punishes libelous and oral injuries directed against higher dignitaries as public persons. Here these injuries are punished if committed against laymen or clerics by the persons just mentioned. But here a *tort* is committed, rather than a crime, which in secular law would be prosecuted in the civil, not in the criminal court. Those who *inflict* (not real but) *verbal injuries* by *word or writin*g,[1] *or in any other way, for instance,* by offensive gestures, on anyone, whether a *cleric of inferior rank or a layman,* or *who defame any of the aforesaid persons, may be compelled to give satisfaction*[2]

1 To these belong insulting pictures or caricatures.

2 Satisfaction is generally made by offering an apology or inserting

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and to repair eventual damage, provided the offended party insists upon such punishment, according to can. 1618 (a civil trial) or a denunciation to the fiscal promotor has been made according to can. 1938 (a criminal trial in the ecclesiastical sense).

Besides, *other proportionate punishments and penances may be meted out;* and if the offenders are *clerics, they may,* if necessary (for instance, if the scandal or damage was of a very serious nature) *also be suspended or removed from office and benefice.*

Thus a slanderous cleric, according to the IVth Synod of Carthage, should be made to apologize, and if he demurs, may be degraded.[3] Laymen who slander a priest, orally or in writing should be excommunicated.[4] Laymen who commit the same offence against one of their own class, should be scourged and compelled to do public penance.[5]

The penalties are now fixed by the civil courts. Laymen who wish to bring suit against a cleric in such cases need the permission of the local Ordinary.[6] Prescription for such offences runs one year (*v.* can. 1703, n. 2).

BIGAMY

Can. 2356

Bigami, idest qui, obstante coniugali vinculo, aliud matrimonium, etsi tantum civile, ut aiunt, attentaverint, sunt ipso facto infames; et si, spreta Ordinarii monitione, in illicito contubernio persistant, pro

an article in a specified newspaper.
3 C. 2, Dist. 46.
4 C. 8, C. 5, q. 6.
5 C. 18. C. 5, q. 1.
6 See can. 120; can. 2341.

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diversa reatus gravitate excommunicentur vel personali interdicto plectantur.

1. *Bigamists, i. e., persons who, though validly married, attempt another (though perhaps only civil) marriage* are *infamous by law,* and *if they spurn a warning given by the Ordinary and continue their unlawful relation, should be punished by excommunication or personal interdict, according to the grievousness of their guilt.*

A bigamist, as here understood, is a man who has two or more wives at the same time. Bigamy, therefore, is identical with polygamy. It is punishable only when it is *subjective,*[1] *i. e.,* when one knows that the former marriage tie was and is still valid and not dissolved in an ecclesiastically legal form. Unfortunately the State sometimes grants a divorce for reasons nugatory in the eyes of the Church, and without regard to her laws.

2. Polygamy is punishable only if a *second marriage has been attempted.* We say: attempted, not contracted, because the object of the marital contract has not only been promised, but delivered up to another party still living. But there must be a *semblance* of a second marriage, that is, the culprit must go through a legally recognized marriage ceremony with another person to incur the censure.[2] It is hardly imaginable that a Catholic minister would assist at a marriage without having inquired into the free state of the parties. Therefore, *civil marriage* is especially mentioned.

3. *Equally punishable* is the woman who, though free,

1 A man who marries (invalidly) a woman whilst his first wife is still alive, but *bona fide* believed to be dead, would not commit bigamy subjectively, but objectively; and, therefore, could not be punished as a bigamist in the ecclesiastical court.

2 Kenny-Webb, *l. c.,* p. 286 ff.

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marries a bigamist, provided, of course, she knows of the married state of her supposed husband. The individual contract and the attempt against the unity of matrimony in this case require equal punishment.[3]

4. The penalty for bigamy is *legal infamy* with all its consequences (can. 2294, § 1). Besides, says the text, the *seriousness of the guilt* should be properly considered. For the rank of the parties (can. 2207, n. 1) may set an exceptionally bad example or cause great scandal.[4] But the severer penalties are to be inflicted only *after a warning,* which should be a canonical one (can. 2309), because the penalty to be inflicted (*ferendae sententiae*) is the heaviest, namely, excommunication or the personal interdict.

CRIMES OF LAYMEN AGAINST GOOD MORALS

Can. 2357

§ 1. Laici legitime damnati ob delicta contra sextum cum minoribus infra aetatem sexdecim annorum commissa, vel ob stuprum, sodomiam, incestum, lenocinium, ipso facto infames sunt, praeter alias poenas quas Ordinarius infligendas iudicaverit.

§ 2. Qui publicum adulterii delictum commiserint, vel in concubinatu publice vivant, vel ob alia delicta contra sextum decalogi praeceptum legitime fuerint

3 The secular law would have her indicted for bigamy as a principal in the second degree (*ib.*, p. 291). "It is no defence that the defendant was a member of a religious sect [Mormons of the original type are here meant], which professed to extol polygamy as a virtue, and that he conscientiously believed he was doing no wrong in contracting a plural marriage" (*ib.*, p. 292).

4 Former penalties were excommunication and public penance; c. 19, C. 24, q. 3; cc. 8, 9, C. 32, q. 7; Urban VIII, "*Magnum in Christo,*" June 20, 1637, § 2, condemned bigamists to the galleys or public whipping post and perpetual prison.

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damnati, excludantur ab actibus legitimis ecclesiasticis, donec signa verae resipiscentiae dederint.

§ 1 declares laymen *legally infamous* and otherwise punishable by the Ordinary:

1. If they have been *lawfully convicted of crimes against the sixth commandment committed with minors, i. e.,* persons of either sex who have not yet completed the sixteenth year of age; or

2. If they have been *lawfully condemned for fornication, sodomy, incest,* or *panderage.*

As to the requisites for incurring this penalty, it may be observed that the act must amount to a *copula perfecta; actus inconsummati* would not constitute the crime,[1] wherefore *tactus, oscula, amplexus* are not here intended. Minors may be of either sex, whence a *coitus viri cum viro* would indeed be sodomy, but even more punishable on account of the moral seduction and responsibility involved.[2]

Stuprum is here to be understood as violent fornication, otherwise the text would have employed *fornicatio.* Properly speaking it is the violent defloration of a woman still a virgin.[3] But common doctrine has accepted it as a violation of any woman, married or single, whose character was not ruined by immoral conduct. However, if we say *violent,* this term must be understood also of deceit, fraud, threats, and fear.[4]

Sodomia is unnatural sexual gratification by an act committed with a person of the same sex. It also includes *bestiality.* Not included under this penal law is

1 See Hollweck, *l. c.,* p. 267, note 4.

2 Pius V, "*Cum primum,*" April 1, 1566, § 11; it need not be habitual.

3 Civil law styles it seduction with a widely different definition; Kenny-Webb, *l. c.,* p. 294 f.

4 Reiffenstuel, V, 16, n. 43 f.

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sodomia imperfecta or *coitus viri cum femina, non servato vase naturali.*[5]

Incestus is sexual intercourse between persons related within the degrees of consanguinity or affinity wherein they may not lawfully marry. The former[6] penalty of illicit affinity and loss of marital rights *(ius petendi debitum conjugale)* is now abolished. The fact of incest or the intention or agreement to commit incest in order more easily to obtain a dispensation need not be mentioned in the petition for the dispensation.[7]

Lenocinium is panderage for filthy lucre's sake, according to the Roman Law, *i. e.*, as a canon of the synod of Elvira (313, n. 3) states, the sale of another person's body for the purpose of unlawful gratification, no matter whether the mother, or the father, or another commits the crime.[8] Hence keepers of houses of ill fame fall under this heading and, therefore, incur infamy (can. 2294, § 1).

§ 2 considers the public crimes of *adultery* and *public concubinage,* as also other crimes against the sixth commandment, provided the perpetrators have been lawfully convicted of such crimes or misdemeanors, or whatever else they be styled, in civil law. The latter has not even a clear view of what constitutes adultery.[9] According to ecclesiastical law, adultery is sexual intercourse of a married person with another person than his or her consort.[10] It does not require the *copula perfecta* and may be committed with a married or a single person.

On *concubinage* see can. 1078.

The *penalty* for these crimes is *exclusion* from *legal*

5 Schmalzgrueber, V, 16, n. 117.
6 C. 1, X, IV, 13.
7 S. O., June 25, 1885 (*Coll. P. F.*, n. 1635).
8 L. 4, § 2, Dig. 3, 2; Hollweck, *l. c.*, p. 271, note 2.
9 See Kenny-Webb, *l. c.*, p. 292 f.
10 *"Adulterium est alieni thori violatio"; Gratiani dictum,* § 3 ad c. 2, C. 36, q. 1.

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ecclesiastical acts as long as no signs of repentance are given.[11] But the penalty is *ferendae sententiae,* conditioned by a previous civil conviction.

CLERICAL OFFENDERS CONTRA SEXTUM

Can. 2358

Clerici in minoribus ordinibus constituti, rei alicuius delicti contra sextum decalogi praeceptum, pro gravitate culpae puniantur etiam dimissione e statu clericali, si delicti adiuncta id suadeant, praeter poenas de quibus in can. 2357, si his locus sit.

Can. 2359

§ 1. Clerici in sacris sive saeculares sive religiosi concubinarii, monitione inutiliter praemissa, cogantur ab illicito contubernio recedere et scandalum reparare suspensione a divinis, privatione fructuum officii, beneficii, dignitatis, servato praescripto can. 2176-2181.

§ 2. Si delictum admiserint contra sextum decalogi praeceptum cum minoribus infra aetatem sexdecim annorum, vel adulterium, stuprum, bestialitatem, sodomiam, lenocinium, incestum cum consanguineis aut affinibus in primo gradu exercuerint, suspendantur, infames declarentur, quolibet officio, beneficio, dignitate, munere, si quod habeant, priventur, et in casibus gravioribus deponantur.

§ 3. Si aliter contra sextum decalogi praeceptum deliquerint, congruis poenis secundum casus gravitatem coerceantur, non excepta officii vel beneficii privatione, maxime si curam animarum gerant.

11 Whether the signs are sufficient is to be decided by the one who issued the penal sentence in the ecclesiastical court.

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These two canons have one and the same object in view, *viz.:* to punish more severely the crimes referred to in can. 2357, which are punished gradually, *i. e.,* according to the degree of the clerical state.[1] But what was stated as to consummate acts, by way of explanation of the preceding canon, etc., also applies here.

1. Clerics *in minor orders* who are proved guilty of an offense against the sixth commandment, are to be punished in proportion to the seriousness of the transgression, even with dismissal from the clerical state if necessary, *i. e.,* if the circumstances demand it; besides, the penalties stated in can. 2357 must be applied if the crime is such as to call for them.

2. Clerics *in sacris, i. e.,* from subdeaconship upward, either secular or religious, who *live in concubinage,* must first be canonically warned.[2] If the warning proves fruitless, they are to be compelled to give up the unlawful relation and to repair the scandal by suspension *a divinis* (see can. 2279, § 2, n. 2), privation of the income from office, from benefice, and from dignity. But the procedure stated under can. 2176-2181 must be observed.

3. Clerics *in sacris,* secular or religious, who have committed a crime against the sixth commandment with a person of either sex who has not completed the sixteenth year, or who have committed adultery, rape, bestiality, sodomy, panderage, incest with blood or legal relatives in the first degree,[3] shall be suspended, declared infamous, deprived of every office, benefice, dignity, and charge they may hold, and, in more serious cases, shall be deposed.[4] All these penalties, though preceptive (see

1 Former penalties: deposition, removal from office, imprisonment in a monastery; see cc. 6, 28, C. 27, q. 1.

2 See can. 2176.

3 That is to say; with mother, daughter, stepmother, stepdaughter, sister, stepsister, sister-in-law.

4 See can. 2278, § 2; 2291, n. 4; 2298, n. 6; 2298, n. 10.

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can. 2223), are *ferendae sententiae* and, therefore, require a canonical warning (see can. 2233).

4. Clerics *in sacris*, either secular or religious, who have committed a delinquency *contra sextum* not mentioned in the preceding two sections, must be punished in proportion to the grievousness of the sin. Such delinquents, especially if they are entrusted with the care of souls, may also be deprived of their office or benefice.

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TITLE XV

CRIMEN FALSI OR FORGERY

Under this heading were formerly reckoned not only the crimes mentioned in can. 2360 and 2362, but also forgery of weights, measures, and money, and the substitution of children *(suppositio partus alieni)*.[1] Our text retains only two of the former subjects classed in this category, namely, forgery of papal documents and forgery of ecclesiastical documents and acts. But it adds obreptitious and subreptitious rescripts, and above all the act of falsely accusing a confessor of solicitation in the confessional.

FORGERY OF PAPAL DOCUMENTS

Can. 2360

§ 1. Omnes fabricatores vel falsarii litterarum, decretorum vel rescriptorum Sedis Apostolicae vel iisdem litteris, decretis vel rescriptis scienter utentes incurrunt ipso facto in excommunicationem speciali modo Sedi Apostolicae reservatam.

§ 2. Clerici delictum de quo in § 1 committentes aliis poenis praeterea coerceantur, quae usque ad privationem beneficii, officii, dignitatis et pensionis ecclesiasticae extendi possunt; religiosi autem priventur omnibus officiis quae in religione habent et voce activa

1 See the commentators on X, V, 20, *de crimine falsi.*

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ac passiva, praeter alias poenas in propriis cuiusque constitutionibus statutas.

The canon mentions three classes of criminal tamperers with official documents of the *Apostolic See.*

1. *Fabricatores* are forgers. To forge a document means to make a false imitation of it. The document may be drawn from pre-existing material, as, for instance, the Pseudo-Isidorian Decretals. The idea of forgery in the strict sense embraces the document as a whole; a document is a forgery when it purports to be what it is not; or, in other words, when it not only tells a lie, but tells a lie about itself.[2] That such a document cannot be called genuine, is evident. It is the task of diplomatics — as this art is called since the time of Mabillon — to determine the genuineness of documents. In the Middle Ages the seal appended to or impressed upon a diploma was considered a decisive proof of its genuineness.[3]

2. *Falsarii* are those who partly forge a document by interpolating, changing or correcting it [4] with the intention of defrauding *(cum dolo et jactura)*. Our canon does not exclude this malicious intention, for there can be no reasonable doubt that *falsarii* is used here in the same sense as in the "*Apostolicae Sedis,*" [5] where the commentators

2 Kenny-Webb, *l. c.*, p. 240.

3 Bresslau, *Urkundenlehre*, 1889, p. 5 ff. The diplomaticists distinguish internal and external marks of genuineness.

4 Cfr. c. 5, X, V, 20: appending a genuine bull or seal to false documents, changing the string of hemp or silk, using erasure, caustics, etc.

5 § I, 9. "*Omnes falsarios Litterarum Apostolicarum, etiam in forma Brevis ac supplicationum gratiam vel iustitiam concernentium per Romanum Pontificem vel S. R. E. Vice-Cancellarios seu Gerentes vices corum aut ae mandato eiusdem Romani Pontificis signatarum: nec non falso publicantes Litteras Apostolicas, etiam in forma Brevis, et etiam falso signantes supplicationes huiusmodi sub nomine Romani Pontificis, seu Vice-Cancellarii aut Gerentis vices praedictorum.*"

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unanimously understood it in the sense of intentional fraud. We can hardly imagine that any one would tamper with papal documents just for fun. But the *fabricatores,* as distinguished from falsifiers, need not have an evil intention. The crime is committed if a false document is made.[6] It is an outrage to public authority, especially since such a document may be passed on to others. Therefore, the penalty is incurred as soon as the document is completely manufactured. As to the *falsifiers,* a *dolus* or malicious purpose is certainly required, but it does not matter whether the effect intended is or is not produced.

3. Those who *knowingly use* (or rather abuse) such forged and falsified documents, are also mentioned. The word *uti,* to make use of or enjoy, may mean by exhibition or offer either to benefit oneself or another, although the intention may have been frustrated by discovery. But mere reading, although knowingly done, would certainly not constitute the act of "using."

4. The *documents* here intended are letters, decrees, or rescripts of the Apostolic See,[7] *i. e.,* documents emanating either from the Pope himself or from some department of the Roman Court.

5. The *penalty* for all fabricators and forgers of papal documents, and those who knowingly use them, is *excommunication incurred ipso facto and reserved modo speciali to the Apostolic See.*

Clerics, besides incurring this censure, *are to be punished otherwise, even with privation of benefice, office, dignity, and ecclesiastical pension. Religious* are to be punished with privation of all offices they hold in their institute (*including prelacies*) and of the active and

6 D'Annibale, *l. c.,* p. 53, n. 81. 7 See can. 7.

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passive vote, besides other penalties established in their constitutions.

SUBREPTITIOUS AND OBREPTITIOUS RESCRIPTS

Can. 2361

Si quis in precibus ad rescriptum a Sede Apostolica vel a loci Ordinario impetrandum fraude vel dolo verum reticuerit aut falsum exposuerit, potest a suo Ordinario pro culpae gravitate puniri, salvo praescripto can. 45, 1054.

Those who fraudulently or deceitfully suppress the truth or state a falsehood in a petition for a rescript addressed to the Apostolic See or the local Ordinary, may be punished by the latter according to the grievousness of their guilt.

However, according to can. 45, *all rescripts are now valid,* even if some essential point has been suppressed, provided the final or motive cause has been truly stated. And rescripts for *matrimonial dispensations* are valid even if the motive or final cause has been misrepresented. Thus can. 1054.

The penalty is *optional* and may therefore be inflicted by the Ordinary according to can. 2223, § 2, or not, as he chooses. The *Ordinary* qualified to inflict the penalty is the one whose subject has obtained the rescript under false pretences; for *religious,* their immediate superior.

FORGERY OF OTHER ECCLESIASTICAL DOCUMENTS

Can. 2362

Litterarum vel actorum ecclesiasticorum tam publi-

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corum quam privatorum fabricatores vel falsarii vel huiusmodi documentis scienter utentes, pro gravitate delicti coerceantur, firmo praescripto can. 2406, § 1.

Those who forge or falsify ecclesiastical letters or acts, either public or private, as well as those who knowingly make use of such spurious documents, shall be punished proportionately to the seriousness of their crime. Those who are charged with compiling, writing or keeping official acts shall, in case such acts are criminally tampered with, be punished according to can. 2406, § 1.

Can. 1813 defines the term *public ecclesiastical documents*. They are: acts of Ordinaries,— for instance appointments and regulations emanating from the diocesan chancery, instruments drawn up by an ecclesiastical notary, judiciary acts of every kind pertaining to ecclesiastical courts, the different parochial books, etc.

Private documents: private letters, contracts or deeds, or abstracts thereof, legacies and bequests, as far as they pertain to ecclesiastical persons as such, not as private persons.

The *penalty* is obligatory, but arbitrary and proportionate, inasmuch as it is left to the Ordinary (or superior of exempt religious), who must weigh the importance of the document, the condition of the delinquent, and the damage caused by the criminal act. Formerly the punishment was deposition, *i. e.*, reduction to the lay state, and perpetual penance in a monastery, for bishops as well as clerics of lower rank.[1]

1 See c. 7, Dist. 50. Ecclesiastical corporations as well as individuals were guilty of such unqualified acts; see Bresslau, *l. c.*, p. 972 ff.

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FALSE ACCUSATION OF SOLICITATION

Can. 2363

Si quis per seipsum vel per alios confessarium de sollicitationis crimine apud Superiores falso denuntiaverit, ipso facto incurrit in excommunicationem speciali modo Sedi Apostolicae reservatam, a qua nequit ullo in casu absolvi, nisi falsam denuntiationem formaliter retractaverit, et damna, si qua inde secuta sint, pro viribus reparaverit, imposita insuper gravi ac diuturna poenitentia, firmo praescripto can. 894.

One who either himself or through others *falsely accuses a confessor of the crime of solicitation to his superiors* —

1. Incurs *ipso facto* the *excommunication* reserved to the Apostolic See *modo speciali,*

2. From which he can *in no case be absolved,* unless

3. *He has formally retracted the* slanderous denunciation, and

4. Has *repaired,* as far as possible, the *damage* caused by his act.

Besides a grave and lasting penance must be imposed on him, and canon 894 be duly observed.

What solicitation is has been explained under can. 894. It is *provocatio ad turpia* in the act or under the species of sacramental confession.[1]

a) The *denunciation* must be made *judiciarily, i. e.,* either to the Holy Office or to the Ordinary, and must be effective,[2] *i. e.,* be accepted as a means of prosecution.

1 See Vol. IV of our *Commentary,* p. 318 f.

2 Hollweck, *l. c.,* p. 280, note 4.

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The effect is assured when the summons is issued to the accused or to the witnesses.

A *false* denunciation is one based on (at least subjective) untruth. Falsity always supposes prevarication of the truth, done with malice *(dolus)*. However, it may happen that a penitent has misunderstood a question put to him by the confessor and construed it as a solicitation. In this case the malice or subjective untruth would be wanting. The confessor might be an innocent victim until the prosecution cleared up the mistake.

Denunciation may be made by the *penitent himself* for any motive, — hatred, anger, revenge, etc. — or *through others,* by means of impious advice, promises, flattery, threats, or even ambiguous insinuations.

b) The censure *can in no case* be absolved from unless the conditions mentioned are complied with; hence neither in the case of danger of death — which was excepted by Benedict XIV in the Constitution quoted below [3] — nor in the cases mentioned under can. 2254.[4] The condition next mentioned is

c) *Formal retraction,* which is to be made to the same authorities before whom the accusation was brought, and in a judiciary way. If this is impossible on account of the physical or mental condition of the culprit, the confessor may receive the retraction, absolve the penitent (immediately if required), and then report to the authorities.

The other condition of *repairing the damage* has *tractum temporis,* and therefore, in case of urgent necessity, a serious promise may be accepted.

The question may here be asked: Would the *ab-*

3 Bened. XIV, "*Sacramentum poenitentiae,*" June 1, 1741, § 3.

4 This seems to be implied by the term *nequit in ullo casu,* although not especially mentioned in can. 2254, § 3.

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solution be valid if no formal retraction had been made? Provided the priest had the necessary faculty, or the circumstance was one mentioned in can. 2252 or 2254, we believe that the absolution would be valid. For the *nequit* can just as well be referred to illicit absolution, and therefore the minimum must be assumed. Besides, retraction and reparation certainly cannot be made at the moment of confession. Consequently, we would have to say that absolution would be valid only after the reparation was made, which would hardly be admitted by theologians. As to the *gravity* and *duration of the penance,* the general rules given by moralists may be consulted.[5]

A last remark, inspired by some magazine articles,[6] may be permitted. The sin mentioned here is reserved, not only by reason of the censure attached, but on its own account *(ratione sui)*, and it is the only one thus reserved. This is reservation pure and simple, or limitation of jurisdiction, which requires only the necessary matter and that the persons be subject to the power of jurisdiction. Since the sin as such is reserved, and is supposed to be complete in *genere suo,* it follows that a person by committing this sin is withdrawn from the jurisdiction of any one inferior to the Pope, and consequently neither ignorance nor doubt can excuse the delinquent.

Arregui (*Summarium Theol. Moralis,* 1919, ed. 4, n. 607, note 2, p. 388) insists on the wording of the "*Sacramentum Poenitentiae,*" which says, "*ut tam detestabile facinus metu magnitudinis poenae coerceatur.*" But does the *finis legis* fall under the law itself? The "*ut finale*" would indeed have weight if the context were not contradictory.

5 Hearing Mass, Litany of All Saints, five decades of the Rosary, are grave penances; Lehmkuhl, II, n. 357.

6 See *Eccl. Review,* Vol. 59, p. 458 ff.; Vol. 60, p. 61 ff.

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Here we may add another observation provoked by some writers (see *Eccl. Review*, 1921, May, Sept., Nov.). The controversy concerns the extent to which the "*periculum gravis scandali vel infamiae*" may be stretched. Can. 2254, § 1, where this phrase occurs, has reference to a rather urgent case, *casus urgentior*. An objectively light reason would hardly be acknowledged as sufficient to absolve from censure. For the matter of censure is a serious one, and the confessor is therefore obliged in conscience not to make light of it. However, the confessor is judge and physician in the confessional and minister of God's justice and mercy (Can. 888, § 1). Therefore he is entitled to use his own judgment in the matter of absolution. He must consider the grievous faults and the serious penalty on the one hand, and the welfare of the penitent on the other. But the welfare of the individual must cede to the welfare of society. Hence, when the public weal would be jeopardized, human respect or the consideration of private benefit must give way. Therefore, when a notorious violation of a penal law is involved, we cannot convince ourselves of the permissibility of absolving for a light reason, such as devotional or even society communion would be. But when the transgression is not a notorious violation, and the public welfare not in danger, we do believe that any plausible reason which appears such to the confessor is sufficient.— The interpretation of "*quoquo modo*," in can. 899, § 3, as if this could mean "for examples, *in synodo aut extra synodum*," sounds to us very improbable. For can. 895 tells the Ordinary the conditions or methods he should observe in reserving cases; but this produces no effect on reservation itself. And the "*quoquo modo*" concerns the mode of reserving which is twofold: under sin only, or under censure.

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TITLE XVI

UNLAWFUL ADMINISTRATION AND RECEPTION OF ORDERS AND OTHER SACRAMENTS

Two Sacraments are especially protected by penal sanctions: Penance and Orders. Extreme Unction is not mentioned, though formerly religious were forbidden under censure to administer it.[1] Four canons of this Title refer to the Sacrament of Penance, five canons to Orders, and one each to Confirmation and Matrimony. The first canon is devoted to the administration of the Sacraments in general.

ADMINISTRATION OF THE SACRAMENTS TO PERSONS FORBIDDEN BY LAW TO RECEIVE THEM

Can. 2364

Minister qui ausus fuerit Sacramenta administrare illis qui iure sive divino sive ecclesiastico eadem recipere prohibentur, suspendatur ab administrandis Sacramentis per tempus prudenti Ordinarii arbitrio definiendum aliisque poenis pro gravitate culpae puniatur, firmis peculiaribus poenis in aliqua huius generis delicta iure statutis.

Ministers who dare to administer the Sacraments to such as are forbidden to receive them by either divine or ecclesiastical law, should be suspended by the

1 "*Apostolicae Sedis*," II, 14.

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Ordinary from administering the Sacraments, for a time to be determined by the same Ordinary according to his own judgment, and punished with *other penalties according to the gravity of the guilt.* Special penalties decreed for specified transgressions of this kind remain untouched.

The administration of a Sacrament is unlawful not only in case of *invalid,* but also of *illicit* reception, for the Code does not distinguish, but only states: *recipere prohibentur,* which may be applied to invalid as well as illicit administration.

The Code states that the prohibition may be dictated either by divine or by ecclesiastical law.

1. The *divine law* excludes

a) From *Baptism* those incapable of receiving it according to can. 745, § 1;

b) From the *other Sacraments* those *who are not baptized,*[2] as well as heretics and schismatics.[3] Note also can. 968, § 1, according to which only males can be validly ordained.

The *ecclesiastical law* excludes

a) From *any Sacrament* all those who are *excommunicated* and personally interdicted;[4]

b) From *Baptism* the children of non-baptized parents, and of heretics and schismatics; adults against their own will and *amentes;*[5]

c) From *holy Communion* public *indigni* and those who unlawfully break the natural fast;[6]

d) From *Extreme Unction* those who, being of the age of reason, are not sick, according to can. 940;

e) From *Orders* those who are irregular or subject to a simple canonical impediment.[7]

2 See can. 786; 853; 901; 940; 968; 1012, § 2.
3 See can. 731, § 2.
4 Can. 2260, § 1; 2275, n. 2.
5 Can. 750–752, 754.
6 Can. 855, § 1; can. 858.
7 Can. 984, 985, 987.

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As to marriage, observe that the priest merely assists at, but does not administer, the Sacrament of Matrimony, and that, therefore, can. 2364 cannot be applied in this case.

The penalty is both *vindictive* and *preceptive,* and accompanied by irregularity if any act of the power of orders is exercised.[8] The text states: *firmis peculiaribus poenis, etc.* The act of unlawful administration may, besides, have a special penalty attached, by reason of a special circumstance, as in regard to can. 2338, § 3, admitting excommunicated, interdicted, or suspended persons to the reception of the Sacraments.[9] Attention is also drawn to the term, *ausus fuerit,* which must be understood in the light of can. 2229, § 1-2.

CONFIRMATION ADMINISTERED BY A PRIEST

Can. 2365

Presbyter qui nec a iure nec ex Romani Pontificis concessione facultatem habens sacramentum confirmationis ministrare ausus fuerit, suspendatur; si vero facultatis sibi factae limites praetergredi praesumpserit, eadem facultate eo ipso privatus exsistat.

A priest who, though he is empowered neither by law nor by Apostolic faculty to administer Confirmation, yet dares to administer this Sacrament, must be suspended. If he presumes to overstep the limits of a faculty which he actually possesses, *let him be deprived of this faculty ipso iure.*

1. Priests empowered by *law* to administer Confirmation

8 Can. 985, n. 7; 2223; 2298, n. 2. Eichmann, *l. c.,* p. 198.
9 See also can. 2370, 2373, 2375;

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are all cardinals, abbots *nullius,* and prelates *nullius,* vicars and prefects Apostolic.[1]

2. Priests empowered to confirm by an *Apostolic privilege or faculty,* are those who have obtained this privilege by papal delegation or subdelegation, as stated elsewhere.[2]

If any priest not empowered by law or by a papal faculty should dare (*ausus fuerit*) [3] to administer Confirmation, he is to be suspended either by his Ordinary or by higher authority. The suspension here worded in general terms must be taken as a *general suspension.*[4] Besides, if those endowed with the power of administering Confirmation should dare to exceed the territorial or personal limits assigned to them, or to extend it beyond the duration of their office or of the term granted in the indult, they *lose* the power or faculty.

HEARING CONFESSIONS AND GIVING ABSOLUTION FROM RESERVED SINS WITHOUT JURISDICTION

Can. 2366

Sacerdos qui sine necessaria iurisdictione praesumpserit sacramentales confessiones audire, est ipso facto suspensus a divinis; qui vero a peccatis reservatis absolvere, ipso facto suspensus est ab audiendis confessionibus.

This canon mentions two distinct transgressions:

I. A *priest who dares to hear sacramental confessions*

1 See can. 782, § 3; it is supposed that these dignitaries have not received episcopal consecration.

2 See Vol. IV of this *Commentary,* p. 102 f.

3 See can. 2229, § 2.

4 See can. 2278, § 2; see can. 782, § 3, 4, 5: formerly an Oriental or a Ruthenian priest confirming a Latin child was *ipso facto* suspended; S. C. P. F., Oct. 6, 1863 (*Coll.,* n. 1243).

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without the necessary jurisdiction, is ipso facto suspended a divinis.

1. The culprit is supposed to be a validly ordained *priest,* not a layman or cleric who has not yet received the priesthood. Of the latter can. 2322, n. 1, treats under crimes against religion.

2. The priest may be either *secular* or *religious,* and it matters not what kind of a privilege he may have obtained, provided he hears sacramental confession without being endowed with the necessary (ordinary or delegated) jurisdiction.[1]

3. Concerning *exempt religious,* if they wish to hear confessions of lay persons or of Sisters with either solemn or simple vows, they need a special faculty or jurisdiction from the local Ordinary in whose diocese the confessions are to be heard.[2]

4. This faculty now required according to can. 879, § 1, must be granted *expressly,* either in writing or orally.

5. The act must concern *sacramental confession* according to can. 2322, n. 1. A confession is sacramental also if it involves only venial sins, and hence a *simplex sacerdos* without jurisdiction or faculties can not hear confessions the matter of which are only venial sins.[3] If the confession was sacramental, it matters not whether absolution was given or not, because the text simply says: *to hear* sacramental confessions. The same term also occurs in the papal constitutions quoted below.

1 See can. 872, 873, 874, 878, § 1.

2 *Ibid.;* also Innocent X, *"Cum sicut,"* May 14, 1648, § 3, 4, I, ad 10 (*Bull. Luxemb.,* 1727, t. V, 458 f.). Even the privileges of the *Cruciata* are of no avail; Bened. XIV, *"Apostolica indulta,"* Aug. 5, 1744, §§ 3, 5.

3 It may appear strange to state this explicitly, but the S. C. C., Feb. 12, 1679 (*Coll. P. F.,* n. 219) had occasion to emphasize it.

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6. The *penalty* is suspension *a divinis* incurred *ipso facto* according to can. 2279, § 2, n. 2. However, note the term *praesumpserit,* which presupposes that the act was done with full knowledge and deliberation (can. 2229). It might easily happen that a pastor or priest would think that he could hear the confessions of female religious in virtue of his general faculties. If under such an impression he did so, he would not incur the censure. Neither would he incur this penalty if he were in doubt (can. 209), and much less if he would hear the confession of a person in danger of death (can. 882).

II. *Priests who dare to absolve from reserved sins are ipso facto suspended from hearing confessions.*

1. What was said above 1, 1-4 also applies here.

2. This case supposes that *absolution* was "attempted," *i. e.,* pronounced by a priest who, though perhaps possessed of ordinary faculties, did not have the special faculty required for absolving from reserved sins.

3. The *reservation* concerns sins, not censures, these being mentioned under can. 2338, § 1, as a usurpation of authority. To this class, therefore, belong the case mentioned in can. 894 (false accusation of an innocent confessor), and those cases which the local Ordinary may, according to can. 895, reserve to himself. From the latter cases, however, any confessor may absolve according to can. 900. Can. 882 mentions a lawful excuse from incurring the censure.

If superiors of exempt clerical religious have reserved cases to themselves, according to can. 986, their subjects would incur the censure if they absolved from these cases without possessing any other faculty than that granted by their superior. However, if they possess faculties from the local Ordinary, and absolve from sins reserved

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in their institute, they do not incur the penalty. Neither would secular priests absolving religious from sins reserved in their order incur the penalty, according to can. 519. But confessors, secular or religious, who would absolve female religious from sins reserved by the local Ordinary would incur the penalty, and could be removed from office.[4]

ABSOLUTIO COMPLICIS

Can. 2367

§ 1. Absolvens vel fingens absolvere complicem in peccato turpi incurrit ipso facto in excommunicationem specialissimo modo Sedi Apostolicae reservatam; idque etiam in mortis articulo, si alius sacerdos, licet non approbatus ad confessiones, sine gravi aliqua exoritura infamia et scandalo, possit excipere morientis confessionem, excepto casu quo moribundus recuset alii confiteri.

§ 2. Eandem excommunicationem non effugit absolvens vel fingens absolvere complicem qui peccatum quidem complicitatis, a quo nondum est absolutus, non confitetur, sed ideo ita se gerit, quia ad id a complice confessario sive directe sive indirecte inductus est.

Those who *absolve, or feign to absolve, an accomplice in peccato turpi, ipso facto incur the excommunication reserved modo specialissimo to the Apostolic* See.

To what was said on this subject elsewhere[1] only a few remarks need be added:

4 S. C. EE. et RR., Sept. 3, 1746 (Bizzarri, *Collectanea*, p. 365).

1 See this Commentary, Vol. IV, p. 291 ff. Hearing (voluntarily and knowingly) the confession of an accomplice is forbidden by the natural law on account of the danger of temptation; D'Annibale, *l. c.*, p. 55, n. 85.

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1. The act forbidden under censure and declared invalid by can. 884 is absolution, not merely hearing confession. Therefore, any manifest refusal to absolve ("I am not in a condition to absolve you," etc.) would be sufficient to ward off the censure.

2. *Feigning to absolve* would not render one immune from the penalty. To feign or simulate *(fingere)* is to make an act or thing appear real or true when it is not so. To absolve fictitiously, therefore, would be to act as if absolution were given and thus lead the penitent to consider himself absolved. Thus giving a penance and making the sign of the cross, or even omitting the penance and giving the blessing in a way which the penitent could construe as an absolution, would be simulation or fictitious absolution, provided there were a *dolus* on the part of the confessor.[2]

3. § 2 of can. 2367 states explicitly that *the censure is incurred even if the confessor absolves an accomplice who does not confess the sin of complicity from which he was not yet absolved, but conceals that sin, because he was induced by the confessor not to confess it either directly or indirectly.*

This text is taken verbally from a decision of the S. Poenitentiaria,[3] which also explains the terms *directly* and *indirectly*.

A confessor would induce an accomplice *directly* if he would previously tell him or her not to mention the sin of complicity, because he already knows of it or because its manifestation would be useless. He would induce the accomplice *indirectly* if he would persuade him or her that the *turpis actus* is no sin or not grievous enough

2 Thus Eichmann, *l. c.*, p. 201; but the *dolus* is presumed, according to can. 2200, § 2.

3 Feb. 19, 1896 (*Coll. P. F.*, n. 1916).

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to scruple about, thus leading the penitent to conclude that the sin of complicity need not be mentioned and causing him not to mention it. It can no longer be taught, therefore, as was the case before the promulgation of the Code, that simulating absolution would render the confessor immune from censure.[4] For, as the above-quoted decision of the S. Poenitentiaria clearly states, such an admission would render the censure almost illusory.

4. From the same decision,[5] as well as from our text itself, we may indirectly deduce that if the sin of complicity had been properly and lawfully absolved by another confessor, the censure would not be incurred by the guilty priest, even though the accomplice would mention it to him in the confessional.[6]

5. The complicity must concern a *peccatum turpe, i. e., contra sextum,* which amounts to a grievous sin.[7] Besides, since complicity here refers to the act of absolution, it is evident that, if the confessor does not recognize the penitent as his accomplice *in peccato turpi,* he may lawfully and validly absolve him. The same is true in case of a positive and well-founded doubt about the identity of the person.[8]

6. As to the *case of necessity,* can. 2254 must be consulted. But this very canon refers to our canon 2367, which, in § 1, determines the *mortis articulus* as follows: *In point of death, i. e.,* when the danger of death is real

4 S. O., Dec. 5, 1883 (*Coll. cit.*, n. 1608).

5 S. Poenit, *l. c.*

6 D'Annibale, *l. c.*, p. 57, n. 87.

7 D'Annibale, *l. c.*, p. 54, n. 84: "*Ut peccatum adsit ultro citroque, ac ultro citroque grave in ipso opere externo.*"—S. O., May 28, 1873: "*Comprehendi nedum tactus, verum omnia peccata gravia et exterius commissa contra castitatem, etiam illa quae consistunt in meris colloquiis et aspectibus, quae complicitatem important*"; Hollweck, *l. c.*, 330, note 5.

8 D'Annibale, *l. c.*, p. 56, n. 86; Hollweck, *ib.*, note 2.

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and certain, *provided no other priest, whether endowed with jurisdiction for hearing confessions or not, can be called without serious infamy or scandal.* If another priest is available, he must be called, under penalty of censure, *unless the dying person should refuse to confess to another priest.*[9]

7. Concerning *ignorance* it has been declared that neither *ignorantia crassa* nor *supina,* much less, of course, *affectata,* excuses from censure.[10] Absolution from *occult* cases of this kind is not included in the power granted to the Ordinaries by the Code.[11]

8. Finally, it may be observed that members of the *Oriental rites* are also subject to this censure.[12]

SOLLICITATIO

Can. 2368

§ 1. Qui sollicitationis crimen de quo in can. 904, commiserit, supendatur a celebratione Missae et ab audiendis sacramentalibus confessionibus vel etiam pro delicti gravitate inhabilis ad ipsas excipiendas declaretur, privetur omnibus beneficiis, dignitatibus, voce activa et passiva, et inhabilis ad ea omnia declaretur, et in casibus gravioribus degradationi quoque subiiciatur.

§ 2. Fidelis vero, qui scienter omiserit eum, a quo sollicitatus fuerit, intra mensem denuntiare contra praescriptum can. 904, incurrit in excommunicationem latae sententiae nemini reservatam, non absolvendus

9 See Vol. IV of our Commentary, p. 292.

10 S. O., Jan. 13, 1892 ad 3 (*Coll. P. F.*, n. 1777); see can. 2229.

11 See can. 2237, § 2; S. O., Sept. 13, 1859, ad 2–3 (*Coll. cit.*, n. 1181).

12 S. C. P. F., Aug. 5, 1885 (*ib.*, n. 1640).

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nisi postquam obligationi satisfecerit aut se satisfacturum serio promiserit.

1. What *solicitation means* has been explained under can. 894 and 904. The earliest document referring to this crime is the Constitution of Pius IV, "*Cum sicut nuper,*" of April 16, 1561, which was directly intended for Spain. The Constitution of Gregory XV, "*Universi,*" of Aug. 30, 1622, had a general bearing, and is more explicit as to the nature and extent of solicitation. The source *par excellence* of our Code is the Constitution of Benedict XIV, "*Sacramentum poenitentiae,*" of June 1, 1741.

That feigned confession is also intended seems to follow from the term *praetextus,* which indicates a simulated act committed in order to accomplish the evil intention more freely.[1]

2. The Code says *that those guilty of the crime of*

1 Cfr. Thesaurus-Giraldi, *l. c.*, P. II, p. 413 f. The words of the constitution of Bened. XIV: "*vel etiam extra occasionem confessionis in confessionali,*" seem to indicate that simulation is included; see also Hollweck, *l. c.*, p. 328, note 5. However, D'Annibale, *l. c.*, p. 117, n. 181 makes some noteworthy restrictions concerning simulation, which we will quote verbatim: "*Simulatione confessionis, reus sollicitationis intelligitur, qui dum fingit confessionem audire, provocat ad turpia. Verum ut videatur simulare confessionem, opus est ut specie tenus, qua alii decipiantur, confessio agi videatur. Proinde necesse est, ut stet vel in confessionario, vel in loco destinato, aut electo ad audiendas confessiones; utque nedum in hoc, et in isto, quod nemo dubitat, sed in illo fingat se confessionem audire. Praetextu, qui v. c. aliquem ad confessionem invitat, ut provocet ad turpia, licet ad veram confessionem invitet: praetextus enim est quod intentionem obtegit facto aliquo seu apparenti, seu vero. Quocirca sollicitatio cessat, si non ipse, sed poenitens confessionem praetexuit; vel ipse quidem, sed ut alium, (non poenitentem) deciperet; vel uterque ex condicto ut alios fallerent. Verum si is cubiculum aegrotantis ingressus, rogatu ipsius adstantes recesserint, et remanserit solus cum sola quasi confessionem excepturus, nonne videtur eam sollicitare simulatione confessionis? Minime, quippe non sollicitat occasione confessionis, sed turpiter agit.*" (St. Alph., VI, 679).

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solicitation, according to can. 904, (a) *are to be suspended from saying Mass and hearing confessions or declared incapable of hearing sacramental confession,* according to the grievousness of the crime; (b) *Should also be deprived of all benefices and dignities and of the active and passive vote, and be declared incapable of* holding or exercising both; (c) *In more serious cases they should be subjected to degradation.*

3. All these penalties are *ferendae sententiae,* and therefore require a procedure in conformity with the instructions alleged elsewhere.[2] According to the Constitution quoted above, the inquisitors and local Ordinaries are the guardians and executors of criminal procedure and sentence in cases of solicitation. The Constitutions except no *dignitary* from these penalties. *Cardinals,* however, are clearly exempt under can. *2227,* § 2. But to exempt *bishops* from them on the plea that inquisitors would be incompetent to proceed against them and for the reason that they are not wont to hear confessions,[3] is more than we can understand. For the Holy Office can always be approached, and the Pontiff in person could take cognizance of such a case, according to can. 1557, § 1, n. 3. The other plea, that bishops are not accustomed to hear confessions, has no foundation in our country, where many a bishop takes his regular turn in the confessional in the cathedral and elsewhere.

Degradation, according to the Constitution of Gregory XV, was to be decreed only for *enormous* crimes of solicitation, and after being degraded, the culprits were to be handed over to the secular power.

2 See Vol. IV of this Commentary, p. 343 ff.; S. O., March 18, 1863 (*Coll. P. F.,* n. 1237).

3 Thus some authors quoted by Hollweck, *l. c.,* p. 327 note 2, who, however, with Berardi, leans to the opinion stated above. Besides, can. *2227,* § 2, does not exempt bishops from these penalties.

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§ *2 of can. 2368* imposes the strict *obligation on every person solicited by a confessor to denounce the latter. Whoever knowingly omits such denunciation for a month,* as prescribed by can. 904, *incurs excommunication latae sententiae, reserved to no one, from which, however, he cannot be absolved unless he has complied with, or seriously promised to satisfy, his obligation.*

The duty of denouncing clearly binds whenever the following circumstances [4] concur:

1. The person to be denounced must be a *priest;* he may be of any rank or dignity, cardinals and, possibly,[5] bishops, excepted.

2. The *solicitation* must be *ad inhonesta et turpia, sive verbis, sive signis, sive nutibus, sive tactu, sive per scripturam, tunc aut postea legendam, i. e.,* a mutual, grievous, external sin against the sixth commandment, committed with a person of the same or the other sex, whether solicited for himself (the confessor) or for another person; whether the solicited person consented or not.[6]

3. The solicitation must, in one way or another, concern *confession,* either as occasion or pretext, either in a place properly destined for confession or at least connected with the act of confession, — immediately before or immediately after. It is, however, immaterial whether the penitent understood the solicitation at once or only afterwards. But there can be no obligation of denouncing the confessor if the solicitation was not certain.[7] How long a time may intervene between the

4 "*Sacramentum Poenitentiae*"; Thesaurus-Giraldi, *l. c.*, p. 413 f.; D'Annibale, *l. c.*, p. 114 f., n. 179.

5 Because of the controversy stated above; besides there is another reason which renders the case somewhat unlike, *viz.:* shyness in denouncing a bishop.

6 In the procedure the person must not be asked whether he or she consented to the solicitation.

7 D'Annibale, *l. c.*, n. 182.

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solicitation and the cessation of the obligation to denounce the culprit, is not definitely stated.[8]

4. As to *difficulties* arising from circumstances of time and person, especially in the case of women, it must be said that as long as such circumstances prevail, they are not obliged to denounce the culprit.[9]

5. The *time when the censure is incurred* is after one month, to be reckoned from the moment the penitent knew or became aware of his or her obligation and of the censure attached to the omission. Those who seriously promise to make denunciation — an oath is not required — may be absolved from the censure even after a month has elapsed.[10]

VIOLATION OF THE SEAL OF CONFESSION

Can. 2369

§ 1. Cofessarium, qui sigillum sacramentale directe violare praesumpserit, manet excommunicatio specialissimo modo Sedi Apostolicae reservata; qui vero indirecte tantum, obnoxius est poenis, de quibus in can. 2368, § 1.

§ 2. Quicunque praescriptum can. 889, § 2 temere violaverit, pro reatus gravitate plectatur salutari poena, quae potest esse etiam excommunicatio.

There are two ways of breaking the seal of confession, as described in the fourth volume of this Commentary.[1]

8 The "*Sacramentum Poenitentiae*" merely says: "*nec post longum tempus,*" and hence triennial prescription is not admitted; Thesaurus-Giraldi, *l. c.*, p. 415; also can. 1703 excludes from prescription cases to be brought before the Holy office.

9 See Vol. IV of this *Commentary*, p. 342.

10 D'Annibale, *l. c.*, p. 119, n. 183.

1 Page 302; but the *or* in line 5 from above should be changed into *and;* for different cases see the moralists, especially Ballerini-Pal-

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Violation is *direct* if, together with the matter confessed, the name of the penitent is revealed, either explicitly or by a description which reveals his identity. It is *indirect* if, from the confessor's way of acting or speaking there is danger that the sin of the penitent and his identity become known, thus rendering confession hateful.

Can. 889, § 2, obliges also interpreters and *all others* who may in any way have acquired knowledge of confession, to keep the seal.

1. A confessor, says our canon (§ 1), *who dares to break the seal of confession directly, remains under excommunication reserved modo specialissimo to the Apostolic See.*

a) The term *confessor* implies a *priest*[2]; as to others who are not priests, whether laymen or clerics, consult can. 2322. But whether the term supposes jurisdiction is not quite certain. Can. 2366 punishes such priests with suspension *a divinis*. Could it be a sacramental confession if made to a priest bereft of jurisdiction? To make such a confession, an accusation of sins in order to obtain absolution is required. On the other hand, the seal of confession was instituted in favor of the penitent and the Sacrament. From this we should conclude that even a priest destitute of jurisdiction would fall under this censure. Yet we candidly confess that the opposite view is just as probable. For the text, by employing the term *confessor,* supposes a priest having jurisdiction, — at least, as we say, general faculties. Besides, since this is a most grievous penalty, it should not be extended to any one not comprised under the name of confessor.

mieri, *l. c.*, Vol. V, p. 485 ff.; nn. 899 ff.

2 See Schmalzgrueber, V, 38, n. 80.

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b) The text furthermore says, *sigillum sacramentale,* which naturally presupposes a sacramental accusation. Therefore a fictitious or jocose confession would not induce the obligation of keeping the seal, nor entail censure. Whether a sacramental confession is intended must be judged from the words or acts which surround the deed. However the mere lack of intention of absolving the penitent would not be sufficient to excuse the confessor from the obligation of keeping the seal, though if he were to say: "I don't wish to hear your confession," this would render the accusation non-sacramental, and no obligation would arise to keep the seal.[3] The general rule, therefore, may be stated thus: *The censure is incurred whenever the obligation of keeping the sacramental seal is violated.*

c) But there is a condition to be added, namely, *unless the penitent himself* — none other, not even the Pope, can do so — *has given permission to reveal something out of confession.* This permission would have to be given expressly and freely.[4]

Note that the revelation of something else than the matter of confession would not constitute a violation of the seal. Besides, most authors say that a revelation of merely venial sins, confessed in a general way, though by a definite person, would not constitute a serious violation of the seal involving censure.[5]

d) The penalty is excommunication *latae sententiae* reserved *modo specialissimo* to the Apostolic See, provided *presumption* is verified. Therefore inadvertency or

3 Schmalzgrueber, V, 38, n. 80; Ballerini-Palmieri, *l. c.*, V, p. 490 f.; n. 909 f.

4 Schmalzgrueber, *l. c.*, n. 62; Hollweck, *l. c.*, p. 276, note 5.

5 Ballerini-Palmieri, *l. c.*, V, p. 499 ff.; n. 924 ff.

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indeliberate revelation would not induce the penalty, which formerly was deposition and perpetual banishment of the culprit to a monastery.[6]

2. Those who *violate the seal of confession indirectly* are liable to the same penalties as those who are guilty of solicitation (see can. 2368, § 1) *ferendae sententiae.*

3. Those mentioned above and in can. 889, § 2, namely, interpreters and bystanders, who rashly *(temere) violate the seal of confession, are to be punished with wholesome penalties,* according to the seriousness of the crime, excommunication not excluded.

The following five canons treat of Orders; and the first of episcopal consecration, for which a papal mandate is required, as stated elsewhere.[1]

EPISCOPAL CONSECRATION WITHOUT AN APOSTOLIC MANDATE

Can. 2370

Episcopus aliquem consecrans in Episcopum, Episcopi vel, loco Episcoporum, presbyteri assistentes, et qui consecrationem recipit sine apostolico mandato contra praescriptum can. 953, ipso iure suspensi sunt, donec Sedes Apostolica eos dispensaverit.

A bishop who consecrates another, and the assistant bishops or the priests taking their place, as well as the one who receives episcopal consecration without having obtained an Apostolic mandate, are suspended *ipso iure* until the Holy See has granted a dispensation. This is a general suspension, but has the character of a vin-

6 See c. 2, Dist. 6, *de Poenit.*; c. 12, X, V, 38.

1 See Vol. IV of this Commentary, p. 414 f.; can. 953.

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dictive penalty.[2] An example of its effective application may be seen in a papal constitution of historical importance.[3]

SIMONIACAL ADMINISTRATION AND RECEPTION OF ORDERS AND SACRAMENTS

Can. 2371

Omnes, etiam episcopali dignitate aucti, qui per simoniam ad ordines scienter promoverint vel promoti fuerint aut alia Sacramenta ministraverint vel receperint, sunt suspecti de haeresi; clerici praeterea suspensionem incurrunt Sedi Apostolicae reservatam.

Simony is clearly defined in the Code itself, as explained elsewhere.[4] Not only real simony, but also conventional simony, which requires no fulfillment of the simoniacal contract, is punishable, the only supposition being that a simoniacal agreement existed. Suspicion of heresy is founded on can. 727, § 1.

1. *Those,* then, *who have knowingly ordained any one, as well as those who have been ordained through simony, are suspect of heresy,* and must consequently be treated according to can. 2315.

Note that by *ordo* is also understood the first tonsure, as per can. 950 and the Council of Trent.[5] However, the act must be complete, *i. e.,* the order must have been

2 See can. 2278, § 2; can. 2298, n. 2; 2227, § 2; 2236, § 1: *"dispensaverit."*

3 Pius VI, *"Charitas,"* April 13, 1791, § 15: the civil constitution of the French Clergy; three bishops had consecrated another without an Apostolic mandate, nay without as much as consulting the local ordinary.

4 Vol. IV of this Commentary, pp. 5 ff.

5 Sess. 21, c. 1, *de ref.;* the oldest source is c. 8, C. 1, q. 1, taken from the Council of Chalcedon; see also c. 1, X, V, 3.

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conferred before the penalty is incurred, even though the price agreed upon was not paid and perhaps never will be paid, provided only an agreement was made. Then, the act of simony must have been committed knowingly *(scienter)* as per can. 2229, § 2. If it was committed by a third person with the ordaining minister, but the one ordained knew nothing of it, he would not fall under this canon, even if simony was committed according to can. 727.

2. *Suspected of heresy are also those, bishops not excepted, who administer or receive other Sacraments simoniacally,* supposing always that an agreement to that effect has been entered into.

Purely mental simony, though it may be grievous, is not intended by the Code. Thus it may happen that one administers the Sacraments merely for the sake of the stole fee; but as long as he does not make a formal agreement or utter his intention in an unmistakable way, with the other's consent, no simony in the sense of the law is committed.

Bishops too, we said, are included; for the position of the clause at the beginning doubtless comprises them.

Is the *scienter* placed between *ordines* and *promoverint* to be supplied in the *ministraverint?* We hardly think so, because the position of the word makes it appear to have reference only to orders. The reason probably is because Orders are intended chiefly for the public good and the welfare of society at large, and therefore the legislator wished to spare prelates unnecessary scruples.[6] The other Sacraments are more or less of a

[6] Clement VIII, "*Romanum Pontificem decet,*" Feb. 28, 1595 (*Bull. Luxemburg.*, III, 60): "*ab ordinum collatione deterreri,*" on account of scruples and the fear of the severe penalties threatened by Sixtus V, "*Sanctum et salutare,*" Jan. 5, 1589, § 6, § 2 (*Bull. cit.*, II, 711 f).

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private character and, therefore, left to the uprightness of individuals.

3. Clerics offending against this canon also incur *suspension reserved to the Apostolic See.* Are bishops included in this clause. Some deny,[7] others assert it,[8] There seems to be little doubt that they are. Can. 2227, § 2, cannot be quoted against this view, as bishops are especially mentioned at the very beginning of this canon, and, moreover, the Council of Trent subjected bishops to all the penalties inflicted by law,[9] and the papal constitutions subjected them to the censure here mentioned.[10] Lastly, it must be remembered that bishops are the ministers of orders. There would be no justice, since simony requires an accomplice, if the greater culprit were less punishable than the simple cleric. The bishops, therefore, according to our view, are also subject to this suspension, which is a general one (can. 2278, § 2).

RECEPTION OF ORDERS FROM CENSURED ECCLESIASTICS

Can. 2372

Suspensionem a divinis, Sedi Apostolicae reservatam, ipso facto contrahunt, qui recipere ordines praesumunt ab excommunicato vel suspenso vel interdicto post sententiam declaratoriam vel condemnatoriam, aut a notorio apostata, haeretico, schismatico; qui vero bona fide a quopiam eorum sit ordinatus, exercitio careat ordinis sic recepti donec dispensetur.

7 Thus Ayrinhac, *l. c.*, p. 331, without giving a reason.

8 Thus Eichmann, *l. c.*, p. 207.

9 See cc. 6, 8, 101, 107, 113, C. 1. q. 1; c. 4, C. 2, q. 5; cc. 4, 5, 11, 13, X, V, 3.

10 Clement VIII *(l. c.,)* modified the Constitution of Sixtus V, but left the censure.

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The older sources of this canon seem to be conflicting. Some insinuate that the order received from bishops mentioned in the text was invalid,[1] whilst the majority clearly state that it was valid, though illicit.[2] Yet even the former may be explained of the exercise of orders.[3] Our text is taken in a somewhat modified form from the "*Apostolicae Sedis.*"[4]

1. *Those who dare to receive Orders from an excommunicated, suspended, or interdicted minister, provided he has been declared such or condemned to one of the three afore-mentioned penalties,* or *from a notorious apostate,* a notorious *heretic,* or a notorious *schismatic, ipso facto incur suspension a divinis, reserved to the Apostolic See.*

That *orders* includes episcopal consecration, seems to us evident from can. 950, even though the majority of authors[5] does not maintain this view.

The penalties must have been *declared,* or must have been incurred by a *condemnatory* sentence. Formerly a nominal or personal denunciation was required. *Notoriety* of fact is here intended (can. 2197, n. 3), not of law, the latter not being required, as per can. 2314, unless a declaratory sentence should be necessary in virtue of can. 2223, § 4. But the term *praesumunt* also requires full knowledge of the fact that the ordaining minister was under censure, or had been condemned,

1 C. 33, C. 24, q. 1; cc. 41, 73, III, C. 1, q. 1; c. 24, C. 1, q. 7.

2 C. 8, Dist. 19; cc. 24, 25, C. 1, q. 7; c. 2, X, V, 8; this latter settles the former controversy.

3 Kober, *Die Suspension,* p. 189; Hollweck, p. 295, note 1; D'Annibale, *l. c.,* p. 129, n. 205.

4 § V, 6: "*Suspensionem ab ordine suscepto ipso iure incurrunt, qui eundem ordinem recipere praesumpserunt ab excommunicato vel suspenso, vel interdicto, nominatim denuntiato, aut haeretico vel schismatico notorio: eum vero qui bona fide a quopiam eorum est ordinatus, exercitium non habere ordinis sic suscepti, donec dispensetur, declaramus.*"

5 Hollweck, *l. c.,* p. 295, note 3.

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or that he is a notorious apostate, heretic, or schismatic.[6]

Besides, it is generally held that the order must have been received *validly*, and therefore the penalty would not follow if, for instance, a Protestant bishop would confer an order.[7] The penalty is *suspension a divinis* (can. 2279, § 2, n. 2), excluding the exercise of any act of the power of orders.

2. *Those who have been bona fide ordained by one of the above-named persons* forbidden by law to administer orders, *may not exercise the orders thus received, until they are dispensed.* This dispensation can be given by the Ordinary to whom the *ordinatus* is subject.[8] It is a vindictive penalty, but irregularity would follow unlawful exercise of the Order thus received.[9]

ILLEGAL ORDINATION

Can. 2373

In suspensionem per annum ab ordinum collatione Sedi Apostolicae reservatam ipso facto incurrunt;

1°. Qui contra praescriptum can. 955, alienum subditum sine Ordinarii proprii litteris dimissoriis ordinaverint;

2°. Qui subditum proprium, qui alibi tanto tempore moratus sit ut canonicum impedimentum contrahere ibi potuerit, ordinaverint contra praescriptum can. 993, n. 4, 994;

3°. Qui aliquem ad ordines maiores sine titulo ca-

6 Mere hearsay or knowledge received from unofficial sources is not sufficient.

7 D'Annibale, *l. c.*, p. 206.

8 *Ibid.* and Hollweck, *l. c.*, p. 296, note 7; cc. 1, 2, X, I, 13.

9 Can. 985, n. 7.

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nonico promoverint contra praescriptum can. 974, § 1, n. 7;

4°. Qui, salvo legitimo privilegio, religiosum, ad familiam pertinentem quae sit extra territorium ipsius ordinantis, promoverint, etiam cum litteris dimissorialibus proprii Superioris, nisi legitime probatum fuerit aliquem e casibus occurrere, de quibus in can. 966.

This canon furnishes the proper sanction of the laws laid down concerning the *episcopus proprius* (n. 1-2), the canonical title (n. 3), and the competent Ordinary with regard to religious. We may be permitted to refer the reader to the canons mentioned.

Suspension from conferring orders for one year, to be reckoned from the date of ordination and *reserved to the Apostolic See, is ipso facto incurred*

1. By those who ordain a *subject of another Ordinary* without *dimissorial letters* from that Ordinary, as per can. 955;

2. By those who ordain *one of their own subjects,* but without testimonials from the Ordinaries in whose dioceses the ordinand has lived long enough to contract a canonical impediment, as prescribed by can. 993, n. 4, and can. 994;

3. By those who confer *major orders* without a canonical title, as per can. 974, § 1, n. 7 (see also can. 980, § 2, 3);

4. By those who *ordain a religious* who belongs to a religious family located outside of the ordaining minister's territory, even though the aforesaid religious have dimissorial letters from his own superior; unless the certificate of the episcopal chancery proves that the case was one admitted by can. 966 or the exempt religious

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order has obtained a *privilege* permitting it to have its subjects ordained by any bishop.

ILLEGAL RECEPTION OF ORDERS

Can. 2374

Qui sine litteris vel cum falsis dimissoriis litteris, vel ante canonicam aetatem, vel per saltum ad ordines malitiose accesserit, est ipso facto a recepto ordine suspensus; qui autem sine litteris testimonialibus vel detentus aliqua censura, irregularitate aliove impedimento, gravibus poenis secundum rerum adiuncta puniatur.

1. *Ipso facto suspended from the exercise of an order (illegally)* [1] *received are those who maliciously present* [2] *themselves for Ordination*

a) *Without any dimissorial or with false dimissorial* letters (see can. 958). The term *false* letters includes such as are forged, and consequently can. 2362 applies here. But the term also means letters issued by incompetent authorities (can. 958). Thus the vicar-general needs a special commission and the vicar capitular or administrator can issue them only after a year of vacancy;

b) *Without having reached the canonical age,* as per can. 975, or not being duly dispensed from this impediment;

c) Without observing the order prescribed by can. 977 (ordinations *per saltum).*

1 The other orders, which the cleric has received properly, he may exercise; see *Trid.*, Sess. 6, c. 5, *de ref.;* Hollweck, *l. c.*, p. 297, n. 4.

2 *Accedere* means *to approach,* and could therefore be construed as if the penalty were incurred, even though ordination did not actually follow; however, the text refers to *orders actually received.*

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2. Those who maliciously present themselves for ordination *are to be punished grievously,* according to the circumstances of each case.

a) This class includes those who have not the required testimonials (see can. 993-1001), or

b) who are *under censure,* be it excommunication, or interdict, or suspension, or who are bound by an *irregularity* of defect or crime (can. 984, 985), or by a canonical impediment (can. 987).

UNLAWFUL MIXED MARRIAGES

Can. 2375

Catholici qui matrimonium mixtum, etsi validum, sine Ecclesiae dispensatione inire ausi fuerint, ipso facto ab actibus legitimis ecclesiasticis et Sacramentalibus exclusi manent, donec ab Ordinario dispensationem obtinuerint.

Catholics who dare to contract a mixed, even though valid, marriage without ecclesiastical dispensation, are ipso facto debarred from legal ecclesiastical acts and from the Sacraments, until they have obtained a dispensation from the Ordinary.

1. Mixed religion constitutes a prohibitive impediment, which does not invalidate a marriage, but requires a dispensation to make it licit.

2. If the form prescribed in canons 1094 and 1099 has been omitted, the marriage is invalid.

3. Can. 1098 permits the full form to be omitted when there is danger of death or when the pastor, or Ordinary, or a delegate, cannot be reached.

The *ausi fuerint* is verified if the Catholic party, know-

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ing that a dispensation is necessary and possessing the necessary means of communicating with the ecclesiastical authorities, neglects to ask for the dispensation. Deception of the pastor or assisting priest is possible, though not likely to occur, except in cases of elopement.

4. Such parties, provided they give signs of true repentance and accept the required conditions, may be admitted to the Sacraments [1];

5. But they are *excluded from the ecclesiastical acts* enumerated in can. 2256, n. 2.

6. This penalty lasts until the Ordinary *dispenses* from it, because it is a vindictive penalty, and dispensation here refers to the penalty, not to the impediment of mixed religion. Besides, no dispensation is required after the marriage is contracted.[2]

1 S. O., Aug. 23, 1877; Feb. 10, 1892 (*Coll. P. F.*, nn. 1478, 1783).

2 See Vol. V of this Commentary, p. 159. We may be permitted to say a word here in defense of this volume against a review of the same in the October number of the *Irish Theological Quarterly*. We regret to say that the critic does not appear to be competent, having betrayed his incompetency in reviewing our first volume by putting a synodal decree on the same level with the Code. Besides mere platitudes and general aspersions, we believe, should be avoided by a conscientious critic. There are, as a well-known professor in Rome used to say, when he was attacked by some writers, *"boni viri, sed non tenentur scribere."*

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TITLE XVII

VIOLATION OF THE OBLIGATIONS PROPER TO THE CLERICAL OR RELIGIOUS STATE

Under this heading fall the obligations mentioned in Book II, which determines the duties of the clerical state as such (Title III) and of the religious state in particular (Title XIII, Ch. 1). But it must be understood that the obligations peculiar to the clerical state are also incumbent on religious who belong to the clerical state, unless the wording makes it plain that religious are not comprehended. This shall be indicated under each canon.

REFUSAL TO MAKE EXAMINATIONS

Can. 2376

Sacerdotes qui neque ab Ordinario dispensati neque legitimo impedimento detenti examen de quo in can. 130 facere renuerint, ab Ordinario congruis poenis ad illud cogantur.

Priests who, without a dispensation from the Ordinary or a lawful impediment, refuse to make the examination required by can. 130, *shall be compelled by suitable penalties to do so.*

1. The above-quoted canon 130 requires *yearly examination for a term of three years* after the completion of a priest's theological studies.

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2. All *secular priests*, even though they have obtained a parochial office or a canonicate, must submit to this examination, unless they are exempted from it by the Ordinary. *Religious* are *not* bound by this canon, but by can. 590.

3. To *refuse* is a positive act *(facere renuerint)*, although mere failure to appear at the examination would amount practically to the same thing, provided the time and matter of examination had been duly appointed and made known. In case of a lawful impediment, the Ordinary or the diocesan chancery must be notified, which may be done through the rural dean.

4. The *penalty* is arbitrary but preceptive (can. 2223). Except in case of protracted stubbornness, censures should not be used (can. 2241, § 2).

STUBBORN ABSENCE FROM PASTORAL CONFERENCES

Can. 2377

Sacerdotes contra praescriptum can. 131, § 1 contumaces, Ordinarius pro suo prudenti arbitrio puniat; quod si fuerint religiosi confessarii curam animarum non gerentes, eos ab audiendis saecularium confessionibus suspendat.

This canon embodies the sanction for can. 131, which relates to the pastoral conferences that are to be held several times a year. At these all *secular priests* as well as all *religious* who have charge of souls should be present, and also those other religious who hold faculties for hearing confessions in the diocese, provided no such conferences are held in their monasteries or convents, according to can. 591. Therefore the local Ordinary is

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entitled to know of this fact, even in exempt monasteries, unless a special privilege exempts them from attendance at the diocesan conferences.[1]

1. *Priests who resist the law laid down in can. 131, § 1, should be punished by the Ordinary* according to his good judgment. The name *sacerdotes* here includes religious who are in charge of souls, whether as pastors or assistants (curates). These also may, therefore, be punished according to can. 616, § 2. But *contumacy* must precede, and this supposes a canonical, not merely a paternal, warning (can. 2307). Although such a warning is to be given to all who are engaged as pastors, curates, or confessors, yet, says one decision, against secular priests who have no such charge, the bishop should proceed with exhortations and admonitions rather than with penalties.[2]

2. *Religious* who, though not in charge of souls, are *confessors* of Sisters or transient helpers in the confessional must, in case of contumacy, *be suspended from hearing confessions,* provided, of course, no pastoral conferences are held at their religious house.

SERIOUS NEGLECT OF RITES AND CEREMONIES

Can. 2378

Clerici maiores qui in sacro ministerio ritus et caeremonias ab Ecclesia praescriptas graviter negligant et moniti sese non emendaverint, suspendantur pro diversa reatus gravitate.

1 Regulars who neither have charge of souls nor enjoy the usual faculties, cannot be compelled to attend diocesan conferences; S. C. EE. et RR., Aug. 23, 1593; Oct. 13, 1593 (*Regesta,* fol. 265[d], fol. 309[a]), implied in can. 131.

2 S. C. EE. et RR., Aug. 2, 1594 (*Regesta,* fol. 224[b]).

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Clerics in higher orders who in the sacred ministry *grievously neglect the rites and ceremonies prescribed* by the Church, and, when admonished, do not amend their ways, should *be suspended* according to the seriousness of their guilt.

1. The books which contain the rites and ceremonies of the Church are the Roman Ritual, the Missal, the Pontifical, and the rules governing these rites are called *rubrics,* of which mention is made elsewhere.[1] The rubrics here especially intended are those governing the administration of the Sacraments and sacramentals as well as the celebration of Holy Mass.[2]

2. The *grievousness* of the offence is to be gauged by the importance of the rubrics, the scandal given, and the duration of the neglect. Rural deans are called upon to watch over the pastors of their districts and the pastors over their assistants.[3]

3. In proceeding against offenders, the Ordinary must first issue a *canonical* warning according to can. 2307 and then await amendment within the term stated.

4. If no amendment follows, *suspension must* be inflicted, and it may be either total or partial, for a definite or an indefinite time, either as a censure or a vindictive penalty.[4]

1 See Vol. IV of this Commentary, p. 157.

2 See can. 755–761; 814–819; 945–947; 1002–1004; 1148.

3 Can. 447, § 1, n. 4; 476, § 7; concerning chapters can. 415, § 3, n. 2. This, of course, does not mean that every new rubric must at once be applied and insisted upon, as if the salvation of souls depended on a Talmudic observance of rites.

4 See can. 1933, § 4; 2278, f.; 2298, n. 2.

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REFUSAL TO WEAR THE CLERICAL DRESS

Can. 2379

Clerici, contra praescriptum can. 136, habitum ecclesiasticum et tonsuram clericalem non gestantes, graviter moneantur; transacto inutiliter mense a monitione, quod ad clericos minores attinet, servetur praescriptum eiusdem can. 136, § 3; clerici autem maiores, salvo praescripto can. 188, n. 7, ab ordinibus receptis suspendantur, et si ad vitae genus a statu clericali alienum notorie transierint, nec, rursus moniti, resipuerint, post tres menses ab hac ultima monitione deponantur.

The clerical dress spoken of in can. 136 is the one usually worn by clergymen. It differs in different countries. Everyone knows the habit and usage of our country, except perhaps foreigners.[1]

The present canon may be said to contain three clauses: one applying to clerics in general, the second to clerics in minor orders, the third to clerics in major orders.

1. *Clerics* who do not wear the clerical dress and tonsure, as prescribed by can. 136, are to be *seriously warned;* which means that a formal admonition must be addressed to them according to can. 2143 and 2307, and put on record.

2. As to clerics in *minor orders,* can. 136, § 3 says that they are *ipso facto* reduced to the lay state if the canonical warning just mentioned is unheeded for *one*

1 Thus we lately heard of a foreign bishop who travelled through our country in cassock and prelatial colors.

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month (30 days). Therefore such clerics lose the clerical rank and its privileges without a formal sentence. However, we believe that, since the public welfare[2] is here concerned, a declaratory sentence, according to can. 2223, § 4, should be issued.

3. Clerics in *higher orders* should be dealt with as follows:

a) If they do not put on clerical dress *within a month* from the date of the canonical warning, their *office becomes vacant* without any further declaration, just as if they had resigned,— provided, of course, they hold an office — and they *must,* besides, *be suspended from the orders* which they have already received.

b) If, besides refusing to wear the clerical dress and letting the canonical warning go unheeded, they *notoriously* take up a mode of life not compatible with the clerical state, they must *again be warned.* If this second canonical warning also goes unheeded, they must be *deposed after the third month* (or 90 days), to be reckoned from the day of the last warning.

A *state or vocation of life not becoming the clerical character* would be one of those mentioned under can. 139, 141, 142 (store or saloon-keeper, etc.). However, the fact of the cleric's having embraced this state must be *notorious, i. e., notorietate facti,* which supposes a knowledge of the higher clerical state.

The *penalty for clerics* in minor orders is *latae sententiae,* whereas those for clerics in major orders are *ferendae sententiae.* Consequently, if a cleric has never been suspended or deposed, even though he may have

2 Because of the public character of the clergy and of the clerical privileges.

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been for several years a public teacher, unknown to the people as a priest, no absolution or dispensation is required.[3]

Discarding the clerical dress does not *ipso facto* entail a censure for clerics in higher orders. The penalty is prescriptive, which is to be understood according to can. 2223.

Although this canon does not strictly apply to *religious* who wear a habit of their own, yet the Ordinary may, under can. 616, § 2, proceed also against religious who neglect to wear the clerical dress customary in their country.

TRADING FORBIDDEN TO CLERICS

Can. 2380

Clerici vel religiosi mercaturam vel negotiationem per se aut per alios exercentes contra praescriptum can. 142, congruis poenis pro gravitate culpae ab Ordinario coerceantur.

Clerics or religious who, contrary to can. 142, practice a trade or engage in business, either by themselves or through the medium of others, shall be punished by the Ordinary according to the gravity of their guilt.

To what we have said elsewhere[1] on this subject only a few remarks need be added here. The subject is really important, affecting as it does the entire clerical-religious state, and "notions" or consciences sometimes seem to be very much obscured. *Negotiatio* is generally defined as "the act of buying things with the intention of

[3] We were informed of such a case by a late friend of ours.

[1] Vol. II of this Commentary, p. 95 ff.

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selling them unchanged for a higher price." [2] Thus buying land with the sole view of selling it again, is trading; buying shares in mines, railroads, oil, cotton, etc., and selling them at a higher price is styled trading, or in common parlance, at least in the U. S., speculating or even gambling. Buying prayer-books or devotional articles from a firm in order to sell them with profit to pupils or parishioners is trading. The same must be said of books, magazines, calendars, typewriters, etc. All that we can justify in the sale of such articles is that the priest, religious, or religious house may add the additional expense of freight, express or an eventual risk of storage, but nothing more. Religious houses, especially those chartered as benevolent corporations, are not allowed to undertake financial operations.

1. The penalties established by the Constitutions of Urban VIII, "*Ex debito,*" Feb. 22, 1633, and Clement IX, "*Solicitudo,*" June 17, 1669, against trading by *missionaries* either in or outside of Europe, and which were maintained even after the "*Apostolicae Sedis*" (1869),[3] are now *destitute of legal force,* as per can. 6, n. 5.

2. But the declaration given by Benedict XIV, ("*Apostolicae servitutis commissum,*" Feb., 25, 1741) remains in force. This declaration says that trading by commission *(alieno nomine)* is forbidden. Hence a cleric may not furnish money to, or hire a layman to trade or traffic for him. To do so would be an evasion of the law or a deception. If family affairs or an inheritance compel a cleric to engage in business against his will, the bishop may grant him permission to continue in

2 Wernz, *Ius Decret.*, II, n. 216 (1st ed., Vol. II, p. 310); also Santi-Leitner, *Decret.* l. III, tit. 50, n. 3. (*Coll.*, nn. 1398, 1589).

3 S. O., Dec: 4, 1872; Jan. 17, 1883; S. C. P. F., March 29, 1873

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business for a short time, provided a layman acts as the actual administrator and manager (*l. c.*, § 2).

3. The *penalty*, though preceptive, is arbitrary, but its arbitrary character is somewhat modified by the gravity of the guilt, which is diminished if there is need of temporary support, or if, as stated above, family relations require such conduct. Although deposition and other severe penalties of former laws[4] should not be employed, yet suspension in more stubborn cases would not exceed the bishop's power.

VIOLATION OF THE LAW OF RESIDENCE

Can. 2381

Qui officium, beneficium, dignitatem obtinet cum onere residentiae, si illegitime absit:

1°. Eo ipso privatur omnibus fructibus sui beneficii vel officii pro rata illegitimae absentiae, eosque tradere debet Ordinario, qui ecclesiae vel alicui pio loco vel pauperibus distribuat;

2°. Officio, beneficio, dignitate privetur, ad normam can. 2168-2175.

Those who hold an office, a benefice, or a dignity which obliges them to residence, are, if they unlawfully absent themselves:

1. *Ipso facto deprived* of the revenues of their office or benefice in proportion to the duration of their unlawful absence, and these revenues, which are of the nature of a fine or vindictive penalty, must be handed over to the Ordinary, who shall distribute them to churches or charitable institutions, or to the poor;

[4] See cc. 2, 3, Dist. 88, c. 1, Clem. III, 1; for filthy lucre's sake.

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2. They *shall be deprived* of their office, benefice, dignity, according to the rules laid down in canons 2168-2175.

We need not again enter into the subject of residence,[1] but merely note that the *bishops are not affected by* this canon, for the reason stated in can. 338, § 4, where the metropolitan is called upon to report negligent bishops to the Apostolic See.

Who, then, are the *dignitaries* referred to in this canon? The cathedral and collegiate dignitaries, and none other. Not the prelates *nullius* or abbots *nullius,* because they too must choose a metropolitan and have the same obligations as the bishops[2]; nor the vicars or prefects Apostolic, for they are subject to the Apostolic See.[3] Nor religious superiors, for the vow of poverty prevents their assuming any dignities.

Are dignitaries who fail to observe the law of residence *bound to give up the revenues* received or due during their unlawful absence? Official Roman decisions clearly indicate that they are obliged to make restitution and that the Ordinary may proceed against them according to law.[4] The *bishops* or Ordinaries obliged to residence, on the other hand, are *not* bound to surrender the revenues *pro rata absentiae,* because the text distinctly says that these must be handed to the Ordinary. Therefore deliverer and recipient would be the same person. The Apostolic See shall therefore state what is to be done. As to n. 2, we refer the reader to the canons quoted.

1 See Vol. II of our Commentary, p. 98 f.; p. 358 ff.; p. 545 f.
2 See can. 285; can. 323.
3 See can. 301.
4 S. C. C., *Cathac.,* Nov. 14, 1671 (Richter, *Trid.,* p. 358, n. 71 f.); the procedure against non-resident canons, S. C. C., *Vercell.,* 1573 (*ib.,* n. 71).

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NEGLECT OF PASTORAL DUTIES

Can. 2382

Si parochus graviter neglexerit Sacramentorum administrationem, infirmorum assistentiam, puerorum populique institutionem, concionem diebus dominicis ceterisque festis, custodiam ecclesiae paroecialis, sanctissimae Eucharistiae, sacrorum oleorum, ab Ordinario coercetur ad normam can. 2182-2185.

If a pastor *grievously neglects the following duties,* the Ordinary must proceed against him according to can. 2182-2185:

1. The *administration of the Sacraments,* as per can. 467, § 1;
2. *Sick calls,* as stated in can. 468, § 1;
3. *Religious instruction* for children and people, as per canons 1329-1336;
4. *Preaching* on Sundays and holydays of obligation, as per can. 1344;
5. The *custody of the parish church,* as per can. 1178;
6. The *custody of the Holy Eucharist and the holy oils,* as per canons 1265-1275 and can. 735.

CARELESSNESS IN KEEPING THE PARISH BOOKS

Can. 2383

Parochus qui paroeciales libros diligenter, ad normam iuris, non conscripserit aut servaverit, a proprio Ordinario pro gravitate culpae puniatur.

Pastors who are careless in keeping records and pre-

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serving the parish books, as prescribed by law, shall be punished by their own Ordinary according to the gravity of their fault.

The books here mainly, though not exclusively, intended are:

1. The *Baptismal* Book, which must be kept according to can. 470 and canons 776-778. It should, besides the entry, contain four vacant columns for recording (a) confirmation, (b) marriage, except the marriage of conscience (can. 1107), (c) subdeaconship and (d) solemn profession, — the two latter on account of their being matrimonial impediments,

2. The *Confirmation* Book, to be kept according to canons 798-799.

3. The *Matrimonial* Book, to be kept according to can. 1103, but omitting the marriage of conscience (can. 1107) though not omitting the record of an eventual declaration of its nullity (as per can. 1988).

4. The *Obituary* Book, to be kept according to can. 1238. This is the *norma iuris* mentioned here, as well as in the Roman Ritual (Tit. x, c. 2). But can. 470, § 1 also demands a record of the census, or *status animarum,* which should be made as carefully as possible.

Is the *pastor* obliged to keep all these books *personally?* There is no doubt that he is *responsible* personally and *sub gravi* for these books. But this does not solve the question asked. Our answer would be as follows: Since a man may do through another what he can do himself,[1] a pastor may have the records kept by another. If the pastor were impeded, either by sickness, or absence, or by reason of a very poor handwriting, he certainly could entrust this work to others. Therefore

[1] *Reg. Iuris* 68 *et* 72 *in* 6°.

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we cannot see why it should be wrong to entrust the assistant or curate with this task.

Another obligation is that of properly preserving the books mentioned (can. 470, § 4).

The *penalty* is arbitrary, but preceptive. The Ordinary, says a decision, may proceed with canonical penalties, which means that either censures or vindictive penalties may be employed if necessary.[2] The time of the canonical visitation offers a good opportunity for inspecting these books.[3]

NEGLIGENCE ON THE PART OF THE CANONICUS THEOLOGUS AND POENITENTIARIUS

Can. 2384

Canonicum theologum et poenitentiarium in suis muneribus obeundis negligentes, Episcopus gradatim compellat monitionibus, comminatione poenarum, subtractione portionis fructuum iis assignandae qui illorum vices suppleant; et perdurante per integrum annum negligentia post monitionem, suspensione a beneficio plectat; negligentia vero producta per aliud semestre, ipso beneficio privet.

If the *canonicus theologus* or the *canonicus poenitentiarius* should neglect their duties (see can. 308-401), the *bishop* shall proceed as follows:

1. He shall serve them with a canonical *warning* (see canons 2143 and 2307), which may contain a *threat of penalties,* and then, if this warning goes unheeded, he may *deprive* them of *part of their revenues* and give them

2 S. C. Sacrament., March 6, 1911, nn. II et IV (*A. Ap. S.*, III, 102 f.).

3 Bened. XIV, "*Firmandis,*" Nov. 6, 1744, § 9, 10.

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to those who take the place[1] of the neglectful priests.

2. If *they continue their negligence for one year after this canonical warning* they shall be *suspended from their benefice* (see can. 2280).

3. If their *negligence is protracted* for another six months, *i. e.*, for eighteen months altogether from the date of the canonical warning, they shall be *deprived* of their respective benefices.

APOSTATES A RELIGIONE

Can. 2385

Firmo praescripto can. 646, religiosus, apostata a religione, ipso iure incurrit in excommunicationem, proprio Superiori vel, si religio sit laicalis aut non exempta, Ordinario loci in quo commoratur, reservatam, ab actibus legitimis ecclesiasticis est exclusus, privilegiis omnibus suae religionis privatus; et si redierit, perpetuo caret voce activa et passiva, ac praeterea aliis poenis pro gravitate culpae a Superioribus puniri debet ad normam constitutionum.

Apostates *a religione* are those who, having made *profession of perpetual vows,* whether solemn or simple, unlawfully leave the religious house with the intention of not returning, or who, having lawfully left the house, do not return to it, with the intention of withdrawing themselves from religious obedience. A perverse intention is presumed after a month of unlawful and unjustified absence (can. 644).

Apostates in another sense are those who publicly deny

1 The place of a *canonicus theologus* may, in this case, be assigned by the bishop to either a secular or a religious priest; S. C. C., April 27, 1630 (Richter, *Trid.*, p. 19, n. 29).

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the Catholic faith, clerics who elope with a person of the opposite sex, or who attempt marriage (can. 646). There is no doubt that those also must be considered apostates who *transfer themselves to another religious institute, i. e.,* another religious order or congregation, without the necessary dispensation.[1] The superior of the institute to which a religious of another order or congregation has repaired, is obliged to make him return to his own institute or, at least, to notify his lawful superior.[2]

It may be asked whether religious who leave their own convent and without due permission transfer themselves to a monastery or convent of the same order, must be considered apostates. The constitution of Paul IV answers in the affirmative,[3] for the text "*extra claustra suorum regularium locorum degunt*" (to live outside their own regular convents) can mean nothing else but that those religious who leave the convent of their profession without the necessary permission are considered apostates. However, we believe that a distinction must now be made between centralized and non-centralized orders, of which latter the Benedictines furnish an example. For the essence of apostasy, as the term implies, is desertion or defection from the religious state one has chosen by perpetual vows, and subsequent withdrawal from the obedience due to one's legitimate superior. Centralized orders have a central or supreme superior who represents the entire institute. Profession is made in these centralized orders, not for a certain house, but for the province or order, which depends on their Con-

1 Paul IV, "Postquam," July 20, 1558, § 8 (*Bull. Luxemb.*, I, 834).

2 S. C. EE. et RR., Aug. 11, 1758 (Bizzarri, *l. c.*, p. 330).

3 *L. c.*, § 1, 2; even those who held a benefice, *i. e.*, a parish or office of their own order without the necessary permission, were considered apostates; *ibid.*

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stitutions.[4] The consequence is that one may transfer himself from one monastery to another, and still remain under the same higher superior, and hence he does not violate the vow of obedience. This is clearly expressed in can. 632. The same canon, however, requires an Apostolic indult for a transfer from one independent monastery to another independent monastery, even though it be of the same (so-called) order. Here we have a clear indication of the distinction between various organizations.

The consequence is that unlawful desertion of an autonomous monastery, even though the deserter repairs to another one of the same order or congregation, constitutes apostasy, if the other marks concur. With regard to Benedictine congregations much, of course, depends on whether the subjects of single monasteries pronounce their profession for the congregation as such, or for the individual house. If profession is made for an individual religious house, apostasy is verified in case of illegitimate desertion of that house, even if the deserter would straightway repair to another house of the same congregation. As stated elsewhere,[5] no apostasy or flight would be implied if a religious would seek redress with the Provincial or President or General in case of unjust vexation or manifestly unjust condemnation.

Our canon first states that can. 646 remains in force, and therefore those mentioned therein must be considered apostates. Then it lays down the *penalties* for apostates from religious institutes, as follows:

1. They *ipso facto incur excommunication,* which is *reserved*

4 Also on papal privileges; Lezzana, *Summa Quaestionum Regularium,* Venet., 1637, p. 187, n. 11.

5 See Vol. III of this Commentary, pp. 382 f.; Lezzana, *l. c.,* p. 188, n. 8.

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a) To *their own higher superior,* according to can. 488, n. 8, *i. e.,* to the abbot of the monastery, or to the superior general or provincial, or their equals in power, if the apostate is a member of a *clerical exempt institute;*

b) Or to the *local Ordinary* in *whose diocese the apostate is stationed,* if he is a member of a lay or non-exempt organization.

From this censure only the exempt religious superior, or the Pope, or the delegate or successor of the religious superior, can validly absolve, according to can. 2245. Can. 519 cannot here be applied, for this censure is not merely one reserved by or in the religious institute, but reserved by common law to the religious superior.

Under can. 2340, the apostate, if he obstinately remains under censure for one year, becomes suspect of heresy and must be treated as such according to can. 2315. This may be a case of censure reserved to the *local Ordinary,* if the apostate belongs to a lay or non-exempt religious congregation, either papal or diocesan, male or female. The vicar general is competent to absolve from this censure even without a special commission (can. 198).

2. Such apostates are furthermore *debarred ipso facto* from all *legitimate ecclesiastical acts,* according to can. 2256, n. 2.

3. They are, moreover, *ipso facto deprived of all the privileges* granted to *their order or congregation,* but not of the privileges of the clerical state.

4. If they *return,* they remain *forever* deprived of the *active and passive vote,* and therefore cannot licitly[6] vote or be candidates for any elective office. If such a one is desired for an office, he can not be elected, but

[6] See can. 167.

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must be postulated, according to can. 179, and in the petition the reason would have to be stated. If a dispensation were granted, we think it would also restore the right to the active vote.

5. They must, in proportion to the seriousness of the case or the gravity of their offence, *be punished with other penalties by their superiors,* who are in this case bound by the constitutions. A decree of the S. Congregation of the Council[7] admonishes bishops to seek out such unfortunates and return them to their superiors, and exhorts the latter to receive them with paternal kindness.

Formerly such apostates had to do public penance, were excommunicated and forbidden to exercise any clerical office. If a monk received any sacred order during the time of his apostasy, he needed an Apostolic dispensation to exercise its functions.[8] A peculiar penalty was decreed by Paul IV: apostates from any order or congregation had to wear a black biretta with two white stripes running around its whole circumference.[9] But this was abolished by Pius IV.[10]

It may be added that a religious institute *cannot be held responsible* for *debts* contracted by apostate or fugitive religious.[11]

FUGITIVE RELIGIOUS

Can. 2386

Religiosus fugitivus ipso facto incurrit in privationem officii, si quod in religione habeat, et in sus-

7 Sept. 21, 1624, § 4, 5 (Richter, *Trid.*, p. 433, n. 21).

8 Cc. 1-3, C. 20, q. 3; c. 69, Dist. 50; c. 6, X, V, 9.

9 "*Postquam,*" July 20, 1558, § 6.

10 "*Sedis Apostolicae,*" April 3, 1560, § 3.

11 Lezzana, *l. c.*, n. 19; can. 536.

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pensionem proprio Superiori maiori reservatam, si sit in sacris; cum autem redierit, puniatur secundum constitutiones, et si constitutiones nihil de hoc caveant, Superior maior pro gravitate culpae poenas infligat.

Fugitive religious, according to can. 644, § 3 are such as leave a religious house without the permission of their superior, but with the intention of returning. It does not matter whether such a one leaves with or without the religious habit.[1] The difference between apostasy and flight consists in the intention.

1. A *fugitive religious ipso facto*

a) *Loses any office he may hold in his institute,* whether that office be high or low. Hence a higher superior, a conventual prior or prioress, an assistant, procurator, or procuratrix, porter or portress, those who hold a pastoral office in the name of their organization, *i. e.,* a parish fully incorporated into the monastery (not a secular benefice or office) — all lose their office if they withdraw from obedience.

b) If the fugitive is a *cleric in higher orders,* he incurs *suspension reserved to* the *major superior* of the institute (can. 488, n. 8).

Note that these penalties are *latae sententiae* and, therefore, *per se,* require a declaratory sentence only under the circumstances mentioned in can. 2223, § 4.

1 S. C. C., Sept. 21, 1624, § 4 (*l. c.*); Lezzana, *l. c.*, p. 188, n. 7. Whether the flight is accomplished by day or by night is immaterial. If *expositi, i. e.,* religious who hold an office outside the religious house, leave their post or trust, they cannot strictly be called fugitives. (Suarez, *De Relig.,* tr. VIII, l. III, c. 1. ed. Paris., 1860, t. XVI, p. 278). However, if they withdraw from the obedience due to their superiors for more than one month, they would have to be considered apostates. In this case the essential point is withdrawal from obedience.

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The *suspension* here understood is the general one of can. 2278, § 2.

2. In case of the *fugitive's return, he shall be punished according to the respective constitutions,* and if these contain nothing on the matter, the major superiors shall inflict fit penalties in proportion to *the gravity of the fault.* Here, too, it must be observed that local Ordinaries and religious superiors should strive to bring fugitives back to their religious houses.[2]

Both canons 2385 and 2386 suppose a return, and distinguish two kinds of penalties: a severer one for the act itself, and a milder one after the culprit's return. Does the penalty established for the mere act of apostasy or flight cease after the culprit's return? By no means. For censures cannot be removed except by absolution, and vindictive penalties are removed only by dispensation. Both, however, should be imparted soon after the culprit's return, whilst the other penalties, which are preceptive, are to be inflicted according to the constitutions or the prudent judgment of the superior, who, however, is not at liberty to let the culprit go entirely unpunished, because penal measures are intended for the public welfare and the protection of discipline.

PROFESSION VOID BY REASON OF DECEIT

Can. 2387

Religiosus clericus cuius professio ob admissum ab ipso dolum nulla fuerit declarata, si sit in minoribus ordinibus constitutus, e statu clericali abiiciatur; si in maioribus, ipso facto suspensus manet, donec Sedi Apostolicae aliter visum fuerit.

2 S. C. C., Sept. 21, 1624, § 4 *(l. c.)*

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A *profession may be invalid* for any one of the reasons stated in can. 542, n. 1. Besides, can. 572, § 1, n. 4, expressly states that *dolus*[1] (fraud or deceit) on the part of the candidate invalidates a religious profession. Therefore, if a candidate deliberately concealed any of the reasons stated in can. 542, n. 1, his profession would be invalid. The respective constitutions may also contain an invalidating impediment, for instance, a certain disease, especially of an incurable kind, like consumption, epilepsy, etc. If the religious is afflicted with such a defect and conceals it, his profession is invalid.[2] The declaration of nullity, in the last instance, belongs to the S. Congregation of Religious.

A religious whose profession has been declared null and void on account of deceit admitted by him shall be punished as follows:

1. If he is a *cleric with minor orders, he is to be cast out from the clerical state,* but he may be readmitted as a lay brother, provided he repeats the novitiate and makes a new profession. This penalty is *ferendae sententiae,* and, therefore, requires a trial and a condemnatory or declaratory sentence, after the fact is verified.

2. If he is a *cleric in higher orders, he is ipso facto suspended until the Apostolic See shall have made provision for him.* The Pontifical Commission for the Interpretation of the Code has decided that canons 2386, 2387, and 2389 must also be applied to delinquent members of *religious associations* (can. 673), provided they lead a life in common and are of clerical rank.[3]

1 "*Dolus proprie sumptus importat iniuriam in decipiendo, et effectum seu damnum illatum per talem iniuriam, seu errorem seu ignorantiam*"; Suarez *De Voto,* tr. VI, l. I, c. 11, n. 4 (t. XIV, 793). It is the injury caused by deceit which produces, if nothing else, *i. e.,* no material damage, at least error or ignorance, which in itself is an evil.

2 S. C. C., July 6, 1726 (Richter, *Trid.,* p. 426 ff. n. 14).

3 June 2-3, 1918, n. VI (*A. Ap. S.,* X, 347).

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MARRIAGE ATTEMPTED BY CLERICS AND RELIGIOUS

Can. 2388

§ 1. Clerici in sacris constituti vel regulares aut moniales post votum sollemne castitatis, itemque omnes cum aliqua ex praedictis personis matrimonium etiam civiliter tantum contrahere praesumentes, incurrunt in excommunicationem latae sententiae Sedi Apostolicae simpliciter reservatam; clerici praeterea, si moniti, tempore ab Ordinario pro adiunctorum diversitate praefinito, non resipuerint, degradentur, firmo praescripto can. 188, n. 5.

§ 2. Quod si sint professi votorum simplicium perpetuorum tam in Ordinibus quam in Congregationibus religiosis, omnes, ut supra, excommunicatio tenet latae sententiae Ordinario reservata.

By ecclesiastical law *clerics in higher orders, i. e.,* from subdeaconship onward, and *regulars or nuns with solemn vows,* cannot validly contract an ecclesiastical marriage,[1] and the Church consequently looks upon such marriages as mere "attempts." There must be a genuine attempt at *matrimony* to incur the penalty stated in this canon; mere concubinage is not sufficient. A valid marriage presupposes mutual consent, a certain form, and freedom from diriment impediments. There is only one form, *viz.:* marriage before a Catholic minister and at least two witnesses, which Catholics are obliged to observe under pain of nullity.[2] Therefore, if they

1 We say: an ecclesiastical marriage, because the civil law, in most countries, does not debar them from contracting a civil marriage. See canons 1072 and 1073; this Commentary, Vol. V, pp. 187 ff.

2 See can. 1094, 1099.

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would contract marriage before a non-Catholic minister it would be null and void by reason of lack of the prescribed form. Yet even in that case the censure would not be incurred, for it would be a species of civil marriage,[3] which is possible in our country, because non-Catholic ministers can and do perform the ceremony in the name of the law. Another possibility of complying with the form would be that mentioned in can. 1098. Besides, it might happen that the Catholic minister would be deceived. Otherwise the probability of clerics observing the required form would be exceedingly small.

The *consent* must be given internally as well as externally, and is generally presumed after puberty.[4] The question arises: May this consent coexist together with the knowledge or belief that the marriage will be void? For instance, if the contracting parties would, besides the impediment of sacred orders (celibacy) or vow, suffer from affinity or consanguinity, could they have real consent? The Code (can. 1085) expressly states the affirmative. The censure, therefore, would be incurred even under this knowledge of nullity,[5] provided it was directed to a matrimonial relation, and not merely to a concubinage.

It may also be asked whether the censure would be incurred if the marriage were null and void, not from a mere diriment impediment, but also from *lack of consent*. D'Annibale[6] and others deny that the censure would follow such a fictitiously attempted marriage. This opinion is acceptable because consent is no doubt the essential element of marriage. But trouble might

3 S. O., Dec. 22, 1880 ad 1 (*Coll. P. F.*, n. 1544).

4 See can. 1082; this Commentary, Vol. V, pp. 223 f.

5 S. O., Jan. 13, 1892, ad 5 (*Coll. P. F.*, n. 1777).

6 *Comment.*, 1894; p. 101, n. 157; Lehmkuhl, II, 969.

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arise in the external forum, which presumes internal consent whenever external consent is given.[7] Hence in the external forum a marriage is supposed to exist if there is a semblance (*figura et species*) of matrimony, as is the case, *e. g.*, in a *civil marriage, i. e.*, one contracted before a civil magistrate without the prescribed ecclesiastical forum. This no doubt is generally the case where persons forbidden by ecclesiastical law attempt to contract marriage. But the Code lays under censure also the *party* who contracts with one forbidden to marry. This is a relative impediment, following the individual character of the matrimonial contract. Our text, then, states:

1. *Clerics in higher orders, and regulars or nuns with solemn vows of chastity,* who *presume to contract a marriage, even though it be only a civil one,* and

2. *All those who presume to contract such a marriage with one of the aforesaid persons,*

3. *Incur excommunication latae sententiae, simply reserved to the Apostolic See.*

4. *Clerics* who, after a canonical warning, do not retrace the step within the time set by the Ordinary. (a) *forfeit all the offices* they may hold, just as if they had formally resigned, for which no further declaration is required; and (b) shall be *degraded,* which requires a condemnatory, or at least a declaratory, sentence, after the term set in the canonical warning has expired.

Note that the penalty is incurred[8] only after *solemn* profession and that the profession must be valid and

7 See can. 2200, § 2.

8 Therefore those members of the Society of Jesus who have made only simple vows, although these produce for them the same effect, in this regard, as the solemn vows (Gregory XIII, "*Ascendente,*" May 25, 1584) do not incur the penalty; D'Annibale, *l. c.*, n. 156.

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the vow absolute and pronounced after the temporary vows had been taken.[9]

The term "*praesumentes*" supposes full knowledge and deliberation. *Knowledge* is here directed to the fact that the marriage is null and void and contrary to ecclesiastical law. It also supposes knowledge of the penalty.[10] Therefore *supine or crass ignorance* would excuse one from incurring the censure. This ignorance would have to be directed to the fact that the marriage was (supposedly) contracted and that it is null and void. This is true also concerning another hypothesis. It may be that the parties concerned did not realize the nullity of their marriage at the moment they contracted it, but learned of its nullity afterwards, and continued their matrimonial or rather concubinarian relation. Even in this case the censure would not be contracted.[11] But it must be added that in clerics and religious such ignorance is almost impossible, unless their mental condition be impaired.[12] On the other hand it is not impossible that they should doubt and gradually persuade themselves that their ordination or profession was not according to law, or defective, or invalid. Consequently, they may also deem their marriage valid. Much easier is it to assume ignorance in the other contracting party, who is not bound by the ties of the clerical state or vow. However, even there affected ignorance would not excuse.[13] *Deliberation* requires freedom of the will, which is certainly impaired by grave fear. Therefore it is commonly held [14] that grave fear *(metus gravis)* excuses one

9 See can. 574, § 1; can. 1309.

10 Can. 2229, § 2.

11 Avanzini, n. 39; Pennacchi, *l. c.*, II, p. 24.

12 Hollweck, *l. c.*, § 230, p. 300, note 4.

13 The *affectata*, admitted by Pennacchi (II, p. 23) can no longer be defended on account of can. 2229, § 1.

14 Pennacchi, *l. c.*, II, p. 22 f.; D'Annibale, *l. c.*, p. 101, n. 157.

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from censure. Grave fear may be caused by serious threats of imprisonment or death, no matter whence they come, provided it is inflicted for the purpose of contracting this particular marriage.[15] Even clerics and religious may be subjected to such threats.

§ 2 of can. 2388 sets forth the penalty for *religious with simple perpetual vows.* This penalty is *excommunication latae sententiae, reserved to the Ordinary.* "*Ut supra,*" says the text; therefore:

1. All religious who have taken simple perpetual vows incur this excommunication;

2. Also those who contract a marriage with one perpetually professed,—

3. Provided, however, they *presume* to contract such a marriage, according to what was said on presumption.

In regular *orders* the lay brothers or lay sisters generally pronounce simple perpetual vows, which can now only be taken after temporary vows lasting at least three years (can. 574, § 1).

In congregations, either papal or diocesan, all the members, even though their institute be exempt (like that of the Passionists and that of the Redemptorists), pronounce only simple vows after the temporary vows.

The other penalties, *i. e.,* loss of office and degradation, are not to be applied to these.

The *Ordinary* to whom the censure is reserved, is the *local* Ordinary with regard to non-exempt clerical institutes and nuns with solemn vows; with regard to members of exempt clerical institutes the Ordinary is the competent religious *superior major.*

[15] See can. 1087, § 1.

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VIOLATIONS OF COMMUNITY LIFE

Can. 2389

Religiosi legem vitae communis constitutionibus praescriptae in re notabili violantes, graviter moneantur et, emendatione non secuta, puniantur etiam privatione vocis activae et passivae et, si Superiores sint, etiam officii.

Can. 594 insisted upon community life for all religious. Here we have the penal sanction of this law, which provides that:

1. *Religious who in a serious matter transgress the law of common life prescribed by their Constitutions shall be earnestly warned.* This warning may be first paternal and then canonical, according to can. 2307, in order to serve as juridical basis for further procedure;

2. If *no amendment follows,* the *culprits shall be deprived of the active and the passive vote,* and

3. If they are *superiors, they shall also be deprived of their office.*

We need not add more than a few remarks to what we have said elsewhere on this subject.[1]

a) A *res notabilis* is a matter intrinsically or extrinsically serious. A matter is *intrinsically* important or serious if it is of great weight in preserving discipline or the special purpose of the respective institute. Thus the *peculium* seriously affects the whole religious life, especially of the Mendicant Orders. Thus also the choir service might seriously impair institutes which have solemn divine office for their main or chief object, as the Benedictines.

1 See Vol. III of this Commentary p. 303 ff.

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A matter is *extrinsically* serious if it is apt to have grave consequences, *e. g.,* by reason of the influence of the transgressor.

That superiors are not exempt, nay liable to severer punishment than inferiors, is evident from our text. This holds good also as to the common table and the vow of *poverty.* The latter binds the superiors as well as their subjects. Therefore, says a decree of Clement VIII, they are not allowed to retain anything, either movable or immovable, for their own person, neither can they give permission to anyone to possess anything of whatsoever kind for himself. As to the *common table,* the same decree says that all, including the superiors, should be satisfied with the same quantity and quality of food and wine, unless excused by infirmity.[2] This decree is merely a further declaration of the Tridentine decree,[3] and was again embodied in a decree of the S. C. Concilii.[4]

The penalty is *(ferendae sententiae)* privation of the active and the passive vote as well as of office. Superiors therefore should issue a canonical warning, and after that proves ineffective, *must* inflict the penalty, which is preceptive (can. 2223).

If the *superiors are delinquent,* the local Ordinary is the competent authority to proceed in case of non-exempt religious, according to can. 618. In case of exempt religious, the local Ordinary should paternally admonish the superior, and if he does not obtain the desired result, report to the Holy See, as per can. 617.

2 "*Nullus omnino,*" July 25, 1599. § 2, 4 (*Bull. Luxemburg.,* III, 891). The *law of residence* also concerns superiors (can. 508) and belongs to community life.

3 *Trid.,* Sess. 25, c. 2, *de reg.*

4 S. C. C., Sept. 24, 1624, § 1.

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This canon also applies to members and superiors of societies that do not take the three vows, but lead a common life, for instance, the Fathers of the Precious Blood.[5]

[5] *Commissio Pont.*, June 2-3, 1918 (*A. Ap. S.*, X, 347).

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TITLE XVIII

CRIMES COMMITTED IN CONFERRING, RECEIVING, AND RELINQUISHING ECCLESIASTICAL DIGNITIES, OFFICES, AND BENEFICES

This entire Title concerns a purely ecclesiastical matter. The preliminary notions are supposed from former titles, especially from Book II, Title IV, on ecclesiastical offices, also Title IV, on benefices, as well as from the particular canons on special obligations, like the oath of Cardinals, the blessing of abbots, and the profession of faith.

VIOLATION OF THE FREEDOM OF ELECTIONS

Can. 2390

§ 1. Libertatem electionum ecclesiasticarum quovis modo per se vel per alios impedientes, vel electores aut electum, peracta canonica electione, propter eam quoquo modo gravantes, pro modo culpae puniantur.

§ 2. Quod si electioni a collegio clericorum vel religiosorum peragendae, laici vel saecularis potestas sese illegitime, contra libertatem canonicam, immiscere praesumpserint, electores qui hanc immixtionem sollicitaverint vel sponte admiserint, ipso facto privati sunt pro ea vice iure eligendi; qui vero suae electioni taliter factae scienter consenserit, fit ad officium vel beneficium, de quo agitur, ipso facto inhabilis.

This canon protects the liberty of elections in general

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(§ 1) and particularly against unlawful interference by the secular power (§ 2).

§ 1 has two clauses. The first regards freedom before or at election. Those, it says, *who in any way, either themselves or through others, impede the freedom of ecclesiastical elections, shall be punished according to the gravity of their guilt.*

a) *Ecclesiastical elections* are those mentioned in canons 160 ff., especially of bishops, abbots *nullius* or prelates *nullius*, abbots or superiors of religious (also female) institutes, of the vicar capitular or administrator, of synodal examiners, judges and pastors consultors.[1]

An election, according to our Code, may take place by balloting or by compromise. It is also generally taught that postulation, presentation, and nomination were intended by the Decretal [2] from which our text is taken.[2] The scope of this canon no doubt is to safeguard the freedom of the Church.

b) *Freedom* is required, because it is essential, as for every truly human act, so especially for such transactions as depend on the choosing of a fit or worthy superior. Hence any contrary custom is styled a corruption.[3]

c) The freedom of election may be endangered in many ways, *e. g.*, by violence, serious threats, grave fear, deceit, directly or indirectly.[4]

d) The undue influence may be exerted by the *persons themselves* who endeavor to impede the electors, or through intermediary agents, including *mandantes*. Thus the voters themselves may be the executioners of the will

1 See can. 329, § 3; 321; 432; 506; 385; 1574. As to the *papal election* see can. 166 or "*Vacante Sede.*"

2 C. 12, 6°, I, 6, *de electione.*

3 Cfr. Schmalzgrueber, I, 6, n. 67; Maschat-Geraldi, *Institutiones Canonicae*, 1, 6, n. 17 (*ed. Venet.*, 1760, I, 237).

3 C. 14. X. I, 6.

4 See can. 169, and this Commentary, Vol. II, p. 133.

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of one who is by right excluded from asserting any influence in the election. The Decretals mention especially blood relations.[5] But other relatives, friends, pastors, chaplains — who sometimes exert more power than the law or their office permits — also Ordinaries and religious superiors may become guilty of such interference.

Those *who on account of the result, in any way vex the voters or the elected candidate after the canonical election has been completed, shall be punished according to the gravity of their guilt.* This vexation may be exercised by malicious defamation, withdrawal of support, material damage, or bodily injury. But these molestations must be inspired by the result of the election, which is here supposed to have taken place in a canonical way. If the vexations were inspired by personal spite or family reasons, the crime would not be verified. The *persons* aimed at by these vexations are the voters and the person elected by them, and no one else.[6]

The *penalty*, which according to the Decretals was excommunication *latae sententiae,* is *now arbitrary* but *preceptive* (can. 2223).

§ 2 concerns unlawful *interference by the lay or secular power with the elections of clerical or religious bodies.* The interference, to fall under this canon, must be directed *against canonical freedom.* It may consist of any act that is injurious to the freedom of the election. Thus it would be against canonical election if a layman would be freely and spontaneously admitted to cast his vote,[7] or if the magistrate, no matter what his name or title, would be asked for permission to hold the election, or to cast a vote for a certain person;[8] or if any lay or

5 C. 12, X, 6°, I, 6.
6 Eichmann, *l. c.*, p. 219.
7 C. 28, Dist. 63.
8 Cc. 14, 43, X, I, 6.

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secular power were present under the pretext of safeguarding the election.[9]

The *penalty* does not concern those who unjustly interfere,[10] but

a) *The electors who either solicit or spontaneously admit such interference.* Consequently, if the lay power threatens or creates grave fear in the minds of the electors, the penalty is not incurred.[11] The *voters are by this canon deprived ipso facto of the right of ballot,* but only for this one time *(pro ea vice), i. e.,* for the election or ballot to be cast after this election, which is invalid on account of unlawful interference.

b) The person unlawfully *elected,* if *he knowingly consents* to an election held under such circumstances, *is ipso facto unfit* for the *office or benefice* to which he has been elected with the interference of the lay power. Knowledge (can. 2229, § 2) here means being aware of the lay interference, not of the penalty. The inability is restricted to the one elective office or benefice which was to be conferred — *quoad ius ad rem* — by this one invalid election. Since the text says: office or benefice, not only dignities[12] are intended, but any office or benefice, even that of a religious superioress and her assistant or secretary, where such officers are elected.

If the lay interference were sanctioned by a special and express agreement of the secular power with the Church, as, *e. g.,* a concordat, it would not be unlawful.[13] Neither is the prohibition of lay interference here to be understood as applying to elections performed by laymen,

9 Cfr. Maschat, *l. c.;* Schmalzgrueber, I, 16, n. 69.

10 The election would be null and void; see can. 166.

11 C. 43, X, I, 6; Schmalzgrueber, *l. c.,* n. 68.

12 C. 43, X, I, 6 only mentions dignities (see Hollweck, *l. c.,* p. 309, § 241, note 4); but our text is wider.

13 Maschat, *l. c.,* I, 6, n. 17; Schmalzgrueber, *l. c.,* n. 69.

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as, for instance, in cases where they lawfully elect a pastor[14]; for the text explicitly says: an election held by a clerical or a religious body.

ELECTION, NOMINATION OR PRESENTATION OF UNWORTHY CANDIDATES; NON-OBSERVANCE OF ESSENTIAL FORMALITIES

Can. 2391

§ 1. Collegium quod indignum scienter elegerit, ipso acto privatur pro ea vice iure ad novam electionem procedendi.

§ 2. Singuli vero electores qui substantialem electionis formam scienter non servaverint, possunt pro gravitate culpae ab Ordinario puniri.

§ 3. Clerici vel laici qui indignum scienter praesentaverint vel nominaverint, iure praesentandi vel nominandi ipso facto pro ea vice carent.

This canon contains two specifically distinct enactments: one directed towards the person elected, presented, or nominated (§§ 1 and 3), the other concerning the essential formalities of election (§ 2).

§ 1. A *college that has knowingly elected an unworthy candidate, is ipso facto deprived, for that time, of the right of proceeding to a new election.*

1. A *college* is the elective body as such, *i. e.*, as a body, and therefore the penalty falls upon the members of this body, as such. Such a body would be a cathedral chapter or a group of religious endowed with the right of electing their superior. But it may also be a congregation, according to can. 455; because the text does not say: a college of clerics or religious.

14 Can. 455.

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2. Who is unworthy *(indignus)?* The Code uses the term *idoneus* almost exclusively to signify a fit person.[1] Here it employs the word *indignus*. Is unfit and unworthy the same? According to a Decretal[2] it would seem that the words *indignus* and *inidoneus* have the same meaning. Worthy *(dignus)* is the one who possesses the necessary qualifications, as prescribed by law, and also the necessary competency for the office in question. Unworthy *(indignus)* is he who lacks one or the other qualification required by law.[3] These definitions, however, seem to apply to *fit* and *unfit* just as well, and therefore some other element is plainly required to render the distinction more adequate.

Dignus includes juridical as well as moral qualities, or, in other words, it combines the strictly technical qualifications prescribed for an office by law with moral fitness or equipment; or, perhaps, still better, *he* is worthy who possesses all the qualities positively prescribed by law and is without the negative qualities that render one unworthy of holding a benefice. The latter are, for instance, excommunication, interdict, suspension, deprivation of the passive vote, infamy, etc.[4] Therefore we may say that *dignus* includes *idoneus,* but adds to it moral aptitude for the respective office.

But is this the meaning of *indignus* in our text? We believe it is. For *indignus* here cannot simply mean *non-idoneus,* since a person who is not-fit on account of

1 See can. 153, § 2; 331; 399 *(aptiores);* 434; 435; 504 *(inhabiles).*

2 C. 29, X, III, 5.

3 Reiffenstuel, I, 6, n. 204, Schmalzgrueber, I, 6, n. 15, also assumes *dignitas* to be identical with *idoneitas,* under three headings: *aetatis maturitas, gravitas morum et litterarum scientia;* the *gravitas morum* he distinguishes into two defects or rather absence thereof: *rimen et aliud impedimentum canonicum,* among the latter censures; but these might just as well be referred to crimes.

4 See can. 2265, § 1; 2275; 2283; 2291, n. 11; 2294.

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a merely technical law, can still be postulated.[5] Thus, for instance, a religious who is too young to be elected to an office, according to can. 504, can be postulated for that office. Thus a mother general who has served two successive terms, must now be postulated for a third by the S. Congregation of Religious.[6] But no one can proclaim her "unworthy" on that account. The same appears from the quotations appended to our canon by Card. Gasparri. Thus a dean of a cathedral chapter was elected vicar-capitular, but his election was annulled not only on account of irregularities, but also because he was under suspension *ex informata conscientia*.[7]

3. If, then, the electors elect one whose unworthiness is *known* to them, they are, for *this time only, deprived of the right to proceed to a new election*. This supposes that the first election was invalid and, therefore, null and void.

The next question is: How is the invalidity of an election to be ascertained? If an invalid election needs ratification by the superior or presiding officer, it is his business to declare that it is invalid. After this is done, the electors who knowingly voted for an unworthy candidate, are deprived of the right of proceeding to a new election, and the superior who is entitled to confirm or ratify is authorized to elect another, according to can. 178. If for one reason or another the superior should decline to exercise this right, he may return it to the college, and in this case the whole college would again be entitled to vote.[8]

If the election,———for instance, of a vicar capitular

[5] Thus also Eichmann, *l. c.*, p. 220 f.

[6] S. C. Rel., March 9, 1920 (*Am. Eccl. Rev.*, Vol. 63, p. 498 ff.).

[7] S. C. C., Nov. 4, 1722 (Richter, *Trid.*, p. 370, n. 2).

[8] Eichmann, *l. c.*, p. 221.

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(can. 438), ——— requires no ratification, the fact of the unworthiness of the candidate must be ascertained by either a declaratory or a condemnatory sentence, or must at least be notorious. Such a declaration would have to be issued by the presiding officer or in the form of a protest from the innocent members, and in this case we believe that the innocent members, though in the minority, could proceed to the election immediately (*in continenti*).[9]

§ 2. *Individual electors who knowingly fail to observe the essential formalities, may be punished by the Ordinary in proportion to their guilt.* Essential formalities, according to our Code, are:

a) The calling of all the chapter members; if more than one-third has not been called, the election is invalid (can. 162, § 3);

b) The election of two tellers and the secret collection of the votes,

c) The publication of the votes and comparing them with the number of electors,

d) The proclamation of the election and the elected (see canons 171 and 174).

If any one of these formalities was omitted, though the electors, or at least some of them, *knew* of the necessity of observing them, the guilty ones *may* be punished.[10] This punishment is facultative.

§ 3. *Clerics or laymen who knowingly present or nominate an unworthy person for office, are ipso facto de-*

9 Reiffenstuel, I, 6, n. 260.

10 We suppose by him who is entitled to ratify the election, generally the superior; thus the local ordinary may punish religious at whose elections he presides; the provincial or president may punish the electors regular. The Sacred C. of Religious, to which the acts in some cases must be forwarded, would also be competent.

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prived of the right of presentation or nomination, for this one time.

To what was said above concerning *indigni* nothing need be added except that it is easier for laymen than for clerics to plead ignorance as an excuse. The *ea vice* must be understood as stated above. As soon as the Pope or bishop has rejected the unworthy person and selected another, the punishment ceases, and the electors may again nominate or present a candidate.

SIMONY IN ECCLESIASTICAL OFFICES, BENEFICES, AND DIGNITIES

Can. 2392

Firmo praescripto can. 729, delictum perpetrantes simoniae in quibuslibet officiis, beneficiis aut dignitatibus ecclesiasticis:

1°. Incurrunt in excommunicationem latae sententiae Sedi Apostolicae simpliciter reservatam;

2°. Ipso facto privati in perpetuum manent iure eligendi, praesentandi, nominandi, si quod habeant;

3°. Si clerici sint, praeterea suspendantur.

The crime of simony, so heartily detested by the Church, has been previously mentioned in connection with penal laws.[1] What it is and how far it extends has been clearly explained. Can. 729 renders any simoniacal provision of offices, benefices, or dignities null and void.[2] This enactment is here repeated. Consequently any simoniacal election, postulation, nomination, presentation is null and void *ipso iure*. Besides, any

1 See can. 2324, 2327, 2371.

2 Except the papal election; see can. 160 and *"Vacante Sede."*

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simoniacal appointment to, or exchange of, offices, benefices or dignities, or any simoniacal alienation or advowson or payment for appointment or presentation, retention of, or agreement to pay, revenues or parts thereof, also parochial concursus — are illegal and subject to punishment.[3] Not included is real simony practiced for the purpose of entering the religious state.

Simony, as here intended, not only includes real (*realis*), but also *confidential* or conventional simony, provided it be not purely mental. The present canon decrees that *those who commit the crime of simony* in *any ecclesiastical office, benefice or dignity:*

1. *Incur the excommunication latae sententiae simply reserved to the Apostolic See,* and

2. *Are ipso facto deprived forever of the right electing, presenting, or nominating, if they possess that right.*

3. If the perpetrators *are clerics, they should also be suspended.*

The last-named penalty is *ferendae sententiae,* but preceptive (can. 2223), and the suspension is general (can. 2278, § 2).

NEGLECT OF RATIFICATION OR INSTITUTION

Can. 2393

Omnes qui iure eligendi, praesentandi vel nominandi legitime fruuntur, si, neglecta auctoritate illius cui confirmatio vel institutio competit, officium, beneficium aut dignitatem ecclesiasticam conferre prae-

[3] See X, V, 3; c. 2, Extrav. Comm., V, 1; Pius IV, "*Romanum Pontificem,*" Oct. 17, 1564; Pius V, "*Cum primum,*" April 1, 1566; "*Quanta Ecclesiae,*" April 1, 1568; "*Intolerabilis,*" June 1, 1569; N. Garzia, *De Beneficiis Ecclesiasticis,* P. VIII, c. 1 (*ed. Venet.,* 1630, Vol. II, p. 131 ff.).

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sumpserint, suo iure pro ea vice ipso facto privati manent.

One who is elected and requires ratification *(confirmatio)*, must ask for this confirmation according to can. 177, § 1; one who has been postulated, must ask to be admitted according to can. 181, § 1; one who has been nominated or presented, needs institution according to can. 148, § 1. These acts are here understood, not the *institutio corporalis* or *installatio*.[1] The Code says: *Those legitimately endowed with the right of electing, presenting, or nominating, if they presume to confer an ecclesiastical office, benefice, or dignity by setting aside the authority of the one who is entitled to ratify the election* (respectively, to admit postulation) *or to grant institution, are ipso iure deprived of their right for this one time.*

Here *dolus*, or rather ignorance and lack of deliberation, is pre-supposed. The reason for this penalty lies in the fact that by the act of election, or nomination, or presentation, one acquires only a *ius ad rem, i. e.*, not a full right, but merely a claim to the office, benefice, or dignity, whilst the actual preferment is granted by those who enjoy the right of confirmation or institution. Neglect to seek ratification or institution is, therefore, a perversion of the real act of preferment and a slur on the proper authority.[2]

1 Eichmann, *l. c.*, p. 225 is wrong in mentioning this.

2 See c. 23, X, I, 6 (postulation); c. 2, X, I, 10 (advowson of regulars).

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ILLEGALLY TAKING POSSESSION OF ECCLESIASTICAL OFFICES, ETC.

Can. 2394

Qui beneficium, officium vel dignitatem ecclesiasticam propria auctoritate occupaverit vel, ad ea electus, praesentatus, nominatus in eorundem possessionem vel regimen seu administrationem sese ingesserit, antequam necessarias litteras confirmationis vel institutionis acceperit easque illis ostenderit, quibus de iure debet:

1°. Sit ipso iure ad eadem inhabilis et praeterea ab Ordinario pro gravitate culpae puniatur;

2°. Per suspensionem, privationem beneficii, officii, dignitatis antea obtentae et, si res ferat, etiam per depositionem, cogatur a beneficii, officii, dignitatis occupatione eorumque regimine vel administratione statim, monitione praemissa, recedere;

3°. Capitula vero, conventus aliique omnes ad quos spectat, huiusmodi electos, praesentatos vel nominatos ante litterarum exhibitionem admittentes, ipso facto a iure eligendi, nominandi vel praesentandi suspensi maneant ad beneplacitum Sedis Apostolicae.

This canon distinguishes two different ways of taking possession: the *corporalis institutio* (can. 1443, § 2) for offices or benefices of free appointment, and the assumption of offices to which a claim has been obtained by election, nomination, or presentation. The offices or benefices to which one is freely appointed are taken possession of by bodily institution or installation, which is reserved to the local Ordinary. This last in the series

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of appointive acts presupposes actual appointment or *ius in re*. However, as can. 1443, § 1, says, no one should take possession of a benefice conferred on him on his own authority.

Those elected, presented, or nominated, need letters of confirmation or institution, which they must obtain from the proper authority and show to those who are entitled to see them. Thus a bishop elected and confirmed must show the bulls to the chapter or consultors,[1] before he can take possession of, govern, or administer his diocese.

1. *Those who act contrary to this law are ipso iure rendered incapable of holding the office, benefice, or dignity in question* and, *besides, shall be punished by the Ordinary in proportion to the gravity of their fault.* Consistorial as well as non-consistorial, secular as well as religious, residential and non-residential, curata and non-curata benefices are comprised in this law.[2] But the office, benefice, or dignity must have been actually obtained, because the appointment is supposed to have been made, the election ratified and the nomination and presentation accepted.

In our country the installation of pastors is not always performed; and, consequently, this canon does not concern pastors in dioceses where this formality is usually omitted. But the other clause concerning the papal letters for prelatical offices also holds here.[3] The penalty is vindictive, but *latae sententiae,* and therefore needs a dispensation from the superior to whom the installation

1 See can. 334, § 3; 293, § 2; 312, § 1; 322, § 1.

2 C. 5, 6° I, 6; c. 3, Extrav. Comm., I, 3; Innocent VIII, *"Ad reformandum,"* 1485; Paul IV, *"Incumbentia,"* Nov. I, 1557; Hollweck, *l. c.*, 312, § 246.

3 Pius IX, *"Romanus Pontifex,"* Aug. 28, 1873 (*A. S. S.*, VII, 401).

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or ratification by right belongs, *i. e.,* either the local Ordinary or the Pope.

2. *By suspension from,* or *privation*[4] *of, the benefice, office, or dignity already obtained and,* if necessary, *even by deposition, must the culprit be* compelled to give up his office, benefice, or dignity and immediately to relinquish the government and administration thereof; but this latter deposition, being *ferendae sententiae,* requires a canonical admonition (can. 2307).

3. *Chapters, convents, and other communities that admit persons elected, presented, or nominated to the administration or government of an office, benefice, or dignity before the exhibition of the letters of appointment, remain ipso facto deprived* of the right of electing, nominating, or presenting as long as it pleases the Apostolic See *(ad beneplacitum Apostolicae Sedis).*[5]

Aliique may mean any community or corporation that enjoys the right of election, *e. g.,* a chapter under a prelate or abbot *nullius.*

ACCEPTANCE OF AN OFFICE NOT VACANT DE IURE

Can. 2395

Qui scienter acceptat collationem officii, beneficii vel dignitatis de iure non vacantis et patiatur se in eius possessionem immitti, sit ipso facto inhabilis ad illa

4 Privation is possible, because they really had a *ius in re,* not only *ad rem.*

5 *"Apostolicae Sedis,"* V, 1: *"Suspensionem ipso facto incurrunt a suorum Beneficiorum perceptione ad beneplacitum S. Sedis Capitula et conventus ecclesiarum et monasteriorum aliique omnes, qui ad illarum seu illorum regimen et administrationem recipiunt Episcopos aliosve Praelatos de praedictis ecclesiis seu monasteriis apud eandem S. Sedem quovis modo provisos, antequam ipsi exhibuerunt litteras apostolicas de sua promotione."*

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postea assequenda aliisque poenis pro modo culpae puniatur.

As we have explained elsewhere, an office may become vacant *de iure* or *de facto* or both ways.[1] It becomes vacant *de iure* if the title to it is lost, as per can. 183. An office must be vacant at least *de iure* to be legally conferred; any provision made otherwise is null and void (can. 150, § 1).

Our canon says:

Whoever knowingly accepts an appointment to an office, benefice, or dignity that is *not vacant de iure* and *allows himself to be put in possession thereof, is rendered ipso facto incapable of obtaining this office, etc., afterwards* and, besides, shall be punished otherwise in proportion to his guilt. Note the word *scienter* according to can. 2229, §2, and the copula *et,* which signifies that one permits himself to be illegally installed after having knowingly accepted an illegal appointment. The text, following the old law,[2] mentions actual appointment *(collationem)* and hence a mere promise of a benefice to become vacant in future is not forbidden.

RETENTION OF INCOMPATIBLE OFFICES

Can. 2396

Clericus, qui assecutus pacificam possessionem officii vel beneficii cum priore incompatibilis, prius quoque retinere praesumpserit contra praescriptum can. 156, 1439, utroque privatus ipso iure exsistat.

Concerning incompatible offices and benefices, consult

1 See Vol. II of this *Commentary,* p. 107.

2 C. 6, X, III, 8; Maschat, *l. c.,* III, tit. 8, n. 5 f.

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canons 156 and 1439.[1] Note also that the second office or benefice must be peacefully possessed, *i. e.*, there must be no litigation in connection with it. It supposes, therefore, not only appointment or preferment, but actual possession by bodily installation.

Therefore, the law punishes *with the loss of both benefices a cleric* who, *having taken peaceful possession of another office or benefice incompatible with one already possessed by him, dares to retain both.*

How soon this penalty is effective, the Code does not expressly state, but it may be deduced from the text. The word *praesumpserit* supposes a knowledge of the incompatibility of the two offices. The term *assecutus* (perfect) supposes tranquil possession. The moment these two conditions are verified, therefore, the penalty goes into effect. Formerly it was assumed that a month must have elapsed[2]; but the Code does not favor this assumption.

REFUSAL OF THE CARDINAL'S OATH

Can. 2397

Si quis ad dignitatem cardinalitiam promotus, iusiurandum, de quo in can. 234, emittere recusaverit, ipso facto cardinalitia dignitate privatus perpetuo maneat.

The duty of a cardinal is, as Sixtus V declared,[1] to assist the Vicar of Christ on earth by advice and collaboration in governing the Church. This naturally re-

1 See Vol. II of this Commentary, pp. 113 f.

2 Hollweck, *l. c.*, p. 318, § 257, note 3; Reiffenstuel, III, 5, n. 338, rejects this view.

1 *"Postquam," Dec.* 3, 1586, § 19 (*Bull. Luxemb.*, II, 611).

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quires personal presence, at least occasionally. Hence the same Pontiff ordered that no one absent from the Curia should be created a cardinal, or rather receive the red biretta, blessed by the Pope and transmitted by a special courier, unless he gives oath into the hands of an ecclesiastical dignitary that he will visit the Holy City within one year. A copy of this oath was to be immediately forwarded to the Pope. Then the penalty contained in our text is added: "If any *one promoted to the cardinalate refuses to take this oath, he is ipso facto and forever deprived of the cardinalitial dignity.*" [2] No declaratory sentence is required.

NEGLECT OF EPISCOPAL CONSECRATION

Can. 2398

Si quis ad episcopatum promotus, contra praescriptum can. 333 intra tres menses consecrationem suscipere neglexerit, fructus non facit suos, fabricae ecclesiae cathedralis applicandos; et si postea in eadem negligentia per totidem menses perstiterit, episcopatu privatus ipso iure manet.

The Council of Chalcedon (451) and other synods [1] insisted upon the necessity of episcopal consecration for those called to the plenitude of sacerdotal power. Our canon is the sanction to can. 333. It provides that anyone promoted to the episcopacy, *who neglects to receive the episcopal consecration* within *three* months after receiving the Apostolic letters of appointment, *is deprived of the*

2 Said Constitution added that if the Cardinal does not come to Rome, the same penalty follows. But our text leaves that to the Pope to decide.

1 See c. 2, Dist. 75; c. 1, Dist. 100.

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revenues of his office, which are in that case to be applied to the building fund of the cathedral, not to the *mensa episcopalis*. This obligation becomes effective ninety days after date of the reception of the papal letter, and binds *ex iustitia*.

If the appointee neglects to receive the episcopal consecration for *another term of three months, he is ipso facto deprived of the episcopal office,*[2] without any further declaration. However, it appears to us that can. 2223, § 4, concerning the public weal, would find application here.

FORSAKING ONE'S POST

Can. 2399

Clerici maiores, munus a proprio Ordinario sibi commissum, sine eiusdem Ordinarii licentia, deserere praesumentes, suspendantur a divinis ad tempus ab Ordinario secundum diversos casus praefiniendum.

Not only the law of obedience, but also the residential or diocesan obligation and ordinary courtesy demand that a cleric stick to the position or post entrusted to him by his Ordinary.[1] The present canon is a sanction of can. 128. The *munus* intended comprises all kinds of offices with which a cleric may be entrusted. Only in case the clergyman had no "place" in the diocese and was not properly incardinated, would he be allowed to go elsewhere.[2] But even then he should at least *ask* for permission to leave.[3] Not to forsake the charge assigned means to "stick to it" as long as the bishop

2 *Trid.*, Sess. 23, c. 2, *de ref.*
1 See can. 127, 128, 143.
2 S. C. C., Dec. 5, 1574 (Richter, *Trid.*, p. 207, n. 3).
3 S. C. C., June 12, 1604 *(ib.)*.

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deems it necessary. This obligation is attached to the office or charge, and even clerics who have been ordained on the title of their own patrimony are not exempt from this law.[4]

The text says: *Clerics in higher orders, who without the Ordinary's permission, dare to relinquish a place or position assigned* to them by their Ordinary, *shall be suspended a divinis for a period* to be determined by the Ordinary, as the case may require.

This vindictive penalty (can. 2298, n. 2) presupposes malice and knowledge of the evil consequences apt to follow such conduct. Resignation, if properly tendered and accepted (can. 190), does not establish the crime.

RESIGNATION OF AN ECCLESIASTICAL OFFICE INTO THE HANDS OF LAYMEN

Can. 2400

Clericus qui in manus laicorum officium, beneficium aut dignitatem ecclesiasticam resignare praesumpserit, ipso facto in suspensionem a divinis incurrit.

A cleric who dares to resign an ecclesiastical office, benefice, or dignity into the hands of laymen, ipso facto incurs suspension a divinis. Here the act of resignation itself is punished, and justly so, because, as ecclesiastical offices, etc., cannot be received from laymen, neither can they be resigned into their hands. The Decretals[1] from which our text is taken supposed that the clergyman received his office or benefice from laymen, and therefore pronounced privation.

4 *Ibid.*

1 C. 8, X, I, 9; Hollweck, *l. c.*, p. 317, § 257. But our text does not suppose re-acceptance — only resignation.

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Laymen are all persons not initiated into the clerical order, even though they be trustees or hold a so-called ecclesiastical office.[2] The offices here intended are all kinds of offices, either of election, or presentation, or nomination. Presumption, however, is supposed (can. 2229, § 2). The suspension is not reserved (see can. 2253, n. 1).

RETENTION OF OFFICE DESPITE PRIVATION OR REMOVAL

Can. 2401

Si quis in detinendo officio, beneficio, dignitate, non obstante legitima privatione aut remotione, persistat, aut ne ea dimittat, moras illegitime nectat, ea, praemissa monitione, deserere cogatur per suspensionem a divinis aliasve poenas, depositione, si res ferat, non exclusa.

By privation and removal legitimately decreed and inflicted, an office becomes vacant *de iure* and may therefore be conferred upon another person.[1] Thus one who holds two incompatible offices is deprived *ipso iure* (can. 2396) of both and they become vacant by law (can. 2396; see can. 156). A pastor, whether removable or irremovable, may be removed according to law, and in that case has to leave his pastoral residence as soon as possible.[2] If *he continues to hang on to an office, benefice, or dignity, of which he has been lawfully deprived, or from which he has been removed, or if he sets up an unlawful opposition,* he shall be (canonically) warned, and if the warning proves fruitless, compelled to leave the office,

2 Reiffenstuel I, 9, n. 5.
1 See can. 151; 183, § 1; 2298, n. 6; 2299, § 1, 3.
2 See can. 2147-2161.

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benefice or dignity, by *suspension a divinis* and, if necessary, by *deposition.*[3]

Morae illegitimae properly means unlawful delay caused in the execution of a sentence or decree. Lawful would be an appeal from the sentence of privation, which is a vindictive penalty, and also *recourse* from a decree of the Ordinary against removal (can. 2153). Pending an appeal or recourse, no canonical warning should be issued, because the text presupposes *unlawful* delay.

NEGLECT TO RECEIVE THE ABBATIAL BLESSING

Can. 2402

Abbas vel Praelatus *nullius*, qui contra praescriptum can. 322, § 2, benedictionem non receperit, est ipso facto a iurisdictione suspensus.

An abbot nullius or a prelate nullius who is required by an Apostolic mandate or by a statute of his institute to receive the *abbatial blessing* (to be imparted by a bishop) and *neglects to receive* it within three months from the date of receiving the Apostolic letters of appointment or confirmation, *is ipso facto suspended from jurisdiction*[1]; provided no lawful impediment prevented him from receiving the blessing.

NEGLECT OF PROFESSION OF FAITH

Can. 2403

Qui contra praescriptum can. 1406 fidei professionem

3 See c. un. Extrav. Joann. XXII, tit. III, c. 4; c. 4; Extrav. Comm., III, 4.

1 See can. 2278, § 2, n. 1.

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sine iusto impedimento emittere negligat, moneatur, praefinito quoque congruo termino; quo transacto, contumax, etiam per privationem officii, beneficii, dignitatis, muneris, puniatur; nec interim beneficii, officii, dignitatis, muneris fructus facit suos.

Those who are obliged to make profession of faith are enumerated in can. 1406. This profession is distinct from the oath to be administered by the consecrating bishop to a bishop-elect, and therefore the oath cannot take the place of the profession[1] (can. 1406, § 1, n. 3). The Orientals, too, are bound to make this profession according to the newly prescribed formula.[2]

Our canon says that whoever, contrary to can. 1406, neglects to make profession of faith, unless prevented by lawful impediment,

1. Shall be warned canonically, a suitable time being granted within which he may comply with his obligation;

2. If he permits the fixed term to go by and stubbornly persists in his refusal, he shall *be punished* even by *privation* from office, benefice, dignity or charge, and

3. Meanwhile (*i. e.*, as long as his contumacy lasts) *he shall not be entitled to the income* from his benefice, office, dignity, or charge and is, therefore, obliged to make restitution if he takes any part of it.

1 S. C. P. F., Jan. 10, 1875 (*Coll.*, n. 1429). The *iuramentum* in the *Pont. Rom.*, "*De Consecratione Electi in Episcopum.*"

2 S. C. P. F., July 16, 1878 (*ib.* n. 1429), and the formula *ib.*, Vol. II, 122 f.; the formula for the Latin Church, *ib.*, p. 97 f.

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TITLE XIX

ABUSE OF ECCLESIASTICAL POWER OR OFFICE

This Title, too, *per se,* contains purely ecclesiastical matter, yet there are canons inserted here which may bring the Church into conflict with the civil power. Thus official documents may be abused and passed to persons for whom they are not intended. Ecclesiastical officials may be bribed and provoke a civil suit. All this is comprised under the general term *abuse*. *Power* refers to those who exercise either jurisdiction proper or domestic power, whilst *office* comprises every charge of public trust. It is precisely the abuse of public confidence and the damage accruing to public welfare that the Church wishes to prevent by these penal enactments.

ABUSE OF ECCLESIASTICAL POWER

Can. 2404

Abusus potestatis ecclesiasticae, prudenti legitimi Superioris arbitrio, pro gravitate culpae puniatur, salvo praescripto canonum qui certam poenam in aliquos abusus statuunt.

Abuse of ecclesiastical power shall be punished by the lawful superior according to his prudent judgment and in proportion to the gravity of the fault, with due regard, however, to the canons which inflict distinct penalties for certain abuses.

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There may be overzealous, or imprudent, or revengeful prelates, who are too ready to inflict penalties, especially censures, before they have lawful proofs against the culprit.[1] Then there is "the root of all evil," [2] avarice, which may prompt some to be too lenient in granting favors, absolutions, or dispensations,[3] or in meting out penalties. Another abuse of power would be to demand pecuniary contributions on the occasion of episcopal or canonical visitations.[4] Some abuses are especially singled out in the following canons, whilst others have already been mentioned, for instance, absolution without the necessary faculties (can. 2338) and conferring of orders (can. 2370, 2373).

TAMPERING WITH DIOCESAN DOCUMENTS

Can. 2405

Vicarius Capitularis aliive omnes, tam de Capitulo, quam extranei, qui documentum quodibet ad Curiam episcopalem pertinens sive per se sive per alium subtraxerint vel destruxerint vel celaverint vel substantialiter immutaverint, incurrunt ipso facto in excommunicationem Sedi Apostolicae simpliciter reservatam, et ab Ordinario etiam privatione officii, beneficii, plecti poterunt.

The reader will have noticed that the Code is very particular about official books and documents. The present canon sanctions by censure the enactments issued on this head.

1 C. 11, C. 2, q.: "*excommunicare, antequam causa probetur.*"
2 I Tim. VI, 10.
3 C. 3, X, V, 37.
4 C. 2, 6° III, 20; *Trid.*, Sess. 24, c. 3, *de ref.*

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1. The *vicar capitular* (our administrator during the vacancy of the episcopal see) *as well as the members of the chapter* (our diocesan consultors), *as well as outsiders* (for instance, the secretary or chancellor of the diocese, or other officials of whatever name or rank, clerics or laymen) incur the *excommunication simply reserved to the Holy See:*

2. If *personally or through intermediary persons they withdraw, or destroy, or conceal, or substantially alter*[1] *any document belonging to the episcopal court,* which certainly is identical with our diocesan court. By *documents* are understood the papers or entries mentioned in can. 1813, § 1; — but not only such as are issued by the diocesan officials and abstracts of which are kept in the diocesan archives, but also such as are sent to, or received by, the episcopal court; in other words, all documents which concern persons, property, or rights of the diocese, as, *e. g.,* petitions, accusations, criminal and civil acts, dispensations, appointments, concursus and examination papers, establishments,[2] dedications, consecrations of churches and chapels, parishes and missions, inventories, deeds, abstracts, receipts, and also civil documents addressed to the diocesan court. Private letters, unless they bear on ecclesiastical as connected with civil or criminal procedure, do not belong to the diocesan court.

3. The penalty is *ipso facto excommunication, simply reserved to the Apostolic See.* Note that no presumption or knowledge or rashness is required (see can. 2229). Transgressors may furthermore *be punished by the Ordinary by privation from office or benefice.*

1 A substantial alteration may happen if the initials or the surname of a person are changed.

2 Also documents fixing boundaries, the distinction between removable and irremovable parishes, etc.

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PERFIDIOUS AND NEGLECTFUL HANDLING OF OFFICIAL DOCUMENTS

Can. 2406

§ 1. Quicunque officio tenetur acta vel documenta seu libros Curiarum ecclesiasticarum vel libros paroeciales conficiendi, conscribendi aut conservandi, si ea falsare, adulterare, destruere vel occultare praesumpserit, suo officio privetur aliisve gravibus poenis ab Ordinario pro modo culpae puniatur.

§ 2. Qui vero acta, documenta vel libros hos legitime petenti exscribere, transmittere seu exhibere dolose detrectaverit aliove quovis modo officium suum prodiderit, privatione officii vel suspensione ab eodem et mulcta ad arbitrium Ordinarii pro gravitate puniri potest.

§ 1. *Whoever is obliged by his office to compile, write or keep records or documents of ecclesiastical courts or parochial books, shall be deprived of his office* and be severely punished in proportion to his guilt by the Ordinary, if *he dares to falsify, adulterate, destroy, or conceal any of these documents.* This concerns especially *chancellors* and *notaries,* who have charge of diocesan and secret archives, and keep the records of ecclesiastical, civil and criminal trials, and also of trials for beatification.[1]

Administrators or the diocesan board of *trustees* are responsible for an accurate and faithful inventory of the documents and instruments relating to church property.[2]

1 See can. 375-378, also, for elections, can. 171, § 5; then, canons 1585; 1621-1625; 1645, § 2; 1811; 1874, § 5; 1946, § 2, n. 1; 2142; 2144.

2 See can. 1522; 1523, n. 6.

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Those in charge of *Mass stipends* and *Mass foundations* must take good care of their books.[3]

Pastors are responsible for their parish books.[4] These are especially mentioned, whilst the records, documents, or books are supposed to belong to the "*curia ecclesiastica,*" or ecclesiastical court. *Curia* means court and hence signifies not only the papal or Christian court *par excellence,* but also the episcopal court. Here it comprises all chapters, cathedral as well as collegiate, and also religious chapters,[5] *i e.,* corporations which have corporate rights acknowledged as such. All the officials of such *curiae* are here intended, and all their official documents. But religious houses of female congregations are not included, because the local Ordinary and the religious superiors are responsible for them.[6]

The officials named are to be punished if they *presumptuously* commit an act here prohibited.

§ 2. *Officials who maliciously refuse to copy, transmit, or produce such records, documents or books to those who are lawfully entitled* to have a copy thereof, or to have them *forwarded or shown, or who in any way betray their office, may be punished* by privation or suspension from office and, *in addition thereto, be fined* if the Ordinary deems it proper, in proportion to the seriousness of their crime. This concerns not only the *notaries* or *chancellors* of dioceses, but also the vicars-general and the priests entrusted with the government of a diocese according to can. 381. The notaries and pastors have to give out abstracts of or extracts from ecclesiastical registers, or let those who are entitled to see them inspect the original papers.[7] Pastors are obliged to communicate

3 Can. 843, § 1; 1549.
4 Can. 470.
5 Du Cange, *Glossarium,* I, 1257; see can. 383.
6 Can. 535.
7 Can. 384.

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marriage records to the pastor in whose parish the parties have been baptized.[8] The officials of the court from which appeal is made are bound to forward the acts to the court of appeal.[9] Title deeds must be safely kept and not allowed to come into the possession of interested, much less of maliciously inclined, persons.[10]

The *pecuniary penalty* is of ancient date and was applied to the church that had suffered from the malicious conduct of these officials.[11] *Privation and suspension* must be strictly referred to the office itself, and are vindictive penalties.

ATTEMPTED BRIBERY OF DIOCESAN OFFICIALS

Can. 2407

Qui Curiae officiales seu administros quosvis ecclesiasticos, iudices, advocatos vel procuratores donis aut pollicitationibus ad actionem vel omissionem officio suo contrariam inducere tentaverit, congrua poena plectatur et ad reparanda damna, si qua illata sint, compellatur.

Whoever attempts, by gifts or promises, to induce ecclesiastical officials or ministers of the (diocesan or ecclesiastical, also Roman) court — judges, advocates, or procurators, — to an action or omission contrary to their office, shall be punished according to his deserts and compelled to repair any damage that may have been caused by his conduct. Here the *inchoate* crime of bribery is punished, and the punishment is inflicted on those who make the attempt *(conatus delicti)*, no matter whether it is or is not successful.[1]

8 Can. 1103, § 2; 470, § 3.
9 Can. 1644, 1890; Bened. XIV, "*Ad militantis*," March 30, 1741.
10 See cc. 33, 40, C. 12, q. 2.
11 *Ibid.*
1 See 2212, § 3, § 4.

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Such attempts may be made by gifts or promises. Can. 1624 forbids the acceptance of any kind of presents, even food or drink. Promises are punishable even if given conditionally. The object or aim of the attempt is to cause an official to commit or to omit an act contrary to the obligations of his office. The positive act *(actio)* may be committed by the judge who refuses his services to such as lawfully ask him, or who violates an entrusted secret, or declares himself competent when he is not, or deliberately renders an unjust sentence.[2]

Lawyers and procurators may betray their office by unjust acts or illegal means.[3]

By *omission* judges become guilty in cases which require official *(ex officio)* procedure if they omit to execute the sentence or fail to forward the acts to the court of appeal.[4] A doubt may arise as to couriers and beadles, because they may be laymen,[5] and the text only mentions ecclesiastics. However, since they are in the service of the ecclesiastical court, they no doubt incur the above-mentioned penalty if they violate the official secret or neglect to carry out summonses or orders to the detriment of the party concerned.

OVERCHARGE OF TAXES

Can. 2408

Taxas consuetas et legitime approbatas ad normam can. 1507, augentes aut ultra eas aliquid exigentes, gravi mulcta pecuniaria coerceantur, et recidivi ab officio suspendantur vel removeantur pro culpae gravi-

2 Can. 1608; 1625, § 1.
3 Can. 1666.
4 Can. 1618; 1938: 1920, § 2; 1644; 1890; Eichmann, *l. c.*, p. 235.
5 Can. 1591–1593.

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tate, praeter obligationem restituendi quod iniuste perceperint.

With the exception of taxes for matrimonial dispensations and funeral services (see can. 1056 and 1234), all other taxes and stole fees must be fixed by a provincial council or meeting of the bishops and be approved by the Apostolic See (can. 1507).

Those *who charge more than the customary and legally established taxes, or permit or demand something beyond* the taxes fixed and determined, shall be *checked by heavy fines,* and in case of *relapse,* be *suspended* or *removed,* according to the gravity of their fault. They are, besides, obliged to *make restitution* of the ill-gotten goods. *Free* gifts or donations in excess of the taxes are not forbidden and may be lawfully kept by the recipient. The penalties of *suspension* and *removal* are *ferendae sententiae,* but may become obligatory in a serious case of relapse. The gravity of the fault must be gauged by the character of the offender, his stubbornness, the persons who were overcharged, and the amount of the overcharge. The fines are to be applied according to can. 2297.

ILLEGAL ISSUANCE OF DIMISSORIAL LETTERS BY THE VICAR CAPITULAR

Can. 2409

Vicarius Capitularis concedens litteras dimissorias pro ordinatione contra praescriptum can. 958, § 1, n. 3, ipso facto subiacet suspensioni a divinis.

According to can. 958, § 1, n. 3, the vicar capitular

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(our administrator), with the *consent* of the chapter (our diocesan consultors), may issue dimissorial letters after the vacancy of the episcopal see has lasted one year.

Within the first year the vicar capitular may grant such letters only to *arctati.*[1] If he would issue dimissorials without the consent of the chapter, or within the first year of vacancy, he would *ipso facto* incur *suspension a divinis,* which, however, is not reserved.

RELIGIOUS SUPERIORS GRANTING ILLEGAL DIMISSORIALS

Can. 2410

Superiores religiosi qui, contra praescriptum can. 965-967, subditos suos ad Episcopum alienum ordinandos remittere praesumpserint, ipso facto suspensi sunt per mensem a Missae celebratione.

Can. 965 prescribes that religious superiors, who are entitled to issue dimissorials according to can. 964, should address them to the bishop in whose diocese is located the religious house of which the ordinand is a member.[1] Can. 966 enumerates the cases in which religious superiors are permitted to have their subjects ordained by another bishop, provided the diocesan chancellor testifies to the existence of one of the reasons. Can. 967 warns superiors against fraudulent dealing.[2] Can. 2410 sanctions these enactments thus: *Religious superiors who dare to send their ordinands to another bishop are ipso facto suspended from saying Mass for one month.*

Note the term *praesumpserint.* There would be no

1 See Vol. IV of this Commentary, pp. 427 f.

1 See Vol. IV of this Commentary pp. 434 ff.

2 See Vol. IV of this Commentary pp. 442 f.

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presumption if a religious order had a privilege permitting it to have its members ordained by any Catholic bishop; nor would there be presumption if they would act thus under the impression that all regulars possessed such a privilege; or that this privilege was still valid, which may really be the case. Neither would there be presumption if the diocesan officials would refuse to issue an attestation that the bishop is absent or does not hold ordinations. For the law grants the religious this right, and if the diocesan officials unjustly or unreasonably refuse it, the religious are entitled to assert the law, which is more than a mere formality of attestation. This canon also applies to religious living a common life according to can. 673, if their community enjoys the privilege of granting dimissorials to its members.[3]

ILLEGAL ADMISSION TO NOVITIATE OR PROFESSION

Can. 2411

Superiores religiosi qui candidatum non idoneum contra praescriptum can. 542, aut sine requisitis litteris testimonialibus contra praescriptum can. 544, ad novitiatum receperint, vel ad professionem contra praescriptum can. 571, § 2 admiserint, pro gravitate culpae puniantur, non exclusa officii privatione.

Religious superiors who

1. Have received *into the novitiate candidates*

a) Who under the common law cannot be admitted *either validly or licitly,* as per can. 542, the whole of which is here intended; or who

[3] Commissio Pontif. 2-3 June 1918, in Acta Apostolical Sedis, Vol. X, p. 347.

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b) Have received *candidates into the novitiate without testimonial* letters, as prescribed by can. 544; or who

2. Have *admitted novices,* although fit, before their novitiate was completed, to *temporary profession,* as forbidden by can. 517, § 2; — *shall be punished according to the gravity of the fault; if necessary, by privation from office.*[1]

The first part of this canon (n. 1; a and b) also applies to religious societies, with due regard to their constitutions.[2]

Observe that presumption or ignorance is not admitted in the text, the reason being that every superior worthy of the name is supposed to know and to apply these essential laws.

TRANSGRESSIONS CONCERNING DOWRIES AND NOTIFICATION OF THE ORDINARY

Can. 2412

Religiosarum etiam exemptarum Antistitae pro gravitate culpae, non exclusa, si res ferat, officii privatione, ab Ordinario loci puniantur:

1°. Si contra praescriptum can. 548 dotes puellarum receptarum quoquo modo impendere praesumpserint, salva semper obligatione de qua in can. 551;

2°. Si contra praescriptum can. 552 omiserint Ordinarium loci certiorem facere de proxima alicuius admissione ad novitiatum vel ad professionem.

Religious superioresses, even of exempt institutes,

1 If a professed member leaves the institute, her entire dowry, except the interest, must be restored to her (Can. 551, § 1); in case of transfer can. 551, § 2 must be observed.

2 *Commissio Pont.,* June 2–3, 1918 (*A. Ap. S.,* X, 347).

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shall be punished by the local Ordinary according to the gravity of their fault,— if necessary, by *privation from office*, —

1. If they *dare to expend* the dowries of their members contrary to can. 549;[1] or

2. If they *neglect to notify the local Ordinary of the admission of candidates to the novitiate, or of novices to profession,* as required by can. 552.

The canon here quoted requires a threefold notification: 1°. before admission to the novitiate, 2°. before admission to the temporary profession, 3°. before admission to the perpetual profession. But no information, either formal or informal, is required for the annual renewal of vows, which is customary in some religious institutes. Some sisterhoods renew the vows every year after the temporary profession, for the space of three or five years. For such renewal no notification is required.

Observe that the first section of this canon supposes presumption *(praesumpserint)*. Therefore, if the superioress thought it proper to expend the dowries of her nuns for building a school or a chapel, or for some other purpose, because the money was ready at hand and she forgot the ruling of can. 549, the local Ordinary may be lenient, and instead of dealing out a penalty, may read to her said canon; provided the case is not too serious.

§ 2 contains no mention of presumption, because religious superiors are supposed to know this law and to respect the authority of the Church.

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RELIGIOUS SUPERIORS INTERFERING WITH THE CANONICAL VISITATION

Can. 2413

§ 1. Antistitae quae post indictam visitationem religiosas in aliam domum, Visitatore non consentiente, transtulerint, itemque religiosae omnes, sive Antistitae sive subditae, quae per se vel per alios, directe vel indirecte, religiosas induxerint ut interrogatae a Visitatore taceant vel veritatem quoquo modo dissimulent aut non sincere exponant, vel eisdem, ob responsa quae Visitatori dederint, molestiam, sub quovis praetextu, attulerint, inhabiles ad officia assequenda, quae aliarum regimen secumferunt, a Visitatore declarentur et Antistitae officio, quo funguntur, priventur.

§ 2. Quae in superiore paragrapho praescripta sunt, etiam virorum religionibus applicentur.

This canon is the penal sanction of can. 511–513, as far as the canonical visitation concerns the religious themselves, not the visiting superior, although the latter is under strict obligation to make the visitation at the time stated in law and according to the approved Constitutions of the resp. institute.[1]

Note that the Code does not adopt the severe penalties laid down in the Decretals against nuns who rashly attempt to impede episcopal visitation. They incurred *ipso facto* excommunication notwithstanding all their

1 See Vol. III of this Commentary, pp. 133 ff.; also Pellizzarius, *Tractatus de Monialibus,* Rome, 1755, p. 315; cap. X, n. 65 (this edition was corrected by F. Montani; the first edition had been placed on the Index); Lezzana, *Summa Quaest. Regul.,* 1637, p. 239; this obligation is said to rest on natural and divine law.

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privileges.[2] Neither does our text suppose presumptuous violence, as when religious shut their doors by force against the canonical visitor. If this should happen, the visitor would be justified in meeting force with force, and also to pronounce excommunication against such unruly religious.[3]

The persons affected by this canon may be divided into two principal classes.

1. *Religious superioresses who, after a visitation has been duly announced, transfer religious to another house against the will of the visitor.*

Antistitae are the superior general as well as the provincial, provided the latter is in any way entitled to transfer religious to another house or usurps this right against the rule of the institute. The purpose of such conduct palpably is to remove such as may testify against the superioress.

Post indictam visitationem supposes that the visitation was announced, but a formal announcement is not required if the visitation is held regularly every five years. Yet the law supposes an express announcement. This all the more since, as a rule, the canonical visitation should be made known to the religious, so that they may prepare themselves for it.[4]

The *transfer* may be only temporary and most probably it will be made under one pretext or another. But it does not matter whether it was made permanently or temporarily, if it was done against the express will of the visitor *(visitatore non consentiente)*. We say *express,* because the text supposes that the visitor forbade or did not consent to the transfer. Neither does it matter

2 C. 2, Clem. III, 10.
3 Pellizzarius, *l. c.*, p. 299; cap. X, n. 24.
4 Lezzana, *l. c.*, p. 373; cap. 27, n. 2.

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whether the transfer was made to a *religious house of* the same or of another province, or to a local house or colony or summer resort.

2. The second clause considers two different momenta: one before or on the day of the canonical visitation, the other afterwards.

a) *All religious, whether superiors or subjects, who induce other religious to keep silence or misrepresent the truth in any way or explain things insincerely when asked by the visitator, no matter whether the religious induce other religious to do these things themselves or through intermediary persons, are to be declared incapable of holding any office involving the government of others and deposed from the office of superiors.*

The inducement may be made *directly,* especially by superiors, by way of command, threat, etc., or *indirectly* by promises or flattery or special attention, without expressing special reference to the visitation.

The intermediary persons may be outsiders, servants, students, parents, relatives, friends. It is required, however, that these inducements produce an *effect* upon the religious. For not the mere attempt is intended, as in can. 2407.

The phrase *ut interrogatae,* supposes that the religious was asked by the visitor. There is no *strict and general obligation compelling religious to present themselves of their own accord before the visitor.* This obligation only arises if the visitor imposes it on all religious without exception, or if the rule or Constitutions demand it. However, if the visitor calls one, she (or he) is obliged to obey. Nor are they allowed to keep silence *(tacere)* if he asks them questions, for that would be tantamount to contempt for authority. Occult crimes, of which

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there is no rumor, must not be revealed, nor faults or transgressions which have already been corrected.[5]

On the other hand the religious *are not allowed* to *dissimulate* or to make untruthful statements concerning either disciplinary or financial matters.

b) *Religious, either superiors or inferiors, who, under any pretext, vex other religious on account of answers given to the visitor* are to be punished in the same way.

The *pretext* may be a species of zeal or promotion, but in fact is removal. Reproaches, private or public remarks, signs of displeasure, may also be used to vex others. Quite different, of course, would be a paternal or maternal admonition based on the results of the canonical visitation.[6]

3. The *penalty* for these transgressions enumerated under 1 and 2 is as follows: *They shall be declared incapable of holding any office which implies government of others, and, if they are superiors, they shall be deprived of their office.*[7]

Offices implying "government of others" are those held by superiors ——— general, provincial, or local; also by mistresses of novices, assistants, prefects or directrices of schools or academies, also pastors and chaplains. Those who themselves spurn authority are not fit to rule others.

§ 2 of can. 2413 says that what has been prescribed *in the preceding paragraph also applies to male institutes.*

5 *Ibid.* see this Commentary, Vol. III, pp. 138 f.

6 Here a remark may be permissible: The visitor is not allowed to reveal the names of those who "had something to say" to the religious superior; much less is he allowed to give their names to the confessor or chaplain. This would be an abuse of trust, apt to cause jealousy, rancor, aversion, nay even enmity.

7 There is no special penalty provided for a visitor who abuses his power or office; but can. 2404 is applicable to him.

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And since the text does not distinguish between exempt and non-exempt, all are included. But the visitor must perform this duty himself, and only in case of a lawful impediment may he substitute another, who, however, must belong to the same order or congregation, because he should know the rules and constitutions.[8] The visitor intended in § 1, on the other hand, is the local Ordinary or prelate regular with regard to nuns with solemn vows; whether the female visitor is included, seems doubtful.[9] This canon is also applicable to religious societies who lead a common life.[10]

SUPERIORESS VIOLATING FREEDOM OF CONSCIENCE

Can. 2414

Antistita quae contra praescriptum can. 521, § 3, 522, 523 se gesserit a loci Ordinario moneatur; si iterum deliquerit, ab eodem officii privatione puniatur, illico tamen certiore facta Sacra Congregatione de Religiosis.

Superiors of female religious institutes who violate the rules laid down in can. 521, § 3, *can.* 522, *and can.* 523, *shall be warned by the local Ordinary* (see can. 2307). If they commit the same offence again, they *shall be deprived of their office* and *the S. Congregation of Religious shall be immediately notified* of the fact. It is unnecessary to add anything to what we have said under the canons quoted,[11] except that it is the *local*

8 Lezzana, *l. c.*, p. 251; cap. 18, n. 92.

9 At least we hardly believe that she could inflict the penalties mentioned.

10 *A. Ap. S.*, X, 347.

11 See Vol. III of this Commentary, pp. 159–164; Vol. IV, pp. 269f.

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Ordinary, not the religious superior, much less the pastor or chaplain, who may proceed thus.

LAUS DEO ET REGINAE PACIS

END

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This general index is made on the *English* text, though not exclusively, quite a number of *Latin* terms being inserted for the convenience of those accustomed to the ecclesiastical terminology. The Roman number refers to the Volumes, the arabic to the pages.

The canons contained in the eight volumes are distributed as follows:

Volume I:	Canons	1–86:	General Rules; Public Law of the Church.
Volume II:	"	87–486:	The Clergy and Hierarchy.
Volume III:	"	487–725:	Religious.
Volume IV:	"	726–1011; 1144–1153:	Sacraments and Sacramentals.
Volume V:	"	1012–1143; 1960–1992:	Marriage Law.
Volume VI:	"	1154–1551:	Administrative Law.
Volume VII:	"	1552–2194:	Ecclesiastical Trials.
Volume VIII:	"	2195–2414:	The Penal Code.

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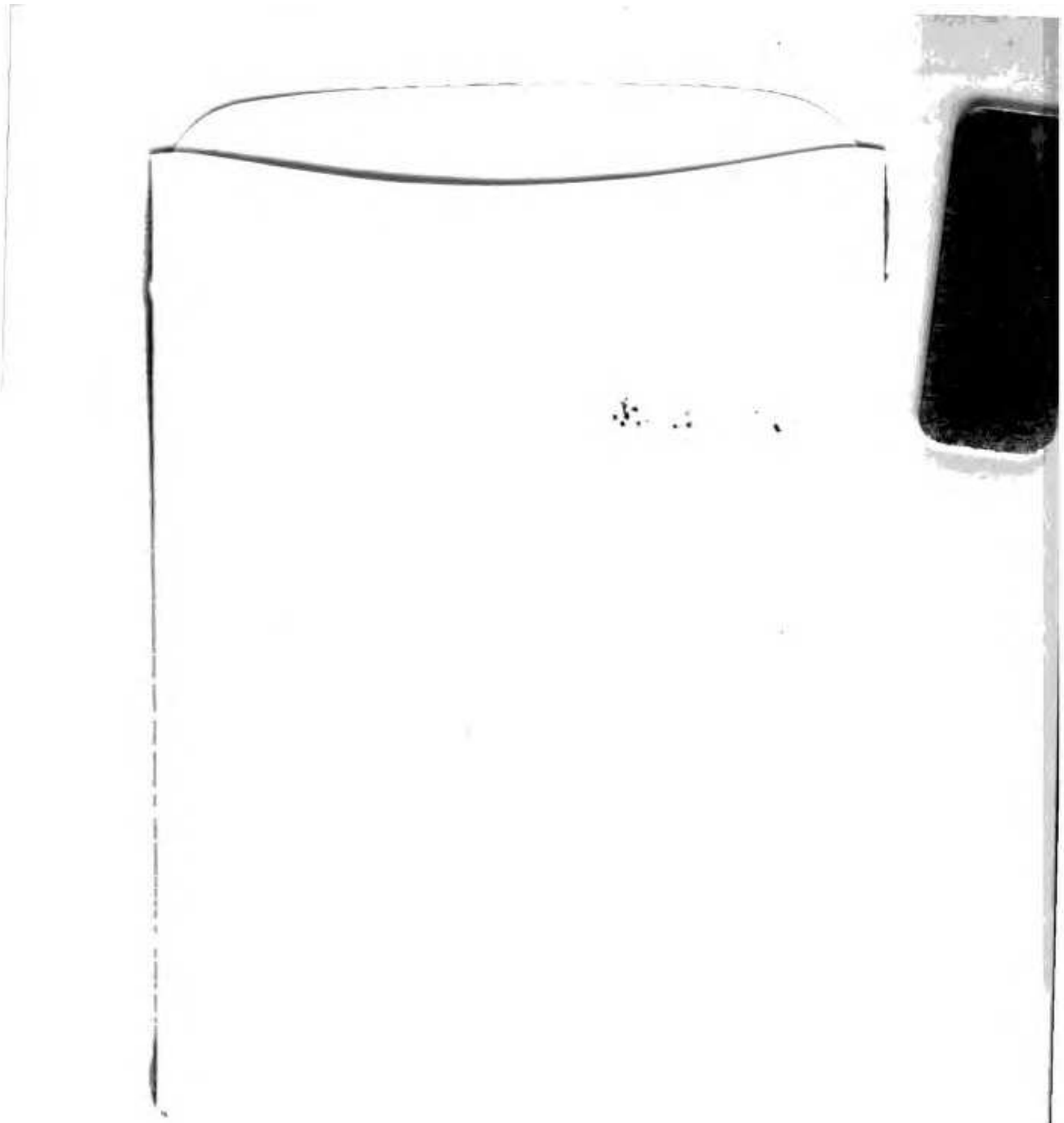
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